Legal Updates & News
Bulletins

Communications Law Bulletin, August-September 2009

September 2009
by Charles H. Kennedy, Jennifer L. Kostyu, Frank W. Krogh, Alison Ann Minea, Joan E. Neal

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The Month in Brief

This edition of our Bulletin combines news items from August and September.

Among the developments our readers already might have heard about, Meredith Baker (Republican) and Mignon Clyburn (Democrat) were sworn in as commissioners of the Federal Communications Commission ("FCC" or "Commission"). With these new commissioners on board, the FCC, which has operated with three commissioners since Chairman Martin's departure in January, is again at full strength.

August and September also saw important developments in net neutrality, cable ownership caps, the National Broadband Plan and other areas. These developments are covered here, along with our usual list of deadlines for your calendar.

Chairman Genachowski Proposes to Expand and Codify Internet Openness Policy Principles

In a speech at the Brookings Institution on September 21st, Chairman Genachowski outlined his proposal for expanding and codifying the Commission's existing net neutrality principles adopted in 2005. These four original principles provide that consumers: (1) may access the lawful Internet content of their choice; (2) may run applications and use services of their choice; (3) may connect their choice of legal devices that do not harm the network; and (4) are entitled to competition among network providers, application and service providers, and content providers.

Chairman Genachowski stated his intention to add two additional principles—nondiscrimination and transparency—and to codify all of these principles into formal rules that would apply to all platforms for accessing the Internet (including cable modem, DSL, and wireless). His proposed nondiscrimination principle would prohibit Internet access providers from discriminating against content or applications, while allowing for reasonable network management. His proposed transparency principle would ensure that Internet access providers clearly explain to customers what network management practices they employ.

Public response to the proposal followed quickly. The Chairman's proposal received strong support from his fellow Democrats on the Commission (Commissioners Copps and Clyburn) and a statement expressing concern from his Republican colleagues (Commissioners McDowell and Baker). Several members of the House of Representatives (many of whom had previously supported net neutrality legislation) praised the Chairman's proposal. Some Republican Senators initially planned to introduce an amendment to pending legislation to prohibit the FCC from spending funds on developing such net neutrality rules, but dropped this plan after Chairman Genachowski approached them to open a dialogue on net neutrality. AT&T has already filed a letter with the FCC urging that any new net neutrality rules apply to Web companies such as Google in order to ensure a "level playing field," so the debate promises to be a lively one.

Chairman Genachowski intends to circulate a Notice of Proposed Rulemaking ("NPRM") to his fellow commissioners soon, and observers expect that he will schedule a vote to adopt the NPRM at the Commission's open meeting in October. The public will then have the opportunity to comment on the issues raised in the NPRM, including how to determine if network management practices are reasonable, what information Internet access providers should be required to disclose to their customers, and how the rules should apply to different platforms. Any rules likely would not be adopted until sometime in 2010.

FCC Tackles Consumer Issues

FCC Issues NOI on Availability of Consumer Information

In late August, the FCC unanimously adopted a Notice of Inquiry ("NOI") seeking comment on whether consumers have up-to-date information that is sufficient to make informed decisions regarding their communications services. In the past, the FCC has focused primarily upon the information contained in consumer bills, but the present NOI raises questions about the information provided at all stages of the consumer process: choosing a service provider, choosing a service plan, managing use of a selected service plan, and deciding whether to change providers or service plans. The NOI raises these questions broadly with respect to all types of communications services, including not only wireline and wireless, but also broadband and video. The FCC specifically seeks comment on policies that have a high ratio of consumer benefit to industry cost, how the formatting and display of information can impact the usefulness of various types of consumer information, and how consumer disputes should be resolved. Comments are due October 13, 2009, with reply comments due October 28, 2009.

Media Bureau Issues Report on Protecting Children Across All Media Platforms

As required by the Child Safe Viewing Act of 2007, the Media Bureau has released a report on the protection of children from inappropriate content, whether online, over wireless devices, on television, or over other media. The report concluded that there is no single parental control technology available today that functions across all media platforms. Accordingly, the FCC intends to issue a further notice of inquiry ("Further NOI") to obtain the following additional information regarding parental control technologies: (1) the level of consumer awareness; (2) the pace of adoption; (3) the ease of use; (4) familiarity with ratings systems; and (5) the pace of innovation.

Broadcast Developments: FCC to Take Another Look at Janet Jackson's Wardrobe Malfunction; Media Bureau Declines to Regulate Broadcasts on School Buses and Defers to Local Authorities

In mid-September, the FCC announced it will review Janet Jackson's "wardrobe malfunction" during Super Bowl XXXVIII in 2004, in which the singer's breast was briefly visible during a halftime show. After years of litigation before the Commission and in the federal courts, the U.S. Supreme Court remanded to the U.S. Court of Appeals for the Third Circuit a ruling that vacated the FCC's $550,000 fine against CBS stations that aired the game. The Commission wants to determine whether CBS's violation of the indecency laws was willful.

The remand stems from the high court's ruling in another case, *FCC v. Fox Television Stations*,in which the U.S. Circuit Court of Appeals for the Second Circuit foun that the FCC has the authority to sanction broadcasters for "fleeting" expletives on the air. (The court declined to address whether such an enforcement policy comports with broadcasters' First Amendment rights.) The FCC prevailed in *Fox* because the Supreme Court found that the Commission's new, more stringent indecency enforcement policy had been adequately explained and justified in prior Commission actions. Based on this precedent, the Supreme Court concluded that the decision to fine CBS for a "fleeting" glimpse of nudity during a primetime broadcast was not an arbitrary and capricious action, as CBS had argued.

On September 15, the Commission filed a request with the U.S. Circuit Court of Appeals for the Third Circuit seeking permission to consider whether CBS acted recklessly when it aired Super Bowl XXXVIII live, without using a video delay that could have permitted the network to censor or blur the footage of Jackson's breast. Because CBS used a time delay for the 2004 Grammy Award a week after the Super Bowl, the network could not argue that it lacked the technical capability to use delays to avoid broadcast of indecent content.

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In early September, the FCC's Media Bureau submitted a report to Congress required by the 2009 Omnibus Appropriations Act addressing the issue of allowing broadcasts on school buses. The report concluded that local authorities (including parents and teachers) should decide the matter, focusing in particular on the service BusRadio. The Bureau noted that because BusRadio was not a broadcast licensee, the Commission could not subject it to more stringent broadcast regulations.

BusRadio features music but also carries advertisements and promotions, and currently is played on buses reaching about 1 million schoolchildren. The Media Bureau did suggest that BusRadio could empower local authorities to make more informed decisions by making available more detail about its programming guidelines.

August/September 2009 Legislative Developments in Brief

- ***FCC Chairman's First Congressional Oversight Hearing***: Chairman Genachowski and the four Commissioners faced tough questions from the House Commerce Committee in the chairman's first Congressional oversight hearing on September 17. The chairman discussed in detail his plans for overhauling FCC processes and for ensuring that the National Broadband Plan is delivered to Congress by the February 17, 2010 statutory deadline. Net neutrality regulation and wireless competition also were discussed at length.

- ***Cellphone Jamming Bill Progresses in Senate***: In early August, the Senate Commerce Committee approved S. 251, the Safe Prisons Communications Act of 2009, a bill that would allow cellphone jamming equipment in federal prisons. Prisons would have to obtain waivers of the FCC's rules that generally prohibit all use of such equipment. Under recent amendments to the legislation, wireless services providers and public safety agencies would have access to a database tracking the status all waiver requests. Shortly after the bill was approved in committee, 20 governors sent a letter to Congress voicing support for the bill.

- ***Net Neutrality Legislation Introduced***: In late July 2009, Representatives Edward Markey (D-MA) and Anna Eshoo (D-CA) introduced H.R. 3458, the Internet Freedom Preservation Act of 2009, a bill to require Internet access providers to comply with specific net neutrality mandates and to offer stand-alone Internet access service. It also would require the FCC to promulgate rules to implement the mandates. The bill's chances of advancement for 2009 are unclear, given FCC Chairman Genachowski's recent announcement that the FCC would institute a net neutrality rulemaking.

Congress may wait to see how the FCC proceeds, and could also hold legislation pending the resolution of Comcast's challenge in the U.S. Circuit Court of Appeals for the D.C. Circuit challenge of the Commission's authority to regulate Internet services.

- ***House and Senate Approve Satellite Reauthorization Bills***: Both the House and Senate have approved similar versions of satellite reauthorization legislation. On September 16, the House Judiciary Committee approved the Satellite Home Viewer Extension and Reauthorization Act, which would renew the copyright license for a 5-year term that lets Direct Broadcast Satellite ("DBS") companies transmit out-of-market network programming to their subscribers. On September 24, the Senate Judiciary Committee approved S. 1670, the Satellite Television Modernization Act of 2009, which, like the House bill, would reauthorize DBS providers to retransmit broadcast television stations. The House bill would override a court order currently forbidding Dish Network from sending out-of-market signals to so-called "short markets" that do not have access to one or more major broadcasters on local airwaves, but the Senate version would not. Both bills will go to markup in the House and Senate Commerce committees.

National Broadband Plan Data Gathering Continues with New Comment Rounds and Section 706 Notice of Inquiry

In August and early September, the Commission expanded its data gathering efforts as part of its development of the National Broadband Plan, due to Congress in February. The record is ballooning with several different comment cycles on additional broadband issues as well as responses to the staff workshops. Field hearings on the National Broadband Plan were scheduled for September 21, 2009, in Austin, Texas; October 1, 2009, in the Washington, D.C. area; and October 6, 2009 in Charleston, South Carolina. Additional broadband deployment data is being sought through the Commission's sixth notice of inquiry under Section 706 of the Telecom Act. The Commission's September 29, 2009 Open Meeting also was scheduled to feature presentations on the status of the Commission's processes for development of the National Broadband Plan.

"Tailored" Comments Sought on Specific Broadband Issues

While the National Broadband Plan Notice of Inquiry ("NOI") comments in June and July sought public input on a wide variety of broadband issues, the Commission has more recently changed its approach and sought comment on targeted issues through individual public notices. Input on these targeted issues supplements the record received in response to the National Broadband Plan NOI and the discussions at the National Broadband Plan staff workshops that have been held to date.

- Defining "Broadband": August 20 FCC Public Notice (DA 09-1842, GN Docket Nos. 09-47, 09-51, 09-137) sought comment on how to define "broadband" in the context of development of the National Broadband Plan. Commenters were asked to weigh in on, among other things: "(1) the general form, characteristics, and performance indicators that should be included in a definition of broadband; (2) the thresholds that should be assigned to these performance indicators today; and (3) how the definition should be reevaluated over time." Comments were due August 31 and replies were due September 8.

- Telework: September 4 FCC Public Notice (DA 09-2018, GN Docket Nos. 09-47, 09-51, 09-137) sought comment on how broadband enables employees to work outside the office. The Notice cites successful telework programs offered by the Government Accountability Office and Patent and Trademark Office. Input was sought on a wide variety of questions, including how broadband increases the effectiveness of telework currently, what applications are most often used by teleworking employees, how telework can bring jobs to economically depressed areas, and what percentage of private, public, and non-profit entities have telework programs. Comments were due September 22.

- Smart Grid Technology: September 4 FCC Public Notice (DA 09-2017, GN Docket Nos. 09-47, 09-51, 09-137) sought comment on using broadband infrastructure to support deployment and implementation of Smart Grid technology. Commenters are asked to weigh in on, among other things, which communications networks and technologies are suitable for various Smart Grid applications, specific network requirements for each application in the grid, the types of network technologies that are most commonly used in Smart Grid applications, the extent to which electric supply facilities have access to communications networks capable of supporting Smart Grid, and the extent to which licensed spectrum is used or could be used for Smart Grid applications. All comments should refer to GN Docket Nos. 09-47, 09-51, and 09-137 and should be titled "Comments—NBP Public Notice #2." Comments are due October 2.

- Broadband Accessibility for People with Disabilities: September 18 FCC Public Notice (DA 09-2080, GN Docket Nos. 09-47, 09-51, 09-137) seeks comment and feedback on a list of tentative panel topics and questions for a second workshop on this topic area, "Broadband Accessibility for People with Disabilities: Barriers, Opportunities, and Policy Recommendations," scheduled for October 20. (The first workshop on "Disabilities Opportunities" was held on August 20, 2009.) All comments should refer to GN Docket Nos. 09-47, 09-51, and 09-137 and should be titled "Comments—NBP Public Notice # 4." Comments are due October 6.

- Broadband Deployment and Adoption on Tribal Lands: September 23 FCC Public Notice (DA 09-2093, GN Docket Nos. 09-47, 09-51, 09-137) seeks comment on identifying and remedying barriers to broadband deployment and adoption on Tribal lands. Citing a current lack of data, the Public Notice specifically asks for quantitative data, studies or analyses regarding the current extent of broadband deployment and adoption on Tribal lands. Input is also sought on broadband adoption, mapping efforts, digital literacy/education, and affordability specifically in the context of Tribal lands and residents. All comments should refer to GN Docket Nos. 09-47, 09-51, and 09-137 and should be titled "Comments – NBP Public Notice # 5." Comments are due November 9 and reply comments are due December 9.

- Spectrum for Broadband: September 23 FCC Public Notice (DA 09-2100, GN Docket Nos. 09-47, 09-51, 09-137) seeks comment on the sufficiency of current spectrum allocations, including but not limited to the "prime" spectrum bands below 3.7 GHz, for America's current and future wireless broadband needs. The Commission asks for comment on, among other things, the ability of current spectrum allocations to support next-generation build-outs and the anticipated surge in demand and throughput requirements; what spectrum bands are best positioned to support mobile wireless broadband; what spectrum bands are best positioned to support fixed wireless broadband; the key issues in moving spectrum allocations toward their highest and best use in the public interest; and the ability of current spectrum allocations to support both the fixed and mobile wireless backhaul market. Comments should refer to GN Docket Nos. 09-47, 09-51, and 09-137 and should be titled "Comments (or Reply Comments)—NBP Public Notice # 6." Comments are due October 23 and reply comments are due November 13.

- Contribution of Federal, State, Tribal, and Local Government to Broadband: September 25 FCC Public Notice (DA 09-2122, GN Docket Nos. 09-47, 09-51, 09-137) seeks comment on how "governments at all levels promote broadband deployment and adoption, and how digital technologies and broadband deployment can improve civic engagement, government at all levels, and the lives and welfare of residents and businesses." The Notice asks questions about, among other things, E-government programs and government policies that support broadband adoption and deployment. All comments should refer to GN Docket Nos. 09-47, 09-51, and 09-137 and be titled "Comments – NBP Public Notice # 7." Comments are due November 6.

FCC Seeks Responses to National Broadband Plan Staff Workshops

On September 1, the Commission released a Public Notice soliciting responses to the staff workshops on National Broadband Plan issues taking place in August, September, and October. (*See FCC Announces National Broadband Plan Implementation Schedule*, July 2009 CLB). Any parties interested in further responding to "the facts and reasoning asserted during these workshops" were permitted to file comments according to the following schedule:

- Responses to workshops held from August 6 to August 20 due by September 15.
- Responses to workshops held from August 25 to September 15 due by October 2.
- Responses to workshops held from September 16 to October 20 due by October 30.

All filings responding to staff workshops should refer to GN Docket No. 09-51, and should be titled "Workshop Response" or "Workshop Response—[title of workshop]."

Section 706 Notice of Inquiry Released

On August 7, 2009, the FCC released its sixth notice of inquiry under Section 706 of the Telecommunications Act asking whether advanced telecommunications capabilities, including in particular broadband service, are being deployed to all Americans in "a reasonable and timely fashion." *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the*

Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, Notice of Inquiry, 24 FCC Rcd 10505 (2009). This notice coincides with the FCC's implementation of the National Broadband Plan. Like the National Broadband Plan, the Section 706 Report must be delivered to Congress in February 2010. The FCC stated that it will measure "the nation's progress in deploying broadband in light of . . . recent Congressional directives," including the National Broadband Plan and the Rural Broadband Report. Comments were due September 4 and reply comments are due October 2.

Sprint–Virgin Mobile Deal Gets Antitrust Approval

On August 24, 2009, the Federal Trade Commission ("FTC") announced its approval of the acquisition by Sprint Nextel Corporation ("Sprint") of wireless reseller Virgin Mobile USA Inc. ("Virgin Mobile").

The acquisition, which still requires FCC and SEC approvals, is intended to strengthen Sprint's position in the prepaid wireless calling market. Virgin Mobile began as a joint venture between Sprint and Virgin Group Ltd., and became a public company in 2007.

Besides the need for further regulatory approvals, the deal faces opposition from three subsidiaries that have sued Sprint for competing against them in alleged violation of exclusive territory agreements contained in Sprint's contracts with those companies. The three subsidiaries—iPCS Wireless, Horizon Personal Communications, and Bright Personal Communications Services—all seek an injunction from an Illinois state court against consummation of the pending transaction. The subsidiaries had filed previous suits against Sprint's acquisitions of Nextel and Clearwire, and obtained a judgment against Sprint in the Nextel case. The Clearwire litigation is pending.

Fees for Wireless Applications Revised

The Wireless Telecommunications Bureau Fee Filing Guide has been updated to reflect the new regulatory fee rates for Funding Year 2009. The new fees became effective September 10, 2009. It is very important that applicants pay the appropriate fee amounts; otherwise their applications could be returned and/or dismissed. The new Fee Filing Guide is available at www.fcc.gov/fees/appfees/html.

Federal Appeals Court Throws out FCC's Cable Ownership Caps

In late August, the U.S. Appeals Court for the District of Columbia Circuit threw out the FCC's controversial cable ownership caps, a legacy of the chairmanship of Kevin Martin. The cap was adopted in late 2007, and prohibited any one cable company in the U.S. from serving more than 30% of all pay-TV subscribers. The Commission argued that the cap is necessary to ensure that no single cable operator would be able to shut out competitors.

In its ruling, the D.C. Circuit agreed with Comcast that the Commission acted arbitrarily and capriciously when it required that no cable operator serve more than 30% of U.S. cable subscribers. The Commission failed to adequately consider growing competition faced by cable companies from satellite TV providers and from telephone companies (for example, AT&T's U-Verse, Verizon's FiOS service). The decision notes that the FCC "failed to demonstrate that allowing a cable operator to serve more than 30 percent of all cable subscribers would threaten to reduce either competition or diversity in programming."

This is not the first time the Commission has tried to cap nationwide cable ownership. In *Time Warner v. FCC*, a D.C. Circuit case decided in 2001, the court remanded the 30% cable ownership cap imposed under Chairman Kennard. It is unclear whether the current FCC will appeal the ruling, especially given that the 30% cap was a product of the previous chairman.

Report Concludes the FCC Is Ready for Emergency, but That There Is Room for Improvement

The FCC's Public Safety and Homeland Security Bureau released a report concluding that the FCC generally is prepared for emergencies, but certain areas of readiness can and will be improved. The report, which comprehensively reviewed the FCC's ability to respond to natural disasters, terrorist attacks, public health emergencies, and other large scale emergencies, is the culmination of a top-to-bottom state-of-readiness review that FCC Chairman Genachowski initiated upon arriving at the FCC.

According to the report, "the FCC's primary mission is to ensure continuous operations and reconstitution of critical communications systems and services" during major public emergencies. Over the years, the FCC has developed comprehensive plans and capabilities for responding in emergency situations, which includes working with other federal agencies and members of the communications industry. The report, however, identifies several areas in which the FCC can and intends to improve its emergency planning and response, including:

- Expanding its cyber security expertise;
- Expanding its public safety and emergency response outreach activities;
- Enhancing the ability for emergency personnel to remotely access essential FCC applications and databases;
- Expanding its emergency response and continuity training; and
- Modernizing its disaster outage and priory services programs.

As part of its efforts to improve its emergency preparedness and track problems within U.S. communications networks, the FCC is considering requiring broadband Internet service providers to file outage data, as more traditional communications providers are required to do. Such a mandate, however, may well require an act of Congress to expand the FCC's Title I ancillary authority over information services.

Universal Service Developments

Bureau Decision Highlights Importance of Verifying That Resale Carrier Customers Are USF Contributors

The Wireline Competition Bureau ("Bureau") upheld a determination by the Universal Service Administrative Company ("USAC"), which administers the Universal Service Fund ("USF"), that Global Crossing Bandwidth, Inc. incorrectly reported revenues as "carrier's carrier" or "resale" revenue from customers that did not contribute to the USF. Thus, according to the Bureau, USAC was justified in seeking USF support based upon that revenue.

The FCC distinguishes between "end user" revenue, which is subject to USF contribution obligations, and "carrier's carrier" or "resale" revenue, which generally is not subject to contribution obligations. Any revenues derived from resale customers that do not contribute to the USF, however, are treated by the FCC as "end user" revenue and thus subject to USF contribution requirements.

The Bureau concluded that Global Crossing's reliance on outdated customer certifications, contract provisions and information and product descriptions from customers' websites did not establish a reasonable expectation that its resale customers directly contributed to the USF. Accordingly, USAC acted appropriately by reclassifying the resale revenue as "end user" revenue and seeking USF support from Global Crossing based upon that revenue. The Bureau acknowledged that the resale customer verification process set forth in the FCC Form 499-A Instructions (which includes obtaining annual certifications and related information from customers and checking the FCC's online database of Form 499-A filers) is "guidance" only and that other validation measures might be used, but indicated that service providers have a high burden to demonstrate the validity of these alternative measures.

In related matters, the Bureau also confirmed in the Global Crossing case that in the event it disputes an invoice from USAC, a service provider is required to pay the disputed invoice. If the dispute is resolved in favor of the service provider, USAC will credit back the disputed amount.

Decreased USF Contribution Factor Still Hovers Above 12%

The USF contribution factor for the fourth quarter of 2009 will decrease by 0.6% from 12.9% to 12.3%. The decrease comes at the heels of significant criticism, alarm and renewed calls for USF reform after the contribution amount almost topped 13%.

> ***Tip Box: USAC Will No Longer Accept Filings at New Jersey Location***
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> USAC announced that after December 31 it will no longer accept forms for the USF high-cost and low-income programs at USAC's New Jersey address. Starting October 1, carriers should submit these filings to USAC's Washington, D.C. location (or online where possible). The affected forms include, but are not limited to, FCC Forms 497, 507, 508, 509, and 525; local switching support forms; interstate access support line count filings; and CMT revenue filings.

In August, a long-pending traffic pumping proceeding at the Iowa Utilities Board ("IUB") came to a head. On August 14, the IUB announced its decision in *Qwest Communications Corp. v. Superior Tel. Cooperative, et al.* ("*Qwest*"), finding that the defendant local exchange carriers ("LECs") had assessed terminating intrastate access charges improperly. On August 20, the FCC sought comments on a Petition for Declaratory Ruling filed by Great Lakes Communication Corp. ("Great Lakes") and Superior Telephone Cooperative ("Superior"), two of the LEC defendants in *Qwest*, requesting that the FCC preempt the IUB's expected final written ruling in *Qwest*. Great Lakes and Superior argued that the IUB intended to rule on matters affecting interstate access services and charges. On September 15, Qwest Communications Co., LLC, the plaintiff in the IUB proceeding, requested that the FCC suspend the comment schedule on the Great Lakes petition until after the IUB rules on Qwest's complaint.

On September 21, the same day that initial comments were due on Great Lakes' petition, the IUB issued a Final Order in *Qwest* ordering refunds of improper intrastate access charges and initiating a proceeding to "prevent this abuse in the future." Qwest had alleged that the eight LEC defendants were engaged in a scheme to dramatically increase the amount of terminating access traffic delivered to their exchanges by means of agreements with conference calling and other service providers. The service providers offered free conference calling, international calling, and other services nationwide, which resulted in vast increases in the toll traffic terminating in the LEC defendants' exchanges, and the LECs shared their increased access revenues with the service providers.

In ruling for Qwest, the IUB addressed three sets of issues: (1) the LECs' alleged tariff violations; (2) prospective remedies for traffic pumping; and (3) one of the LEC counterclaims. Regarding the first category, the IUB found that terminating switched access charges were improper because the incoming toll calls were not delivered to "end users" of the LECs' intrastate services, nor were they terminated at any end user's "premises" or in the terminating LEC's local exchange area, as the relevant tariff requires. The IUB found that the conference calling providers were not end users because they had not purchased the LECs' local exchange services. The LECs' supposed invoices to the providers were backdated or nonexistent. The IUB described the LECs' backdating of invoices as "an attempt . . . to manufacture evidence, after the fact" and stated that "[t]he effort reflects badly on those [LECs] and the credibility of their cases." The IUB also found that the revenue sharing and other factors showed that the service providers were business partners of the LECs, not the LECs' end users.

The IUB also found that calls were not delivered to a separate "end-user's premises." The service providers did not own, lease, or control separate buildings or even separate areas in the LECs' central offices for which they paid collocation fees. The IUB also found that most of the toll traffic at issue was not subject to terminating access charges because it did not terminate in the LECs' exchanges. Rather, it was routed to distant points, including international locations in the case of calling card and international calling services, or was terminated in locations other than the exchange area of the LEC assessing the terminating access charges.

Regarding prospective remedies for the traffic and access rate manipulation alleged by Qwest, the IUB did not make a finding that revenue sharing agreements between LECs and their service provider customers are always unreasonable per se. The IUB expressed concern, however, that where a carrier's access traffic volume surges after access rates are set based on low volume, the incremental cost of the increased traffic is less than the charge, the carrier is willing to share a portion of access revenues, and the carrier has market power over access services, the result is an unreasonable rate or service arrangement. "In an effort to curb this unreasonable result going forward," the IUB initiated a rulemaking regarding high-volume access services. Based on evidence that some of the service providers offered pornographic content, the IUB also announced that it will initiate a rulemaking to consider restricting access to obscene calling services in Iowa. Finally, because carriers may issue telephone numbers only to end users, the IUB also directed the North American Numbering Plan Administrator and the Pooling Administrator to initiate proceedings to reclaim telephone numbers that Great Lakes issued to service providers and ordered the other LECs to report on whether they issued numbers to parties other than end users.

One of the LEC defendants, Reasnor Tel. Co., LLC, filed counterclaims against Qwest and intervenor Sprint Communications Co., L.P., based on their withholding of payment of the disputed access charges and their alleged call-blocking. The IUB found that, although withholding of payment "is not a preferred form of dispute resolution," nothing is owed by Qwest or Sprint because the access charges were improper. The IUB also found that the record did not support any finding of call-blocking by Qwest but that Sprint blocked calls bound

for the service providers by routing such traffic to inadequate facilities, thereby "choking" the traffic. The IUB accordingly placed Sprint on notice that it engaged in call-blocking and that any repeated call-blocking may result in civil penalties. Finally, the IUB rejected Reasnor's claim that Qwest discriminated against its wholesale-carrier customers by offering them unequal discounts because Qwest provides discounts in a competitive market, unlike the access market manipulated by the LECs.

The IUB denied a motion filed on August 17 by Great Lakes and Superior to stay the proceedings. Echoing their FCC petition, Great Lakes and Superior had argued that, because most of the disputed access traffic is interstate, the case is preempted by the FCC. The IUB stated that it "is aware of its jurisdictional limitations with respect to interstate and international traffic and as such has limited its findings . . . to the intrastate issues raised in [Qwest's] complaint." The IUB also directed Qwest and the intervenor plaintiffs to calculate the access charge refunds they are owed. The IUB order covered a number of significant intrastate access issues that are also before the FCC on the interstate side and will be subject to intense interest and analysis as the FCC and other state commissions address these issues.

Recent Enforcement Activity Focuses Largely On CPNI Rules

From the end of July through the first week of August, the FCC's Enforcement Bureau ("Bureau") released over 30 orders adopting consent decrees with small carriers terminating investigations of possible violations of the FCC's customer proprietary network information ("CPNI") rules. All of the consent decrees arose from the February 2009 *Omnibus Notice of Apparent Liability for Forfeiture* ("*Omnibus NAL*") against numerous companies, proposing forfeiture in each case of $20,000. The *Omnibus NAL* alleged that each of the companies had failed to submit satisfactory evidence of its timely filing of an annual CPNI compliance certification for 2007, including an explanation of any actions taken against data brokers and a summary of all customer complaints in the past year concerning unauthorized release of CPNI. Each of the companies agreed in its consent decree to adopt a plan ensuring future compliance with the CPNI rules, including the certification requirement. Each of the companies also agreed to make a voluntary contribution to the U.S. Treasury of $1,000. Each consent decree expires after two years.

From the end of July to September 1, the Bureau also cancelled at least 18 proposed forfeitures for alleged CPNI certification violations. Most of the cancellations arose from allegations in the *Omnibus NAL*. The Bureau determined that the companies involved either had timely filed proper CPNI compliance certifications for 2007 or were not subject to the certification requirement then.

On July 30, the Bureau released an order adopting a consent decree with Pinnacle Systems, Inc. terminating an investigation of possible violations of the FCC's "V-Chip" rules, which require that all television receivers shipped in interstate commerce allow blocking of programming based on its content and be able to respond to changes in the content advisory rating system. Pinnacle's response to a letter of inquiry indicated that it may have shipped a number of personal computer digital television tuners that were not in compliance with the V-Chip rules. Under the consent decree, Pinnacle agreed to establish a compliance plan in which Pinnacle will notify its customers that it will provide a software patch to supply the missing V-Chip functionality at no cost and will file periodic compliance reports with the Bureau. The consent decree's requirements will terminate after two years. Pinnacle also agreed to make a voluntary contribution to the U.S. Treasury of $25,000.

During August 4-6, the Bureau also released three orders relating to enforcement of the FCC's "junk fax" rules. The Bureau released forfeiture orders against First Alliance Security and Universal Roofing for sending unsolicited advertisements to consumers' telephone facsimile machines. In both cases, the Bureau received complaints that consumers had received unsolicited faxes after the Bureau had issued citations to the companies. Neither company responded to a Notice of Apparent Liability for Forfeiture ("NAL") proposing a forfeiture for the post-citation faxes. Following the base penalty amount of $4,500 per violation used in prior junk fax cases, the FCC imposed a forfeiture of $13,500 on First Alliance and $4,500 on Universal Roofing. The Bureau cancelled an NAL for $18,000 previously issued against Venali, Inc., finding that Venali had presented a reasonable showing that neither it nor customers using its services had transmitted the faxes involved in the NAL or more recent complaints.

Wireless Developments

FCC Initiates Inquiries Regarding Mobile Wireless Competition and Wireless Innovation and Investment

At its August 27 open meeting, the FCC announced two Notices of Inquiry focusing on the status of the wireless marketplace. The first seeks comment on the competitiveness of the mobile wireless marketplace and how the FCC can improve its analysis of the market's competitive conditions (the "Competition NOI"). The

second seeks comment on ways the FCC can promote innovation and investment in the wireless marketplace (the "Innovation NOI"). It appears that the new FCC administration is taking a fresh and different look at the wireless industry, which may prove beneficial for carriers and consumers alike.

The record in the Competition NOI will help ensure that the FCC's annual report on the state of competition in the commercial mobile services market accurately reflects ongoing developments in technologies and services. The Competition NOI asks about the analytic framework and data sources that the FCC should use to measure competition. The Competition NOI also includes new market segments, including device and infrastructure, which had not been included in the FCC's prior annual competition reports. In addition, the Competition NOI seeks comment on vertical relationships between "upstream" and "downstream" market segments, and their impact on competition.

Recognizing the key role that innovation plays in the communications sector, the Innovation NOI seeks proposals through which the FCC can foster innovation and investment in the wireless sector. The Innovation NOI specifically seeks comment on spectrum availability, management, and use, wireless networks, devices, applications, and business practices. Commentators are also encouraged to discuss how wireless services and technologies benefit health care, energy, education and public safety.

Comments and replies for both the Competition NOI and Innovation NOI are due September 30 and October 15, respectively.

Maryland Prison Obtains Experimental License for Cell Phone Demonstration

The FCC's Office of Engineering and Technology ("OET") granted a two-day experimental license to Tecore Networks, Inc. for it and several other companies to conduct demonstrations at a Maryland prison of various alternatives to jamming technologies. Prison administrators and other government officials have been exploring ways to obstruct inmates' efforts to smuggle illegal cell phones into prisons, but the wireless industry has opposed the use of the technology because it would interfere with lawful communications.

The FCC has consistently rejected requests for special temporary authority to demonstrate cell phone jamming capabilities at prison facilities under Section 333 of the Communications Act, which bars the use of jamming equipment. According to OET, "in contrast to previous proposals for testing cell-jamming technologies, Tecore has worked with the Maryland Department of Public Safety and Correctional Services to establish test conditions that ensure against any interference or disruption of cell phone calls that are not part of the demonstration." Commercial wireless carriers showed support for the experimental license and those in the affected testing area consented to the tests.

Importance of Timely Filing of Renewal Applications

The Wireless Bureau, in a series of orders and letters addressing late-filed renewal applications, has cracked down on what used to be an almost-routine grant of such applications. Most of the licenses at issue were microwave industrial/business pool licenses held by utility companies that inadvertently failed to file their renewal applications prior to the expiration of the licenses.

In denying the applicants' waiver requests, the Wireless Bureau set forth its current policy regarding late-filed applications for Wireless Radio Services:

"[R]enewal applications that are filed up to thirty days after the expiration date of the license will be granted *nunc pro tunc* if the application is otherwise sufficient under the Commission's Rules, but the licensee may be subject to an enforcement action for untimely filing and unauthorized operation during the time between the expiration of the license and the untimely renewal filing. Applicants who file renewal applications more than thirty days after the license expiration date may also request renewal of the license *nunc pro tunc*, but such requests will not be routinely granted, will be subject to stricter review, and also may be accompanied by enforcement action, including more significant fines or forfeitures…."

In the recent cases, despite claims by the licensees that the licenses at issue were critical to their safe and efficient operations, the Bureau denied the waiver requests, noting that "an inadvertent failure to renew a license in a timely manner is not so unique and unusual in itself as to warrant a waiver of the Commission's Rules." Instead, the Bureau stated that the applicants could request special temporary authority ("STA") for their wireless operations and

must file a new, properly coordinated application to obtain a regular authorization.

These decisions emphasize the importance of internal processes for docketing and keeping track of license expiration dates and renewal deadlines, even for companies whose wireless licenses are ancillary to their main operations.

Upcoming Deadlines for Your Calendar

Note: Although we try to ensure that the dates listed below are accurate as of the day this edition goes to press, please be aware that these deadlines are subject to frequent change. If there is a proceeding in which you are particularly interested, we suggest that you confirm the applicable deadline. In addition, although we try to list deadlines and proceedings of general interest, the list below does not contain all proceedings in which you may be interested.

October 5, 2009	Comments due on Medical Body Area Network ("MBAN") NPRM.
October 13, 2009	Comments due on Consumer Information and Disclosure NOI.
October 15, 2009	Reply comments due on Mobile Wireless Competition NOI.
October 15, 2009	Reply comments due on Wireless Investment and Innovation NOI.
October 27, 2009	Auction 86 (Broadband Radio Service or "BRS") begins.
October 28, 2009	Reply comments due on Consumer Information and Disclosure NOI.
November 1, 2009	Form 499Q (Telecom Reporting Worksheet) due.
November 11, 2009	Reply comments due on Medical Body Area Network ("MBAN") NPRM.