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Legal Updates & News

Bulletins

Communications Law Bulletin -- June 2007

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The Month in Brief

Although the prospects for comprehensive amendment of the Communications Act are dim this year, Congress, the courts, the Federal Communications Commission (“FCC” or “Commission”), and the states continue to alter the legal landscape in areas ranging from broadcast indecency to universal service reform. These developments are presented here, along with our usual list of deadlines for your calendar.

Our next edition of this Bulletin will be a combined July-August issue. We wish all of our readers an enjoyable summer.

Congress Continues to Introduce Targeted Bills

Although no broad communications reform legislation is expected this year, new legislation continues to be introduced with respect to targeted topics. In addition to the bills mentioned below, there have been reports that bills addressing the Universal Service Fund (“USF”) and broadband mapping may be introduced in the near future:

- In June, Rep. Engel (D-NY) introduced a bill (HR-2566) requiring broadcasters to air two minutes of public service announcements providing information regarding the upcoming digital TV transition. The bill would require these announcements to be broadcast daily from November 1, 2007, to March 31, 2009.
- In an effort to promote broadband deployment, Rep. Boucher (D-VA) announced plans to introduce a bill to allow municipalities to offer broadband services. The measure is intended to remove restrictions against such activities imposed in some states.
- Rep. Lipinski (D-IL) introduced a bill requiring cable TV operators to choose one of three options designed to offer cable subscribers greater choice in cable programming: (1) provide a family-friendly tier of news, sports, and children's programming; (2) comply with the decency standards applicable to broadcasters from 6 a.m. to 10 p.m.; or (3) allow subscribers to block unwanted channels and to receive a refund for the blocked channels. FCC Chairman Martin endorsed the bill in an appearance on the Hill. Consumer groups support the bill because it will give consumers greater programming choice and control over their cable bills. Cable operators, however, oppose the bill, arguing that mandating an a la carte regime would lead to higher prices and less diversity in programming. A similar bill stalled last year before the House Commerce Committee.
- Sen. Pryor (D-AK) introduced a bill (SB-1629) directing the FCC to conduct a new study of the potential for interference from broadband over power lines ("BPL") services to other radio communications services. Under the bill, the FCC, within 90 days of enactment, must report to the Senate Commerce Committee on options for new or revised BPL rules that would prevent harmful interference to public safety and other wireless systems.

Second Circuit Vacates FCC Order Finding "Fleeting Expletives" Indecent

On June 4, the U.S. Court of Appeals for the Second Circuit decided the matter *Fox Television Stations, Inc. v. FCC*, No. 06-1460-ag (L) by vacating the FCC's 2006 Omnibus Order concerning indecency. The Order altered Commission policy in that it deemed "fleeting expletives" indecent speech and threatened to punish broadcasters for spontaneous and isolated uses of the "F-word" and "S-word." The court held that the FCC failed to provide a reasoned explanation for this departure and thus acted arbitrarily and capriciously under the Administrative Procedure Act.

Beginning with *FCC v. Pacifica Foundation*, 438 U.S.C. 726 (1978), which concerned a broadcast of George Carlin's "Filthy Words" monologue, the FCC penalized broadcasters only for numerous and repeated uses of expletives; fleeting expletives, however, were tolerated. Though it repeatedly affirmed this policy, the FCC changed course in response to NBC's broadcast of the 2003 Golden Globe Awards. During that program, the musician, Bono, accepted an award on his group's behalf by proclaiming, "This is really, really, fucking brilliant." In response, the FCC declared any utterance of the "F-word" inherently indecent and profane and disclaimed Commission precedents which discussed fleeting expletives. The 2006 Order subsequently criticized the Fox Network for its broadcasts of the 2002 and 2003 Billboard Music Awards, during which performers uttered numerous expletives.

Before the Court of Appeals, the FCC justified its change in policy on the basis of the "first blow theory." This theory stems from Justice Stewart's opinion in *Pacifica* and compares turning off the radio after hearing indecent speech to remedying assault by fleeing after the first blow. The court disagreed with this explanation and noted that the Commission declined to consider "a fleeting expletive . . . a harmful 'first blow' for nearly thirty years." The court then found the first blow theory unrelated to the Commission's actual policy, as exceptions existed for fleeting expletives uttered in the context of *bona fide* news interviews, as well as repeated and deliberate uses of expletives when such uses were integral to the work. Thus, "concern with the public's mere exposure" to the "F-word" and "S-word" failed to explain the Commission's new policy.

The Second Circuit also rebuked the FCC for its assertion that non-literal uses of expletives were indecent, which the court found contradicted "common-sense understanding[s]." The court further held that the FCC practiced conflicting approaches to indecency enforcement; in some instances, the Commission stressed the critical nature of programming content, while in others all variants of expletives were treated as "presumptively indecent." The court additionally faulted the FCC's labeling of fleeting expletives as "profane" as encompassed within its indecency analysis, thus making a separate prohibition against profanity unnecessary.

In dicta, the Court of Appeals discussed several constitutional issues. It noted that the FCC's indecency test is perhaps unconstitutionally vague and questioned the Commission's ability to punish speech based on subjective analysis. Notably, the court questioned the continued special treatment of broadcast media. While the holding in *Pacifica* described broadcast as "uniquely pervasive," the court opined that this description is possibly now inapplicable.

Following the Second Circuit's decision, a rulemaking concerning indecency is unlikely. Citing the court's assertion that attempts to justify the policy face constitutional and statutory obstacles, Chairman Martin suggested that the FCC will likely appeal the matter. Additionally, in a statement following the decision, Chairman Martin implored Congress to give viewers more control over programming by allowing parents to select channels on an "a la carte" basis (*see* previous article).

Video Franchise Bills Continue to Move Ahead in the States, While Request for Stay Filed at Federal Level

On June 20, several local government and nonprofit groups filed a petition in federal appeals court to stay the FCC's December 2006 video franchising order pending appeal. The order would grant interim franchising authority to new cable television entrants if local franchising authorities miss new FCC-mandated deadlines for acting on applications.

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

- At the end of May, Georgia's governor signed into law a video franchise reform measure shifting franchising from municipalities to the secretary of state. The bill allows video providers to either negotiate local franchises or seek a state franchise.
- Also at the end of May, Iowa's governor signed a bill shifting video franchising authority from municipalities to the Iowa Utilities Board.
- In early June, Nevada's governor signed a bill to move video franchising from municipalities to the secretary of state.
- In mid-June, Connecticut's Senate passed an amended version of a video franchising bill that was previously passed by the House.
- The Illinois legislature passed a bill in mid-June that would shift video franchising authority from municipalities to the state Commerce Commission. The bill now goes to the governor.
- In late June, Ohio's legislature passed a bill to shift video franchising from municipalities to the state's Commerce Department.

Meanwhile, a vote on a video franchising reform bill in Massachusetts was delayed because its main sponsor requested further study of the bill by a joint legislative task force.

XM-Sirius Merger Comment Date Approaches, FCC Opens Related Rulemaking

As the July 9, 2007 deadline for comments to the FCC on the proposed merger between XM Satellite Radio Holdings Inc. ("XM") and Sirius Satellite Radio Inc. ("Sirius") approaches, the Commission has opened a proceeding to determine whether the merger would violate an FCC rule and, if so, whether the rule should be waived or modified.

Specifically, the Notice of Proposed Rulemaking ("NPRM") released on July 27, 1997 points out that XM and Sirius each hold Satellite Digital Audio Radio Service ("SDARS") licenses, and that together the two companies use all of the SDARS spectrum assigned by the Commission. The proposed merger therefore raises an issue under the Commission's 1997 *SDARS Order*, which stated that "one licensee will not be permitted to acquire control of the other remaining satellite DARS license."

XM and Sirius have urged the Commission to find that the 1997 language is a nonbinding policy statement rather than a regulation, and the NPRM seeks comment on that contention. In the alternative, the Commission asks whether the public interest would be served by waiving, modifying or otherwise altering the prohibiting against acquisition of one provider's SDARS license by the other provider. In this connection, the Commission notes that the 1997 statement was based upon a policy of promoting competition, and that XM and Sirius now argue that "the preservation of two separate radio licensees" for digital satellite radio is no longer necessary to preserve competition.

Comments on the NPRM are due 30 days after publication in the Federal Register, and reply comments are due 45 days after publication in the Federal Register.

Eighth Circuit Upholds IntraMTA Rule

On June 11, the U.S. Court of Appeals for the Eighth Circuit upheld a Missouri Public Service Commission ("PSC") order finding rural incumbent local exchange carriers ("ILECs") liable for reciprocal compensation to a wireless carrier terminating calls from the ILECs' subscribers originating and terminating within the same Major Trading Area ("intraMTA"). The court rejected arguments by Alma Communications Company ("Alma") and other rural ILECs that intraMTA calls should be treated as long distance calls subject to access charges if they were routed through a long distance carrier. The Eighth Circuit decision arose from an arbitration proceeding filed with the PSC by Alma to resolve issues that had emerged from its unsuccessful interconnection negotiations with T-Mobile USA, Inc. ("T-Mobile"). The PSC ruled in favor of T-Mobile's position that all intraMTA calls are subject to reciprocal compensation. In Alma's subsequent complaint in federal district court for declaratory relief against T-Mobile and the PSC, the court granted summary judgment for T-Mobile.

In affirming the district court ruling, the Eighth Circuit stated that the FCC's 1996 *Local Competition Order* and prior decisions by the Eighth and Tenth Circuits clearly held that a telephone call originating and terminating within the same wireless MTA was a local call for intercarrier compensation purposes, irrespective of how it was carried between the end points. The Eighth Circuit stated, "accordingly, we are bound by circuit precedent to hold that calls from a land line to a cell phone placed and received within the same major trading area are local calls, subject to . . . reciprocal compensation arrangements," and "the involvement of an interexchange carrier at the originating end of the call" makes no difference.

Net Neutrality Proponents Target Upcoming Auction as Possible Focus of Federal Efforts, While Maine Backs Away From Explicit Rules

With no vehicle for comprehensive telecommunications reform in Congress at the moment, and little support for a stand-alone measure, some net neutrality advocates have turned their focus to the FCC's upcoming 700 MHz auction, launching a campaign urging the FCC to require auction winners to adopt net neutrality principles. The FCC reportedly received approximately one-quarter of a million letters as part of this campaign, although many observers question whether it would even be possible as a logistical matter to get such conditions added to the auction in light of the fact that the FCC is pushing hard to get the final rules issued by July.

At the state level, the Maine legislature downgraded a net neutrality bill to a less far-reaching resolution that merely requires the Office of Public Advocate ("OPA") to monitor the net neutrality issue, gauge the impact of FCC and congressional actions on the state's Internet users, and report back to the state legislature by February 1, 2008. The OPA is also directed to monitor other states' efforts with respect to net neutrality. Both houses of the state legislature passed the resolution, and the governor signed it in June.

FCC "Pumps Up" Behringer's Forfeiture Amount to the Tune of a $1 Million

Tired of "mixing it up" with Behringer USA, Inc. ("Behringer"), a designer, manufacturer and distributor of professional audio equipment, musical instruments and related products, the FCC levied a $1 million fine against the company for willful and repeated violations of Section 302(b) of the Communications Act of 1934. Section 302(b) requires that all electronic equipment and systems comply with FCC rules and procedures, including emission testing and labeling guidelines.

On February 16, 2006 the FCC issued a Notice of Apparent Liability for Forfeiture ("NAL") alerting Behringer that its digital audio music devices did not comply with FCC requirements, were not authorized for sale in U. S. markets, and that it faced a $1 million forfeiture for past and continuing violations. The Enforcement Bureau found that during the one-year period since it sent the company the first letter of inquiry, Behringer had imported more than 90,000 unauthorized units and sold more than 100,000 unauthorized units with a retail value of approximately $28.5 million. The seemingly blatant disregard of the FCC's requirements earned the company a substantial upward adjustment from the aggregate base forfeiture of $350,000 to the final $1 million. Behringer's arguments for a reduction in the forfeiture amount fell on deaf ears; the FCC found no substantiated evidence that the company attempted to rectify the violations or remove unauthorized equipment from the U. S. marketplace.

Analog-Only TV Importers and Retailers Beware

The FCC Enforcement Bureau is making it clear that importers, manufacturers and retailers face stiff fines for violations of the Digital Television ("DTV") tuner mandate. Under the mandate, importations and interstate shipment of analog-only tuners was banned as of March 1. Not all importers heeded the deadline, so based on complaints and import data, the FCC began tracking down violators. On May 30, the FCC issued NALs to Syntax-Brillian and Regent USA for abuses in the sums of almost $3 million and $64,000 respectively. In response, Syntax-Brillian vowed to appeal and Regent declined to comment.

Retailers of analog-only TVs are not fairing much better since the FCC issued its May 25 order requiring consumer electronic dealers to alert consumers when they are buying analog-only TV equipment. Six days after the order went into effect, the FCC began inspecting retailers looking for violations. Retailers are required to post notices about legacy analogy-only TV products in an effort to educate consumers of the transition from analog to digital transmissions. As of June 20, nearly 600 retail locations and e-commerce Web sites were cited for missing notices under the DTV mandate. Not only was the speed and breadth of the FCC crackdown impressive, but so were the names of the cited violators, which include Amazon, Best Buy, Circuit City, CompUSA, and Target. The possible penalties are serious as well. Violators face a maximum $11,000 a day fine up to a maximum of $97,500. And, once cited, companies must answer the allegations in writing or by appearing at the nearest FCC field office within ten days.

The FCC issued the emergency labeling order in response to an apparent lack of interest in voluntarily labeling television sets and related devices by consumer electronic manufacturers. Television set makers have not completely dodged the bullet, however, as they are now the subject of a newly circulated rulemaking that would impose regulations and possible civil penalties for noncompliance with the DTV mandate. In addition to addressing television manufacturers' obligation in connection with the April 2009 DTV transition deadline, the rulemaking also asks whether the FCC should work with the National Telecom and Information Administration ("NTIA") to require retailers participating in the DTV coupon program to detail their consumer education plans; if the FCC should require cable or satellite providers to include notices on invoices warning customers of the DTV changeover with civil penalties for non-compliance; and whether broadcasters should be required to make public service announcements about the transition (*see* discussion of related bill in "Congress Continues to Introduce Targeted Bills," above).

DTV Consumers to Receive a $1.5 Billion Plus Education?

The National Telecom and Information Administration ("NTIA") is moving forward on its DTV converter box coupon program and expects to pick a vendor in mid-August. NTIA has been working closely with the FCC and will expand the program once a contractor is chosen. Despite lawmakers' complaints that the $1.5 billion budget is not adequate to educate every American about the transition from analog to digital transmissions and ensure that those who need them get boxes for their analog TVs, NTIA has begun to tap into other resources to reach out to certain groups. For example, they are working with the American Association of Retired Persons, non-profit senior groups and churches to reach the elderly. The U.S. Hispanic Chamber of Commerce is also attempting to reach and educate Hispanic families through 200 local chambers.

Congressional response to the FCC's plan for educating Americans has been generally favorable. FCC Chairman Kevin Martin revealed the plan to the House Commerce Committee via a letter, which among other things noted that the FCC was currently unable to do more than "no cost" or "low cost" educational activities unless Congress spent an additional $1.5 million. As it stands, the plan relies heavily on the Internet to reach consumers; perhaps missing the bulk of those communities who will be affected by the April 2009 deadline. There was mention of reaching low-income and non-English speaking communities by placing information in retail stores and other "alternative outlets." A portion of the additional $1.5 million may be spent on a direct mailing to about 300,000 households and used to target retirees and other underserved groups.

700 MHz Order Delayed Until July at the Earliest

The FCC continues to face significant pressure from the industry as well as from Congress to quickly resolve issues concerning the auction of the 700 MHz spectrum. Despite the FCC's previously stated intention to adopt auction and service rules for the 700 MHz band in June, FCC action is not anticipated until July at the earliest. Timing in this case is crucial because the FCC is statutorily required to auction the 700 MHz spectrum by January 28, 2008, and bidders need adequate time to prepare for the auction.

FCC Commissioner Jonathan Adelstein recently remarked that "it doesn't look very hopeful for getting it done in June… because we don't have an item yet. But we need to move fast because there needs to be some sufficient spacing between the time that we finalize the rules and the time of the auction. We need to ensure that businesses that want to participate [in the auction] have time to establish business plans." The Wireless Telecommunications Bureau is reportedly working on a draft of a 700 MHz band order, but as the bureau chief recently explained, the process requires wading through a massive record and addressing several complicated issues.

Issues of significant concern include a band plan and licensing scheme that will sufficiently balance the interests of varying types of commercial businesses and business plans as well as public safety needs. Members of the Senate Commerce, Science, and Transportation Committee offered varying views during a recent hearing. Although the members generally agreed that public safety 700 MHz needs were tremendously important, they were divided on how those needs could best be served. Senators questioned various proposals for a joint private-public safety network and whether suggested means of funding such a network were viable.

Lawmakers Take Aim at FCC for Lack of Universal Service Reform While Appeals Court Upholds State

ETC Authority

Commissioner Deborah Tate received the brunt of Congressional displeasure regarding FCC efforts to reform the USF during a recent hearing by the Senate Commerce, Science and Transportation Committee. Commissioner Tate, who chairs the Federal-State Joint Board on Universal Service ("Joint Board"), defended the Joint Board's recent recommendation to impose an interim cap on the high-cost USF support available to competitive eligible telecommunications carriers ("ETCs") and tried to respond to Senators' frustration over the lack of action by the FCC to implement comprehensive USF reform.

Specifically, lawmakers expressed concern that the cap, supposedly a temporary measure to control rising USF costs, effectively could become permanent due to the FCC's lack of comprehensive USF reform. Senator John Sununu (R-NH) stated that the Joint Board has recommended "a relatively arbitrary cap" and that "a piecemeal approach like this… isn't necessarily fair, and is passing [tougher decisions] further down the road." Sununu was not alone, with several other Senators expressing discontent over the Joint Board's recommendation and the FCC's failure to date to address USF reform in a comprehensive manner. Commissioner Tate explained that the Joint Board is "totally committed to making additional revisions" to the USF, as is the FCC.

Amid concerns regarding the need to reform the USF, the third quarter 2007 contribution factor for the USF has decreased slightly from 11.7 percent to 11.3 percent. This decrease comes on the heels of a dramatic two percent increase in the USF contribution factor in the second quarter of 2007, due to an increase in monies allocated to USF subsidies simultaneously with a decrease in the USF revenue base that supports those subsidies.

In related events, the U.S. Court of Appeals for the Tenth Circuit concluded that a state public regulatory agency could impose service quality and consumer protection standards on wireless ETCs without formal hearings or a rulemaking proceeding. Specifically, the Colorado PUC conditioned the designation of Western Wireless (now Alltel) as a competitive ETC, and its receipt of high-cost USF subsidies, on compliance with certain service quality and consumer protection requirements. The court concluded that that PUC's authority to designate carriers as ETCs derives from Section 214 of the Communications Act, which makes hearings optional. The court further found that under Section 214 the PUC's ETC authority is not limited by the fact that its actions may affect interstate services.

FCC Revises and Clarifies Certain International Section 214 Rules

The FCC issued a long-awaited order following up on some biennial review recommendations in 2002 and a notice of proposed rulemaking in 2004. Although the order did not make the more dramatic changes urged by many, the FCC did revise its international Section 214 rules in a few respects and clarified other aspects of the rules.

The FCC made a few changes to its international rules:

- First, the FCC made some changes to its *international discontinuance* rules to align them more closely with the rules for domestic discontinuances. Specifically, carriers must now provide 30 days' advance notice to the FCC (rather than 60 days' notice). Such notice must be filed simultaneously with the provision of notice to affected customers. International discontinuances, however, will not appear on public notice or require specific prior approval from the FCC.
- Second, the FCC amended its rules to require cable landing license applicants to comply with the *Coastal Zone Management Act* of 1972 ("CZMA"). Although no state currently includes cable landing licenses within their consistency review programs, the FCC does not want to foreclose the possibility of state review under the CZMA, and thus amended its rules to clarify that any required consistency certifications must be included with the application. The FCC will not streamline or act on a cable landing license application until it is notified that any required state approvals have been received or may be presumed.

The FCC also clarified its international rules in several respects:

- The FCC clarified its rules to state that a Commercial Mobile Radio Service ("CMRS") carrier's Section 214 resale authority permits it to resell the U.S.-inbound services of foreign carriers, including by entering into a *roaming or other arrangement with a foreign carrier*. Accordingly, a CMRS carrier that provides subscribers abroad the ability to call back to the U.S., even via a roaming arrangement, requires Section 214 authority. No separate roaming authority is required, however, as a general Section 214 resale authorization now explicitly covers such activity.

- The FCC clarified its rules to state that a *diminution of ownership in a carrier from more than 50% to 50% or less* is a transfer of control that must be reported to the FCC. (The current rules state only the converse, *i.e.*, an increase from less than 50% to 50% or more ownership must be reported.) Of course, such a change may still qualify as a *pro forma* transfer of control if the entity retains *de facto* control, and if so would be subject only to after-the-fact notification.
- The FCC clarified that an *asset acquisition that does not result in a loss of service for customers* must be treated as an assignment rather than a discontinuance. Accordingly, even if Section 214 authority is not being assigned, a sale of a customer base (in whole or in part) requires prior Section 214 approval. The FCC also declined to exempt CMRS carriers from this rule, although spectrum swaps not affecting customers do not require a Section 214 filing (only review under Title III).

Finally, the FCC declined to revise its international rules in other respects:

- The FCC declined to loosen its rules to permit *commonly controlled (but less than wholly owned) subsidiaries* to provide service under a parent company's Section 214 authorization. The Executive Branch opposed such a change on national security grounds due to differences in ownership that it believes should require prior review and approval, and the FCC deferred to this position.

The FCC declined at this time to *exempt CMRS carriers* from the requirement to obtain prior Section 214 authority before beginning to provide international service. The FCC noted, however, that it intends (based upon the 2006 biennial review staff recommendations) to look more broadly at the further streamlining of international Section 214 applications, and will further consider the treatment of CMRS carriers in that proceeding.

Post-9/11 Interim Filing Procedures Rescinded

After 9/11 and the anthrax scares in Washington, the FCC had adopted various interim filing procedures to accommodate the mail delays. In light of improved mail processing times and the steady increase in electronic filings, however, on June 20, 2007, the FCC released an order rescinding interim filing procedures for the following types of filings: (i) petitions to deny filed pursuant to 47 U.S.C. § 309; (ii) petitions for reconsideration filed pursuant to 47 U.S.C. § 405; (iii) applications for review filed pursuant to 47 U.S.C. § 155(c)(4); (iv) petitions to amend the TV and FM Broadcast Table of Allotments and responsive pleadings; (v) comments or oppositions to open video system certification made pursuant to 47 C.F.R. § 76.1502(e)(1); and (vi) informal requests for Commission action involving pending applications filed pursuant to 47 C.F.R. § 1.41. Effective September 25, 2007, these filings will no longer be accepted by facsimile or e-mail, unless specifically authorized by the Commission's rules.

Third Circuit Court of Appeals to Rehear *Core Communications*

In the last issue of our Bulletin we reported on the Third Circuit's recent decision in *Core Communications*, *Inc. v Verizon Pennsylvania, Inc.*,where the court held that disputes regarding interconnection agreements must be taken to the public utility commission that approved the agreement before complainants may resort to the federal courts. On June 15, the court vacated that opinion and announced that it will rehear the case at a future date. One of the judges on the three-judge panel had discovered "facts causing him to recuse" himself from the panel. Judge Anthony Scirica will replace the recused judge, Judge Brooks Smith.

New York and New Jersey Pass VoIP Bills

The New York Senate has passed SB-4611 to require Voice over Internet Protocol ("VoIP") providers to disclose to their customers any limits on basic or enhanced 911 service. VoIP providers would have to disclose the limitations in all advertisements and marketing materials, contracts, and installation instructions, and customers would have to sign statements indicating that they are aware of the 911 limitations. Providers that are unable to provide 911 access would have to disclose that at the time of sale and in all advertising and would have to provide their customers with "No 911" stickers for their telephones. The bill now goes to the Assembly for consideration.

In New Jersey, the Senate and General Assembly have passed identical bills that will, if signed by the governor, prohibit the regulations of rates, terms, and conditions of VoIP and other IP-enabled services. Both houses considered and passed Senate Bill 2777 and Assembly Bill 4339 within ten days of introduction. Nothing in either bill will preclude enforcement of current consumer protection laws or any other requirements imposed by federal law, including the collection of 911 fees, Universal Service and other FCC imposed charges. The bills expressly do not interfere with the management of public rights-of-way by the state or any political subdivision or interfere with the state's obligations under Sections 251 and 252 of the Communications Act. The governor is expected to sign A 4339.

The Supreme Court has requested the Solicitor General's opinion on whether it should accept for hearing wireless industry challenges to the 11th Circuit Court of Appeal's opinion in *Sprint Nextel v. NASUCA*. The U.S. Court of Appeals for the 11th Circuit previously rejected the FCC's March 2005 "Truth-In-Billing" decision, in particular that portion of the decision finding that state rules and regulations requiring or prohibiting certain line items on invoices were preempted by federal law. As a result of the 11th Circuit decision, states now have jurisdiction over these wireless billing practices. While the Supreme Court is considering whether to grant *certiorari* in *Sprint Nextel*, the FCC is likely to act on additional wireless industry requests to preempt state regulation of other wireless practices, including whether early termination charges are "rates charged" that are exempt from state regulation.

California Senate Defeats Wireless Consumer Protection Legislation

By a 20-17 vote, the California State Senate delivered another blow to consumer advocates' attempts to impose consumer protection rules on wireless carriers. Their earlier efforts before the PUC failed when a consumer protection decision that imposed rules on all telecommunications carriers was rescinded in favor of less stringent guidelines for landline carriers only. SB-831 would have required wireless carriers to provide a 30-day trial period in which customers could cancel contracts without penalty, and would have required that early termination charges after the trial period be prorated according to the time remaining on the contract. In addition, wireless contracts would have been limited to 2 years and customers' liability for unauthorized use of a lost or stolen phone would have been capped at $50.

AT&T and Cox Question Potential Changes to California PUC *Ex Parte* Rules

The California PUC ("CPUC") has issued a revised draft decision in Case 05-11-011, Utility Consumer Action Network's 911 "warm line" complaint against AT&T and Cox Telecom. Separately from the substantive issues of the case, which the CPUC has yet to address, recent activity in the proceeding has focused on alleged violations of the CPUC's *ex parte* rules by both AT&T and Cox. Under the CPUC's rules, communications regarding substantive matters in complaint cases are prohibited but procedural communications are allowed. In the course of their defense against the complaint, AT&T and Cox had submitted to the Commission various requests to open a rulemaking regarding the "warm line" procedures, but the requests had been rejected, on both procedural and substantive grounds. Subsequently, the companies met with a number of Commissioner advisors to discuss matters related to "forum selection," which AT&T and Cox argue were procedural issues not subject to the *ex parte* ban. The revised draft decision disagrees, however, and characterizes the communications as substantive. AT&T and Cox have vigorously challenged the draft decision, stating that it will substantively revise the *ex parte* rules without notice or an opportunity to be heard. The Commission has rejected these objections, however, and is scheduled to vote on the draft at its July 12 public agenda meeting.

FCC Preserves February 2008 Analog Sunset Date

The FCC denied a petition for rulemaking filed by the alarm industry that requested a two-year extension of the analog sunset date, which remains February 18, 2008. The FCC, however, adopted additional steps to help ensure that customers are aware of the sunset and can prepare for any discontinuance of their analog service. The FCC's decision paves the way for wireless carriers to stop providing costly analog services to a small subset of wireless customers while also ensuring analog customers get sufficient time to transition to digital services.

Specifically, the FCC determined that the requested extension did not serve the public interest. According to the FCC, the alarm industry had ample notice of, and opportunity to prepare for, the sunset date. The FCC also concluded that there are sufficient digital equipment and personnel to ensure that the alarm companies can switch their customers to digital services before analog services are discontinued. Furthermore, the FCC found that the reason for adopting the sunset date – to ensure that persons with hearing disabilities have access to mobile services - has been satisfied. In contrast, the FCC believed that extending the deadline would impede E911 deployment and the roll-out of wireless advanced services.

The FCC, however, adopted certain measures to help ensure that customers are aware of, and can prepare for, the analog sunset:

- Cellular licensees must notify any remaining analog customers of the sunset and provide notice well in advance of any intention to discontinue their analog services.
- In lieu of the existing rules that would require revised Cellular Geographic Service Area ("CGSA") showings upon discontinuance of analog service, a cellular licensee instead can certify that the discontinuance of its analog service will not result in any loss of wireless coverage in its CGSA. To the extent a licensee cannot provide such a certification, however, it must file a revised CGSA showing and any territory not served will be forfeited and available for reassignment.

The Consumer and Governmental Affairs Bureau and Wireless Telecommunications Bureau will commence a public outreach and education campaign to notify any affected parties of the analog sunset date.

Private Equity Firm BC Partners to Buy Intelsat

BC Partners, a London-based private equity firm, agreed to buy Intelsat Holdings Ltd., parent company of satellite operator Intelsat Ltd. ("Intelsat"). BC Partners will be acquiring 76 percent of Intelsat for around $16.4 billion, which includes around $5 billion in cash and the assumption of around $11.4 billion in debt. The current owners of Intelsat, a consortium of private equity firms consisting of Apax Partners, Permira, Apollo Management and Madison Dearborn Partners, will retain a 24 percent stake in the company. The consortium purchased Intelsat in August 2004 for $3.1 billion.

This will be the largest deal ever for BC Partners and its first purchase of a U.S.-based company. BC Partners won Intelsat through an auction process that included bids from Liberty Media Corp. (set to take control of DirectTV Group Inc. in the next few months), EchoStar Communications Corp. and Loral Space & Communications, Inc. The process began when the Blackstone Group, a private equity firm, made a preliminary offer for the company, although it did not submit a formal bid.

Intelsat, based in Washington, D.C., is the largest commercial satellite operator in the U.S., with 51 satellites. Intelsat leases capacity on its satellites to cable television programmers for delivery of their channels to cable operators. Industry analysts have commented that, as a financial investment rather than a strategic transaction, the acquisition likely will raise few regulatory or antitrust issues. The deal also will be reviewed by the Committee on Foreign Investment in the U.S., or CIFIUS, an inter-agency group chaired by the Department of Treasury that includes the U.S. Trade Representative and the Departments of Commerce, Defense, Justice, Homeland Security and State.

VoIP Services Subject To Disability Access And TRS Contribution Requirements

The FCC has extended its disability access and Telecommunications Relay Service ("TRS") requirements to interconnected VoIP services. This marks the latest piecemeal step by the FCC to subject VoIP services to various common carrier regulatory policies and regimes, despite the supposed "unregulated" nature of the Internet and VoIP services in particular. The authority for the FCC's action was based upon its "ancillary jurisdiction" set forth in Title I of the Communications Act.

The FCC's latest decision requires interconnected VoIP services – generally, services that are perceived and used by customers as substitutes for traditional telephony services – and any manufacturers of equipment, or customer premises equipment ("CPE") specially designed for such services, to comply with the disability access requirements set forth in Section 255 of the Communications Act and the FCC's rules. Specifically, an interconnected VoIP provider must ensure that its service, including related documentation and information, is accessible to and usable by individuals with disabilities, if readily achievable. A manufacturer of VoIP equipment or CPE must ensure that the equipment is designed, developed, and fabricated so that any portion of the equipment, and related documentation used for interconnected VoIP service, is accessible to and usable by individuals with disabilities, if readily achievable. Each interconnected VoIP provider and manufacturer also is under an affirmative obligation to: (1) consider disability access throughout the design, development, and fabrication of services and equipment; (2) incorporate disability access issues into employee training; (3) maintain records of the company's accessibility efforts; and (4) designate and notify the FCC of its agent for service of any disability access complaints and inquiries.

In addition, interconnected VoIP providers are required to contribute to the TRS fund, which is used to compensate TRS providers for the cost of providing TRS to those with disabilities, and to offer 711 abbreviated dialing for access to relay services. TRS fund contributions will be calculated based upon an interconnected VoIP provider's end-user revenues derived from providing interstate services as reported in the Form 499-A. According to the FCC, it anticipates that interconnected VoIP providers will begin making TRS contributions on a prorated basis in the latter half of the 2007 calendar year. Although the FCC does not mandate any particular technology for implementing 711 access to TRS, it requires VoIP providers to ensure that customers can access appropriate relay centers. Furthermore, like traditional telephony service providers, VoIP providers must conduct ongoing education and consumer outreach efforts to widely publicize the availability of 711 access.

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 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 2, 2007	Comments due on **NPRM on delivery of multichannel video to multiple-dwelling units (MDUs)**.
July 5, 2007	Comments due on **geographic scope of current E911 wireless location accuracy requirements and PSAP service area level.**
July 9, 2007	Comments due on **CPNI FNPRM.**
July 9, 2007	Comments due on **Sirius/XM Radio merger.**
July 11, 2007	Reply comments due on **geographic scope of current E911 wireless location accuracy requirements and PSAP service area level.**
July 16, 2007	Reply comments due on **net neutrality NOI.**
July 16, 2007	Reply comments due on **broadband deployment NPRM (regarding data collection).**
July 20, 2007	Effective date of **increased forfeiture amounts for obscene, indecent and profane broadcasts**.
July 24, 2007	Reply comments due on **Sirius/XM Radio merger.**
July 25, 2007	Comments due on **DOJ/FBI petition challenging sufficiency of CALEA technical standard**.
July 31, 2007	**International traffic and revenue reports due**.
August 1, 2007	**TV license expiration date** for Delaware and Pennsylvania.
August 1, 2007	**Telecommunications Reporting Worksheet (Form 499-Q) due.**
August 1, 2007	**NANPA numbering resource utilization/forecast (NRUF) report (Form 502) due.**
August 1, 2007	Reply comments due on **NPRM on delivery of multichannel video to multiple-dwelling units (MDUs)**.
August 7, 2007	Reply comments due on **CPNI FNPRM.**
August 20, 2007	Comments due on **remaining E911 NPRM issues.**