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Legal Updates & News

Bulletins

Communications Law Bulletin, March 2008

April 2008

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- Communications & Media Law

Communications Law Bulletin, March 2008

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The Month in Brief

March brought many developments affecting the legal and regulatory environment for communications markets. Notably, a new net neutrality bill was introduced in Congress, the Federal Communications Commission ("FCC" or "Commission") announced its new media ownership rules (exciting immediate congressional opposition), and the states moved forward on broadband availability, telecommunications deregulation, and other issues.

These and other subjects are covered in this issue of our Bulletin, along with our usual list of deadlines for your calendar.

Third Circuit Addresses Toll-Free Numbering Rules

The U.S. Court of Appeals for the Third Circuit recently addressed a toll-free numbering dispute. In this case, a company – Business Edge – obtained a toll-free number that spelled "Champion," and then contacted Champion Mortgage and reached an agreement to route calls placed to the toll-free number to Champion for a monthly fee of $25,000 for five years.

Three years into the term, Champion alleged that the contract violated the FCC's rules against the brokering or sale of toll-free numbers and stopped paying the monthly fees. Business Edge terminated the agreement and filed suit for non-payment. Champion alleged illegality of the agreement, while Business Edge argued that there had not been a "sale" of the number.

The District Court – finding the monthly fee to have a value closer to the value of the number rather than the value of the routing services – found the agreement to constitute an impermissible sale of the toll-free number.

On appeal, the Third Circuit reversed, finding that there had been no sale of the number in light of the fact that Business Edge retained control of the number and responsibility for paying toll charges for use of the number, and because the agreement was for a limited duration. Nonetheless, the Third Circuit remanded the case for a determination of whether Business Edge violated the FCC's related prohibition against the hoarding of toll-free numbers.

Interestingly, the Third Circuit noted in a footnote that the current FCC rules against the brokering or sale of toll-free numbers permit a company to avoid a violation by simply leasing the number rather than selling it. The court noted that the FCC's goals would appear to be served by also prohibiting such leasing, and invited the FCC to address this loophole.

Net Neutrality Issues Continue to Percolate in Washington

Network management issues have continued to occupy the attention of policymakers in Washington.

On the Hill, the House Judiciary Committee's antitrust task force held a hearing on net neutrality issues. Rep. John Conyers, Jr. (D-Mich.), the chairman of the full committee as well as of the task force, stated at the hearing that there was not yet a case for Congressional action on the subject. Rather, he felt that any specific anti-competitive behavior could be addressed by existing antitrust laws. This hearing could set up a jurisdictional battle with the House Telecom Subcommittee, whose chairman Rep. Ed Markey (D-Mass.) introduced a net neutrality bill in February, as reported in the February, 2008 issue of this Bulletin.

Meanwhile, at the FCC, Chairman Martin has indicated in public speeches that he plans to act on net neutrality and the pending Comcast complaint by the middle of the year. Martin has emphasized that he views the varying treatment of similar applications by broadband access providers as discriminatory, and views adequate disclosure of network management practices as critical. Therefore, Martin has been critical of Comcast's failure to disclose, and initial denial that it engaged in, network management practices that inhibit customer use of high-bandwidth applications.

In addition, the FCC has announced a second public hearing on network management issues, which will be held at Stanford University on April 17.

USF Contribution Factor Increases More than One Percent

The universal service fund ("USF") contribution factor for the second quarter of 2008 will increase by more than one percent from 10.2 percent to 11.3 percent. This is the first increase in the USF contribution factor since the second quarter of 2007.

Practice Tip: ETCs Must Notify Customers of DTV Transition

The FCC's Digital Television ("DTV") Education Order, reported on in this issue of our Bulletin, imposes limited obligations on eligible telecommunications carriers ("ETCs"). Specifically, ETCs must notify their Lifeline and Link-up low-income universal service program customers about the DTV transition in their monthly bills. The notice must clearly state that on February 17, 2009, full-power analog broadcasting will end, and analog-only televisions may be unable to display full-power broadcast programming unless the viewer takes steps to ensure he or she receives the digital broadcasts, and must inform customers where they can obtain more information. ETCs also must include DTV transition information as part of their normal Lifeline and Link-up publicity campaigns. The new requirements require approval of the U.S. Office of Management and Budget before becoming effective. Once they are effective, the requirements run through March 2009.

Happenings on the Hill

Media Ownership Rules Are Met with Resolutions of Disapproval

The FCC's media ownership rules, adopted in December 2007 and released March 5 (see "FCC Releases New Media Ownership Rules," below), are being challenged in both the Senate and the House. In the Senate, Sen. Byron Dorgan (D-N.D.) has introduced a resolution of disapproval (SJ Res 28) that will stop the FCC from implementing the new rules if passed by Congress and signed by the President. Although the resolution has 18 bipartisan co-sponsors, there is concern that Congress's schedule and a likely Presidential veto will stop the resolution's passage. Supporters are optimistic, however, comparing the initiative with Sen. Dorgan's efforts in 2003, when he got a similar resolution through the Senate as a part of a Defense Department authorization bill. The Senate has 60 days to act on the resolution. The House introduced its own resolution of disapproval on March 13, which was backed by five members.

VoIP 911 Bill Heads to Conference Committee

The Senate unanimously passed its version of the Voice over Internet Protocol ("VoIP") 911 bill (S 428) at the end of February. The House version, HR 3403, was passed in November, 2007. The next step is for House-Senate conference negotiators to resolve the differences between the two bills. Congressional aides indicated that the dissimilarities were minor and should be resolved quickly and easily.

Like the House version, the Senate bill requires VoIP providers to offer 911 services to all customers and ensures access to 911 network facilities controlled by incumbent telephone companies. Both bills also give carriers liability protection.

The Senate bill also contains two additional amendments: the first grants the FCC the authority to impose 911 requirements on any provider of a voice service that is a substitute for telephone exchange service, and the second requires the Commission to perform a next-generation enhanced 911 ("E911") capability study.

Unanimous Agreement on Wireless Consumer Protection Bill

Everyone is in agreement that the Wireless Consumer Protection Bill is a start…but that is where the agreement ends. The draft bill consists of three parts: a federal framework for wireless consumer protection focused on industry termination fee practices, a provision that allows municipalities to build broadband networks, and a mandate for more efficient use of spectrum. During and after the House Telecom Subcommittee hearing on February 27, several concerns were voiced, including the potential lack of balance between federal consumer standards and carriers' need for consistent regulation; the fear that cumbersome state regulation would be replaced by overly strict federal regulation; and the FCC's possible micromanagement of the carrier-consumer relationship. An updated version incorporating hearing feedback is expected in the next couple of weeks.

One Step Forward, Two Steps Back on FCC Transparency

Every time Chairman Kevin J. Martin takes a step forward by providing additional transparency into FCC practices and procedures, he receives another "Dingellgram" (that is, a message from Congressman John Dingell (D-Mich.)) requesting more information about past Commission actions. (See "Another Step Towards Transparencyin FCC Processes" in the February, 2008 Bulletin.) The latest request from the leadership of the House Energy and Commerce Committee was very specific in the type of information the Commission must provide within two weeks, and was based on allegations from a variety of sources, including current and former FCC employees. According to the letter sent March 12, the Commission must turn over all email communications, memoranda, electronic and handwritten notes, telephone conversation records, talking points, and meeting schedules since January 2005 dealing with the following activities: circulation of items at FCC meetings; personnel reassignments of employees at the GS-13 level and above, as well as new hires; Chairman Martin's trips to North Carolina; telecom carrier audits; analysis of the 70/70 test for cable providers; withdrawal of a part of an E911 report; and FCC employees' ability to communicate with each other concerning official agency business and the scope of permissible communications with outside entities.

Broadcast News

FCC Releases New Media Ownership Rules
On March 5, 2008, the Commission released the text of the new media ownership rules. Couched by the Commission as an "opportunity for new entrants and small businesses to own broadcast outlets," the Order was met with resolutions of disapproval in both the House and Senate, raising the possibility that the rules will not be allowed to take effect. (See "Media Ownership Rules Are Met with Resolutions of Disapproval" in this issue.) Congress is not the only party displeased with the new rules. The 9th Circuit of the United States Courts of Appeals was chosen by lottery to hear challenges, consisting of 15 consolidated actions, to the new media rules as well.

According to the Order's language, the new rules will help eligible entities with access to financing and availability of spectrum, as well as:

- Change construction permit deadlines to allow "eligible entities" acquiring expiring construction permits additional time to build out their facilities;
- Revise the equity/debt plus ("EDP") attribution standard to facilitate investment in eligible entities;
- Modify the distress sale policy to allow a licensee in certain situations to sell its station to an "eligible entity" prior to the commencement of the hearing;
- Adopt an Equal Transactional Opportunity Rule that bars reliance on race or gender in broadcast transactions;
- Adopt a "zero-tolerance" policy for ownership fraud and "fast-track" ownership-fraud claims;
- Require broadcasters renewing licenses to certify that advertising sales contracts do not discriminate on the basis of race or gender;
- Encourage local and regional banks to participate in SBA-guaranteed loan programs in order to facilitate broadcast and telecommunications-related transactions;
- Give priority to any entity financing or incubating an eligible entity in certain duopoly situations;
- Consider requests to extend divestiture deadlines in mergers in which applicants have actively solicited bids for divested properties from eligible entities; and
- Revise the exception to the prohibition on the assignment or transfer of grandfathered radio station combinations.

Education Mandated Concerning DTV Transition
On March 3, 2008, the Commission released its order mandating industry Digital Television (DTV) education efforts. The order requires broadcasters, multi-channel video programming distributors ("MVPDs"), telecom carriers, retailers, and television receiver manufacturers to take a number of steps to help alert the consuming public about the approaching deadline.

In discharging their education requirements, television broadcasters may choose between a set schedule of public service announcements ("PSAs") that must be aired each quarter, and a National Association of Broadcasters option, which requires weekly announcements and a DTV transition "countdown" message beginning 100 days before the transition. Noncommercial broadcasters may choose from either of the broadcaster options or a third proposed by the Association of Public Television Stations.

MVPDs and telecom companies participating in the federal low-income universal service program are required to include DTV transition information on phone bills. Retailers will face FCC Enforcement Bureau visits to assess employee education and training efforts, as well as compliance with the DTV converter box voucher program guidelines. Television receiver manufacturers must give customers notice of how the transition will affect their equipment. In addition, participants in the DTV.gov effort and 700 megahertz band winners are required to regularly report to the FCC about their respective education efforts.

DTV Transition: It Works in Theory, but Will It Work in Practice?
In support of the DTV transition, FCC Commissioner Michael J. Copps is encouraging the Commission to conduct "real-world" testing in small-test markets before the 2009 deadline. In a March 3 letter to FCC Chairman Kevin J. Martin, Commissioner Copps suggested conducting limited DTV field tests similar to those used in the United Kingdom before its DTV transition.

Commissioner Copps acknowledged some technical and practical challenges associated with conducting tests, such as identifying suitable test markets, educating participants, and ensuring converter box availability, but stressed that the benefits outweigh the difficulties. The benefits cited included gaining insight on DTV reception, needed cable and satellite coordination efforts, converter box installation, DTV equipment functionality, and consumer reaction.

Chairman Martin agreed that such an effort implicated both challenges and benefits, but promised to ask the FCC DTV Task Force to coordinate with various stakeholders and explore conducting possible DTV field tests.

Supreme Court to Utter Last Word on Fleeting Expletives
In a surprising move, the Supreme Court granted certiorari in the *FCC v. Fox* case. The case, which was remanded by the United States Court of Appeals for the 2nd Circuit on procedural grounds, was not considered a likely candidate for a place on the High Court's docket because the appeal does not invoke any constitutional matters. (See "Court Rejects FCC's 'Fleeting Expletives' Policy" in the November, 2007 Communications Law Bulletin.) The question before the Court is one of administrative procedure – specifically, whether the FCC's new "fleeting expletives" policy is arbitrary and capricious because it represents a significant departure from the agency's 30-year-old precedent, and whether the FCC failed to articulate a reasoned basis for the policy change. Regardless of the end result, however, stakeholders are hoping that at a minimum the Justices will provide some needed clarity to both broadcasters and policymakers.

Justice Department Approves XM/Sirius Merger
On March 24, 2008, the U.S. Department of Justice ("DoJ") announced its approval of the proposed $13 billion merger between XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc. The DoJ's action leaves FCC approval as the only regulatory sign-off still needed before the deal may proceed.

House Subcommittee Scrutinizes Private Equity Investment in Telecom Industry

On March 11, 2008, the House Telecommunications and Internet Subcommittee held a hearing to investigate whether ownership of telecom and media companies by private equity firms threatens to harm the industry. Subcommittee Chairman Rep. Edward Markey (D-Mass.) and Rep. John Dingell (D-Mich.), chairman of the full House Energy and Commerce Committee, led the discussion of private equity's benefits, such as freeing companies from Wall Street's focus on short-term returns, along with its drawbacks, such as less transparency, less focus on the public interest, and the draining of cash from the acquired companies and the piling on of debt.

Rep. Dingell was particularly concerned with the lack of accountability of private equity-owned businesses, because private companies are not subject to the same reporting requirements as public firms. Several witnesses remarked that because many buyouts are financed with bond sales, companies are still subject to public disclosure requirements through Securities and Exchange Commission regulation, even though they are not public companies.

Richard Bressler of leveraged buyout firm Thomas H. Lee Partners, speaking on behalf of the Private Equity Council, noted several other benefits of private equity ownership. He noted that private equity buyers generally are patient with their telecom and media investments, usually retaining ownership for five to eight years before selling. Also, he noted that private equity involvement in the sector promotes competition by allowing companies to remain independent instead of being acquired by an incumbent.

At the end of the hearing, Rep. Markey commented that he expected the subcommittee to focus "more and more" on private equity in 2008, as worsening economic conditions expose marketplace inconsistencies that might not be apparent in a stronger economy.

Enforcement Activity over the Past Month Ranges from Hearing Aid Compatibility Issues to Slamming

Hearing Aid Compatibility NALs
From February 27 to March 21, 2008, the Enforcement Bureau ("Bureau") released six Notices of Apparent Liability for Forfeiture ("NALs") against wireless carriers for apparent violations of the FCC's technical standards governing the compatibility of wireless digital handsets with customers' hearing aids. The hearing aid compatibility ("HAC") rules establish radio frequency interference standards for handsets to enable them to be used with hearing aids operating in "acoustic coupling" and "inductive coupling" modes and impose deadlines by which the standards had to be met – September 16, 2005, for acoustic coupling and September 18, 2006, for inductive coupling compatibility. The HAC rules require that manufacturers and wireless service providers make commercially available at least two handset models meeting the standard for each of the two coupling modes by the respective deadlines. In response to letters of inquiry ("LOIs"), the wireless providers

admitted that they had not met the deadline as to at least one handset model.

Following its previous practice, the Bureau generally proposed a base forfeiture of $15,000 per noncompliant handset model. The Bureau noted in each case that the wireless provider is a Tier III carrier (*i.e.,* a non-nationwide wireless radio service provider with 500,000 or fewer subscribers), and that the Bureau would exercise its prosecutorial discretion and decline to assess a forfeiture on a continuing violation basis. In some of the NALs, the Bureau rejected arguments that the penalty should be mitigated because manufacturers tended to fill orders from larger carriers first, resulting in delays in shipping coupling-compliant handsets to Tier III carriers. In all six NALs, the Bureau found that the service provider had failed to demonstrate good-faith, diligent efforts to come into compliance. The service providers either failed to seek a waiver of the deadline or requested a waiver at or after the deadline, which was denied, and they only came into compliance long after "many other Tier III carriers." (The waiver denial involving some of the same service providers is discussed in another article in this issue of the Bulletin.)

In five of the NALs, the proposed forfeiture ranged from $15,000 to $45,000, depending on the number of noncompliant handset models involved. In the most recent NAL, however, issued to Iowa Wireless Services, dba i wireless ("Iowa"), the Bureau noted that Iowa is not a typical Tier III carrier because it "is comprised of and has the financial support of 37 associated PCS licensees and is owned by subsidiaries of T-Mobile USA and Iowa Network Services." Taking into account Iowa's "size and ability to pay a forfeiture," the Bureau proposed a forfeiture of $22,500 for one noncompliant handset. Three of the NALs would have proposed larger penalties if one or more additional noncompliant handset models had not come into compliance more than one year prior to the NAL. Additional HAC NALs are likely in light of all of the service providers that were denied a waiver of the HAC deadlines in the recent waiver denial.

Horizon Telecom Slamming NAL

On February 29, 2008, the FCC released an NAL against Horizon Telecom, Inc. ("Horizon") for failing to respond to 21 informal complaints that the FCC had received from consumers and served on Horizon and for changing the preferred carriers of 125 consumers without proper authorization, a practice commonly referred to as "slamming." The FCC noted that it had reminded all carriers on March 2, 2007, of the importance of responding to informal complaints and the penalties for failure to do so. The informal complaints against Horizon were served in early and mid-2007. Horizon responded at least two months late to nine of the complaints and never responded to 12 of them. The FCC proposed to assess, for each of the 21 complaints, the base forfeiture amount of $4,000 imposed for any failure to respond to a Commission communication, for a total penalty of $84,000.

The slamming allegations were based on complaints from 125 consumers who alleged that Horizon changed their preferred carrier to Horizon without authorization. Horizon claimed that it received authorization when it processed signed letters of agency ("LOAs") from the consumers. The FCC found, however, that the LOAs contained inducements, in the form of free airline tickets, which violate its slamming rules. The LOAs also failed to include any means or location for consumers to provide an electronic signature, as required by the rules. The FCC proposed to assess, for each of the 125 unauthorized preferred carrier changes, the standard forfeiture amount of $40,000, for a total slamming penalty of $5,000,000, resulting in a combined total proposed forfeiture of $5,084,000 against Horizon.

FCC Brings "Junk Fax" Enforcement Actions

On February 29 and March 21, 2008, the FCC released NALs against SMC, LLC ("SMC") and America's Toner ("AT"), respectively, for repeated violations of Section 227 of the Communications Act and the FCC's "junk fax" rules. In both cases, the firms continued to use a telephone facsimile machine, computer, or other device to send unsolicited advertisements to facsimile machines in violation of Section 227 and related rules after receiving citations from the Bureau warning them that any subsequent violations could result in forfeitures of up to $11,000 per violation. SMC sent 86 unsolicited advertisements to 54 customers – 13 of the transmissions after 10 of the customers requested SMC to stop sending the advertisements. AT sent 14 unsolicited advertisements to 14 customers. Following its previous practice, the FCC proposed a penalty of $4,500 per violation, except for the 13 transmissions sent to customers who had previously requested SMC to cease. In those "egregious" cases, the FCC followed its practice of proposing a penalty of $10,000 per violation. Accordingly, the FCC proposed a forfeiture of $458,500 for SMC and $63,000 for AT.

On March 19, 2008, the FCC issued a Forfeiture Order for $2,591,500 against The Hot Lead LLC d/b/a The Hot Lead Company ("Hot Lead") for sending 417 unsolicited advertisements to the telephone facsimile machines of 149 customers. The Forfeiture Order arises from two NALs, which were reported in the July-August 2007 and January 2008 Bulletins, proposing forfeitures of $2,168,500 and $423,000, respectively, for violations of the junk fax rules. Hot Lead never responded to the NALs. The Forfeiture Order applies the standard base amount of $4,500 to 287 violations and an increased penalty of $10,000 to 130 advertisements sent to customers who had previously requested Hot Lead to stop sending facsimile messages, for a total forfeiture of $2,591,500.

Communications Options Subject to Forfeiture Order for Failure to Maintain Records

On March 13, 2008, the Bureau released an Order of Forfeiture against Communications Options, Inc. ("COI") for failing to maintain back-up records for the data reported in its Telecommunications Reporting Worksheets ("TRWs") and for failing to respond to a Bureau directive to provide the records in a timely manner. The Order grew out of an NAL released last year alleging that COI had previously failed to respond to an LOI requesting information about COI's compliance with its reporting requirements and universal service and other regulatory fee payment obligations. COI had responded late to the LOI, and its response was not supported by an affidavit or declaration, as required. The Bureau released an NAL against COI last July proposing a forfeiture of $65,000 for apparently failing to maintain records to support its TRWs and failing to respond in a timely manner to a Bureau directive to provide information and documents with a supporting affidavit or declaration. COI never responded to the NAL.

The base forfeiture for failure to maintain required records is $1,000. In the Order of Forfeiture, however, the Bureau noted that the rule requiring the retention of documents supporting TRWs is necessary to ensure compliance with universal service and other regulatory fee payment obligations. The Bureau found that these "important public policy aspects" of the document retention rule warrant an increase in the penalty to $50,000. The Bureau noted that this increased penalty is consistent with prior precedent finding that $50,000 is an appropriate forfeiture for filing an inaccurate TRW.

The FCC also found that COI had failed to respond to the Bureau's inquiries for about one month following COI's promise to file its response to the LOI in a timely manner and then, after it failed to meet the deadline, informed the Bureau that it had "overlooked" its obligation to respond. The base forfeiture for failure to file required forms or information is $3,000, and the base amount for failure to respond to an FCC communication is $4,000. The FCC held that the circumstances presented reflected "a blatant disregard for the Commission's authority," warranting an increase in the penalty to $15,000 for failure to provide a sworn response to the LOI on a timely basis, consistent with recent precedent in similar investigations involving failures to respond to inquiries regarding compliance. The FCC also warned that additional violations could subject COI to further enforcement action, including higher penalties or revocation of its operating authority.

As is often the case with FCC enforcement efforts, these NALs and Forfeiture Orders reflect the value of a proactive response to any FCC enforcement-related inquiry. Early attention to such issues and involvement of counsel can forestall significant penalties and avoid other regulatory and litigation costs later.

States Seek to Expand the Availability of Broadband Services

Legislators in at least half a dozen states are looking to expand broadband services to cover unserved and underserved areas. Washington and West Virginia legislators each have sent bills to their governors (SB 6438 in Washington, HB 4637 in West Virginia) that will, if signed, create task forces to identify unserved areas and develop recommendations for getting broadband services to these areas. The West Virginia bill also would identify areas where subsidies are required and develop a funding program to encourage investment. In Washington, the bill would create a working group made up of private sector providers and nonprofit and community groups. Kansas, Connecticut, Minnesota, Alabama, and California all have similar bills pending. In Kansas, HB 2634 would use state universal funds to fund one-time grants to extend broadband to unserved areas. HB 2107 in Minnesota would create a task force that would develop policies and actions needed to achieve universal broadband availability by 2015. Connecticut's HB 5682 would create a public-private partnership to study existing broadband deployment and subscribership on a census-block basis and identify barriers to increased availability. If Alabama enacts HB 243, broadband providers will be required to identify, on a confidential basis, the non-urban areas that have broadband facilities, and the Department of Economic and Community Affairs will be required to prepare a report to the legislature with proposals for extending broadband to unserved areas. The California Senate has a placeholder bill, SB 1777, expressing its intent to improve broadband Internet access; the bill may be considered later this year.

State agencies in California are beginning their efforts to implement recommendations included in the California Broadband Task Force report issued earlier this year. The state Department of Transportation held a workshop on March 18, 2008, to address the potential for coordinating the installation of fiber conduit in highway projects between the various agencies overseeing these projects. The California Public Utilities Commission already has created the Advanced Services Fund to encourage broadband deployment in underserved areas, defined as areas having service slower than 3 Mbps. The Advanced Service Fund is supported by the intrastate High Cost B surcharge; the CPUC has put up $100 million in matching funds for this year and next and is supporting legislation to continue the program beyond the initial years.

State Legislatures Continue Efforts to Relax Telecommunications Regulations

The Kansas Senate, at the request of Embarq, has passed SB 570. This bill would amend current law to remove the requirement that the Kansas Corporation Commission ("KCC") approve or deny mergers or acquisitions between telecommunications companies that have elected price-cap regulation. Embarq and AT&T are the only price-cap regulated companies in Kansas, and therefore the only beneficiaries of this proposed change in the law. Also in Kansas, the House has passed and sent to the Senate HB 2637. If enacted, this bill will remove the current price caps for the initial residential telephone line and up to four business lines at the same location. Legislation in 2006 deregulated the rates for all other retail services. Like SB 570, AT&T and Embarq will be the primary beneficiaries of this bill. Other incumbent local exchange carriers can opt in to price-cap regulation only if they can demonstrate sufficient competition in their markets. HB 2637 also would require the newly price-deregulated carriers to automatically enroll qualifying customers in the lifeline program. The Department of Social and Rehabilitation Services will provide the companies with a list of eligible customers who have consented to the release of their information, on a confidential basis. To further facilitate participation in the lifeline program, the KCC is directed to approve the applications of wireline carriers for Eligible Telecommunications Carrier ("ETC") status in non-rural service areas of the state, for an area equal to the applicant's own service area, provided that the applicant satisfies other requirements for ETC status. HB 2637 is supported by AT&T, Embarq, and Cox and opposed by Sprint and the Citizen's Utility Ratepayer Board.

The Wisconsin Senate has approved and sent to the House a substantially revised version of SB 285, which would grant all local carriers greater pricing flexibility. The version of SB 285 originally introduced in October of last year was limited to phasing out price caps on basic local services for certain carriers. The revised bill will allow pricing flexibility for services offered in packages or bundles, permit statewide certification of competitive carriers as opposed to the current regulations that permit certification in specific localities only, allow telecommunications utilities to enter into customer-specific contracts, relax the regulations applicable to transactions between a telecommunications utility and affiliated entities, and repeal current restrictions on competitive entry.

The Missouri legislature also is considering substantial changes to the regulations imposed on companies providing telecommunications service, both the traditional carriers and VoIP providers. HB 1779, which the House passed and sent to the Senate in early March, permits incumbent carriers to seek price-cap regulation in exchanges where VoIP is available and allows a price-cap company to be deemed competitive if more than 55% of its subscriber access lines are in competitive exchanges. The bill also "levels the playing field" by relaxing a number of other regulations imposed on incumbent carriers while increasing the regulatory obligations imposed on VoIP and other alternative providers.

Federal Court Grants Preliminary Injunction in Favor of Vonage

The United States District Court for Nebraska issued a preliminary injunction preventing the Nebraska Public Service Commission ("PSC") from requiring Vonage to pay into the state universal service fund, on the grounds that the FCC has preempted state regulation of nomadic interconnected VoIP service. The court relied in large part on the 8thU.S. Circuit Court of Appeals' 2007 decision in *Vonage v. Minnesota PUC* and that court's finding that it is impossible to distinguish between intrastate and interstate calls on interconnected VoIP. The Nebraska PSC argued that the "safe harbor" established by the FCC in June, 2006, which subjects 64.9% of VoIP revenues to the federal USF surcharge, provides a mechanism for assessing the state USF surcharge. The district court did not agree with PSC, however, stating that "[t]he safe harbor ruling does not negate the fact that there is no way to distinguish between interstate and intrastate VoIP service; nor does the adoption of safe harbor rules affect the characterization of VoIP as an information service."

The court's ruling will likely influence those other states that are considering subjecting VoIP to universal service fees and other state regulations. Subsequent to the court's ruling, the Colorado legislature amended HB 1227 to remove language assessing the state's universal service surcharge on interconnected VoIP providers. The bill, as approved by the House and sent to the Senate, would extend the life of the Colorado Public Utilities Commission until 2019 and give the commission authority to impose administrative fines for violations of its rules and to take the lead in lawsuits filed by the Attorney General to recover damages from utilities.

The Missouri House, however, approved and sent HB-1779 to the Senate without removing or modifying the requirements that VoIP providers register with the Missouri Public Service Commission and pay universal service, telecommunications relay service, and enhanced 911 surcharges, as well as comply with a number of other regulations generally imposed on traditional telecommunications carriers. The state Senate has yet to act on the bill.

Global NAPs Runs Out of Time in California

The California PUC has ordered all telecommunications carriers to cease terminating local and intrastate traffic from Global NAPs. The order is the most recent, and most likely the final, defeat for Global NAPs in the state. As reported in earlier Bulletins, in 2007 the CPUC ordered Global NAPs to pay Cox Telecom nearly $1 million in disputed termination charges. When Global NAPs refused to do so, saying that it did not have the money, the CPUC threatened to terminate the company's operating certificate. The termination order was stayed while Global NAPs appealed to the state courts for relief. The state Supreme Court recently upheld the CPUC's rulings, however, thus ending the stay and allowing the CPUC to enforce its earlier decisions.

South Dakota to Upgrade E911 Service

South Dakota Governor Mike Rounds has signed a bill that will require all public safety answering points ("PSAPs") to implement E911 for both wireline and wireless services. This upgrade will provide emergency dispatchers with access to databases that furnish a caller's location information. The new statute also requires E911 capability for any other telecommunications technology capable of calling 911, such as VoIP and prepaid wireless. Providers of these services also must pay a fee to support E911 service, though the funding mechanism is left to state regulators.

FCC Bans Exclusive Telecom Contracts in Multi-Tenant Housing

At the March 19, 2008 Open Meeting, the Commission unanimously approved an order prohibiting telephone companies from entering into exclusive service contracts with residential multiple-tenant environments. The order also retroactively blocks enforcement of existing exclusive contracts. The ban complements the 2007 order prohibiting cable operators from signing exclusive contracts with multi-tenant housing units. The Commission found that exclusive telecommunications service contracts constitute unjust and unreasonable practices within the meaning of Section 201 of the Communications Act because they maintain barriers to facilities-based competition in contravention of the 1996 Act's pro-competitive objectives. The Commission also hopes the ban will further broadband deployment.

Although the Commission clearly hopes the two bans will foster greater competition in broadband communications and video services, industry groups representing apartment building owners condemned the ban, arguing that offering exclusive contracts to serve an entire building or housing community is a crucial bargaining chip that forces service providers to lower prices and improve service quality.

Cautious States Reconsider Video Franchise Reform; Idaho Presses On

California Considering Changes to Video Franchising Law
California, a pioneer in video franchising reform, is considering revisions to buildout requirements imposed on state-level franchisees. The franchising law, called the Digital Infrastructure and Video Competition Act (DIVA), currently provides for a "penetration trigger" of 30% market share, which initiates a series of ongoing buildout requirements. Industry watchers fear that broadband-delivered video services may slow penetration by Bell company Internet Protocol Television ("IPTV") offerings. No amendments have yet been made, but California's utility authority could lower the penetration trigger to ensure that its buildout goals are met.

Minnesota Backs Off Video Franchise Reform in Favor of Further Study
Minnesota legislators have ceased efforts to pass a bill shifting video franchising reform to the state level. That bill has been rewritten to provide merely for a study of at least three states that already have passed state video franchising laws. The study would gather data on the number of state video franchises granted, incumbent providers opting out of local franchises, adoption of services offered by new video entrants, and extent to which new entrants are bringing service to previously unserved areas. If passed, the study would need to be completed by February 2009.

Idaho Considers Video Franchise Reform Bill
The Idaho Senate introduced a bill in early March, 2008, that would shift video franchising from municipalities to the Secretary of State. The bill would allow municipalities to retain authority over use of local rights of way by state video franchisees, though unreasonable conditions would not be permitted. New entrants would have to match channel capacities of incumbent providers, but would not be subject to buildout requirements. If passed, the bill would set a 60-day time limit for the Secretary to act on applications.

FCC Approves New Broadband Data Collection Requirements

At the March 19, 2008 Open Meeting, the Commission adopted an order expanding broadband data collection requirements. As before, data will be collected from broadband service providers using FCC Form 477 every six months, but the new requirements will result in more granular subscriber data and more detailed information about broadband service speeds.

Specifically, the new rules (which require OMB approval before taking effect) will require disclosure of upload and download speeds at each tier of service; reporting of the number of broadband subscribers by Census Tract, broken down by speed tier and technology type; and more accurate information about mobile wireless broadband deployment. Broadband subscribers under the old rules are tracked by the roughly 32,000 5-digit zip codes used throughout the country, compared with 66,000 Census Tracts that would be used for measurement under the new rules.

The order was adopted amid significant differences of opinion among the five Commissioners. Copps wanted reporting that distinguished residential and business broadband subscribers. McDowell, voicing concerns raised by wireline and wireless industry groups, stated that expanded reporting requirements potentially raise costs. Tate supported gathering more granular data on subscribership, but felt that reporting of speed tiers was premature.

The Further Notice of Proposed Rulemaking accompanying the order seeks comment on broadband service pricing and availability.

Wireless Developments

Success of 700 MHz Auction Tainted by Controversies
The 700 MHz auction closed with 101 applicants holding winning bids totaling almost $19.6 billion after 261 rounds of bidding over 38 days. Winning bids were placed on 1090 of the 1099 licenses that cover 62 MHz of "beachfront" spectrum. Except for the D block, the bids for all spectrum blocks met the FCC's established reserve prices, and thus those blocks are not subject to re-auction.

Not unexpectedly, Verizon Wireless and AT&T were the biggest auction winners, collectively accounting for $16.3 billion of the total bids. The former secured the six largest C Block licenses that cover the continental U.S. and Hawaii, while the latter secured nearly a third of the B Block licenses. Frontier Wireless LLC, affiliated with EchoStar Communications Corp., was the winning bidder of 168 E block licenses for $711.8 million that will provide it with a nearly nationwide footprint. Google, Inc. placed the package bid on the C block licenses that met the $4.6 billion reserve price, but ultimately did not win any licenses.

Despite the success of the auction, it also generated several complaints. Rural wireless carriers argued that the auction bore out their prior predictions – the large incumbents won the majority of the licenses to the detriment of small and rural carriers. Commissioner Jonathan Adelstein expressed frustration regarding the lack of diversity in the auction results – women-owned bidders won no licenses, and minority-owned bidders won less than one percent of licenses.

In addition, only one $472 million bid, placed in round one by Qualcomm Corp., was received for the D Block nationwide license that is supposed to serve as part of a public-private interoperable broadband public safety network. Given that the bid is significantly below the $1.33 billion reserve price for the D Block license, it is unclear how the FCC will ultimately allocate the spectrum. Shortly after the auction's conclusion, the FCC issued an order delinking the D Block from the rest of the auctioned spectrum and lifting the anti-collusion period so that the winners of the other licenses could be announced.

The Public Interest Spectrum Coalition asked the FCC to conduct a "thorough investigation into why the D block failed to attract bidders" and allegations of possible wrongdoing. Specifically, some have voiced concerns that Cyren Call Communications Corp., an advisor to the Public Safety Spectrum Trust that holds the 10 MHz public safety license paired with the D block, diminished interest among investors of Frontline Wireless LLC, the main contender for the D block that ultimately did not participate in the auction, by demanding a 10-year $500 million payment from the D block licensee. On the other hand, others have implied that Frontline sought to undermine bidding for the D block to force the FCC to re-auction it with more favorable requirements. Chairman Martin announced that the FCC's inspector general will look into these allegations.

FCC Commissioners Michael Copps and Jonathan Adelstein called for an intensive review of the D block rules to determine "what went wrong" and restructure them to ensure that sufficient capital can be attracted to fund buildout. They, along with Chairman Kevin Martin, however, stated that they continued to support a public-private partnership to develop a nationwide public safety broadband network. Congress also indicated it will likely weigh in on the D block issue by holding its own investigation and hearings on the matter.

FCC Tackles Hearing Aid Compatibility Decisions
In separate orders, the FCC ruled on numerous pending requests to waive its hearing aid compatibility ("HAC") rules and revised those rules based largely upon a plan proposed by the wireless industry and advocates for the hearing-impaired. The FCC denied many of the waiver requests where carriers failed to timely comply with

prior deadlines by which carriers were required to offer a certain number of hearing aid-compatible handsets. The new rules, however, address widespread concerns that compliance with upcoming deadlines would be impossible.

The waiver requests, filed by a handful of midsized "Tier II" carriers and many smaller "Tier III" carriers, in large part sought extensions of the September 18, 2006 deadline to provide handsets that meet the FCC's HAC standard for inductive coupling. Specifically, carriers were required to offer at least two handset models per digital air interference that were certified as meeting the "U3T" or "T3" rating for inductive coupling. Many petitioners argued that failure to comply was based upon the unavailability of equipment. The FCC generally granted those waiver requests in which the petitioner had offered the requisite two T3-rated handsets by January 1, 2007, and demonstrated a reasonable basis for a limited extension. However, the FCC rejected the waiver requests of other carriers, often finding that they had not exercised sufficient diligence in seeking two T3-rated handsets or presented any unique facts or circumstances warranting a waiver. The FCC referred those cases to the Enforcement Bureau, which, as further discussed (see "Enforcement Activity over the Past Month Ranges from Hearing Aid Compatibility Issues to Slamming," in this issue), already has started issuing Notices of Apparent Liability against carriers that did not meet the September 18, 2006 deadline.

The modifications to the FCC's HAC rules were based in large part on a consensus plan proposed last year by wireless carriers and advocates for the hearing-impaired. The consensus parties believe that under the new rules consumers will have access to more HAC-compliant handsets than would be available under the prior mandates. The new rules require handset manufacturers to meet technical standards for radio frequency ("RF") interference reduction on one-third of the handset models they offer, and require wireless service providers to meet the RF interference reduction standard either on a minimum of 8 handset models in 2008 (increasing to 10 by 2010) or on 50 percent of the handset models they offer to consumers. In addition, handset manufacturers and service providers are required to increase, between now and 2011, the numbers of T3-rated models they offer that meet inductive coupling capability standards.

The FCC also adopted a handset "refresh" requirement in which manufacturers must ensure that a certain percentage of their HAC handset models are newly issued each year and wireless carriers must offer customers a range of HAC handsets with differing levels of functionality. The FCC extended its HAC rules to all channels in the 800-950 MHz band and the 1.6-2.5 GHz bands, but declined to extend them to future handsets that may operate in part over frequencies or air interfaces for which HAC standards have not yet been established (e.g., some Wi-Fi handsets). Under the new rules, manufacturers and carriers must continue to file annual reports regarding their HAC compliance and must start posting HAC data on their websites.

New E911 Location Accuracy Requirements Stayed Pending Judicial Review

Sprint Nextel, T-Mobile USA, and Verizon Wireless appealed and requested a stay of the FCC's E911 location accuracy requirements to the U.S. Court of Appeals for the District of Columbia Circuit. The new rules require wireless carriers to demonstrate location accuracy compliance on an Economic Area basis by September 11, 2008. Within three years, wireless carriers will have to demonstrate location accuracy compliance on a Metropolitan Statistical Area and Rural Service Area basis and demonstrate public safety answering point ("PSAP") -level compliance in 75 percent of the PSAPs they serve. Wireless carriers must have full PSAP-level compliance within five years. According to the carriers, the FCC "imposed impossible requirements that have no support in the administrative record." The court agreed that a stay was appropriate pending judicial review, noting that the FCC's decision raises significant substantive and procedural issues. The court noted that "procedural irregularities – in particular, the service problems with notice" – alone satisfied the requirements for a stay.

The FCC had hoped to avoid the judicial stay by delaying carrier compliance with the upcoming September deadline by six months until March 11, 2009. According to the FCC, the stay was not appropriate because a five-month delay in the release and publishing of the new rules in the Federal Register made it difficult for carriers to seek timely judicial review of the rules.

Court Stays Back-Up Power Rules

At the request of wireless carriers, the U.S. Court of Appeals for the District of Columbia Circuit stayed the FCC's requirement that wireless carriers maintain back-up power for at least eight hours for cell sites pending review of the new regulations. Wireless carriers have argued that it is impossible to comply with the mandate and that the FCC violated the Administrative Procedure Act by not providing the industry sufficient notice that it was considering a back-up power requirement, and does not have authority to impose the mandate. Oral arguments before the court are scheduled for May 8, 2008.

Location-Based Privacy Best Practices Guidelines Proposed

CTIA – The Wireless Association proposes establishing "best practices" for guarding the privacy of users of wireless location-based services ("LBS") that track caller or user locations. CTIA's guidelines would create certain criteria for LBS providers, including informing users how their information will be used, disclosed, and protected. They would not apply to the disclosure of location information for law enforcement or enhanced 911 purposes. The guidelines would apply to carriers and other companies that provide content or applications that use LBS, but not wireless carriers that simply act as network providers. CTIA intends to consider the guidelines in April. The guidelines are based upon LBS privacy principles that CTIA proposed in a 2000 petition for rulemaking, which was rejected by the FCC in 2002.

PCS and AWS-1 Power Limits Modified to Facilitate Broadband Technologies

The FCC modified its technical rules governing broadband Personal Communications Services ("PCS") and Advanced Wireless Services ("AWS-1") to permit the use of a power spectral density ("PSD") model when measuring and calculating emissions and power limits. The FCC's decision is consistent with its 2007 decision to allow a PSD model in the commercial services portions of the 700 MHz band. According to the FCC, the ruling should offer PCS and AWS-1 operators greater technological flexibility to accommodate broadband technologies. The FCC also concluded that the PSD model could reduce network infrastructure costs, thus promoting the provision of enhanced wireless broadband services, particularly in rural areas. The FCC, however, declined to double the base station effective isotropic radiated power limits for PCS and AWS-1 licensees, which raised concerns regarding potential harmful interference to operators in adjacent spectrum bands. The FCC also decided not to modify its radiated power limit rules for services other than PCS and AWS-1 at this time.

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.

April 3, 2008	**Down payments and FCC Forms 601 and 602 due for Auction No. 73 (700 MHz).**
April 11, 2008	Effective date of new **slamming/third-party verification rules.**
April 14, 2008	Reply comments due on **Public Knowledge petition for declaratory ruling that text messages and short codes are Title II services or otherwise subject to non-discrimination requirements**.
April 14, 2008	Reply comments due on **cable horizontal and vertical ownership limits NPRM.**
April 15, 2008	Reply comments due for **ORBIT Act report**.
April 17, 2008	Comments due on **three USF reform NPRMs**: (1) Joint Board high-cost reform recommendation, (2) identical support rule, and (3) reverse auctions proposal.
April 17, 2008	**Final payments due for Auction No. 73 (700 MHz).**
April 17, 2008	Second public *en banc* **hearing on broadband network management practices** (at Stanford University).
April 21, 2008	Reply comments due on NPRM on **extension of additional numbering rules to interconnected VoIP providers**.
April 22, 2008	Reply comments due on **pole attachment NPRM.**
April 23, 2008	**Senate Commerce Committee hearing on phantom traffic.**
April 28, 2008	Comments due on **broadcast localism NPRM.**
May 1, 2008	**Quarterly Form 499-Q due** (Telecom Reporting Worksheet).
May 1, 2008	Deadline for certifying compliance with **rate averaging/rate integration rules.**
May 19, 2008	Reply comments due on **three USF reform NPRMs**: (1) Joint Board high-cost reform recommendation, (2) identical support rule, and (3) reverse auctions proposal.