MORRISON | FOERSTER

Legal Updates & News

Bulletins

Communications Law Bulletin -- May 2007

June 2007

Communications Law Bulletin -- May 2007

The Month in Brief

This issue of our bulletin, which discusses developments affecting the communications industry in May, 2007, comes somewhat later than usual in our publication cycle. We elected to delay publication this month so that we could include articles on items announced at the open meeting of the Federal Communications Commission ("FCC" or "Commission") held on May 30, 2007.

For obvious reasons, we hope that the FCC will not make a habit of holding open meetings at the end of the month. Unfortunately, as this issue was going to press, we learned that the June meeting will be held on the 28th. If we decide that the open meeting agenda justifies a slight delay in publication of our June issue to take some of those items into account, we certainly will strive to make that delay as short as possible.

We trust you will find that this bulletin was worth waiting for. As always, along with regulatory and legislative developments affecting all segments of our industry, we include a list of deadlines for your calendar.

Court Upholds Expansion of USF Obligations to Interconnected VoIP Providers

On June 1, 2007, the D.C. Circuit, acting on appeals by Vonage Holdings Corp. and the Computer and Communications Industry Association, partly upheld and partly vacated the FCC's 2006 *Contribution Methodology Order* imposing universal service fund ("USF") contribution obligations on Voice over Internet Protocol ("VoIP") providers. In an opinion by Judge Tatel, the court held that the FCC has the statutory authority to require VoIP providers to make USF contributions and that it acted reasonably in analogizing VoIP to wireline toll service in setting the "safe harbor" percentage of VoIP traffic presumed to be interstate and thus subject to USF contribution obligations. The court, however, found the FCC's explanation inadequate for its requirement that VoIP providers obtain FCC pre-approval for traffic studies used to demonstrate a lower percentage of interstate traffic and its suspension for two calendar quarters of the "carrier's carrier rule" preventing duplicative wholesale and retail USF contributions by VoIP providers.

Applying a "*Chevron* step two" analysis, the court found that it was reasonable for the FCC to find that its permissive contribution authority in Section 254(d) of the Communications Act, which covers "providers of telecommunications," extends to VoIP providers, whether it ultimately determines that VoIP is a "telecommunications service" or an "information service." Citing the U.S. Supreme Court's decision in the *Brand X Internet Services* case, the court found that it was reasonable for the FCC to determine that VoIP providers "provide" "telecommunications" as a component of VoIP service, irrespective of the ultimate regulatory classification of VoIP services.

The court rejected Vonage's challenge to the FCC's comparison of VoIP to wireline, rather than wireless, service for safe harbor purposes. The court acknowledged that the all-distance aspect of VoIP makes the wireline analogy "imprecise" but explained that the arbitrary and capricious standard does not require precision, only reasonableness. It was reasonable for the FCC to find that VoIP and wireless are likely to attract different types of customers making different types of calls. The court acknowledged the flaws in the two surveys cited by the FCC showing a high percentage of interstate VoIP traffic, but pointed out that the FCC did not rely entirely on these studies, and that opponents provided no studies of their own.

The court held, however, that the FCC did not adequately explain its different treatment of wireless and VoIP traffic studies. Even though the FCC required pre-approval for VoIP traffic studies because it had identified problems with wireless traffic studies, it did not require pre-approval for wireless traffic studies, citing the potential disruption to wireless providers. The court found that it was arbitrary and capricious to require pre-approval for VoIP traffic studies but not for wireless traffic studies. The disruption that pre-approval might cause wireless providers was not a sufficient justification for the difference in treatment, given the much greater disruption to VoIP providers created by the imposition of USF contribution obligations for the first time. The court also held that the FCC did not adequately explain the suspension of the carrier's carrier rule for VoIP providers for two quarters. The FCC failed to explain why duplicative wholesale and retail USF contributions by VoIP providers for two quarters were necessary to prevent a decline in contributions – the rationale stated in the *Contribution Methodology Order* –in light of the improbability that the indirect contributions VoIP providers made before the new rule were larger than the direct payments they would make subsequently. The pre-approval requirement and suspension of the carrier's carrier rule were accordingly vacated.

The FCC will now need to figure out the implications of the vacated aspects of the order to the extent that VoIP providers have already made duplicative payments and/or submitted traffic studies for prior approval.

FCC Implements Katrina Panel Recommendations

On May 31, the FCC adopted an Order implementing several recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks ("Katrina Panel"). The Panel was formed to examine Hurricane Katrina's effect on telecommunications services in the Gulf Coast region. The storm devastated wireline and wireless networks, left Public Safety Answering Points inoperative, and limited 911 and E911 availability. After studying the extent of this damage and the sufficiency of the recovery effort, the Katrina Panel proposed measures designed to improve disaster preparedness and network reliability and better coordinate first responders, emergency medical providers, and federal, state, and local agencies.

The FCC's Order affects telecommunications service providers by extending special temporary authorizations ("STAs") for Bell Operating Companies ("BOCs") for an additional year. These STAs exempt BOCs from enforcement of 47 U.S.C. § 272 so that they may share non-public network information with BOC affiliates in order to facilitate disaster planning. In addition, the Order requires local exchange carriers ("LECs") and commercial mobile radio service ("CMRS") providers to have backup power on hand for central offices, cell sites, remote switches, and other assets that normally rely on local AC commercial power. Finally, the Order commands LECs, CMRS providers, and interconnected VoIP providers to report on the reliability and resilience of 911 systems. Small wireline carriers, Tier III CMRS providers, and certain small VoIP providers are exempt from this reporting requirement.

The Order also directs the FCC's Public Safety and Homeland Security Bureau ("Bureau") to carry out several measures. Towards the goal of improved dissemination of emergency information, the Bureau is to revitalize the current Emergency Alert System, develop a voluntary, streamlined approach for collecting outage and situational awareness information, and coordinate efforts amongst the telecommunications industry, representative organizations, and state and local governments to ensure that persons with disabilities and non-English-speaking persons receive emergency information.

The Order further instructs the Bureau to improve disaster preparedness. To this end, the Bureau is to develop outreach programs that target the emergency medical community. The Bureau must also educate public safety agencies about alternative communications technologies such as satellite and paging systems and Wi-Fi and WiMAX networks.

Finally, the Bureau is to work in conjunction with the Department of Homeland Security ("DHS") on several matters. These two bodies are to develop uniform credentialing standards and ensure that service providers are treated as essential personnel under the Stafford Act so as to facilitate access to disaster-afflicted areas. The Bureau and the DHS are also to collaborate to promote Priority Communications Service Programs and facilitate interoperability of communications systems for first responders.

States Continue to Jump into Net Neutrality Fray

In Congress, Senator Dorgan (D-ND) has stated his intention to reintroduce net neutrality legislation from the last Congress and hold hearings on the issue. Some states, however, are not awaiting further Congressional action and are attacking the issue themselves.

In New York, the state Assembly is considering a bill (A. 3980) that would impose net neutrality measures as part of a larger telecom and cable reform measure. Specifically, the bill would prohibit: blocking, impairing, or discriminating against traffic based on source or destination; exclusive or preferential arrangements governing the carriage or treatment of Internet traffic; imposition of certain additional charges; and restrictions on attaching or using certain devices.

In Maine, the legislature is considering a stand-alone net neutrality bill not attached to broader telecom legislation. This bill would ban interference with access to any content, applications, or services on the Internet, but would permit tiered pricing not tied to sources or ownership of content and would permit parental control services. Two different committees held hearings on the bill during May.

Finally, the Illinois House has introduced a resolution urging Congress to refrain from net neutrality legislation, arguing that such legislation would "impede future capital investment in the U.S. broadband infrastructure." The resolution instead urges Congress to permit competition to drive development of the broadband industry. A hearing on the resolution was scheduled for late May.

Video Franchise Reform Continues

In mid-May, the U.S. Department of Justice publicly announced its support of video franchise reform at the state level, stating that such measures should increase competition between telephone companies and cable companies in the market for subscription television services and may lower rates for customers.

Video franchise reform bills designed to shift franchising authority from municipalities to the state level continue to progress in several states:

- In California, which passed its video franchise reform bill in September 2006, the Public Utilities Commission ("PUC") granted its first state-level franchise to cable company Cox Communications. The franchise allows Cox to serve four San Diego neighborhoods for a term of 10 years. The second phase of California's video franchising proceeding now begins, with efforts focused on setting buildout requirements for small, non-cable competitive video entrants. Comments for this second phase were due May 31, and replies are due by June 15.
- In early May, the Florida legislature passed a video franchise reform bill to transfer video franchising authority from municipalities to the Secretary of State on July 1. Florida's governor signed the bill on May 21. The new law permits incumbent providers to opt out of existing local franchises once a competitor begins providing service, caps local franchise fees, and requires state-wide franchise holders to provide free basic cable service to schools. The governor, however, urged the legislature to consider stronger consumer protection and enforcement measures in future legislation.
- The Wisconsin state legislature advanced a bill that would shift video franchising authority from municipalities to the Department of Financial Institutions.

- The Ohio Senate passed an amended version of a reform bill that would shift video franchising from municipalities to the state's Department of Commerce.
- In late May, Nevada's legislature passed a bill shifting video franchising authority from municipalities to the Secretary of State.

Meanwhile, a Tennessee bill to shift video franchising authority to the state level was withdrawn by its primary sponsor, who cited insufficient time in the final two weeks of the 2007 legislative session to defeat persistent opposition to the measure from various cities and towns.

Broadcast and Media Developments

In the courts, the U.S. appeals court in Philadelphia has scheduled oral argument for a CBS lawsuit against the FCC. The action challenges the $550,000 fine issued by the Commission against the network after the exposure of Janet Jackson's breast during the 2004 Super Bowl halftime show.

In Congress, Senator Rockefeller is expected to introduce a bill granting the FCC authority to regulate the broadcast of violent content. For more information, see the "Legislative Developments" section in this issue.

At the FCC, in early May, the Tribune Company asked the FCC to waive cross-ownership rules to allow it to keep seven television and AM radio stations in cities where it publishes newspapers. FCC waivers will be required to complete a deal announced in April under which the Tribune Company's broadcasting assets will come under private ownership.

The FCC also finally revised its regulations to implement the increased forfeiture amounts enacted when the Broadcast Decency Enforcement Act was signed into law last June. Specifically, that statute raised the maximum forfeiture from $32,500 per violation to $325,000 per violation, and raised the maximum forfeiture for a continuing violation from $325,000 to $3,000,000. The rules have now been revised to reflect these amounts.

Private Equity Firms to Buy Alltel in Largest Telecom Leveraged Buyout Ever

Alltel Corp. ("Alltel"), the wireless phone company based in Little Rock, Arkansas, agreed to be sold to private equity firms TPG Capital (formerly Texas Pacific Group) and GS Capital Partners (the private equity arm of Goldman Sachs). The deal, valued at $27.5 billion, is the largest leveraged buyout in the history of the telecommunications industry.

The private equity firms will acquire all of the outstanding common stock of Alltel (NYSE: AT) for $71.50 per share in cash. After the transaction, Alltel will be a privately held company. The purchase price per share represents a 23% premium over Alltel's share price prior to January 2007, when media reports of a potential transaction were first published, and a 10% premium over Alltel's closing price on the last business day before the deal was announced.

Alltel, which was assembled through acquisitions of several regional carriers, has approximately 12 million subscribers in 35 states, mostly in rural areas. The company makes around 20% of its profit through roaming fees that it charges to other carriers when their customers enter a rural area covered by Alltel's network. Analysts predict that with its low debt, a management team highly regarded by Wall Street, and two large financial backers, Alltel is poised for growth.

Vonage Argues for New Trial in Patent Dispute with Verizon

On April 30, 2007, the Supreme Court of the United States issued a groundbreaking ruling in *KSR International v. Teleflex Inc.*, 127 S. Ct. 1727 (2007). This unanimous decision redefines when a patent is invalid as obvious in light of the prior art in the field. While it likely will take years of litigation before the Federal Circuit and federal district courts for the impact of the Supreme Court's new obviousness precedent to be measured, a significant communications case could be one of the first major Federal Circuit appeals to be argued and decided in the post-*KSR* world.

Prior to *KSR* the Federal Circuit's obviousness standard under 35 U.S.C. § 103(a) for 25 years required an explicit or implicit "teaching, suggestion, or motivation" that would lead a person of ordinary skill in the art to combine the prior art references to achieve the claimed invention. This standard often required the party asserting a patent invalidity defense to demonstrate *in the prior art itself* some indication that the ideas from two articles or patents should be combined. Critics of the standard argued that the Federal Circuit's obviousness requirement was inflexible and led to too many patents, as examiners and alleged infringers were often unable to point to a teaching, suggestion, or motivation even though common sense or simple market demands would have led a person of ordinary skill to combine the prior art references to create the putative patentable invention.

The Supreme Court in *KSR* adopted the views of the critics andrejected the Federal Circuit's requirement as a "rigid approach." Citing its prior interpretation of Section 103 in *Graham v. John Deere Co.*, 383 U.S. 1 (1966), the Court, in an opinion authored by Justice Kennedy, held that the obviousness analysis must be "expansive and flexible" so that courts can undertake a broad inquiry into: (1) the scope and content of the prior art; (2) the skill level of a person of ordinary skill in the art; (3) the differences between the claimed invention and the prior art's teachings; and (4) any objective indications of nonobviousness, such as the commercial success of the invention. The Court explained that "[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results." Applying its re-articulated standard, the Court held that summary judgment against the patent holder was appropriate.

On May 1, 2007, one day after the Supreme Court issued its decision in *KSR*, Vonage filed a motion to vacate the district court's judgment and order a new trial in Vonage's pending appeal before the Federal Circuit in *Verizon Services Corp. v. Vonage Services Corp.*, Nos. 2007-1240, -1251, -1274, thereby re-injecting obviousness into a case where claim construction had predominated. The district court had held, after a jury trial, that Vonage's VoIP service infringed upon Verizon's patents, and issued an injunction enjoining Vonage's use of the allegedly infringed-upon technology. Vonage had appealed this adverse decision prior to the *KSR* decision, and the Federal Circuit stayed the injunction and expedited the appeal.

In its *KSR* motion filed in the Federal Circuit before briefing on the merits, Vonage argued that an immediate vacatur and remand was warranted because the district court's jury instructions on Vonage's patent invalidity defense for obviousness under 35 U.S.C. § 103(a) were "overly restrictive" because they required Vonage to satisfy by clear and convincing evidence the Federal Circuit's now-overruled requirement "that there was a teaching, suggestion or motivation in the prior art to achieve the claimed invention." Vonage then cited instances in the trial record where it had raised the issue of obviousness, and argued that it *would have* raised additional references at trial but for "the difficulty in satisfying the now rejected" Federal Circuit test. In response, Verizon argued that the *KSR* arguments were better addressed at the merits briefing, and that Vonage proposed the obviousness instruction it now complained of in any event.

The jury instructions in the Vonage case, like the model jury instructions on obviousness (*see* AIPLA Model Jury Instruction 7.5 (2005)) that had been developed over the past quarter century, were based upon the Federal Circuit's teaching, suggestion, or motivation requirement, as the instructions required the jury to find some suggestion or motivation to combine the elements in the prior art. Going forward, juries are likely to be instructed only on the statute itself and the flexible *Graham* factors reiterated in *KSR*.

On May 2, 2007, the Federal Circuit denied the motion to vacate the district court's judgment and order a new trial. Rather, the Federal Circuit explained that Vonage would have an opportunity to make this argument in its merits brief, which it did in its opening brief filed on May 9, 2007. A decision will be issued sometime after oral argument on June 25, 2007.

Recent FCC Orders Reflect Aggressive Enforcement Efforts

A flurry of enforcement activity in the past month resulted in a half dozen significant orders totaling millions of dollars in penalties and payments to the U.S. Treasury: four Orders of Forfeiture, one of which also contained a Further Notice of Apparent Liability for Forfeiture ("NAL"); one order affirming a previous forfeiture order; and one Consent Decree. Three of the forfeiture orders and the Consent Decree reflected the FCC's increasingly aggressive enforcement of its USF contribution and other regulatory fee obligations. The remaining orders involved violations of the Do Not Call rules and the auction anti-collusion rule, and the Further NAL alleged a failure to obtain Section 214 authority to provide international service.

The first two actions, released on May 3, were Orders of Forfeiture against Global Teldata II, LLC ("Global"), a reseller of local, long distance, and international services, and InPhonic, Inc., a wireless reseller, for violations of regulatory fee requirements. The Global order assessed a forfeiture of almost $237,000 for failing to timely register with the FCC, for late Telecommunications Reporting Worksheet (Form 499) filings, and for failure to make three contribution payments to the USF. The FCC found that Global's failure to register was a continuing violation and therefore was "repeated" within the meaning of the forfeiture provisions of Section 503 of the Communications Act. The FCC also rejected Global's excuses for its failures to file timely Forms 499 and to make USF contributions, noting its years of experience in the telecommunications industry. The FCC accordingly refused to reduce the penalty originally proposed in a previous NAL against Global. It pointed out that the forfeiture amount is less than 3% of Global's total revenues and that the FCC had previously found forfeitures of up to nearly 8% of a company's revenue to be reasonable.

The InPhonic forfeiture order imposed a penalty of nearly $820,000 for various USF and other regulatory fee violations (failing to timely register, late Form 499 filings, and failing to contribute to the USF and Telecommunications Relay Service ("TRS") fund). The FCC rejected InPhonic's arguments for a reduction in the forfeiture amount originally proposed in a prior NAL, and stressed in particular how failing to register can undermine all of the regulatory fee programs, including the USF, justifying an upward adjustment in the forfeiture amount for failure to register from $3,000 to $100,000. The FCC also rejected InPhonic's claim that the forfeiture amount was discriminatory, relative to penalties imposed on other carriers. In particular, the FCC pointed out that it had increased forfeitures for nonpayment into the USF in recent orders because the USF forfeiture calculation methodology used in earlier orders, cited by InPhonic, "was not a sufficient deterrent."

The FCC also issued a Further NAL with the InPhonic forfeiture order proposing an additional $100,000 penalty for unauthorized international operations, in violation of Section 214 of the Communications Act ("Act"). The Further NAL grew out of InPhonic's response to the initial NAL alleging USF violations, in which InPhonic argued that the NAL should be cancelled because InPhonic did not have any FCC authorizations and, thus, under Section 503 of the Act, the FCC was required to issue a citation against InPhonic rather than an NAL. Not surprisingly, that led the FCC to investigate InPhonic's authorizations, and it discovered that the carrier has been providing resold international services without a Section 214 authorization since 2002. The FCC found the violation particularly egregious given the "important public interest considerations involving national security, law enforcement, foreign policy and trade policy." Although the base penalty for unauthorized operations is $10,000, the FCC adjusted the proposed forfeiture upward in this case to $100,000. The InPhonic NAL appears to be the first enforcement action for failure to obtain international Section 214 authority in more than 10 years.

On May 4, the FCC largely affirmed two forfeiture orders issued against Star Wireless, LLC ("Star") and Northeast Communications of Wisconsin, Inc. ("Northeast") by the Enforcement Bureau for violations of the FCC's rule prohibiting auction collusion. (See accompanying article regarding wireless developments.) As noted there, the FCC reduced the forfeiture amounts from $100,000 to $75,000 each on account of the carriers' prior histories of compliance with all FCC rules. Such downward adjustments were ordered in spite of the FCC's findings that "Northeast and Star willfully and intentionally violated the anti-collusion rule," "that such serious violations directly threaten the integrity and competitiveness of the auction process," and that "Northeast and Star have refused to accept responsibility for violating the anti-collusion rule and have failed to present any new evidence to mitigate imposition of the proposed forfeitures."

On May 11, the FCC adopted a Consent Decree with Teletronics, Inc., a telecommunications reseller, under which Teletronics agreed to make a voluntary contribution to the U.S. Treasury of $250,000 to settle its alleged violations of the registration, Form 499 filing, and USF contribution and other regulatory fee payment requirements. Teletronics also agreed to implement and maintain a regulatory fee compliance program under terms spelled out in the Consent Decree. The Consent Decree resolved issues raised in an NAL issued in 2005 proposing that Teletronics be held liable for a forfeiture of $692,000 for these regulatory fee-related violations. The Consent Decree recited that Teletronics subsequently submitted all required Forms 499, paid all past-due debts described in the NAL, and presented evidence sufficient to show that it would be unable to pay the proposed forfeiture amount and would be eligible for a downward adjustment.

On May 14, the FCC released a forfeiture order against Dynasty Mortgage, L.L.C. ("Dynasty") for $748,000 for repeated and willful violations of the National Do-Not-Call ("DNC") Registry. This order imposed the maximum forfeiture amount of $11,000 for each of 68 calls to 50 residential customers. The FCC rejected Dynasty's arguments that some of the calls subject to forfeiture were not proven, that Dynasty has comprehensive procedures to prevent telemarketing to consumers on the Registry, thus excusing any calls made in spite of these procedures from liability under the FCC's DNC safe harbor, and that any forfeiture threatens Dynasty's solvency. Dynasty failed to access the Registry at the required intervals and failed to scrub its call lists against the names of consumers in the Registry. The order noted that Dynasty failed to meet minimal compliance standards even after it acknowledged its obligations and pledged compliance in writing. Dynasty also failed to produce any evidence of financial hardship.

On May 16, the FCC released a forfeiture order against Carrera Communications, LP ("Carrera") for almost $346,000 on account of its failure to timely file Forms 499 and to make USF and TRS fund payments. The FCC had issued an NAL against Carrera in 2005 proposing a forfeiture of over $606,000 for these violations. Since then, Carrera has not filed any required Forms 499 or paid any USF, TRS fund contributions, or other regulatory fees. The FCC rejected Carrera's arguments that the proposed forfeiture should be reduced because its violations were inadvertent, noting that Carrera was sufficiently conscious of its obligations to consider whether its interstate revenues were *de minimis* for USF contribution purposes. The FCC accepted, however, Carrera's claim that its inability to pay the full amount of the proposed forfeiture, based on its gross revenues, justified a reduction to just under $346,000.

These orders clearly demonstrate that the FCC continues to vigorously pursue carriers that do not contribute to the USF and other regulatory funding mechanisms, and is standing by its strengthened forfeiture calculation methodology in such cases. As explained in the InPhonic order, rather than assessing a base forfeiture of $20,000 for one or two months of nonpayment, with an upward adjustment of one-half the balance owed for one or two months, as in cases decided before 2003, the FCC now imposes the $20,000 base forfeiture for each month's nonpayment during the one-year period preceding an NAL, with an upward adjustment of one-half the total outstanding balance. At the same time, the FCC continues to grant downward adjustments for carriers' inability to pay, based on gross revenues, and to recognize a history of compliance.

FCC Proposes to Tighten Enhanced 911 Accuracy and Reliability Requirements for Wireless and VoIP Providers

The FCC at its May open meeting adopted a Notice of Proposed Rulemaking ("NPRM") seeking comment on tentative rules that would tighten enhanced 911 ("E911") accuracy and reliability standards for wireless carriers and providers of VoIP services. If the FCC's proposals are adopted in whole or in part, wireless and VoIP service providers could face a daunting task in complying with stringent technical requirements. Although no one opposed the FCC's underlying intent to make E911 services more reliable, some fear that it will be impossible to comply with the new technical requirements.

The NPRM is bifurcated into two parts. The first part seeks comment on the tentative conclusion that wireless carriers must meet "Phase II" E911 location and reliability standards at the service area level of public safety answering points ("PSAPs"). Currently, wireless carriers measure and test location accuracy on a state-wide basis. The tentative conclusion is based upon a petition for declaratory ruling filed by the Association of Public Safety Communications Officials - International, Inc. ("APCO"). FCC Chairman Kevin Martin originally circulated an order granting APCO's petition, but could not find enough votes from the other FCC commissioners to adopt the order. Several of the other commissioners expressed concern that the record was inadequate to determine whether PSAP-level accuracy was appropriate and feasible, concluding that acting on APCO's petition was premature. The FCC, however, decided to establish a speedier comment cycle for the first part of the NPRM.

The second part of the NPRM focuses on additional measures to improve E911 accuracy and reliability for wireless carriers and VoIP service providers. Specifically, the NPRM seeks comment on:

- Deferring enforcement of a PSAP-level accuracy mandate to provide carriers with time to comply;
- The elements of a uniform accuracy standard given current technology and whether hybrid technologies can help improve accuracy;
- Adopting a single, technology-neutral wireless E911 location-accuracy mandate (which would replace the current network- and handset-based requirements);
- Adopting a schedule for mandatory wireless accuracy testing and providing accuracy data to PSAPs; and
- Requiring interconnected VoIP service providers that offer services that can be used at more than one location to meet the same location-accuracy standards as wireless carriers.

Comments and replies regarding the first part of the NPRM about measuring a wireless carrier's E911 location accuracy on a PSAP level are due 14 and 21 days, respectively, after the NPRM is published in the Federal Register. Comments and replies regarding the additional E911 issues raised in the second part of the NPRM are due 60 and 90 days, respectively, after Federal Register publication.

Legislative Developments

The House Telecom Subcommittee conducted a hearing in May on a draft bill by Subcommittee Chairman Markey (D-MA) that would direct the National Telecommunications and Information Administration ("NTIA") to draw and maintain a nationwide broadband map. The bill also would revise the FCC's definition of "high-speed services" from 200 kbps to 2 Mbps downstream and 1 Mbps upstream. Although the bill's supporters believe that a nationwide mapping program will expedite broadband deployment, a budget-conscious Congress may be reluctant to pass the bill, which calls for an expenditure of at least $36 million.

Two separate bills also were introduced in May by Senate Commerce Committee Chairman Inouye (D-HI) to expedite broadband deployment and to fund federal research regarding broadband services. Sen. Inouye's broadband data bill would direct the Census Bureau to collect broadband usage data and the Government Accountability Office to conduct a study to establish a method facilitating the collection of more accurate information regarding the costs and capabilities of broadband services. The bill also would establish a two-tier definition of "broadband transmission": the first tier would specify a transmission speed of at least 200 kbps, while the second tier would specify a transmission speed required to reliably transmit high-definition video and other advanced applications. Additionally, Sen. Inouye's broadband research bill would direct the FCC and the NTIA to develop a plan for increasing spectrum sharing for federal and non-federal operations. The bill also would establish a research lab to facilitate development of broadband services and would award research grants for innovations in communications technologies. The broadband data and research bills would authorize expenditures over five years of $40 million and more than $250 million, respectively. Vice-Chairman Stevens (R-AK) co-sponsored the broadband research bill, but declined to co-sponsor the broadband data bill. The lack of Republican co-sponsors for the broadband data bill could signal challenges ahead for the bill's passage.

Sen. Rockefeller (D-WV) is expected to introduce legislation authorizing the FCC to regulate violent programming on both broadcast and subscription television channels. In a report to Congress last month, the FCC noted that Congress could authorize it to fine broadcasters for airing violent programming, just as it is authorized to issue fines for indecent broadcasts. Many observers and analysts, however, view the prospects of the bill's passage as dim, given First Amendment concerns and the general public perception that self-regulation by the media is preferable to government intervention.

Rep. Gordon (D-TN) is expected to introduce a House bill soon that would grant VoIP service providers and local emergency centers the same liability protections that wireline and wireless carriers currently enjoy when E911 calls are mistakenly routed. The bill also would entitle VoIP providers to interconnect with the 911 systems controlled by incumbent telephone companies. The Senate Commerce, Science, and Transportation Committee recently approved similar VoIP E911 legislation.

Satellite Developments

On May 4, the FCC issued an order adopting licensing and service rules for broadcasting satellite services ("BSS") in the 17.3-17.8 GHz and 24.75-25.25 GHz ("17/24 GHz") bands. These services promise to offer a new generation of broadband services and may complement existing direct broadcast satellite services. Under the FCC's new rules, satellites in the 17/24 GHz BSS bands will be required to operate at least four degrees from each other. DirecTV, Pegasus, EchoStar, and Intelsat already have filed 22 applications for 17/24 GHz BSS licenses, but the FCC held that those applications must be amended to comply with the new four-degree rule. Although it adopted a first-come, first-served licensing procedure, the FCC ruled that, if properly amended, the 22 applications will be treated as if they were filed at the same time. The FCC also adopted a further notice of proposed rulemaking seeking public comment on interference issues unique to the 17/24 GHz BSS operating environment.

Additionally, in response to a rulemaking petition by General Dynamics SATCOM Technologies ("General Dynamics"), the FCC on May 15 issued a notice of proposed rulemaking proposing to license vehicle-mounted earth stations ("VMES") as an application of fixed satellite services ("FSS") operating on conventional and extended Ku-band frequencies. Although General Dynamics stated that VMES service and licensing rules would facilitate the military's training needs, the FCC found that there is commercial interest in broader applications of VMES involving commercial use of ultra-small antennas on cars and trucks. Because these broader commercial applications raise additional technical questions regarding compliance with the FCC's Ku-band interference avoidance requirements, the FCC is seeking comment on whether these broader applications will increase the risk of harmful interference to other FSS licensees or to federal government operations in the band, and whether the FCC could adopt technical rules to mitigate any harmful interference.

State Legislatures Continue to Address VoIP and Telemarketing Issues

As reported in previous Bulletins, state legislators around the country have been considering a variety of issues related to VoIP services and telemarketing and, as the legislative sessions progress, a number of these bills are reaching governors' desks. In Maryland, Governor O'Malley signed SB-864 on May 17. Under this new law, the Maryland Public Service Commission ("PSC") no longer has jurisdiction over retail interconnected VoIP services, but it retains jurisdiction over E-911, Lifeline services, and intercarrier compensation. The law also requires a company that moves a customer from a Commission-approved tariff service to a VoIP service to notify that customer and provide it with certain information. It also requires that the PSC track customer complaints regarding VoIP service and report back to the legislature.

In Montana, Governor Schweitzer signed HB-611 clarifying that the monthly 10¢-per-line fee that supports the state's programs to provide access services for persons with disabilities and specialized telecommunications equipment applies to prepaid wireless services. The new law also allows the funds collected for the specialized telecommunications equipment program to be used for equipment required for VoIP services in addition to "traditional" telecommunications services. The Department of Revenues is authorized to collect the fees and enforce compliance.

On May 21, Nebraska Governor Heineman vetoed LB-198. Nebraska law already includes restrictions on the use of automatically dialed or "robo"-calls. This bill would have placed additional restrictions on the use of robo-calls by political campaigns. In his veto message, the Governor stated that the restrictions on political speech contained in the bill were constitutionally suspect and that he believed it was possible to fashion a bill in such a way that the restrictions could be applied to all automatically dialed calls. Nebraska's unicameral legislature had passed LB-198 by a vote of 31-7, with ten members not voting and one member absent. It is not certain at this time whether the legislature will attempt to override the Governor's veto.

New Jersey and Wisconsin have advanced bills to further restrict telemarketing practices in their states. The New Jersey Senate is considering a bill, already passed by the Assembly (AB-3231), that would prohibit sending unsolicited advertising text-messages to a New Jersey resident if the recipient will incur a charge or a usage allocation deduction as a result of the message. A message is considered "unsolicited" if the recipient has not given the sender express prior permission, which includes providing the sender with the recipient's telephone number. If passed, fines for violation would begin at $10,000 for the first offense and increase to $20,000 for the second offense, and violations would be subject to an additional $30,000 fine if the sender knew or should have known that the recipient was a senior citizen or disabled. The Wisconsin Senate is considering a bill that would expand its do-not-call list to include small business customers' landline numbers and residential and small business customers' wireless numbers. At present, only residential landline numbers are eligible to be included on the do-not-call list. In addition, larger business customers who are not eligible to include their telephone numbers on the do-not-call list may do so, if the bill is passed, by making a verbal request to a solicitor not to call the business. Current law requires such requests to be in writing.

California Continues Its Efforts to Align Its Regulations with Its Pro-Competitive Telecommunications Policy

The California PUC continues to re-evaluate its existing telecommunications regulations as part of its pro-competitive market policy of "light" regulation. Earlier this year, in order to rationalize its enforcement of California's Environmental Quality Act ("CEQA") as it applies to telecommunications companies' network construction projects, the CPUC held a workshop where interested parties were provided an opportunity to express their concerns. Most recently, on May 8, the Assigned Administrative Law Judge issued a ruling requiring all parties to meet and confer and to prepare joint comments addressing a number of specific issues that were raised during the workshop. These issues include whether certain routine construction activities should be exempt from the CEQA and how the lead agency for purposes of CEQA review should be determined. The joint comments are due on June 22. Individual parties may file separate comments on specific issues of interest.

On May 14 parties filed opening comments on the CPUC's renewed efforts to revise the service quality standards for telecommunications services. Not surprisingly, carriers and consumer groups differ as to the need for service quality standards. AT&T and Verizon agreed that service quality requirements should exist for those situations where competition fails to protect consumer interests, but disagreed as to the scope of the necessary regulations. AT&T supported a CPUC proposal to have customer satisfaction surveys in lieu of any formal regulations; Verizon opposed the survey in favor of continuation of limited reporting requirements, such as outage reporting, and reliance on CPUC customer complaint data. The consumer group TURN opposed the elimination of any service quality regulations. Reply comments are due on June 15, and the CPUC expects to issue its revised regulations later this year.

Are You an Auction "Applicant"? Not Knowing Could Be Costly

Star Wireless, LLC ("Star") and Northeast Communications of Wisconsin, Inc. ("Northeast") learned an expensive lesson in early May when the FCC upheld its finding that both companies willfully violated Section 1.2105(c) of the Commission's rules, which prohibits auction collusion. Although the Commission reduced the forfeiture penalties for each licensee from $100,000 to $75,000 due to their history of compliance with Commission rules, it rejected both companies' claims that the anti-collusion rule did not apply in their case.

At the core of Star and Northeast's argument was the assertion that because Northeast did not pay the required upfront fee and actively participate in the Commission's 700 MHz auction in 2002 ("Auction No. 44"), Northeast was not an "applicant," and the discussions between Northeast and Star's authorized bidders did not violate the anti-collusion rule.

The Commission, however, dismissed the companies' reasoning as without merit, pointing out that once a company submits a timely application, it becomes an applicant under the rules regardless of the outcome of the Commission's review of its application, submission of required payments, or ultimate participation. The Commission further noted that both companies should have known of the implications of their actions. Prior to the auction, several Public Notices were issued warning auction applicants against violating the anti-collusion rule by communicating about bids, bidding strategies, or settlements with other applicants seeking to bid for licenses in the same geographic license areas, unless applicants identified each other in their applications as having entered into agreements. The Public Notices also stated that the prohibition applied to all applicants between the deadline for filing a short-form application and the deadline for post-auction down payments.

The Commission also rejected the companies' additional assertions that the anti-collusion rule is too vague to enforce, inconsistently applied, and unconstitutional; the enforcement proceedings contradict the plain language and intent of the anti-collusion rule; and the Enforcement Bureau lacks jurisdiction to render a forfeiture order in their case.

Auction Updates:

Small Business Administration Weighs In, Seeking Stay of Designated Entity Rules

On the eve of oral arguments before the U.S. Court of Appeals for the Third Circuit concerning the lawfulness of new designated entity ("DE") rules, the Small Business Administration ("SBA") appealed to the FCC to forgo imposing the advanced wireless services ("AWS") designated entity rules in the upcoming 700 MHz band auction. The request focused on the FCC's intention to double the unjust enrichment period to ten years, and impose additional leasing and resale restrictions on DEs. The request follows an April 10 SBA roundtable held to elicit concerns about the current rules.

The SBA asserted that the DE rules will have a negative impact on small businesses, rural companies, and minority groups' spectrum use by preventing small entities from effectively participating in the bidding. In addition, it expressed concern that the entire market will suffer because incumbent positions will be strengthened by the lack of new entrants and small business participation.

AWS Oral Arguments

On May 23, a three-judge panel of the U.S. Court of Appeals for the Third Circuit held oral argument in the appeal challenging the Commission's advance wireless services auction designated entity rules. The panel's questions focused on the effect of vacating or remanding the DE rules on the AWS auction, which raised $13.7 million, and the upcoming 700 MHz band auction. All three judges expressed apprehension about the impact of overturning the auction, but did not foreclose the possibility of nullifying the unjust enrichment rules going forward.

Google "Searches" for Dynamic Auction Mechanisms

Dynamic auction mechanisms will provide opportunities for new entrants, accelerate the penetration of broadband services for all Americans, and better utilize unused or underutilized spectrum – at least according to Google, Inc. ("Google"). On May 21, Google requested that the FCC clarify its position on the use of dynamic auction mechanisms by 700 MHz spectrum licensees before the upcoming auction. The company argued that the 700 MHz band service rules already allowed for the use of dynamic auction techniques, but urged the FCC to remove any doubt by endorsing the concept. In its letter, Google advanced two possible dynamic auction methods: (1) Real-time airwave Internet auctions, which would allow licensees to give winners a slice of spectrum to use for a specified time; and (2) Per-device registration fees that would help the licensee recoup some of its costs. Google also asked the FCC to reserve the E-block in the lower 700 MHz band for interactive, two-way broadband services connected to the Internet.

The Commission responded with a request for public comments on Google's proposal. The notice was published in the Federal Register on May 30, with comments due on or before June 6 and reply comments due on or before June 13.

Industry reaction to Google's proposal has been mixed. Frontline Wireless expressed doubts as to the feasibility of dynamic auctions at this time, noting that its economist thinks they will not be possible for another five to ten years. But a company spokesperson commended the FCC for considering the proposal. CTIA (the wireless industry association) raised concerns that the FCC was seeking comments so close to the issuance of the rules, stating that not only was the proposal complicated, but it added to an auction environment that was itself growing ever more complicated.

Still No FCC Pleading Cycle for Sirius-XM Merger

Although XM Satellite Radio Holdings Inc. ("XM") and Sirius Satellite Radio Inc. ("Sirius") announced their proposed merger in February of this year (*see* "XM and Sirius to Merge," Communications Law Bulletin, February, 2007), the FCC still has not issued a public notice setting dates for the filing of comments on the deal.

In the meantime, a number of parties have weighed in with their views on the merger. Notably, Senator Kohl (D-WI) and Rep. Doyle (D-PA) both have written to the FCC and the Department of Justice, urging that the merger be rejected as anticompetitive and anticonsumer. The National Association of Broadcasters ("NAB") also continued to lobby against the merger, prompting Sirius CEO Mel Karmazin to attack the NAB's strategy as "disgraceful."

Whatever the reasons for the FCC's delay in releasing a public notice in this case, the length of the delay is a departure from recent practice, with the Commission typically setting comment cycles within 20 days after receiving applications for merger approvals.

Third Circuit Holds that Interconnection Agreement Disputes Must Be Heard by State Public Utility Commissions, Not Federal Courts

The Third Circuit Court of Appeals held, in *Core Communications, Inc. v Verizon Pennsylvania, Inc.* (No. 06-2419, May 9, 2007), that carriers must take disputes regarding interconnection agreements to the public utility commission that approved the agreement before resorting to the federal courts. Earlier appellate courts have read applicable FCC precedent less broadly to find that state commissions had non-exclusive jurisdiction of interconnection agreement disputes. The Third Circuit has found, however, that the states' jurisdiction is exclusive and that carriers must exhaust their remedies before seeking relief from the federal courts.

In 2000 Core Communications ("Core") opted into a Pennsylvania Public Utility Commission approved interconnection agreement with Verizon pursuant to Section 252 of the Communications Act. After a series of disputes between the companies, Core filed breach of contract and tort claims against Verizon in the U.S. District Court for the Eastern District of Pennsylvania. The District Court dismissed Core's claims in their entirety, and, using the same rationale, the Third Circuit upheld the District Court's decision.

Both the Third Circuit and the District Court concluded that *Chevron* deference required that they rely on the FCC's ruling in *In re Starpower Communications LLC*. *Chevron* requires a court to defer to an agency's interpretation of a statute if certain conditions exist, in this case, whether the underlying statute was silent on a particular question. Finding that the conditions for such deference did exist, the Third Circuit concluded, as did the District Court, that the FCC's interpretation of Section 252, as articulated in *Starpower*, required Core to seek review from the Pennsylvania PUC before resorting to the federal courts. The Third Circuit noted that Section 252 itself is silent as to what role the regulatory commission that originally approved an interconnection agreement should play in the interpretation and enforcement of the agreement. It rejected, however, Core's argument that Sections 206 and 207 of the Act would fill this void and provide federal courts with jurisdiction. While those sections do govern disputes between common carriers, recent amendments to the definition of "common carrier" require that the carrier be "providing telecommunications for a fee directly to the public." Because courts previously have found that Section 252 interconnection is not "telecommunications for a fee directly to the public," the provisions relied upon by Core were not applicable, and, accordingly, there was no statutory determination of jurisdiction. In this situation, the Third Circuit found that *Chevron* deference was appropriate and the FCC's *Starpower* decision controlled.

The Third Circuit's decision goes one step behind the decisions of every other federal appellate court to have considered this same question and gives a broader reading of the FCC's *Starpower* decision. While courts previously concluded that state commissions have non-exclusive authority to hear post-formation disputes involving approved interconnection agreements, the Third Circuit holds that a state commission's jurisdiction over post-formation disputes is not shared with the federal courts. Rather, "the FCC plainly expects state commissions to decide intermediate and enforcement disputes that arise after the approval procedures are complete." This decision is precedential in the Third Circuit, which covers Pennsylvania, New Jersey, Delaware, and the U.S. Virgin Islands, and will provide guidance to the courts in other parts of the country.

FCC Seeks Comment on Recommendation to Cap Competitive ETC Funding, and Chairman Martin Establishes Tentative Timeframe for USF Contribution Reform

As anticipated, the Federal-State Joint Board on Universal Service recommended that the FCC cap on an interim basis the amount of monies distributed to eligible telecommunications carriers ("ETCs") through the federal USF high-cost support mechanism. The Joint Board also issued a separate, but related, public notice, seeking further comment on various proposals for comprehensive reform of the USF. Shortly thereafter, the FCC released an NPRM seeking comment on the Joint Board's high-cost cap proposal. In addition, FCC Chairman Kevin Martin established a tentative timeframe for additional modifications to USF contribution procedures.

The Joint Board recommended specifically that the FCC cap the amount of high-cost support allocated to competitive ETCs – most of which are wireless carriers – for each state based upon the average level of support that was distributed to competitive ETCs in that state in 2006. The Joint Board further recommended that the cap apply until one year after the Joint Board makes a recommendation regarding comprehensive and fundamental reform of the high-cost USF mechanism, which is the subject of the related public notice that was released in conjunction with the Joint Board's high-cost cap recommendation. The public notice seeks comment on a variety of issues, including the use of reverse auctions to allocate high-cost monies, how to better calculate and target high-cost support, the methodology for calculating high-cost support for competitive ETCs, and whether USF monies should be allocated directly to promote broadband deployment.

Adoption of the Joint Board's high-cost cap recommendation could have a significant impact on competitive ETCs by freezing funding and discouraging states from approving new competitive ETCs. The Joint Board's consideration of further reform efforts also could dramatically affect how high-cost monies are distributed. Comments and reply comments in response to the NPRM regarding capping the high-cost fund are due June 6 and June 13, respectively. Comments in response to the Joint Board's public notice regarding further high-cost reform were due May 31, and reply comments are due July 2.

In related news, Chairman Martin in May reiterated once again his support for modifying USF contribution procedures from a revenue-based methodology to one based upon telephone numbers. Martin noted that he was waiting for the U.S. Court of Appeals for the District of Columbia Circuit to act on an appeal of a 2006 FCC decision that required VoIP providers to contribute to the USF and modified the "safe harbor" percentages by which some wireless carriers contribute. Assuming the court were to uphold the FCC's 2006 decision, Martin anticipated that the FCC would release shortly thereafter a rulemaking proposal to implement a numbers-based contribution methodology. In light of the court's subsequent decision on June 1 that upheld the core elements of the FCC's order, parties should now watch for the release of an NPRM. (*See* "Court Upholds Expansion of USF Obligations to Interconnected VoIP Providers," this issue.)

Chairman Martin also responded to questions posed by Representative Edward Markey (D–MA), Chairman of the House Telecommunications and Internet Subcommittee, regarding USF reform. Martin's letter to Representative Markey explained that the USF continues to require fundamental reform and that he was in favor of a numbers-based USF contribution methodology. Martin continued that he also supported the use of reverse auctions to distribute high-cost support and that reverse auctions would not eliminate competition in rural areas, but rather would spur competition and broadband deployment. Martin offered assurances that deployment of affordable broadband services is a top priority of the FCC. In addition, Martin discussed the USF Schools and Libraries (or "E-Rate") Program, noting that the program's application process should be made easier and that the program's $2.25 billion cap should be retained.

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.

June 6, 2007	Comments due on **Joint Board proposal for interim cap on high-cost universal service support for CETCs**.
June 6, 2007	Comments due on **Google proposals for 700 MHz auction**.
June 11, 2007	**Down payments and FCC Forms 601/602 due in Auction No. 71 (broadband PCS).**
June 13, 2007	Reply comments due on **Joint Board proposal for interim cap on high-cost universal service support for CETCs**.
June 13, 2007	Reply comments due on **Google proposals for 700 MHz auction**.
June 15, 2007	Comments due on **net neutrality NOI.**
June 15, 2007	Comments due on **broadband deployment NPRM (regarding data collection).**
June 16, 2007	**TV license post-filing announcements due** for Delaware and Pennsylvania.
June 18, 2007	**Mock auction for Auction No. 72 (Phase II 220 MHz)**.
June 18, 2007	Comments due on **NPRM on delivery of multichannel video to multiple-dwelling units (MDUs)**.
June 20, 2007	**Auction No. 72 (Phase II 220 MHz) begins.**
June 25, 2007	**Final payments due in Auction No. 71 (broadband PCS).**

June 30, 2007	**Prepaid calling card provider certifications due to FCC.**
July 2, 2007	Reply comments due on **USF Joint Board recommendation for high-cost reform**.
July 16, 2007	Reply comments due on **net neutrality NOI.**
July 16, 2007	Reply comments due on **broadband deployment NPRM (regarding data collection).**
July 18, 2007	Reply comments due on **NPRM on delivery of multichannel video to multiple-dwelling units (MDUs)**.
July 31, 2007	**International traffic and revenue reports due**.