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Legal Updates & News

Bulletins

Communications Law Bulletin, October 2007

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This issue of our Bulletin was delayed slightly so that we could include the items taken up at the Federal Communications Commission ("FCC" or "Commission") open meeting held on October 31, 2007. With the meeting now behind us, we present our summary of developments in October, along with our usual list of deadlines for your calendar.

In this issue:

Two FCC Orders Facilitate Bells' Video Offerings; AT&T's Battle with the Connecticut PUC Rages On

FCC Shuts Down Exclusive Video Deals for MDUs
On October 31, the FCC adopted an order banning exclusive deals for cable service to multiple dwelling units ("MDUs"), which the Commission determined injured competition in the video market. The order is controversial because it prohibits the enforcement of *existing* exclusivity clauses, as well as the creation of new exclusive arrangements. Cable companies have argued that the ban would deprive MDU residents of the lower costs associated with negotiated agreements covering an entire building. The Bell telephone companies, which stand to benefit from the ban when MDUs are opened up as potential subscriber bases for new Internet Protocol Television ("IPTV") offerings, argue that the residents of MDUs will benefit from increased competition in the video marketplace.

The next several weeks and months likely will bring lawsuits challenging the order, for several reasons. Some cable operators could challenge the FCC's authority to abrogate existing contracts. Affected parties also may challenge the order because the FCC, just four years ago, encouraged exclusive deals of the kind now prohibited, reasoning that such arrangements would encourage installation of wiring for broadband services in MDUs. The order also may be challenged as conflicting with the states' authority, given that 20 states already have passed legislation similar to the FCC's action. The FCC, however, has taken the position that the order merely extends the prohibition to states that have yet to pass legislation.

The ban currently applies only to some cable operators, including those using public rights-of-way and/or operating under franchise agreements. The Commission has opened a rulemaking to consider extending the exclusivity ban to other video services providers, such as private cable operators and direct broadcast satellite ("DBS") providers.

FCC Adopts Rules to Ensure Reasonable Franchising Process for Incumbent Video Providers
At the October 31 open meeting, the FCC extended to incumbent video providers rules that prohibit local franchising authorities from unreasonably refusing to award competitive video franchises. The Commission's first report and order on the issue, adopted in December of 2006, had provided such protections only to new video entrants.

AT&T's Battle with Connecticut PUC Continues
In mid-October, AT&T Connecticut sought an emergency declaratory ruling from the state superior court that the Department of Public Utility Control ("DPUC") erred in its order that required AT&T to obtain a cable license rather than a video franchise in order to offer IPTV. Granting the video franchise as requested rather than the cable license would have placed AT&T's U-verse video offering under less stringent regulation. The DPUC's decision was based on its finding that AT&T had been illegally offering cable TV for nearly a year without a cable franchise, and also was based on a July 2007 federal court ruling that U-verse is a cable TV service rather than an interactive Internet application. AT&T plans to exit the video market in the state if the DPUC's decision is not reversed, leaving behind more than 7,000 U-verse subscribers. The Connecticut Office of Consumer Counsel ("OCC") stepped into the fray in late October, urging the superior court to dismiss AT&T's petition.

AT&T has had better luck offering U-verse in other states. In late October, the Illinois Commerce Commission granted AT&T a statewide video franchise to offer U-verse anywhere in the state where it provides telephone service. The franchise was the first granted under a new state law passed over the summer.

Broadcast Developments

Media Ownership Rules Ignite Controversy
Perhaps this media ownership outtake, courtesy of Senator Byron Dorgan (D-N.D.), most accurately illustrates the challenges FCC Chairman Kevin Martin faces as he attempts to get the 32-year-old media ownership rules overhauled: Senator Dorgan stated that if the FCC issues a rulemaking on media ownership rules, there's going to be a "firestorm and I'm going to be carrying the wood."

Senator Dorgan directed his comment to Commissioner Jonathan Adelstein during a Senate Commerce Committee digital television ("DTV") hearing October 17. The Senator, however, was preaching to the choir; Commissioner Adelstein and Commissioner Michael Copps are both refusing to vote on the ownership-rule, public notice draft, currently circulating among the commissioners, until the FCC establishes an independent panel to review several minority ownership proposals and a vote is taken on the recommendations. The public notice draft includes an announcement that the last of six media ownership hearings would take place November 2 in Seattle. The meeting would be followed by a further rulemaking November 13, giving the public a chance to provide comments before the commissioners vote on the order December 18.

Chairman Martin's push to wrap up the comprehensive media ownership rules review by the end of the year, however, has spawned a firestorm of opposition from within and outside the Commission. Approximately 40 House Democrats appealed to Chairman Martin to extend the public comment period, stating that a full round of public commentary is essential given the amount of controversy surrounding the rule revamp. Several members of the Senate Commerce Committee said they want additional time to scrutinize media ownership, and Senator Bill Nelson (D-Fla.) and Senator Olympia Snowe (R-Maine) issued a joint letter asking Chairman Martin to finish the localism proceeding, which began in 2004, before tackling the ownership rules. Both Senators see the localism proceeding, which they believe should include a 2-3 month public comment period, as a key tool the Commission needs to move forward with the ownership review. Senator Dorgan and Senator Trent Lott (R-Miss.) threatened to use a rare legislative veto to block ownership deregulation if Chairman Martin succeeds in getting the commissioners to vote on the rewrite by December 18. Senator Dorgan and Senator Lott's warning that they will co-sponsor a resolution of disapproval reinforces the fact that concerns over the impact of changes to the media ownership rules transcend party lines. A more covert bipartisanship appears to be permeating the Commission as well. Although Republican Commissioners Robert McDowell and Deborah Tate do not necessarily oppose Chairman Martin's proposal, they are apparently withholding their votes while the talks between Chairman Martin and Democratic Commissioners Adelstein and Copps progress.

Opponents cite two major reasons for their concern: first, they contend that Chairman Martin is trying to force the review to a premature conclusion; and second, they believe that Chairman Martin's anticipated removal of the ban on companies from owning both a TV station and a newspaper in the same city, as well as letting companies own more radio or TV stations in the same town, will result in additional consolidation. Although the media ownership review commenced in June 2006, critics assert that the process, which included commissioning 10 media ownership studies costing the FCC a total of $300,000, was flawed from the beginning and premised on a bias in favor of deregulation. The result, they contend, is that the Commission is rushing to rewrite the rules without understanding the impact additional consolidation will have on minority and diversity ownership. They question why the Commission is looking to deregulation when the continuing trend of decreasing ownership diversity and increasing media outlet consolidation points to the need for tightening regulations.

Proponents of revamping the media ownership rules, such as Free State Foundation President Randolph May, give Chairman Martin credit for pushing for more relaxed media ownership rules in spite of the intense political pressure, calling the assertion that interested parties have not had enough time or opportunity to comment "silly." Others, including Senator John Sununu (R-N.H.), state that concentration is not *per se* bad. Deregulation supporters argue that loosening the ownership rules will improve local news because cross-ownership allows stations to pay for the coverage, and additional revenue incentivizes broadcasters to hire more reporters. Supporters contend that the FCC's media ownership reports show that cross-ownership of different media outlets and common ownership of more than one broadcast station within the same market promote the Commission's goals of competition, diversity, and localism.

The debate flared up again on October 25, when Chairman Martin angered critics further by announcing that the Commission would hold a second and final localism hearing on October 31, after the Commission's monthly meeting. The announcement was not completely unexpected: all the commissioners had previously agreed to the date. However, because Chairman Martin had linked the localism hearing to his obtaining a vote on the ownership-rules public notice, the commissioners assumed the hearing would be postponed. The assumption proved wrong, and the late notice gave commission members only one day to suggest witnesses for the hearing. The chosen time slot also attracted some criticism; the hearing was to begin after the FCC's monthly meeting, which commences at 9 a.m., and was to end at 2 p.m. Previous meetings were held in the evening when interested parties were not working, so they could attend to testify. Opponents question how a meeting on localism can be held without giving the local community adequate notice or opportunity to be heard.

On a Related Media Ownership Note

On October 25, Commissioner Copps sent Chairman Martin a formal letter requesting that the Commission open a proceeding on News Corporation's proposed takeover of Dow Jones & Company. News Corp., founded by Rupert Murdoch, owns hundreds of media properties in film, television, cable, magazines, newspapers, publishing, and other enterprises worldwide. The takeover does not involve the transfer of any FCC licenses, but would put News Corp. in control of one of the biggest broadcast networks and two of the five largest U.S. newspapers. It also would mean that a single company would hold the power to direct two top New York TV stations and two of the city's most popular newspapers. Commissioner Copps previously raised the issue of FCC review in August, contending that previous Commission actions exempting national newspapers from cross-ownership rules needed to be revisited.

Who's Driving the DTV Education Train? And, Do You Have the Authority to Drive?

In separate hearings on October 17, House and Senate Commerce Committee Democrats expressed concerns that no one was in charge of the digital television ("DTV") transition. The concern stems from the perception that although numerous separate entities, including the FCC and the National Telecommunications and Information Administration ("NTIA"), are implementing education plans, no one organization is ultimately responsible for the transition. Mark Goldstein, director of physical infrastructure at the Government Accountability Office ("GAO"), reinforced the assessment by informing the House Commerce Telecom Subcommittee that the GAO has determined that no comprehensive plan exists to inform consumers about the digital transition. He said that a voluntary program is not in the best interest of the government and that the GAO was working on an estimate of how much it would cost to set up a proper program.

Senate Commerce Committee Chairman Daniel Inouye (D-Haw.) proposed establishing a DTV task force to drive DTV transition efforts, which Commissioner Jonathan Adelstein endorsed. Both FCC Chairman Kevin Martin and NTIA Administrator John Kneuer balked at the task force idea, reassuring everyone that the FCC and the NTIA were working together to ensure that consumers were educated about the February 2009 transition. Chairman Martin said the FCC was in charge of overseeing the consumer education efforts while the NTIA was managing the converter box coupon program. Chairman Martin also tried to alleviate Democrats' apprehensions by pointing to an order circulating at the FCC that would require broadcasters to air public service announcements about the transition and would require TV receiver manufacturers to include information about the transition's impact on their equipment. He also said that the FCC planned to work with the NTIA to ensure that retailers participating in the converter box coupon program were properly training employees and informing customers.

Putting the FCC in charge may be risky, however, if the Commission does not have the power to adopt certain DTV consumer education rules. House Republicans sent a letter to Chairman Martin in early October asking the Commission to determine, by October 12, if it even has the authority to engage in education efforts. If the Commission determined it did not have sufficient authority to withstand a court challenge, Ranking House Telecom Subcommittee members, Reps. Joe Barton (R-Tex.) and Fred Upton (R-Mich.), offered to move up the Barton-Upton bill (H.R. 608), authorizing the Commission to implement education rules and set consumer education requirements like those stripped from the February 2009 DTV transition law. The letter also requested that Chairman Martin reveal how the Commission plans to rule in the ongoing consumer education proceeding and when the next video competition report would be released.

More Broadcast News

- Debate over the FCC's product placement rules picked up at the end of September. House Telecom Subcommittee Chairman Ed Markey (D-Mass.) sent a letter to Chairman Martin encouraging the Commission to enforce its product placement rules to protect viewers. The Communications Act of 1934 requires broadcast licensees to make an announcement when airing material for pay. The rule was extended to the cable industry. It was a video news release ("VNR") that Comcast's CN8 regional cable network aired in September 2006 that appears to have spawned the letter. The FCC fined Comcast $4,000 for not identifying the sponsor of the VNR. Comcast fired back, however, claiming the FCC's sponsorship identification rules did not apply to the VNR because neither Comcast nor its employees were paid to air the material.
- Five cable, videogame, music, and broadcast executives were subjected to a five-hour-plus marathon of questions about objectionable content. On September 25, the House Consumer Protection Subcommittee wanted to know what the industry was doing to ensure that music videos, radio shows, albums, and games avoided racial epithets, sexism, and cursing. Witnesses from Radio One, Viacom, Take-Two, Universal Music Group, and Warner Music stressed the plethora of voluntary steps the industry currently takes to warn parents, including refusing to air some content. The consensus from the panel, however, was that any type of an outright ban would be unconstitutional. The executives explained that it was not their role to censor the creative expression of artists and disclaimed responsibility for provocative content, because the performer controlled the material.

FCC Gives Consumers a Halloween Treat by Expanding Local Number Portability to VoIP

The FCC gave consumers a Halloween treat by extending local number portability requirements to Voice over Internet Protocol ("VoIP") providers at the Commission's October open meeting on October 31. Going forward, consumers will be able to keep their current local phone number when moving to or from an interconnected VoIP provider. All of the commissioners supported the order, touting it as an opportunity to further level the playing field by removing a known disincentive that kept consumers from switching carriers. In conjunction with the local number portability ruling, the FCC initiated a Notice of Proposed Rulemaking, seeking comment on additional VoIP numbering issues, including the allocation of porting costs.

The FCC order also addresses another source of consumer pain relating to number portability – the amount of time it takes to transfer or port the number. The Commission tentatively concluded that it would require all providers to complete simple ports within 48 hours. In addition, the Commission stated that telephone companies could not impede number porting by demanding excess information from the customer's new provider. The FCC determined that local number portability validations for simple number ports should be limited to four fields: (1) a 10-digit telephone number; (2) the customer account number; (3) a 5-digit zip code; and (4) a pass code, if applicable.

Finally, the FCC order re-imposes local number portability requirements on small wireline carriers, ensuring that their customers can keep their numbers as well. The decision addresses a D.C. Circuit stay of a 2005 order, which required the FCC to analyze the impact of local number portability on small entities under the Regulatory Flexibility Act.

Wireless Developments

Auction Rules and Procedures for 700 MHz Auction Released; Debates About 700 MHz Open Access and Designated Entity Requirements Continue
The Wireless Telecommunications Bureau released a public notice establishing deadlines, rules, and filing procedures for the upcoming 700 MHz auction, Auction No. 73. The short-form application deadline is December 3, 2007, upfront payments are due December 28, 2007, and the auction is scheduled to commence on January 24, 2008. The rules and filing procedures generally track those for previous auctions, with some notable exceptions.

Reserve prices, totaling more than $10 billion, have been set for each of five blocks of spectrum available for auction of the 700 MHz band. Licenses located in spectrum blocks for which the aggregate reserve price is not met in the initial Auction No. 73 may be subsequently reauctioned (designated as Auction No. 76). Auction Nos. 73 and 76 are being treated by the FCC as a single auction for purposes of assessing bidders' qualifications and applying the anti-collusion rules. The auction(s) also will be conducted under anonymous bidding rules, which will require bidders to focus even more intensely on compliance with the anti-collusion rules.

In related developments, Verizon Wireless withdrew its appeal from the U.S. Court of Appeals for the D.C. Circuit challenging the FCC's open access requirements imposed on the 700 MHz C Block licensee. CTIA, however, filed its own appeal challenging the same requirements. According to CTIA, the open access requirements are "at odds with prior Commission rulings and with the realities of the competitive marketplace for wireless services." CTIA is not seeking to delay the auction. Although FCC Chairman Martin circulated a new item that would allow the C Block licensee to block or disable applications or features on devices that it sells, the item has been opposed by Democratic Commissioners Michael Copps and Jonathan Adelstein. Chairman Kevin Martin also later stated that he does not want to weaken the open access requirements.

Chairman Martin also has circulated an item that would modify the 700 MHz rules to allow small businesses, or designated entities ("DEs"), to lease their 700 MHz spectrum on a wholesale basis without compromising their DE status. The draft order follows significant concerns expressed by industry members as well as members of the House Small Business Committee during a recent Congressional hearing. Under the existing rules, DEs would lose their DE status and bidding credits obtained at auction if they leased certain amounts of their spectrum to other parties on a wholesale basis. Several companies, however, have argued that providing wholesale services is necessary for small businesses to capitalize on market opportunities. Under the proposed new rules, a DE could not make more than 17 percent of its spectrum capacity available to any one entity. In addition, Council Tree Communications, Inc. has asked the U.S. Court of Appeals for the Third Circuit to reverse and set aside the DE rules as they apply to the 700 MHz auction (see below for an update on Council Tree's challenge of the DE rules as they apply to the Advanced Wireless Service auction).

FCC Loosens Back-Up Power Requirement
The FCC has loosened its requirement that larger local and wireless carriers provide back-up power for key network facilities, including central office facilities, cell sites, remote switches, and digital loop terminal equipment. The decision comes on the heels of significant opposition from the industry. Despite the FCC's decision to relax the rules, carriers still are concerned about compliance with the back-up power mandate. CTIA also has asked the U.S. Court of Appeals to stay the back-up power rules pending judicial review.

Under the modified rules, exempt larger local carriers and wireless carriers are exempt from the requirements if they demonstrate that compliance is precluded by: (1) federal, state, tribal, or local laws, (2) risk to safety of life or health, or (3) private legal obligations or agreements. Carriers also must file reports within six months providing an inventory of assets that would and would not comply with the new rules, and those where compliance is precluded under the three reasons above. Carriers then would have another six months to ensure that facilities are in compliance with the mandate.

Advisory Committee Makes Wireless Alert Service Recommendations
The FCC's Commercial Mobile Service Alert Advisory Committee recommended certain technical standards, protocols, and procedures to the FCC by which wireless carriers can voluntarily deploy emergency alerts under the Warning Alert and Response Network ("WARN") Act. The Committee recommended three types of alerts – (1) presidential, (2) those that notify subscribers of an "imminent threat to life and property," and (3) Amber Alerts. Wireless subscribers could opt out of the latter two categories.

The Committee also recommended that alerts be distributed on a county level, but urged carriers to target more granular levels if feasible. Although the alert system initially would be text-based, streaming audio and video and multimedia may be possible in the future. Therefore, the Committee recommended "fundamental technological neutrality" in alert service profiles and protocols. Additional recommendations included designating a government entity to authenticate and process alerts, which would be passed through a gateway to carriers, and creating an industry group that would convene regularly to address ongoing implementation issues. In addition, the Committee passed a controversial amendment that states that wireless carriers may pass on to subscribers additional costs associated with developing and manufacturing mobile devices that can transmit alerts.

Pursuant to the WARN Act, upon receiving the Committee's recommendations the FCC has 180 days to adopt technical requirements for the alert service. The FCC then must complete a proceeding within 120 days that would allow carriers to start transmitting alerts and would require carriers not participating in the alert service to notify subscribers.

Carriers Challenge "Home Market Exception" to New Automatic Roaming Rule
Several parties filed petitions seeking reconsideration of the "home market exception" to the recently adopted new automatic roaming rule. Under the exception, wireless carriers are not required to provide automatic roaming services to other carriers if they have access to spectrum in the same geographic area, regardless of whether that spectrum has been built out. Although the FCC adopted the exception to promote facilities-based competition, challengers argue that it ignores market realities and actually will harm consumers and competition. The exception is particularly troubling for carriers who cannot use spectrum purchased in the Advanced Wireless Service ("AWS") auction until the spectrum is cleared of incumbents. Similar issues could arise in the 700 MHz auction context because high bidders may not have access to their spectrum until the DTV transition date in February 2009.

Battle Regarding AWS Designated Entity Rules Continues
In late September, the U.S. Court of Appeals for the Third Circuit dismissed a lawsuit filed by Council Tree, Bethel Native Corp., and the Minority Media and Telecommunications Council ("Appellants") challenging new FCC DE rules that were adopted shortly before the Advanced Wireless Service Auction in 2006. The Third Circuit's decision was based solely on jurisdictional and procedural grounds, noting that the FCC had not yet acted on the Appellants' petition for reconsideration of the same rules and that the lawsuit was filed before the underlying order was published in the Federal Register. The Appellants more recently petitioned the Third Circuit for a writ of mandamus on an expedited basis to direct the FCC to act on the Appellants' pending petition for reconsideration. Council Tree indicated that if the FCC denies reconsideration, the Appellants will refile their appeal with the Third Circuit.

USF Audit Showing High Erroneous Payment Rates Seems to Have Little Effect on High-Cost Reform Efforts

An analysis by the FCC's Office of Inspector General ("OIG") of universal service fund ("USF") audits has revealed a high percentage of "erroneous payments" made under the program. The OIG defines an "erroneous payment" as "any payment that should not have been made or that was made in an incorrect [over or under payment] amount under statutory, contractual, administrative, or other legally applicable requirements."

The OIG reviewed more than 450 USF audits conducted by commercial audit firms and overseen by the USF administrator and the FCC. The OIG concluded that 20.6 percent of payments to those seeking rural health care funds were incorrect. Similarly, payments under the high-cost, schools and libraries, and low-income mechanisms were incorrect 16.6 percent, 12.9 percent, and 9.5 percent of the time, respectively. The mechanism governing contributor payments had the lowest error rate at 5.5 percent. Auditors noted that errors were often caused by inadequate documentation and internal auditing processes and the lack of proper data collection, reporting, and monitoring mechanisms.

Efforts to reform the high-cost USF mechanism, however, appear to be making slow progress. Although Commissioner Deborah Taylor Tate stated that the FCC is expected to act in the near future on a six-month-old proposal by the Federal-State Joint Board on Universal Service ("Joint Board") to temporarily cap the amount of support competitive eligible telecommunications carriers ("ETCs") may receive, there have been no other indications that a decision is imminent. One member of the Joint Board also noted that its target date of November 1 to send additional recommendations on reforming the high-cost mechanism to the FCC will likely slip. Efforts on Capitol Hill also appear to be struggling. Although USF-related bills are pending, telecom reform is not a top priority, and some Congressional members expressed doubt that the bills would make it out of committee.

Private Equity Buyout of Alltel Approved with Novel USF and E911 Conditions

The FCC approved the sale of Alltel Corp. ("Alltel"), the fifth-largest wireless phone company in the United States, to private equity firms TPG Capital (formerly Texas Pacific Group) and GS Capital Partners (the private equity arm of Goldman Sachs). The deal, valued at approximately $27.5 billion, is the largest leveraged buyout in the history of the telecommunications industry. The FCC, however, imposed novel and controversial universal service and enhanced 911 ("E911") conditions on the transaction. Alltel, a publicly traded company based in Little Rock, Arkansas, will be a privately held company after the transaction. The parties expect to close before Thanksgiving.

The FCC concluded that the transaction will serve the public interest, convenience, and necessity and will not harm competition in the mobile telephony market. The FCC, however, also stated that "the transaction raises issues regarding universal service and E911" and imposed conditions on the approval. Specifically, the high-cost universal service support Alltel receives as a competitive eligible telecommunications carrier ("ETC") is capped at the June 2007 level of support. The cap applies until the FCC comprehensively reforms the methodology by which high-cost support is distributed, which is subject to a pending rulemaking proceeding. Alltel also will not be subject to the cap if it immediately: (1) files cost data revealing its per-line costs of providing service in universal service supported areas, and (2) demonstrates that it complies with new E911 public safety answering point ("PSAP") location accuracy standards.

Several FCC commissioners expressed concern about the universal service and E911 conditions imposed on the transaction, particularly given that these issues were not substantively raised in the record of the proceeding. Moreover, Commissioner Robert McDowell stated that the universal service condition "prejudices the Commission's open docket considering universal service support distribution" and could "skew future treatment of similarly-situated parties." Similarly, Commissioner Michael Copps stated that the universal service condition "is even more piecemeal than what the Joint Board recommended in May" and that the condition may be "an even greater hindrance to rational, comprehensive [universal service] reform." Commissioner Jonathan Adelstein also called the E911 provision an illogical "'jack in the box' surprise," noting it was unclear "how Alltel might fulfill this condition given that the Commission currently has an open proceeding addressing the details of how carriers must implement PSAP-level accuracy."

The Realities of Imposing TRS Requirements on VoIP Providers

The FCC's Consumer and Governmental Affairs Bureau ("CGAB") granted interconnected VoIP providers a limited, six-month waiver of the telecommunications relay service ("TRS") rules. TRS enables individuals with hearing or speech disabilities to access the public telephone system and communicate with voice telephone users through a communications assistant at a TRS relay center. The Commission imposed 711 TRS calling requirements on interconnected VoIP providers, those connected to the public switched telephone network ("PSTN"), earlier this summer. The rules require VoIP providers to route incoming calls to the "appropriate" relay provider based on the caller's location and the relay provider's location. The realities of VoIP service, unlike PSTN service, mean customers' telephone numbers are not necessarily correlated to their geographic location. The CGAB granted a limited waiver of the requirement to route the call through the "appropriate" relay center in those instances when the interconnected VoIP provider cannot determine which relay center is the most appropriate because the caller's telephone number does not correspond to the caller's actual location. The limited waiver does not remove the requirement that interconnected VoIP providers provide 711 TRS services. The same VoIP-related telephone number and location correlation issues are complicating the handling of emergency 711 TRS calls on the outbound end. TRS providers handling emergency calls from VoIP customers are, in some instances, unable to match the geographic location of the 711 caller with the "appropriate" Public Safety Answering Point ("PSAP"). As a result, the CGAB granted a similar limited, six-month waiver to TRS providers receiving 711 emergency calls, temporarily lifting the requirement to route calls through the "appropriate" PSAP. The waiver only applies to emergency 711 calls placed via text telephone ("TTY") by an interconnected VoIP user. In conjunction with the limited waivers, the CGAB is seeking public comment on the petitions for waiver.

Questions Aired Concerning FTC and FCC Antitrust and Regulatory Jurisdiction

The Federal Trade Commission ("FTC") shares jurisdiction over antitrust enforcement with the Department of

Justice ("DOJ") and lacks jurisdiction to regulate common carrier communications services. Both of these jurisdictional peculiarities were the subject of comment in September and October.

On the regulatory front, a panel of the Federal Communications Bar Association considered whether the FCC's various forbearance orders have left a regulatory vacuum that the FTC should fill. Repeating a theme that has been sounded by others at the FTC, one panelist, Maureen Ohlhausen of the FTC Policy Planning Office, told the October 17 panel that the exemption from FTC regulations for communications common carriers should be removed. In the absence of that exemption, the FTC presumably could regulate communications services without regard to their status as information services or telecommunications services under the Communications Act, and without attempting to discern the jurisdictional significance of FCC decisions to forbear from regulating those services.

The separate issue of antitrust jurisdiction was raised in a September 25 hearing before the House Judiciary Committee Antitrust Task Force. Representatives of both the DOJ and the FTC agreed that the overlapping authority of the two agencies to review mergers for antitrust compliance presents a challenge for interagency coordination. FTC Chairman Deborah Majoras suggested that Congress should more clearly define the two agencies' antitrust jurisdiction.

Recent Enforcement Activity Ranges from Universal Service and Regulatory Fee Obligations to Sponsorship Identification Requirements

On September 28, the FCC's Enforcement Bureau ("Bureau") released an order adopting a consent decree with TELUS Communications Co. ("TELUS") terminating an enforcement proceeding arising from possible violations of carrier registration requirements and universal service and other contribution obligations. TELUS, a Canadian carrier, provides international telecommunications service to and from the United States. On January 6, 2006, the Bureau issued a letter of inquiry ("LOI") directing TELUS to respond to questions relating to its apparent failure to meet its registration, filing, and payment obligations. TELUS replied and registered with the FCC shortly thereafter. As of the effective date of the decree, TELUS paid all universal service and other contribution obligations and regulatory fees that it owed.

TELUS also agreed to make a voluntary payment to the U.S. Treasury of $450,000 and to develop an internal compliance plan regarding its reporting and contribution obligations. The plan is to include the creation of a compliance manual, to be submitted to the Bureau within 60 days, a compliance training program for any employee engaged in compliance-related activities, and an annual report to the Bureau verifying compliance with the decree. The plan terminates after two years.

On October 18, the FCC released a Notice of Apparent Liability for Forfeiture ("NAL") against two broadcasters, Sonshine Family Television, Inc. ("Sonshine") and Sinclair Broadcast Group, Inc. ("Sinclair"), for repeated violations of the sponsorship identification requirements in connection with political broadcasts. The NAL arose from thousands of complaints that political commentator Armstrong Williams was paid by the Department of Education ("DoEd") to promote the No Child Left Behind ("NCLB") Act in programs that he produced, including "The Right Side with Armstrong Williams" ("RSAW"), or in which he appeared, including "America's Black Forum" ("ABF"), without disclosing the DoEd sponsorship.

In response to the LOIs, Williams' media company, The Graham Williams Group ("GWG"), a public relations firm, identified broadcast licensees whose stations aired programs in which Williams discussed the NCLB Act. In response to a second round of LOIs, Sonshine admitted that one of its stations aired five episodes of RSAW on a total of ten occasions, in which Williams discussed the NCLB program, without any sponsorship identification. Sinclair admitted that nine of its stations aired an episode of ABF, during which Williams discussed the NCLB program, also without any sponsorship identification.

Sonshine argued that it had no reason to believe that any sponsorship identification was necessary because of the "nominal" amount of $100 it was paid for each broadcast and because it was not informed that anyone received any consideration for including any message intended for broadcast in connection with the programs. The FCC concluded, however, that the receipt of any money in exchange for the broadcast of material triggers the sponsorship identification rules. Moreover, contrary to another Sonshine argument, only the terms "sponsored by" or "paid for" meet the requirement; the term "presented by" does not clearly inform the audience that it is hearing or viewing matter for which money has been paid. Sinclair argued that no identification was required because it neither received nor was promised any consideration in connection with the ABF broadcast and had no reason to believe that anyone else received any consideration for including a political message in connection with the broadcast. The FCC concluded, however, that the sponsor of any "political broadcast matter" must be identified under its rules, whether or not any consideration is paid for the broadcast.

Accordingly, the FCC proposed a forfeiture of $40,000 for Sonshine's apparent violations, representing the base amount of $4,000 for each of ten broadcasts, and $36,000 for Sinclair's violations, representing the base amount of $4,000 for the broadcast of the ABF program over each of nine Sinclair stations. On the same day, the FCC also released a citation issued to Williams and GWG on July 23, 2007, in connection with the same investigation. The citation concludes that they failed to notify the licensees broadcasting the NCLB-related material of the DoEd sponsorship of that material, in violation of Section 507 of the Communications Act. The citation states that if either Williams or GWG violates the Act in the same manner in the future, the FCC may impose forfeitures not to exceed $11,000 for each such violation.

The FCC is not the only agency imposing penalties for communications-related violations. It was reported on October 5 that the Ohio Public Utilities Commission ("PUC") fined Buzz Telecom Corp. ("Buzz") $251,000 for repeated violations of state telephone marketing rules and canceled its state operating authority. The PUC found that Buzz engaged in slamming and deceptive sales practices and failed to respond to complaints. The PUC had ordered Buzz to stop signing up new customers in December, but Buzz ignored the order. Buzz also has a history of ignoring FCC requirements, as reported in last month's Bulletin.

Order Granting Neutral Tandem, Inc.'s Direct Interconnection Petition Reported to Be Circulating Among FCC Commissioners

On October 16, it was reported that an order granting Neutral Tandem, Inc.'s request for direct interconnection with Verizon Wireless is circulating on the eighth floor of the FCC. On August 2, 2006, Neutral Tandem, a competitive tandem switching service provider, filed a petition requesting that the FCC order Verizon Wireless to interconnect directly with Neutral Tandem to enable it to provide more efficient tandem services to carriers exchanging traffic with Verizon Wireless. Neutral Tandem asserts that Verizon Wireless is the only major carrier that refuses to interconnect directly with Neutral Tandem and that dependency on legacy incumbent local exchange carrier tandems creates a critical choke point in the nation's telecommunications infrastructure, exposing the public to serious homeland security risks. Verizon Wireless argues that Neutral Tandem requests the extraordinary relief of reinstating a commercial contract that has lawfully expired and that, under Section 251(a)(1) of the Communications Act, carriers have the right to choose whether to connect "directly or indirectly" with other carriers.

There was speculation that an order might be adopted at the October 31 open meeting, resulting in a flurry of FCC lobbying by wireless carriers attempting to head off or at least limit the scope of the order. CTIA and Sprint Nextel argued that the FCC should not overturn longstanding precedent giving wireless carriers flexibility in choosing the most efficient and economical method of direct or indirect interconnection, and CTIA cautioned the FCC not to resolve the dispute in a way that prejudges the outcome of the pending intercarrier compensation reform rulemaking. Verizon Wireless discounted Neutral Tandem's arguments that the requested relief would add to network redundancy, stating that additional switches like those employed by Neutral Tandem do not promote network diversity in the absence of separate connecting facilities. No action concerning the petition appeared on the FCC's "sunshine notice" for the October 31 meeting, and it is not clear when the FCC will act.

Disputes over Access Charges Continue to Absorb Regulatory Attention, from "Traffic Pumping" Issues to the Treatment of Internet Protocol Traffic

While the FCC's long-running intercarrier compensation reform rulemaking remains pending, the current access charge regime continues to spawn new issues. On October 2, the FCC released a Notice of Proposed Rulemaking ("NPRM") to investigate cost, demand, and tariffing issues raised by the ongoing "traffic pumping" dispute (reported in the July/August 2007 edition of this Bulletin). The NPRM notes that chat lines, conference calling, and similar services can generate substantial growth in access traffic to local exchange carriers ("LECs") serving such providers and that the interexchange carriers ("IXCs") delivering the traffic pay access charges for its termination by the LECs. The access rates of the incumbent LECs ("ILECs") and competitive LECs ("CLECs") serving the providers generating increased terminating traffic are typically quite high because they are small carriers serving rural areas with low demand based on historical levels.

The purpose of the NPRM is to examine whether existing tariff rules provide incentives and opportunities for LECs to increase access demand far above the level assumed in setting the access rates, with the result that the relatively high tariffed rates are no longer just and reasonable, as alleged by IXCs in a number of pending complaints. IXCs also allege that these LECs share their access revenues with the service providers generating the demand growth. Such growth allegedly results in LEC earnings far above the authorized rate of return.

The NPRM accordingly requests comment on:

- the activities generating increased access traffic, how the services are provided, and compensation between the parties involved;
- data bearing on the FCC's assumption that average costs per minute fall as demand grows, resulting in excessive earnings if demand increases substantially above the level assumed in setting access rates, including any additional costs accompanying increased demand and the effect of increased demand and costs, if any, on LEC rates of return;
- the FCC's tentative conclusion that a rate of return ("ROR") ILEC that shares revenue with, or provides other compensation to, a customer or provides traffic stimulation activity, and bundles those costs with its access costs, is engaging in an unreasonable practice in violation of Section 201(b) of the Communications Act (the "Act") and AT&T's contention that such payments violate Section 201(b) whether or not the LEC seeks to recover them in its access rates;
- the FCC's tentative conclusion that, because streamlined tariffs are conclusively "deemed lawful" (and thus immune from retroactive damages liability) unless they are suspended, it should have the opportunity to review the relationship between rates and costs through the filing of a revised tariff whenever a ROR ILEC experiences significant increases in traffic, as well as proposed language in ROR ILEC tariffs committing them to file revised tariffs if demand increases a specified amount within a specified period and what those triggers should be;
- whether the FCC should forbear from enforcing the "deemed lawful" provision of Section 204(a)(3) of the Act for any mid-course tariff filing triggered by an increase in demand;
- whether ILECs that leave the National Exchange Carrier Association ("NECA") traffic-sensitive pool should be required to stay out for a certain period, or even permanently, in order to prevent ILECs from gaming the tariffing process by leaving the pool, tariffing high rates based on low demand, and then rejoining the pool after generating high demand to avoid having to file reduced individual rates;
- whether similar concerns require regulatory action with regard to price cap ILECs and CLECs, or categories of intercarrier compensation other than interstate access, such as reciprocal compensation.

Comments are due 30 days after publication of the NPRM in the Federal Register, and reply comments 15 days later.

On the same day, the FCC granted in part a complaint filed by Qwest Communications Corp. against Farmers and Merchants Mutual Telephone Co. ("Farmers"), a rural ILEC, alleging similar traffic-pumping activities. Qwest claimed that Farmers had left the NECA pool, filed higher individual terminating access rates, and then deliberately increased its terminating traffic volume through traffic-generating agreements with conference calling companies. The increased access traffic resulted in an excessive rate of return, in violation of Section 201(b) of the Act. Farmers also compensated the conference calling services.

The FCC found that Farmers exceeded its authorized ROR during the period from July 2005 to June 2007, but denied damages to Qwest because Farmers' access tariffs had been filed on a streamlined basis under Section 204(a)(3) of the Act and were thus conclusively "deemed lawful" for the entire period that they were in effect. The FCC denied Qwest's request to declare Farmers' access rates void *ab initio* and thus not deemed lawful, finding that Farmers did not violate any tariffing or other FCC rules in basing its access rates on low historical demand. Although the FCC "agree[d] that Farmers manipulated the Commission's rules to achieve a result unintended by the rules," Qwest did not identify any improper accounting or other violations and did not allege that Farmers' revenue-sharing arrangements with the service providers constituted a *per se* violation of Section 201(b).

Following the FCC's order denying Qwest's complaint, Farmers and other rural ILECs requested that the Iowa Utilities Board ("IUB") suspend parallel complaint proceedings brought against them by Qwest in order to allow parties time to evaluate how the FCC's ruling narrowed or disposed of issues before the IUB. The IUB denied the request, agreeing with Qwest that the FCC did not settle issues falling within the state's jurisdiction and that if parties believe that certain issues have been resolved, they should petition for dismissal of just those issues.

On October 23, Feature Group IP ("FGIP") filed a petition requesting that the FCC grant forbearance relief that would remove the obligation to pay switched access charges on certain categories of calls involving what FGIP terms "voice-embedded Internet-based communications," or "voice-embedded IP" calls. FGIP provides local exchange service to providers of voice-embedded IP communications – a category that includes VoIP and Internet applications that integrate voice with data, video, or other features. FGIP seeks relief from interstate and intrastate switched access charges assessed by LECs with which it exchanges such traffic. FGIP takes the position that the particular applications for which it seeks relief should not be assessed access charges because the traffic involved is "enhanced," and thus covered by the "enhanced service provider exemption." If, however, the FCC ultimately does not adopt that position, FGIP requests forbearance from Section 251(g) of the Communications Act and related FCC regulations so that such traffic is subject only to reciprocal compensation under Section 251(b)(5), and not interstate or intrastate access charges.

In particular, FGIP seeks relief from switched access charges for three categories of voice-embedded IP traffic:

1. traffic originating in IP format and terminating on the PSTN;
2. traffic originating on the PSTN and addressed to an IP-based end point; or
3. traffic that originates and terminates on the PSTN but is connected to an IP-based platform during the call, and for which there is a change in content or "non adjunct-to-basic enhanced functionalities" are offered to the user.

FGIP also indicates that at least the first two categories are limited to calls in which the point of interconnection between itself or another LEC serving a voice-embedded IP provider and the LEC serving the PSTN user is located in the same local access and transport area as the PSTN end point, although the petition is somewhat ambiguous on this restriction.

FGIP argues that the requested forbearance would "ensure that consumers and users of Voice-Embedded Internet-based communications services and applications are allowed to employ new Internet-based technologies and applications to the fullest extent possible and that providers and enablers of [such] applications are given the assurance that they may deploy and offer such services without the threat that they will be mired in the archaic access charge quagmire that currently plagues legacy telecommunications." FGIP claims that immediate relief is needed because ILECs "are exercising their continuing . . . stranglehold over access to their existing base of consumers" by "attempting to extend the access charge regime to Voice Embedded Internet-based communications services and applications." FGIP concludes that forbearance relief is justified because the Section 251(b)(5) reciprocal compensation regime that will govern the traffic covered by the request will ensure that rates and practices are just and reasonable and that consumers are protected and because elimination of access charges for the covered services will promote competition and innovation. The FCC has not yet released a public notice requesting comments on the petition.

FCC Modified 17/24 GHz BSS Rules to Provide Additional Flexibility

On September 28, in an effort to provide additional flexibility to broadcasting satellite service ("BSS") providers, the FCC on its own motion modified its earlier decision establishing licensing and service rules for BSS in the 17.3-17.8 GHz and 24.75-25.25 GHz ("17/24 GHz") bands. In the earlier decision, the FCC required 17/24 GHz BSS space stations to operate at specified orbital locations spaced at four-degree intervals. On reconsideration, the FCC modified this requirement by allowing 17/24 GHz BSS space stations to operate at an offset of up to one degree from the previously specified orbital locations, without being required to reduce power or accept additional interference.

Broadband Mapping, Wireless Rate Integration, and DTV Bills Are Introduced in Congress, While the House Telecom Subcommittee Approves E911 Amendment

At the end of October, the House Commerce Committee approved bills addressing broadband mapping (HR-3919) and E911 service by VoIP providers (HR-3403). The House broadband mapping bill would require the FCC to collect data on broadband services by nine-digit zip code, census tract, or a "functional equivalent." The bill also would direct NTIA to implement a searchable broadband mapping program and a $300 million grant program encouraging service providers to build new broadband facilities in unserved areas.

The House VoIP E911 bill would require all voice over Internet protocol ("VoIP") providers to offer E911 service. The bill was amended to clarify that existing FCC rules governing VoIP and 911 would remain effective and that VoIP providers would have the same interconnection rights as wireless carriers.

Meanwhile, the Senate Commerce Committee passed a measure (S-1853) that would enable state and local governments to build their own wireless broadband networks. The bill was amended to prohibit the use of federal money for municipal broadband projects, and to allow companies to bid on these projects.

Additionally, House delegates from Guam, Puerto Rico, and the U.S. Virgin Islands introduced a measure (HR-3565) requiring rate integration for wireless interstate toll charges to insular areas. The bill would require the rates charged by wireless carriers for interstate services to be regulated the same as the rates charged for interstate interexchange telecommunications services.

On the broadcast front, a bill (SB-2125) requiring better coordination among the FCC, NTIA, and other agencies on DTV education was introduced in the Senate. The bill also would create a federal task force to examine methods to assist the elderly to install digital converter boxes. Additionally, the bill would require broadcasters to air daily public service announcements on the DTV transition.

California and Pennsylvania Streamline Regulatory Review of Mergers and Other Transactions

Regulatory review of mergers, acquisitions, and security transactions will be reduced as a result of recent changes in California and Pennsylvania. In California, Governor Schwarzenegger signed into law AB 918, which modifies Cal. Pub. Util. Code Section 829 to exempt telecommunications companies that are not subject to rate of return regulation (except those that also provide electricity or gas service) from California Public Utilities Commission ("CPUC") review of stock issuance and security transactions. The new law will be effective on January 1. Proponents of the exemption argued that CPUC review serves no purpose, as it is the competitive companies' shareholders, not ratepayers, that bear the risk of imprudent security transactions.

In a separate matter at the CPUC, an administrative law judge has recommended partial approval of an AT&T request for an exemption from Section 851 of the Public Utilities Code. This statute requires CPUC review and approval of all sales, leases, and other encumbrances of property that is used to provide utility services. The ALJ rejected AT&T's request for a complete exemption, on procedural grounds, stating that an application by a single carrier is not the appropriate mechanism for granting a broad statutory exemption and that such requests should be considered in more general rulemakings. The ALJ did, however, extend to AT&T and other incumbent carriers that are not subject to rate of return regulations the more limited exemptions to Section 851 that the CPUC previously had granted to competitive carriers. Under those existing rules, approval of non-controversial transactions may be requested using the advice letter process rather than through a formal application and, if not protested, is automatically granted after 40 days. The full CPUC may vote on the ALJ's recommended decision at its regularly scheduled agenda meeting in early December.

In Pennsylvania, the state Public Utilities Commission granted Level 3's request to open a rulemaking to streamline its review of mergers and acquisitions between telecommunications carriers. The PUC rejected, however, Level 3's proposal that the streamlined procedures apply only to competitive companies. The proposed rules issued by the PUC would require applications to be approved within 60 days, or 30 days for pro forma transactions, and would apply to both competitive and incumbent telecommunications carriers. The PUC is expected to issue an order establishing the schedule for comments on the proposed rules in the near future.

California Public Utilities Commission Issues Its Phase II Video Franchising Decision

On October 4, the CPUC issued its Phase II decision implementing the Digital Infrastructure and Video Competition Act ("DIVCA"). This decision adopts build-out requirements for state video franchise holders with less than one million customers and requires all franchise holders, regardless of the number of customers, to comply with the same statutory "safe harbor" build-out benchmarks and obligations to provide video services in a non-discriminatory manner. DIVCA imposes specific build-out obligations on the larger franchise holders but allows the CPUC some discretion for the smaller companies. Large franchise holders must have facilities in place to serve specified percentages of households in the franchise area within a certain number of years after commencing service; the specific time lines vary depending on whether the company is deploying fiber or some other technology. In addition, DIVCA requires the large franchise holders to serve a certain threshold level of low-income customers. The smaller carriers will be subject to the same requirements but may request exemptions from offering video services in high-cost areas and may apply for build-out schedules that are more specific to the demographics of their smaller franchise areas.

The Phase II order also adopted, over the strong objections of the video providers, an additional requirement that all franchise holders report the actual number of video subscribers by census tract. The CPUC already required the providers to report the number of subscribers per census tract that are offered service, but it claims that it needs this additional information to determine if the franchise holders are discriminating by income levels. The companies have objected on the grounds that the additional information is competitively sensitive and that DIVCA does not provide the CPUC with the authority to request it. At present the CPUC has granted four video franchises, to Verizon, AT&T, Wave Broadband, and Cox Communications.

Opposition to Wireless Early Termination Fees Gains Momentum

Opposition to long-term contracts for wireless services and early termination fees continues to get attention from Congress and state regulators. While denying that they were responding to the recent sensitivity on these issues, Verizon and AT&T announced that they will prorate their early termination fees when customers end contracts before they expire. Although other carriers are expected to follow Verizon and AT&T, their announcements did not did provide much comfort to the consumer representatives testifying at the Senate Commerce Committee's hearings on the bill introduced by Senators Amy Klobuchar and Jay Rockefeller. As noted in recent CLBs, the Klobuchar/Rockefeller bill would mandate the prorating of early termination fees, require carriers to provide potential customers with accurate coverage maps, and limit the practice of extending contracts when customers make service changes. Support for the bill generally follows party lines, with

Democrats supporting it and Republicans siding with carriers in favor of less regulation. Despite party lines, however, Senator Mark Pryor (D. Arkansas) introduced an industry-friendly bill that would require uniform, nationwide rules for wireless carriers. Despite the recent Congressional activity, industry watchers doubt that either bill will move this year, as the members look to the FCC to follow through on its promises to consider the reasonableness of early termination charges.

Some states are not waiting for the FCC to act, however. Minnesota Attorney General Lori Swanson sued Sprint Nextel in state court, alleging that the company illegally extended customer contracts without full disclosure or consent when customers made small changes to their accounts – such as changing calling plans, adding services, or replacing equipment. Swanson also testified at the Commerce Committee hearings in favor of the Klobuchar/Rockefeller bill, stating that "there needs to be more transparency and more fundamental fairness in consumer cell phone transactions." A wireless consumer protection bill enacted in Minnesota in 2004 subsequently was struck down by a federal court on the grounds that it would have regulated wireless rates.

Consolidation in Wireless Industry Continues

Deutsche Telecom AG announced that its T-Mobile USA ("T-Mobile") unit will acquire rural mobile phone operator SunCom Wireless Holdings Inc. ("SunCom") in a strategic deal valued at $2.4 billion in cash and assumed debt. The deal is expected to create around $1 billion in synergies, primarily by reducing roaming fees and operating costs (T-Mobile has had a roaming agreement with SunCom since 2004), but also through growth in acquired markets. SunCom serves about 1.1 million customers mainly in South Carolina, North Carolina, Tennessee, Georgia, Puerto Rico, and the Virgin Islands. The deal will allow T-Mobile to increase its network coverage capacity by 15 million potential customers to 259 million in 98 of the top 100 U.S. markets.

The T-Mobile / SunCom deal follows a trend of major cellular service providers acquiring rural operators, including AT&T's pending acquisition of Dobson Cellular and Verizon's agreement to purchase Rural Cellular. Some analysts believe that national carriers will continue to acquire strategic roaming partners, while others feel that the acquisition spree will end because few independent targets remain.

Series of Telco and Cable Incidents Reinvigorate Calls for Net Neutrality and Trigger Consumer Petition and Complaint

A series of apparent content-blocking incidents by telephone and cable companies have raised new calls to consider net neutrality restrictions, including filings at the FCC seeking rulings on some of the incidents.

First, Verizon Wireless banned text messages (consisting of customer-requested Short Message Service ("SMS") alerts) from a NARAL Pro-Choice America program. Verizon initially rejected NARAL's application for an SMS short code, citing the subject's "controversial or unsavory" nature. After a petition from NARAL and a news story in the New York Times, Verizon changed its position and accepted the NARAL application, stating that the initial rejection was an "incorrect interpretation" of an internal policy. This change in course, however, did not stop House Commerce Committee Chairman John Dingell (D-Mich.), FCC Commissioner Copps, and several net neutrality advocates from criticizing the initial blocking of customer-requested content and citing the incident as an example of the need for net neutrality legislation.

Second, both Verizon and AT&T reportedly have revised provisions in their Internet access service agreement that were interpreted by some customers to permit service cutoff if the customers criticized the companies. In both cases, the provisions limited use of the Internet to damage the name or reputation of the service provider. Both companies have stated that the provision was never intended to prevent criticism or free expression, but rather to bar only fraudulent impersonation and similar illegal activities.

Third, the Associated Press conducted nationwide testing and reported that Comcast is blocking BitTorrent and other peer-to-peer file-sharing (including the sharing of legal content) by its users. Although many ISPs take steps (such as slowing down certain forms of traffic) to manage the traffic on their networks, Comcast appears to have been blocking certain types of traffic entirely without informing customers of its practices. Further, Comcast reportedly accomplished this blocking by having company computers masquerade as those of other users to send falsified messages that caused the file transfers to fail. Several days later, Comcast acknowledged "delaying" some subscriber Internet traffic, but claimed that any blocking was temporary and that the intention was to improve Internet access for other customers.

Following these incidents, Senators Byron Dorgan (D-N.D.) and Olympia Snowe (R-Maine) raised concerns and requested a Senate Commerce Committee hearing into these incidents to determine if more federal regulation is needed.

In addition, following the Comcast incident, a coalition of consumer groups and law professors made two filings at the FCC. The first is a petition for declaratory ruling, seeking clarification of the FCC's Internet Policy Statement. Specifically, the groups seek a ruling that an Internet Service Provider ("ISP") that intentionally degrades an application violates the Policy Statement, and that such conduct is not permitted under the Policy Statement's "reasonable network management" exception. The petition further seeks clarification that secretly degrading an Internet application (as Comcast reportedly did) is also a deceptive practice. The second filing, made by a subset of the consumer groups, was a formal complaint against Comcast for this activity. The complaint seeks a temporary injunction, a permanent injunction, and a forfeiture of $195,000 (the statutory maximum of $97,500 for a single continuing violation by an entity that is not a common carrier, broadcast licensee, or cable operator, multiplied by two for the two types of violations alleged – i.e., the discrimination under the Policy Statement and the deceptive practice) for each Comcast subscriber affected by the conduct.

Third Circuit Upholds FCC Classification of Wireline Broadband Internet Access Service as an Information Service

As most observers expected, the U.S. Court of Appeals for the Third Circuit has upheld the FCC's decision to classify wireline broadband Internet access service (such as digital subscriber line or "DSL" service) as an information service rather than a telecommunications service. In light of the FCC's earlier decision to classify cable modem as an information service (which was upheld by the Supreme Court in the *Brand-X* decision), and given the similarities of the two services from the perspective of end users, the court was not expected to overturn the FCC's decision.

Forbearance Process Under Attack as FCC Grants AT&T Broadband Forbearance Petition

Acting under statutory deadline, in early October the FCC granted AT&T's petition for substantial forbearance for certain enterprise broadband services. Leading up to and following this grant, however, the forbearance process itself has come under attack from various quarters.

The FCC vote on the AT&T petition – announced minutes before the midnight deadline – was 3-2 (with the Democrats dissenting). The ruling granted substantial forbearance for certain enterprise broadband services, but did not grant forbearance for traditional time division multiplexing ("TDM")-based technology such as DS-0, DS-1, and DS-3 connections. The scope of the forbearance relieves AT&T of certain tariffing and other dominant carrier obligations, but retains basic common carrier regulation for the affected services. (The FCC also released a substantially similar order the next week granting Embarq and Frontier essentially the same broadband forbearance as AT&T.) The AT&T grant thus was substantially more narrow than the earlier Verizon grant-by-operation-of-law in 2006 (which resulted in a 2-2 tie and inaction on the petition, and which was just argued before the D.C. Circuit in October). As a result, the FCC stated in the AT&T order that it intends to issue an order soon on the Verizon petition to narrow the relief to correspond with that granted to AT&T. Multiple parties have already filed appeals of the AT&T grant in the D.C. Circuit.

The fallout from the Verizon grant-by-operation-of-law has resulted in several calls for amendment of the forbearance statute and/or procedures. Our September 2007 edition of this Bulletin described the petition of a group of CLECs seeking reform of the forbearance procedures ("Broadband Forbearance Proceedings Subject of Intense Focus at FCC"). In October, several members of Congress criticized the forbearance process during a House Telecom Subcommittee hearing on special access issues. The criticisms are that the process is not sufficiently transparent, thus preventing appropriate Congressional oversight and court review (when petitions are granted without order, such as happened in the Verizon case). These criticisms were followed by at least two different letters from members of the House (including the House Judiciary Committee) to the FCC urging a careful review of the forbearance process. In the AT&T forbearance grant, Commissioners Copps and Adelstein also criticized the operation of the forbearance process. Finally, in late October, House Commerce Committee Chairman John Dingell (D-Mich.) introduced a bill, co-sponsored by House Telecom Subcommittee Chairman Ed Markey (D-Mass.), which would eliminate the "deemed granted" provision from the forbearance statute. It is unclear, however, if the House will have time for a hearing or markup on the bill before adjourning for the Thanksgiving recess.

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.

November 14, 2007 Reply comments due on NPRM regarding **spectrum etiquette for**

	unlicensed devices in 915 MHz band.
November 19, 2007	**Hearing aid compatibility report** due.
November 19, 2007	**Short-form filing window opens for Auction Nos. 73 and 76 (700 MHz).**
November 20, 2007	**Auction seminar for Auction Nos. 73 and 76 (700 MHz).**
November 23, 2007	Effective date of **BSS rules**.
November 28, 2007	Reply comments due on **roaming FNPRM.**
November 30, 2007	Comments due on **program access and retransmission consent NPRM regarding program tying**.
December 3, 2007	**Short-form filing window closes for Auction Nos. 73 and 76 (700 MHz).**
December 5, 2007	Reply comments due on **17/24 GHz BSS reverse band FNPRM.**
December 8, 2007	Expected **effective date for new CPNI rules**.
December 17, 2007	Reply comments due on **program access and retransmission consent NPRM regarding program tying**.
December 28, 2007	**Auction No. 73 upfront payments due (700 MHz).**