IVHS LEGAL ISSUES

Newsletter of the IVHS AMERICA Legal Issues Committee

Volume 2-Number 3 Summer 1994

Introduction

Welcome to the fourth quarterly issue of IVHS *Legal Issues,* the newsletter of IVHS AMERICA's Legal Issues Committee. This issue presents information and discussion concerning the communications requirements associated with the development and deployment of IVHS services and products. Although this is far too broad a topic to attempt to cover completely in one newsletter, this edition is intended to provide an introduction to these issues and to acquaint our readers with IVHS AMERICA's on-going efforts in this area.

Why is a legal issues newsletter an appropriate forum for addressing IVHS communications needs, which, at first blush, appear to involve technical, and not legal issues? The answer to that can be fairly captured in one word; *process.* Put simply, an understanding within the IVHS community of the legal process by which debate surrounding IVHS communications requirements will be resolved is critical to the timely and successful outcome of those issues. That process may well encompass proceedings before the Federal Communications Commission (FCC), the National Telecommunications and Information Administration (NTIA) of the Department of Commerce, Congress, the Federal Court, the International Telecommunications Union (ITU) and other agencies. This issue of *IVHS Legal Issues* will hopefully contribute to IVHS AMERICA's on-going efforts to familiarize the IVHS community with the legal process that may drive the resolution of its communications requirements. Also contained within are instructive materials on intellectual property and antitrust, as they relate to IVHS.

With this issue, we conclude our first year of publication. We look forward to continuing our efforts in our second year and beyond, and would like to thank the many readers who have sent comments and suggestions that have helped us immeasurably. Any such comments and suggestions concerning this or other issues should be directed to Ian Stone at IVHS AMERICA, 202/484-4139. **Note - This will be the last newsletter to be distributed beyond the IVHS AMERICA Board, Coordinating Council, Institutional and Legal Issues Committees, and those who have completed and returned the enclosed subscription form on the back of this and previous issues.**

Newsletter Highlights

Calendar

Aug. 31,1994	Forum on Privacy and IVHS, Santa Clara University, Santa Clara, California
Oct. 4, 1994	Fall Legal Issues Committee Meeting, Minneapolis
Dec. 13,1994	Winter Legil Issues Committee Meeting Houston (tentative location
Mar. 14,1994	Spring Legal Issues Committee Meeting IVHS AMERICA, Washington, D.C. (tentative location)

IVHS AMERICA 400 Virginia Ave.,S.W., Suite 800 Washington, D.C. 20024

Phone: 202/484-4847 Fax: 202/484-3483

IVHS AMERICA Communications Committee

Fred Cwik, *Senior Staff Engineer*
IVHS AMERICA

At the IVHS AMERICA Fourth Annual Meeting in Atlanta, Georgia, the IVHS AMERICA Board of Directors and Coordinating Council approved the formation of the IVHS AMERICA Communications Committee. The Committee previously functioned as the Communications Spectrum Task Force. In accordance with standard Technical Committee procedures, Frank Mammano from the Federal Highway Administration (FI-IWA) was appointed Committee Secretary. Jerry Marsh from the IIT Research Institute was selected as the new Committee Chairman. However, Mr. Marsh later became the Director of Standards and Telecommunications at IVHS AMERICA and, resultingly, vacated his position as Chairman. In the absence of a Committee Chair, D. James Chadwick (Chairman of the Wireless Communications Subcommittee) became the Acting-Chair of the Communications Committee.

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Legal ***IssuesCommittee***
Cynthia Moreland, ***chair***
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Editorial Board
Robert Kelly
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Doug Povich

Editor
Craig Roberts

Managing Editor
Ian Stone

Production
Kenneth Faunteroy

IVHS AMERICA
400 Virginia Avenue, SW., Suite 800
Washington, D.C. 20024
Phone: 202/484-IVHS • Fax: 202/484-34483

The mission of the Communications Committee is to develop positions and recommendations pertaining to wireline communications, wireless communications, and communications integration which are applicable to the development and implementation of IVHS. In order to expedite the program of the Committee, three permanent subcommittees have been established.

> The Wireless Communications Subcommittee addresses radio frequency communications systems, spectrum management, and electromagnetic compatibility.
>
> The Wireline Communications Subcommittee addresses wireline communications including, but not limited to, fiber optic communications and the National Information Infrastructure (NII).
>
> The Communications Integration Subcommittee addresses the optimization of radio frequency communications and wireline communications capabilities for M-IS, and will also address the integration of IVHS communications with other public and private communications systems.

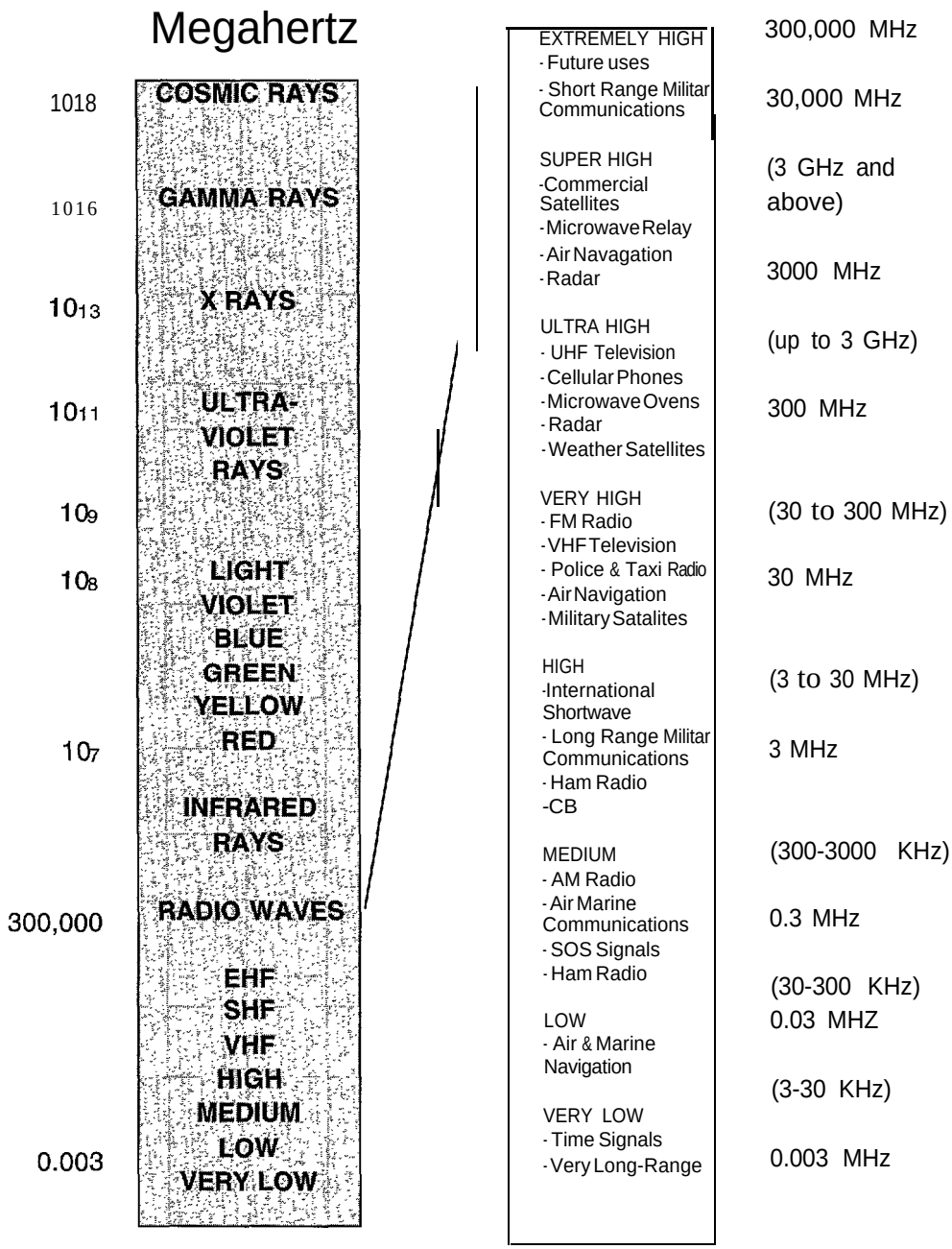
The Committee proactively engages the Federal Communications Commission (FCC) and the National Telecommunications and Information Administration (NTIA) as the focal point on communications and spectrum matters affecting the National IVHS Program.

The first meeting of the TVHS Communications Committee took place on April 21, 1994 at the IVHS AMERICA

Fourth Annual Meeting. Over fifty people were in attendance at the meeting. The second was held at IVHS AMERICA in Washington, D.C. on July 28 - 29, 1994.

Lawyers interested in communications would be particularly welcome to join the Committee. For additional information on the IVHS AMERICA Communications Committee contact Fred Cwik at IVHS AMERICA at (202) 484-4137.

Electromagnetic Spectrum



Source: The Spectrum Report

FCC/NTIA Docket Survey

Douglas L. Povich, *Partner*
Kelly, Hunter, Mow & Povich, PC

The following is a survey of proceedings currently pending before the Federal Communications Commission (FCC) and the National Telecommunications and Information Administration (NTIA) which impact IVHS interests. It is intended to present some of the initiatives which those in the IVHS community may wish to track.

FCC PROCEEDINGS:

Docket	Purpose/Proposals	Status
IC Dkt. No. 94-31 In the Matter of Preparation for International Telecommunication Union World Radiocommunication Conferences	This Notice of Inquiry (NOI) seeks to establish the U.S. position for WRC-95, the proposed final agenda for WRC-97, and the preliminary agenda for WRC-99. The proposals for WRC-95 include frequency allocations for the mobile satellite service (MSS PCS) and Space Services in the 2 GHz frequency band, and allocations for High Frequency (HF) broadcasting.	Comments and reply comments were filed with the FCC on June 6, 1994, and June 27, 1994, respectively. Further FCC action expected later this Summer.
ET Dkt. No. 94-32 In the Matter of Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use	This NO1 requests information on the potential applications for 50 MHz of spectrum subject to immediate reallocation from NTIA including spectrum in the frequency bands 2390-2400, 2402-2417 and 4660-4685 MHz. Issues to be addressed include: (1) whether spectrum identified has the potential for promoting economic growth and competition and enhancing access to services in private sector, (2) what are appropriate non-government uses of these bands, (3) what restrictions should be placed on operations in these bands, (4) whether new services will be able to share with existing amateur and Fixed Satellite Service allocations, (5) whether new users will be able to effectively use 2402-2417 MHz band given existingIndustrial/Scientific/Medical (including microwave ovens) and Part 15 uses, (6) what is the usefulness of these bands for public safety purposes, and (7) whether licensing of some of the bands should be delayed to accommodate larger blocks to be reallocated from NTIA in several years (e.g., the 4635-4660 Hz band). The NO1 also seeks comment on a petition filed by the Coalition of Private Users of Emerging Multimedia Technologies (COPE) which	Comments and reply comments were filed with the FCC on June 15, 1994, and June 30, 1994, respectively. Further FCC action expected later this Summer.

Docket	Purpose/Proposals	Status
	includes the American Petroleum Institute and the APCO-International, Inc. COPE requests an allocation of 75 MHz of spectrum below 3 GHz for the development of an "Advanced Private Land Mobile Communications Service."	
PSCC Spectrum Inquiry	The FCC issued a letter requesting Public Safety Communications Council (PSCC) comment on the FCC report to be developed on public safety spectrum needs through 2010 (due 2/10/95), and the projected spectrum needed to accommodate new services, including IVHS.	PSCC Comments are due by July 29,1994. The FCC will solicit public comment after PSCC, NTIA and APCO file reply comments.
PR Dkt. No. 93-61 In the Matter of Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems	In this highly contested proceeding, the FCC proposes to replace its interim rules governing Location and Monitoring Services (LMS) in the 902-928 MHz frequency band. Issues include the bandwidth division between wide area and short range LMS systems, the impact on Part 15 users and the need and/or desirability of a spectrum allocation for location services given the availability of GPS.	Although official comments and reply comments were filed in 1993, there have been many recent ex parte submissions and meetings. An FCC decision is expected in the near future.
CC Dkt. No. 92-166 In the Matter of Mobile Satellite Services Above 1 GHz	This proceeding is intended to implement service rules for Mobile Satellite Services (MSS) in the 1610-1626.5/2483.5-2500 MHz bands. Proposals include a low earth orbit (LEO) architecture and requirements to have nationwide coverage and position determination capability.	Comments and reply comments were filed on May 5, 1994, and June 6, 1994, respectively. FCC action is anticipated in the Summer or Fall, 1994.
PR Dkt. No. 92-235 In the Matter of Rewrite of Part 90 of the Commission's Rules Governing Private Land Mobile Systems Below 512 MHz	This proceeding is aimed at implementing more spectrally efficient technologies, channel exclusivity and trunking to be phased in over 15 years. The changes adopted as a result of this proceeding are expected to create additional Private Land Mobile Radio (PLMR) spectrum capacity, including capacity for IVHS services.	Comments and reply comments were filed in 1993, and a FCC decision is expected this Summer.
Gen. Dkt. No. 90-314 In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services	In this proceeding, the FCC allocated 160 MHz of radio spectrum in the 2 GHz frequency band for new Personal frequency band for new Personal Communications Services (PCS) which will provide access to a wide array of voice,	The FCC will begin auctioning narrow-band PCS licenses at the end of July, 1994, while auctions for Broadband PCS

Docket	Purpose/Proposals	Status
	data and video services regardless of where a subscriber may be located. PCS equipment will operate at home, at work or on the street, and will include small, lightweight wireless telephone handsets, computers that can communicate over the airwaves, and portable facsimile machines and other graphic devices. PCS services will include traditional cellular-like voice communications as well as wireless data transmission, one number calling, transmission of sports, weather and stock information and a host of specialized services useful in industries such as health care, public safety and education.	licenses are expected to begin at the end of 1994. The FCC's Order on reconsideration of its broadband PCS decision is expected to be issued in August 1994.
Enhanced 911 Inquiry	As part of the FCC's reconsideration in its PCS docket, it will examine a requirement that PCS systems provide E-91 1 by identifying location through Automatic Location Identification (ALI) technology.	The FCC hosted an open hearing on March 26, 1994, concerning wireless E-91 1, and is expected to initiate a broad inquiry examining E-91 1 for all wireless services including cellular
PP Dkt. No. 93-253 In the Matter of Implementation of Section 309(j) of the Communications Act Competitive Bidding.	This proceeding implements competitive bidding, or auctions, as the FCC's primary means of assigning spectrum to licensees who provide service to subscribers for compensation. In general, entities not providing service to subscribers for compensation are exempt from having to competitively bid for licenses.	The first spectrum auctions in history are scheduled to occur beginning July 25, 1994, when the FCC will use simultaneous multiple round bidding to auction certain narrowband PCS licenses.
NTIA PROCEEDINGS:		
920532-2132 Inquiry on Current and Future Requirements for the Use of Radio Frequencies in the U.S.	The NO1 released in this proceeding in June, 1992, was intended to investigate current and future U.S. spectrum requirements, technology trends, spectrum availability and long-range implementation plans. In January, 1994, the NTIA released its Report NTIA TM 94-160, National Land Mobile Spectrum Requirements, which supplements the NO1 responses regarding land mobile service and defines current and future spectrum requirements.	Future studies supporting NTIA's strategic spectrum planning (SSP) program will be released in the future.

Docket	Purpose/Proposals	Status
Preliminary Spectrum Reallocation Report	The predecessor to the FCC's ET docket 94-32, this preliminary report was mandated by the Omnibus Reconciliation Act of 1993 which directs NTIA to transfer 200 MHz of spectrum below 5 GHz, currently used by Federal agencies, to the FCC for licensing to the private sector. The report preliminarily identifies the 200 MHz of spectrum, with 50 MHz for immediate reallocation.	Public comments were filed on May 10, 1994. The FCC must provide its analysis of the comments by August 10, 1994.
940101-404 Comprehensive Review of Privacy Issues Relating to Private Sector Use of Telecommunications-related Personal Information	This proceeding addresses issues associated with the National Information Infrastructure (NII) including the sale and control of database information and whether the convergence of technology requires updated privacy laws.	The official comment cycle has ended and NTIA is in the process of reviewing the submissions.

Where Does IVHS Fit into the National Information Infrastructure?

IVHS Within the Context of NII

Thomas J. Tauke, ***Executive Vice President***
Government Affairs, NYNEX Corporation

Consider the old adage, "The left hand does not seem to know what the right hand is doing."

The Clinton Administration has launched a National Information Infrastructure Initiative. It is aimed at linking every home, school, library, hospital and business in America to what has been dubbed "the information superhighway" -- a vast web of communications networks that will put enormous amounts of information at the user's fingertips. Video on demand, shop-at-home services, financial transactions, telemedicine, distance learning and telecommuting are some of proposed applications of this emerging "network of networks."

In launching this initiative, the Administration has set forth its policy that the government's role is to be limited. It should create a favorable regulatory and policy environment, but the private sector -- not the American taxpayer -- should foot the bill for the deployment of new communications infrastructure. And, indeed, the marketplace is responding to this challenge. In a letter to Vice President Gore, the Bell Telephone Companies committed to invest $125 billion to deploy high performance, advanced intelligent networks by the year 2000, and more than $450 billion by 2015. Independent telephone companies, cable television companies, competitive access providers, cellular and paging carriers, and broadcasters are also making extraordinary investments to upgrade their networks.

At the same time, the Department of Transportation is using taxpayer funds to deploy separate telecommunications infrastructure for the support of Advanced Traffic Management Systems. Why? If medical networks, educational networks, science networks and financial networks are developing within the context of the emerging NII, why are IVHS networks developing outside of it?

The Department, as well as state and local transportation authorities, have expressed concern that private sector facilities may not provide adequate

(See TAUKE, Page 9, Column 1)

IVHS Not Just Another Off the Shelf Service

Robert Kelly, ***Partner***
Kelly, Hunter, Mow, & Povich, PC

At M-IS AMERICA's Fourth Annual Meeting in Atlanta, I had the privilege of participating with former Congressman Tauke on a panel addressing the relationship between IVHS and the National Information Infrastructure. The views expressed there by Mr. Tauke and others regarding the need for IVHS proponents to ensure that their services and products work within the framework of the National Information Infrastructure, indeed, highlight the importance of a vibrant and continuing dialogue between the IVHS community and existing infrastructure providers. Without question, it is incumbent on both parties to work toward the common goal of ensuring that investment in new dedicated IVHS infrastructure is directed wisely and that the "wheel" remains invented only once.

I think it important, however, that due credit be given to the efforts thus far of both the IVHS community and existing infrastructure owners toward this common goal. The Interim Architecture Report published at the Fourth Annual Meeting reflected, for example, a heavy reliance by the competing architecture teams on existing and planned communications infrastructure. For its part, IVHS AMERICA has identified, monitored and advised its members through its Communications Committee (formerly the Communications Spectrum Task Force) of proceedings at the FCC and elsewhere that may impact the utility for the provision of IVHS user services. Such services include cellular networks, Enhanced Specialized Mobile Radio (ESMR) systems, Personal Communications Systems (PCS), Mobile Satellite Systems (MSS), Global Positioning Satellite (GPS) systems, the Emergency Broadcast System (EBS), Synchronous Optical Networks (SONET), FM subcarrier systems and other existing and planned non-dedicated communications infrastructure. It is these things which will form the basis for the NII.

These and other possibilities for IVHS are reflected on the "communications matrix" that is under development under the auspices of the Communications Committee. The Federal Highway Administration

(See KELLY, Page 9, Column 2)

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system reliability, may not adequately protect individual privacy, and may not provide universal access to IVHS services. By building their own systems, with taxpayer money, along public rights-of-way, many transportation officials believe they can exercise better quality control. Some also see an opportunity to lease excess system capacity to other users.

The idea of a "custom built" network is superficially appealing. It is, perhaps, especially appealing to transportation officials who are used to designing and building roads and bridges to their own specifications. But the Department is already beginning to wrestle with the extraordinary difficulties of choosing the "right" communications technologies, making sure they are sufficiently upgradable, and quantifying investment risk. There is also the operations problem. Some transportation officials are beginning to recognize that they may soon be in the business of operating high performance, high technology communications networks -- an area that is far afield from their traditional area of expertise.

System reliability is no more important to transportation officials than it is to surgeons, who cannot afford the loss of communications in the middle of a difficult operation, or to bankers, who cannot afford the loss of key financial data in the middle of a transaction. Existing telecommunications networks have sophisticated means of ensuring system reliability to safeguard against disruptions in service. Privacy is no more important to transportation officials than it is to psychiatrists, lawyers, bankers, or securities dealers. Protection of individual privacy is a key goal of the NII. Finally, universal access to IVHS services could be best served by development within the NII. Not only would IVHS services be more fully accessible, region to region and coast to coast, but IVHS services would become fully integrated into the broader panoply of information services utilizing the nationwide network of networks. Indeed, telecommunications providers are looking for opportunities to make universality of service a global phenomena.

In the initial draft of its ***National Program Plan for Intelligent Vehicle - Highway Systems,*** the Department seemed to assume a need for local governments to build, own and operate their own communications systems. There was no reference

(See TAUKE, Page 10, Column 1)

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similarly presented a comprehensive Tutorial at the FCC last November, where it discussed the many existing and planned communications options that may help form an IVHS infrastructure. FHWA has funded many operational field tests, including TravTek, that have relied upon the existing communications networks for IVHS communications. By the same token, many existing service providers, including NYNEX with "Project NorthStar," merit commendation for sharing these efforts.

There can be no doubt, however, that the efforts of both the IVHS community and existing infrastructure owners must be redoubled in order to reach their common goal. The decisions that must be made soon regarding IVHS communications requirements, indeed, can only be reached with the full and active participation of all affected stakeholders. The issue, for example, of whether and which (if any) IVHS user services require dedicated communications infrastructure (and, for example, an IVHS spectrum allocation) implicates technical and policy issues of major significance.

Those who advocate existing communications infrastructure for IVHS purposes thus must be careful not to view IVHS as an "off the shelf' service and IVHS users as simply more subscribers. These parties must address to the IVHS community their capability to provide ***ZVHS*** services, which include, among other issues, the available system capacity on existing networks, the technical capabilities of those networks, the impact on IVHS deployment from the competitive structure of existing communications markets, the price and priority of service on existing networks and the privacy of the IVHS information collected within those networks.

A concrete example of the need for full discussion between these communities concerns the need of the public safety community for the implementation of wireles "Enhanced 9 11" or "E-91 1" services. E-91 1 enables the Public Safety Answering Point (PSAP) to rapidly identify a caller's location and promptly dispatch assistance. Public safety interests have over the past decade made significant progress in deploying E-91 1 within the wireline networks in the U.S. At the same time, an increasing percentage of 911 calls have been redirected to the wireless networks, including, most particularly, the cellular systems. Yet, E-91 1 is not at all available within the wireless systems, a matter of even greater concern given the expectations of growth in cellular and the coming deployment of

(See KELLY, Page 10, Column 2)

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whatsoever to the NII. In its revised draft, the Department has recognized the existence of the NII, and that there are "commonalities" between the deployment of the NII and deployment of IVHS that will "require coordination and planning." However, the Department still seems to assume that IVHS services should develop as separate systems which may, at some point, need to "interconnect," "link" or "be compatible with" the NII. This is a myopic view which reflects a fundamental misunderstanding of the scope of the Administration's initiative. IVHS will develop more rapidly, in a more sophisticated way, at less cost to the taxpayer if it is built within the context of the NII -- as a component part of the NII. Both telecommunications and transportation would benefit from a marriage of initiatives.

In a speech presented at the National Press Club last December, Vice President Gore said: Unlike the interstates, the information highways will be built, paid for and funded principally by the private sector."

Telecommunications for the intelligent highway should be built, paid for and funded the same way.

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PCS. E-91 1 thus in function may constitute the "Emergency Notification" user service specified in the draft IVHS Program Plan if fully deployed in existing communications networks, including wireless systems. The FCC has been alerted to this issue and has indicated its intention to shortly commence a proceeding to address the E-91 1 concerns of the public safety community. This proceeding will enable the IVHS community to present directly the need for the Emergency Notification user service within existing communications infrastructure.

In closing, it is clear that all parties share the same interest in ensuring that IVHS dollars are wisely spent. The full participation of all stakeholders, including existing infrastructure owners and service providers, in this debate is critical to reaching our common interest. The time for that debate is now upon us.

U.S. DOT News

Nontechnical Constraints Report Released

The report, *Nontechnical Constraints and Barriers to Implementation of Intelligent Vehicle-Highway Systems,* was submitted to Congress on June 24, 1994. The report was mandated by the Intermodal Surface Transportation Efficiency Act of 1991. Topics covered include Procurement of IVHS Products and Services, Staffing and Education Needs, Antitrust Issues, Liability Concerns, Privacy Issues, Intellectual Property Considerations, and Environmental Impacts of IVHS. Copies of the Report may be obtained by writing Thomas Marchessault, Department of Transportation, Office of the Secretary, Office of Economics (P-37), 400 Seventh Street, SW, Washington, DC 20590. You may also submit a request to Mr. Marchessault by fax at 202/366-3393 or electronic mail at tmarches@postmaster2.dot.gov.

User Acceptance Research Program

The Intelligent Vehicle Highway Systems Office at the Federal Highway Administration is putting in place a program of research focusing on user acceptance of IVHS. Results of the research program will be used by the Department of Transportation to guide its IVHS plans and programs, and to measure progress toward achieving Department goals based on IVHS. Results of the research will also be made publicly available to assist others in the industry.

The research will be comprehensive; it encompasses all user services and all categories of users. Work on the first of several projects is expected to begin this fall with the award of a

contract for a study of acceptance of IVHS among drivers of commercial trucks and buses. A study of consumers will be next. Carol Zimmerman of Battelle is working as a consultant to FHWA in planning the research program.

Christine Johnson is Director of DOT's Joint IVHS Program Office

Dr. Christine M. Johnson has been selected to serve in the Senior Executive Service of Director, Joint Intelligent Vehicle/Highway Systems (IVHS) Program Office. The purpose of the Joint Program Office is to execute national policies and plans, and provide leadership for the Department's IVHS program, through coordination with the various modal administrations and private sector organizations. Dr. johnson was formerly the Assistant Commissioner of Policy and Planning for the New Jersey Department of Transportation. Most recently, Dr. Johnson was Vice President of the firm, Parsons Brinkerhoff. Dr. Johnson has served on the Board of Directors of IVHS AMERICA since 199 1, and its Planning Committee since 1993.

Dr. Johnson has also served as the Director, Office of Transportation Planning and as the General Manager, Aviation Customer and Public Services Division for the Prot Authority of New York and New Jersey. The effective date of Dr. Johnson's DOT appointment is July 24, 1994.

Susan Lauffer is Director of the Office of Traffic Management and IVHS Applications

Ms. Susan B. Lauffer was reassigned to the Senior Executive Service position of Director, Office of Traffic Management and IVHS Applications, effective June 12,1994. Ms. Lauffer joined the Federal Highway Administration in January 1989. Since July 1992, she has served in FHWA's IVHS office and she became Acting Director in July 1993. During the period that culminated in the passage of the Intermodal Surface Transportation Efficiency Act, she handled FHWA's Congressional liaison activities. Ms. Lauffer also served as Deputy Director in FHWA's Office of Fiscal Services.

Previously, she held posts in the Office of Congressional Affairs within the Office of the Secretary of Transportation. She also served as Executive Assistant in the White House Office of Intergovernmental Affairs for almost six years. Ms Lauffer also has private sector experience with a major bank and two Fortune 500 manufacturing firms in the Chicago area.

National IVHS Program Planning Forums

The Federal Highway Administration and IVHS AMERICA sponsored five IVHS Program Planning Forums in June. The purpose of the forums was to discuss how IVHS can best be developed to meet the needs of surface transportation users in the United States. Gary Euler, Chief, FIIWA's IVHS Program Management and Systems Engineering Division, provided an overview of the IVHS Program Plan, its purpose and structure. Douglas Robertson, IVHS AMERICA's Director of Plans and Programs, gave an overview of the IVHS user services approach. Forums were held in Detroit, Hartford, Arlington, Los Angeles, and Houston. Attendance ranged from approximately 40 in Houston to 150 in Arlington, Virginia.

Intellectual Property and IVHS Examined at IVHS AMERICA's 1994 Annual Meeting

Presentations on IVHS and intellectual property were made at an IVHS AMERICA Annual Meeting Program Session in Atlanta this past April. Speakers included: Joseph Keene of the law firm Nossaman, Guthner, Knox & Elliott, San Francisco, CA; Cynthia Moreland, Senior Division Counsel at Motorola and Chair of IVHS AMERICA's Legal Issues Committee (LIC); Robert Greene Sterne and Michael B. Ray of the law firm Sterne, Kessler, Goldstein & Fox, Washington, DC; and Julie Dingle, Senior Attorney, FHWA, and Secretary of the LIC. Mr. Keene's work appeared in the Winter '94 *Legal Issues*, which excerpted a paper of his firm's entitled *Intellectual Property Rights in the National IVHS Program.* That paper can be obtained in full from IVHS AMERICA, as can the materials of the other speakers. Ms. Moreland presented on the results of the *Workshop on IVHS and Intellectual Property,* sponsored by U.S. DOT and IVHS AMERICA. Those results will be sent to workshop participants in August. Excerpts from the materials presented by Messrs. Sterne and Ray, and by Ms. Dingle follow.

Sterne/Ray Role Play

Mr. Sterne and Mr. Ray acted out a script entitled *IVHS and Intellectual Property: The Scene is Familiar.* In it, Mr. Ray plays the part of a president of a company which has put together an IVHS system. Mr. Sterne acts as the patent attorney, and they play out the familiar scene of the uninitiated company attempting late in the game to protect its inventions. The script is availble in its entirety from IVHS AMERICA. What follows is an excerpt outlining their conclusions.

> We are now going to step out of our roles as intellectual property attorney and entrepreneur. You have just witnessed a scenario outlining some intellectual property pitfalls that your company may be susceptible to. What we would like to now provide you with are some very specific pointers, which we have called, "Reflections on what you should do if you find yourselves involved in intellectual property issues involving IVHS technology." Hopefully, these pointers will help you to avoid, or soften the blow of these pitfalls.
>
> We have divided our reflections into four groups. The first group is:
>
> **[1] Recommendations relating to intellectual property protection:**
>
> - Get your intellectual property attorney involved as early in the project as possible.
> - Formulate with him or her your specific goals of what you want to try to achieve from your intellectual property.
> - Once you have formulated your goals, have your attorney provide you with your options for intellectual property protection.
> - With these options, obtain cost estimates and time-lines for execution.
> - Be ready to commit as much time and effort as possible for assisting the intellectual property lawyer in obtaining protection. This effort can act to reduce costs, speed up the project, and produce a better end product.
> - Avoid the temptation to wait until the last minute to obtain intellectual property protection prior to product release
> - Be very concerned about inadvertently losing patent rights due to commercializa-

tion activities. Ads run in journals, offers for sales to potential customers, and beta-testing frequently result in loss of rights. Just because you have not sold any product does not mean that you have not lost your rights to foreign patents, or that you've not already started the clock ticking on the one-year U.S. grace period.

Remember that your intellectual property rights are on a country-by-country basis. Obtaining rights in the United States may form the basis for obtaining comparable rights outside of the United States. However, you must worry about your intellectual property portfolio in the United States first, before you worry about overseas protection.

Understand that obtaining intellectual property protection can be quite expensive, particularly if patent protection is sought. Be realistic in the costs associated with protecting your investment. No one would build a building without owning the land under which it sits. The analogy is that it makes no sense to spend a lot of time and money developing a product if you do not have a strong intellectual property portfolio covering it.

Educate yourself as you go through the intellectual property portfolio-building process. What you learn the first time you go through will have direct applicability to all future intellectual property activities that you undertake. Make your attorney teach you the basics the first time through.

Understand that your intellectual property portfolio should be integrated depending on the product that is protected. Obtain an intellectual property attorney who is very strong in the technology, since only such a person will be able to provide you with the full spectrum of intellectual property protection that may be available. Your intellectual property is no better than your technology; but unfortunately, it can be much worse.

- And finally, in terms of protection, integrate your intellectual property protection portfolio with your business objectives. Re-visit these business objectives as you go forward in commercialization, to make sure that your intellectual property protection strategy is in synch with your revised commercialization strategy.

[2] Turning now to *Contract Issues,* we offer the following suggestions:

- Have your intellectual property attorney work with your general attorneys to make sure that all intellectual property rights are obtained under contract from third parties involved in the project.

Be particularly concerned about funding that comes from government sources. Even initial funding may create rights in your intellectual property portfolio for these governmental entities.

Just because you paid for it, and it was your basic idea, doesn't mean you own the intellectual property rights in the technology developed by third parties under your direction. This is particularly true with copyright. Make sure that you have proper transfer of ownership in any consulting agreements, development agreements, or the like.

Oftentimes, obtaining strong intellectual property is a much better approach than utilizing employment agreements and covenants not to compete. The intellectual

property protection encapsulates the rights and the technology in a much more effective fashion than such employment and covenant-not-to-compete agreements.

- Make sure that you utilize proper license agreements in the distribution of all technology. This will act to preserve your intellectual property rights in the portfolio.
- Also, if the product is sold under your trademark, make sure that you have adequate quality control provisions with your licensee who is commercializing your product, so that you do not lose your trademark rights.

[3] Turning, now, to Intellectual Property Infringement issues, the most important thing to remember is that obtaining intellectual property protection does not remove intellectual property infringement problems of intellectual property rights of third parties. This is a very frequently-made mistake. Don't make this mistake. Understand that obtaining protection and avoiding the rights of others are two separate and distinct issues.

- Immediately discuss with your intellectual property attorney infringement-avoidance strategies. Make sure that your investors realize that there may be intellectual property disputes that will come up later, despite your very best efforts.
- Take all intellectual property disputes seriously. Do not ignore them. Most often, they will not go away, and they will become worse if not properly dealt with. They can also create legal liabilities with investors and others.

  A strong intellectual property portfolio often can be used for trading with a party that is asserting its intellectual property rights against your product. This is typically the basis on which cross-licenses are made. This is another reason why a strong intellectual property portfolio has advantage, because it can be used as a shield against the charges of intellectual property infringement by third parties.

[4] The last area of recommendations involve Procedures.

- Our experience is that a critical component in successful R&D is the integration of intellectual property protection and infringement-avoidance into the process. Consider intellectual property to be a key aspect of your R&D effort. Systematize it into your process as early as possible, so that no mistakes are made.
- Finally, a strong intellectual property portfolio can also produce additional benefits. For example, it can form the basis to increase the effectiveness of commercialization activities in the marketplace. No one would buy a building if they did not own it. The analogy here with research and development is, that no one should engage in research and development activities unless they own the intellectual property rights in such efforts.

Dingle Paper

Ms. Dingle presented a paper entitled Intellectual Property Rights in FHWA-Funded IVHS Projects. Her findings are that intellectual property policy is critical to IVHS projects, growth in transportation technology has increased the value of IVHS related intellectual property, and that a variety of government involvement creates special intellectual property concerns. Sections treat the IVHS Act, intellectual property laws and regulations, procurement contracts and federally funded IVHS operational tests. The paper is available from IVHS AMERICA. The following excerpt is the final section of the paper: *Conclusions and Remaining hues.* The views pre

Government Contractor Teaming Arrangements and the Antitrust Laws -A Brief Comment on United States v. Alliant Techsystems and Aeroject General Corporation

Howard Adler, Jr., Esquire
David P. Metzger, Esquire

Introduction

On January 19, 1994, the Antitrust Division of the Department of Justice filed a civil antitrust suit against Alliant Techsystems, Inc. ("Alliant") and Aerojet-General Corporation ("Aerojet") charging that their teaming arrangement on Combined Effects Munition ("CEM") systems, a type of air delivered cluster bomb, violated Section 1 of the Sherman Act (15 U.S.C. 1). Simultaneously, the Division and defendants entered into a settlement that will result in a saving to the Government of $12 million out of a total cost for the 1992 CEM procurement of $133 million. In addition, the Decree prohibits defendants from entering into any future teaming arrangement without the prior approval of the Justice Department or the court where the effect was to eliminate or suppress competition on future CEM procurements. The Decree specifically allows "subcontracting between Alliant and Aerojet so long as the purpose or effect is not to eliminate or suppress . . . competition."

The case has created considerable confusion and concern among defense contractors. The Government and the companies characterize the challenged conduct very differently. The Justice Department asserts that Alliant and Aerojet violated the Sherman Act because they "divided up the market and caused a dramatic increase in price." The companies stated that their agreement "wasn't anticompetitive and did not cost the government or the tax payers a single penny" and that they settled solely to avoid "a lengthy and costly litigation with the government." While Defense and Justice jointly announced the settlement, there is reason to believe the Pentagon is not happy with Justice's aggressive stance; and defense contractors are clearly upset. As a Federal Trade Commission antitrust enforcer quipped, for "some defense contractors, antitrust has taken the place of the former Soviet Union as the greatest threat to our national security."

The antitrust action against Alliant and Aerojet does not break new ground, legally speaking; however, it sends a signal that some teaming arrangements will be challenged even though the Government has advance knowledge of the arrangement or even encourages it. That signal is a disturbing one in an era when defense spending is being reduced and the Pentagon is encouraging consolidations among defense contractors; however, an understanding of the facts of Alliant-Aerojet and a close reading of the Competitive Impact Statement (required to be filed within a consent decree) should provide some assurance that there will not be an epidemic of unfounded antitrust prosecutions. In fact, if properly structured, most teaming arrangements will present little antitrust risk.

The Underlying Facts

Very briefly, Aerojet developed the CEM system for the Air Force and was awarded the first production contract in 1983. Thereafter, the Air Force adopted a second source procurement

strategy under which Alliant became a second supplier. From 1985 on, the Air Force and later the United States Army Armament, Munitions and Chemical Command ("AMCCOM") solicited and received competitive proposals from Alliant and Aerojet. Under a procurement policy designed to promote and preserve competition for cluster bomb production, the Air Force awarded higher quantities to the lower bidder and lesser quantities to the higher bidder.

In the Summer of 1992, the Air Force issued a solicitation to replenish CEM inventories depleted by Operation Desert Storm. Alliant and Aerojet entered into a written teaming agreement that divided production of CEM systems equally between the two companies and designated Alliant the prime contractor. Aerojet agreed not to submit a bid as a prime contractor. The arrangement was intended to apply to procurements for 1992 and beyond. The CIS acknowledges that "Alliant and Aerojet disclosed their intention to enter into a teaming arrangement in advance to AMCCOM." The CIS does not say, and it is not known, whether AMCCOM approved or objected upon being advised of the teaming arrangement. The CIS makes clear, however, that as a matter of law, AMCCOM could not have created any antitrust immunity even if it had approved the teaming arrangement. The parties' disclosure did not create, and could not have created, antitrust immunity for the teaming arrangement. Department of Defense personnel are not authorized, and it is not their role under the Federal Acquisition Regulations or applicable case law, to give antitrust clearance to teaming arrangements.

The same point is made with great emphasis later where the CIS explains the Decree's prohibition against future teaming without advance prior approval of the Department:

> The prior approval requirement in the proposed Final Judgment will emphasize to the defense community generally that the Federal Acquisition Regulations do not confer antitrust immunity. Subpart 9.602 of the Federal Acquisition Regulations states the general policy that the Government recognizes the integrity and validity of teaming arrangements, if disclosed in advance; however, Subpart 9.604 explicitly provides that the general policy does not confer antitrust immunity on teaming arrangements. It is the responsibility of the Justice Department, and not other components of the Executive Branch, to make statements of federal enforcement intention with regard to possible violations of Section 1 of the Sherman Act.

The Justice Department's position is not a departure from prior law and enforcement practice. The Federal Acquisition Regulation ("FAR") has long provided that teaming arrangements do not gain antitrust immunity even if disclosed in advance; and teaming arrangements may be challenged under the antitrust laws even if they have been encouraged by the Government. This recent enforcement action, however, is a strong signal that in certain circumstances teaming arrangements can create significant antitrust liability.

Antitrust Analysis and Guidelines

From an antitrust perspective, government contractor teaming arrangements are subject to both advantages and pitfalls. One special risk is that the contractor team may be misled by military or civilian officials who proceed with the procurement without being forthright about misgivings or even outright objections. As Alliant-Aerojet illustrates, any sense of security fostered by passive or even affirmative official encouragement of the teaming arrangement will be false. A second negative factor is that there is likely to be a written teaming agreement so that the parties will not be able to contest the existence of the "contract, combination or conspiracy" element of a Section 1 violation.

On the other hand, there are two significant advantages. First, to the extent that the teaming arrangement is disclosed to the Government, as it was in Alliant-Aerojet, there will be no risk of a criminal prosecution since criminal sanctions are reserved for covert conspiratorial conduct. In addition, a government contractor teaming arrangement is a "joint venture" and, under well-settled principles, will be judged under the rule of reason rather than the per se rule. Where the per se rule applies, as it does to secret price-fixing or bid-rigging arrangements, the conduct is "conclusively presumed unreasonable 'without elaborate inquiry as to the precise harm [it has] caused or the business excuse for [its] use.'" In contrast, under the rule of reason, "the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." The inquiry is limited to whether the restraint "is one that promotes competition or one that suppresses competition."

The Justice Department has said the following with respect to joint ventures:

> A joint venture is essentially any collaborative effort among firms, short of a merger, with respect to R&D, production, distribution, and/or the marketing of products or services. Joint ventures may be created for a variety of good business reasons. For example, joint ventures may be created to take advantage of complementary skills or economies of scale in production, marketing, or R&D, or to spread risk . . . Because joint ventures typically achieve integrative efficiencies, the Department judges the likely competitive effects of joint ventures under a rule of reason.

Under the rule of reason, even if the venture's anticompetitive effects are substantial, it will often be upheld if there are countervailing efficiencies or other benefits.

Accordingly, Alliant and Aerojet would have had an opportunity to defend their conduct under the rule of reason. Without knowledge of all the facts, it is impossible to judge how a rule of reason analysis would have turned out. The fact that Aerojet and Alliant each had previously been able to submit independent bids pursuant to the Air Force's dual source procurement strategy would have weighed against them. On the other hand, circumstances can change, and the rule of reason affords broad latitude for presenting an array of business and economic factors in litigation of the venture's harm to competition or demonstrating justifiable risk-sharing, efficiencies or other benefits.

Forewarned by Alliant-Aerojet, government contractors contemplating a teaming arrangement should now be guided by the following principles:

> First. A teaming arrangement or joint venture for development of costly and complex technology is unlikely to create antitrust exposure if post-development production and marketing are done on a competitive basis. As the Justice Department has stated, Confining joint activity to the earlier phases of the innovative process rather than extending it to the application stage of production or marketing is a means of lessening any possible adverse effects on competition, and is usually necessary when the joint project is between significant competitors in an oligopoly market.
>
> Second. Team bidding will be accepted in circumstances where the defense authorities have determined that competitive bidding is not a feasible option. As the CIS states, "The Defense Department retains all the CEM acquisition options provided by the Federal Acquisition Regulations. The prohibition of the Final Judgment on teaming relates only to

those CEM acquisitions for which the procurement office has determined that it is appropriate to solicit competition." Defense budget downsizing and defense industry consolidation create an increasing potential for single-source procurement in which a team bid by the only two surviving contractors would not violate the antitrust laws. But the same factors make it more imperative to preserve competition where, as the Justice Department found in Alliant-Aerojet, a dual source, competitive procurement remains feasible. In future similar situations, the government contractor team will want to obtain specific assurances from the Government that it does not consider competitive purchasing to be a feasible option.

Third. Team bidding may also be appropriate in relatively unconcentrated markets or where, in the absence of a teaming arrangement, neither partner would be able to bid. In these circumstances, the joint arrangement would not be substantially anticompetitive, either because there are a sufficient number of other bidders or because the joint arrangement does not eliminate a source of independent competition.

There inevitably will be gray areas. For example, it may be unclear whether competitive procurement is feasible or whether, in the absence of the teaming arrangement, each of the team members would have had the capability or incentive to bid. The action against Alliant and Aerojet serves warning that in those circumstances, contractors should seek legal advice and, if appropriate, obtain a Business Review Letter ("BRL") from the Justice Department. As the CIS points out, that procedure "is available . . . to provide statements of enforcement intention with regard to proposed business conduct." It is not always desirable, however, to seek a BRL. The process is time consuming, requires some disclosure of information, and the Justice Department may be inclined to withhold a BRL in circumstances where, in fact, it would not challenge the parties' conduct.

Conclusion

The action against Alliant and Aerojet reflects not so much a new or more aggressive attitude by the Justice Department as it does a change in the defense industry. The message sent by the Department is clear: defense contractors may not agree to divide up shrinking defense markets without active prior participation of the Defense and Justice Departments. Mere disclosure to, or other interactions with, DOD are not sufficient to provide a safe harbor. In fact, as in the Alliant-Aerojet case, the DOD can award a contract based on the teaming agreement while simultaneously referring the matter to the Justice Department for action. Claims that DOD procurement and award activities constitute waiver or estoppel of the Justice Department's right to bring an antitrust action were not formally adjudicated in the Alliant-Aerojet case; however, the Department clearly attempted to dispel that conclusion with its publicity accompanying the Decree.

Since publication of the last issue of Legal Issues, there have been two Legal Issues Committee (LIC) Meetings. On April 18, 1994, the LIC met in Atlanta in conjunction with the IVHS AMERICA Annual Meeting, and on June 21, 1994, the LIC met in Boston at the Volpe National Transportation Systems Center.

Issues discussed at the April meeting in Atlanta included:

The status of the IVHS Architecture Development Program and the Interim Status Report.

The Virginia Transportation Research Council's short course focusing on Virginia IVHS procurement to be held in the fall of 1994 (contact Brian Smith 804/2931930).

The California Department of Transportation's development of proposed legislation to address contracting issues.

The efforts of the Privacy Task Group.

The U.S. Department of Transportation's IVHS Institutional and Legal Issues Program.

The need to get information about IVHS to the State Attorney General staffs, and the possibility of including speakers on IVHS in their annual training programs.

The National IVHS Program Plan.

The formation of an IVHS Liability Task Group of the LIC.

The formation of a Joint Public-Private Cooperation Task Force of the Institutional Issues Committee and the LIC.

Issues discussed at the June meeting in Boston included:

The second draft of the National IVHS Program Plan.

Comments received from the IVHS AMERICA technical committees in response to the Strawman Privacy Principles.

The status of the Liability Task Force to be appointed by the LIC Chair.

The newly created Public/Private Cooperation Task Force.

Santa Clara University's "Community Meeting About Privacy and IVHS" to be conducted August 30, 1994 (contact Privacy and IVHS Research Project Office, 408/554-2341).

Legal Issues Committee Receives Coordinating Council Award at the Annual Meeting

The Legal Issues Committee was honored with an IVHS AMERICA Coordinating Council Award at the '94 IVHS AMERICA Annual Meeting in April. New IVHS AMERICA Board of Directors Chairman Lawrence D. Dahms presented the award for what he said were "great strides in overcoming the formidable legal barriers to IVHS deployment." In presenting the award, Chairman Dahms noted particular projects undertaken by the LIC over the preceding year, including conferences on public-private partnerships and intellectual property, composition of IVHS privacy principles, development of policy advice on procurement, and production of this newsletter. Special mention was given to LIC Chair Cynthia Moreland, who received the award, LIC Secretary Julie Dingle, and Craig Roberts, IVHS AMERICA staff coordinator for the LIC. The Standards and Protocols Committee also received a Coordinating Council Award for its activity in international standards, vehicle-to-roadside communications, electronic toll and traffic management, and user requirements for future national interoperability.

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IVHS Legal Issues will normally be distributed to the Legal Issues Committee, the Institutional Issues Committee, the Board of Directors, the Coordinating Council, and the technical committee secretaries. It is also available to all other members of IVHS AMERICA who request it. If you are not among the above listed groups and would like to regularly receive this newsletter or know of someone in your organization who would, please provide the information below and fax this page to IVHS AMERICA at: 202/484-*3483.*

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