MORRISON | FOERSTER

Legal Updates & News

Bulletins

Communications Law Bulletin, July-August 2008

September 2008

Related Practices:

- Communications & Media Law

Communications Law Bulletin, July-August 2008

In this issue:

Introduction

Summer is over, and many of our readers are returning from well-earned vacations. This double issue of our Bulletin is intended to help all of you catch up on what's been happening while you were at the beach. As you will learn, the Federal Communications Commission ("FCC" or "Commission"), the courts, and the legislatures were far from idle this summer. The following presents developments from all of these sources, along with our usual list of deadlines for your calendar.

Broadcast Developments: FCC Examines Embedded Advertising; Super Bowl Indecency Case Remanded to FCC

FCC Seeks Comments and Proposes Rules on Embedded Advertising Techniques
On June 26, the FCC released a combined Notice of Inquiry ("NOI") and Notice of Proposed Rule Making ("NPRM") on the topic of sponsorship identification rules and embedded advertising. Comments are due on September 22, with replies due October 22.

The sponsorship identification rules were implemented to protect the public's right to know who is paying for an advertisement. They require broadcasters to announce the advertisement's sponsor once during the programming, and the announcement must remain on the screen long enough to be read or heard by an average viewer.

As a result of technological advances that allow viewers to skip commercials, the broadcasting industry has increasingly made use of embedded advertising, which includes both product placement (the placement of commercial products as props in a program) and product integration (the integration of a product into the dialogue and/or plot of a program). These embedded advertisements may appear in television dramas, reality shows, and news and interview programs. Because embedded advertising is more sophisticated and subtle than traditional advertising, it creates new issues with regard to the sponsorship identification rules.

In the NOI, the Commission asked for comment on the following issues:

- The current trends in embedded advertising;
- How embedded advertising currently interacts with the sponsorship identification rules;
- Whether the FCC should require the disclosure of the sponsor of an embedded advertisement at the same time the advertisement is shown;
- First Amendment implications of changes to the current sponsorship identification rules; and
- Whether the sponsorship identification rules should apply to the rebroadcast of feature films that contain embedded advertising.

In the NPRM, the Commission proposed a rule that applies political advertising requirements to sponsorship identification announcements; i.e., lettering of a particular size shown for a particular amount of time. The Commission also requested comment on whether it should make rules to explicitly prohibit embedded advertising in children's programming, extend embedded advertising regulation to cable programmers, and extend embedded advertising regulation to on-air endorsements of products or services by radio hosts.

Indecency Fines Levied Against CBS Remanded
In mid July, the United States Court of Appeals for the Third Circuit remanded the $550,000 fine, levied against CBS for the 2004 Super Bowl "wardrobe malfunction," back to the FCC. CBS was penalized by the Commission for its airing of a live glimpse of Janet Jackson's breast during the Super Bowl halftime show in 2004. The court ruled that the FCC changed its longstanding precedent without proper notice when it imposed a fine for a "fleeting" indecent image. Janet Jackson and Justin Timberlake, the two performers involved in the incident, were not CBS employees, and thus CBS had less control over that portion of the live broadcast. Justice Scirica, delivering the court's opinion, ruled that the FCC was incorrect under the First Amendment to hold CBS liable for the actions of "independent contractors" where, as here, CBS had no advance knowledge of the indecent image.

This ruling is a victory, and a relief, for broadcasters because it provides some assurance against liability under the FCC's indecency rules for unplanned, live images and utterances that were not planned or condoned by the broadcaster. FCC Chairman Martin criticized the Third Circuit's ruling, and expressed hopes the Commission will be vindicated when a Second Circuit indecency case goes before the Supreme Court in fall 2008.

FCC Rules Against Comcast on Net Neutrality Front

At its open meeting on August 1, 2008, the FCC ruled on a 3-2 vote (Chairman Martin was joined by the two Democratic commissioners) that Comcast's traffic management practices contravened important federal policies protecting the open nature of the Internet. Specifically, the FCC held that Comcast's practice of monitoring customer content and blocking peer-to-peer connections – not targeted to either periods of congestion or heavy users – unduly interfered with Internet users' right to access lawful content and applications of their choice. The FCC found that Comcast has anticompetitive motives to interfere with such traffic, and rejected Comcast's defense that the practice constituted reasonable network management, in part because the practice was not tailored to address the stated problem of network congestion. Finally, the FCC found that the harms were compounded by Comcast's failure to disclose its practices to its customers.

Although the FCC did not impose a fine on Comcast, the order requires Comcast to: (a) disclose the details of its network management practices to the FCC; (b) submit a compliance plan describing how it will stop these network management practices by the end of the year; and (c) disclose to the FCC and customers the network management practices that will replace the existing practices. The FCC cautioned that a failure to comply with these steps will result in an automatic interim injunction against the current practices, and the matter will then be set for hearing.

In his dissent, Commissioner McDowell questioned whether the FCC has the necessary jurisdiction to address this complaint (given that it has adopted only an Internet Policy Statement, but no rules, and given that Comcast is not a telecommunications carrier), and Comcast appears to be considering an appeal. Such an appeal, if successful, might also encourage Congress to reconsider the need for net neutrality legislation to confirm the FCC's authority to enforce its Internet Policy Statement.

Meanwhile, in Canada, a similar battle is brewing. The Canadian Internet Policy and Public Interest Clinic at the University of Ottawa ("CIPPIC") has asked Canadian privacy authorities to investigate whether Internet service providers ("ISPs") are illegally using deep packet inspection technology to gather subscriber information for use in targeted advertising. CIPPIC filed complaints at the Office of the Privacy Commissioner against several ISPs, and previously filed a complaint against Bell Canada with the Canadian Radio-television and Telecommunications Commission ("CRTC").

Comments in FCC's regulatory fees proceeding are due September 25, 2008. Reply comments are due October 27, 2008.

Recent State Tax Decisions Regarding Telecommunications

Courts in Maryland and Washington recently have issued important state and local tax decisions with respect to the taxation of telecommunications services.

The two decisions from Maryland both address the evolving nexus standards for subjecting persons and transactions to state and local taxes.

1. The Court of Appeals of Maryland in *AT&T Communications of Maryland, Inc. v. Comptroller*, 950 A.2d 86 (Md. June 12, 2008), held that a long distance carrier was not liable for collecting and remitting Maryland sales tax imposed on 900-type information services provided by out-of-state vendors. The court held that substantial nexus under the Commerce Clause was not created by reason of the out-of-state seller using the common carrier, AT&T, to deliver its information service, even though the common carrier provided the out-of-state seller with certain services ancillary to, and in addition to, the delivery of the service. Central to its holding was the court's disagreement with the Maryland Tax Court (an administrative body) and the courts below that the several 900 service-related activities performed by AT&T exceeded the customary role of the common carrier, sufficient for AT&T to become the co-vendor with, or agent for, the information providers in order to create a substantial nexus for them.

First, the court found that AT&T's assignment of a 900 number to the vendor and its actual transport of the vendor's information describe functions that are the very definition of a telecommunications common carrier. The court then found that certain duties imposed on AT&T with regard to 900 number carriage under the Telephone Disclosure and Dispute Resolution Act (e.g., reviewing vendor advertisements and content and providing dispute resolution services for vendors' customers) did not act to promote or in some other way assume a vested interest in the success of the information vendors' ventures such that AT&T exceeded its role as a common carrier. Finally, the court determined that AT&T's billing and collection services on behalf of the information service providers were not meaningfully distinguishable from services typically provided by common carriers such as FedEx, UPS, and USPS in analogous contexts. Thus, the court concluded that the facts established only that AT&T acted as a common carrier with regard to the 900 number transactions at issue, and thus, AT&T could not be held responsible for the 900 number sales and use tax on transactions between Maryland consumers and the information services vendors without violating the Commerce Clause of the U.S. Constitution.

2. In our May 2008 Bulletin, we discussed the decision by a Maryland federal district court that held that Vonage America, Inc., a VoIP service provider, "leases, licenses, or sells a telecommunications line" to its Baltimore customers and is subject to the Baltimore Telecommunications Tax. *Mayor and City Council of Baltimore v. Vonage*, 2008 WL 1757753 (D. Md. Apr. 16, 2008). More recently, that court has issued another decision that not only denies Vonage's motion to reconsider the original decision, but also decides what constitutes sufficient nexus over Vonage's service to subject Vonage to the tax. *Mayor and City Council of Baltimore v. Vonage*, 2008 WL 2906633 (D. Md. July 24, 2008).

Vonage argued in its motion that application of the telecommunications tax to Vonage violated the Commerce Clause requirements that the activity taxed have a substantial nexus with the taxing jurisdiction and the tax be fairly apportioned. As to Vonage's argument that reliance solely upon a customer's billing address in Baltimore to establish the requisite connection between the City and the taxed activity (sale of a telecommunications line) fails the substantial nexus requirements set by the United States Supreme Court in *Goldberg v. Sweet*, 488 U.S. 252 (1989), the court concluded that a billing address indicates a significant commercial connection with a locality and that the *Goldberg* test (requiring the origination or termination of a wireline telephone call charged to a service or billing address within that jurisdiction) did not apply in the context of Vonage's nomadic VoIP service allowing calls to be made almost anywhere, but that the presence of a billing address in the taxing locality is *sufficient* to constitute "substantial nexus." The court also concluded that Baltimore's taxation of a transaction billed to a Baltimore address – where the billing address is the only currently recognized nexus that Vonage has with any locality – does not burden interstate commerce.

Regarding Vonage's apportionment argument that it was exposed to a significant risk of multiple taxation because most of its facilities and the "telecommunications lines" at issue were outside Maryland, the court *found* no threat of *real* multiple taxation because there was no evidence that states where the facilities were located have taxed or will tax Vonage for the same transaction taxed by the City, nor was Baltimore's tax out of all appropriate proportion to Vonage's business transacted in the City.

3. The Washington decision *addressed* whether a municipality could impose a telecommunications tax upon an Internet access service.

In *Community Telecable of Seattle, Inc. v. City of Seattle*, 186 P.3d 1032 (June 26, 2008), the Supreme Court of Washington held that a provider of high-speed cable Internet service, Comcast, was not subject to the City of Seattle's telephone utility tax. The Supreme Court found that Comcast provided an "internet service" as defined under RCW 82.04.297, which service is plainly excluded from the definition of "network telephone service" under RCW 82.04.065(2), the statutory basis for the City's tax. Accordingly, the Supreme Court concluded that Comcast cannot be taxed as a "telephone business" subject to the City's telephone utility tax with regard to its service. In doing so, the court reversed the Washington Court of Appeals' decision in *Community Telecable of Seattle, Inc. v. City of Seattle*, 136 Wn. App. 169 (2006), which had considered the data transmission component of Comcast's high-speed Internet access service separately from the Internet service, and determined it to be subject to Seattle's tax. The Supreme Court rejected that determination, instead concluding that the transmission component is integral to the provision of the Internet service and cannot be taxed separately from such nontaxable service. However, the court cautioned that its holding was not intended to allow a "telephone business" to avoid the utility tax entirely simply by providing an Internet service, but that a telephone business can still be charged the tax to the extent it provides telephone service.

D.C. Circuit Rebukes FCC in Directing It to Act on ISP-Bound Traffic by November 5

On July 8, the U.S. Court of Appeals for the D.C. Circuit granted a petition for mandamus filed by Core Communications, Inc., requesting that the court compel the FCC to explain its intercarrier compensation rules governing local dial-up calls to Internet service providers ("ISPs"). The court set a deadline of November 5, 2008 for the FCC to respond to the court in the form of a final appealable order that explains the legal authority for the FCC's interim rules that exclude local calls to ISPs ("ISP-bound traffic") from the reciprocal compensation requirements of Section 251(b)(5) of the Communications Act.

The rules at issue concern local calls to ISPs typically served by competitive local exchange carriers ("CLECs"). Usually, these calls are initiated by a subscriber of an incumbent local exchange carrier ("ILEC") serving the same local calling area, thereby obligating the ILEC to pay reciprocal compensation to the CLEC for delivering the call to its ISP subscriber. The FCC was concerned that CLECs, in partnership with ISPs, were realizing reciprocal compensation windfalls because dial-up Internet traffic is one way. The FCC's interim rules, imposed in 2001, were designed to limit regulatory arbitrage by CLECs serving ISPs by reducing the level of compensation far below typical reciprocal compensation rates.

Those rules were the FCC's second attempt to address the issue of compensation for the termination of ISP-bound calls, the first attempt having been vacated and remanded by the D.C. Circuit in 2000. The 2001 interim rules, based on an alternative legal rationale, capped the level of compensation for terminating local ISP-bound calls at $0.0007 per minute. These interim rules were supposed to be in place for only three years (until 2004). In 2002, however, the D.C. Circuit again rejected the FCC's legal basis for its actions on this issue. Although the court remanded the rules, it did not vacate them, finding that there might "well be other legal bases" for adopting them.

With no action from the FCC responding to the 2002 remand, Core filed a mandamus petition in 2004, which was denied without prejudice in 2005, based on the FCC's promises of forthcoming action. After "'significant additional delay'" of another two years, Core filed for mandamus relief again in 2007. This time, the court granted the petition on July 8, noting "six years of promises and further delay" since its most recent remand of the ISP-bound traffic issue. The court noted that, by delaying action on its remand, the FCC not only "nullified our determination that its interim rules are invalid," but also deprived Core of an order that could be challenged, which "insulates its nullification of our decision from further review." "At some point, promises are no longer enough, and we must end the game of 'administrative keep-away.'" Noting FCC counsel's promises just prior to and during oral argument of "imminent action," the court stated that "[w]e have heard this refrain before," and concluded that "[h]aving repeatedly, and mistakenly, put our faith in the Commission, we will not do so again."

The court accordingly set a hard deadline of November 5 for final FCC action explaining the legal rationale for the interim rules in order to avoid automatic vacatur of those rules on November 6, 2008. In a concurring opinion, Judge Griffith noted that the court's previous open-ended remand had allowed the FCC to delay providing a valid explanation of its action, "and six years later we are forced to clean up a mess we helped create. There is a lesson here." Both sides professed satisfaction with the decision. Core stated that it is "thankful" for the ruling, and the FCC stated that it is "pleased the court has granted us what we asked for," namely, six more months to release a final order. The D.C. Circuit, however, may be less patient with the FCC in the future.

FCC to Reexamine Regulatory Fee Methodology

In August, the FCC adopted and released its annual order on regulatory fees. Although little has changed for the fees due this fall, the FCC has committed to a reexamination of the fees for future years in two respects.

With respect to the international bearer circuit ("IBC") fees payable by submarine cable operators and international facilities-based carriers, the FCC committed to issue an order addressing IBC fee reform by the end of this September (to be effective for fees due in the fall of 2009). The issue of IBC regulatory fees – and the market distortions resulting from the application of a capacity-based fee in today's high-capacity marketplace – has been pending before the FCC for two or three years without resolution. In this year's order, Commissioner McDowell joined the two Democratic commissioners to insist that the FCC address this long-standing issue. The order states that reform is necessary and long overdue, and that the IBC fees are far too high. The order also notes that the FCC will address non-compliance with the current IBC fee requirements in the context of this reform.

With respect to all categories of fees – wireline, wireless, international, cable, broadcast, etc. – the order included an NPRM to reassess all of its fee methodologies. The FCC noted that it has not systematically reassessed its fee structure for over ten years, and that the relative fee burdens have shifted since 1995 – notably, wireline, wireless, and international providers are contributing a higher proportion of the regulatory fee burden today, while cable providers and broadcasters are contributing less. The NPRM therefore seeks comment on ways to make the fees more equitable. The NPRM asks:

- Are there categories that bear too large a regulatory fee burden? Are others not paying their fair share?
- Should the FCC review its regulatory fees on a periodic basis?
- Should the FCC assess fees using a single methodology across all fee categories?
- How can the FCC improve compliance? Should it implement an audit regime for regulatory fees?
- Should some categories of licensees qualify for reduced regulatory fees or an exemption from such

fees?

With respect to specific regulatory fee categories, the NPRM seeks comment on the following specific issues:

- Should wireless carriers be included in the interstate telecommunications service provider ("ITSP") fee category with other long distance providers?

- Should interstate and international toll calls made from wireless handsets be treated as revenue subject to the ITSP fee (even if local and intrastate calls from wireless handsets remain in the separate wireless fee category)?

- Should the FCC add, delete, or reclassify any additional services? In particular, should WiFi service providers be subject to regulatory fees?

Because the FCC's regulatory fees are a "zero-sum" game – Congress dictates the total amount of fees that must be collected – the NPRM will undoubtedly tee up a battle of conflicting interests among the various industry segments. Comments are due September 25, 2008, and reply comments are due October 27, 2008.

Wireless Developments

FCC Urged to Reinstate Spectrum Cap
Seven years after the FCC removed the spectrum aggregation limit, rural wireless carriers are now urging the FCC to reinstate the cap. The Rural Telecommunications Group ("RTG") filed a petition for rulemaking arguing that the current wireless marketplace differs dramatically from the marketplace when the FCC determined that a limit on a carrier's spectrum holdings was not necessary. RTG suggested that wireless carriers be restricted to 110 MHz of spectrum below 2.3 GHz per county.

According to RTG, the wireless industry has undergone "unprecedented consolidation" typified by the significant spectrum gains AT&T, Inc. and Verizon Wireless made during the recent 700 MHz band auction. "In the absence of a spectrum cap, Verizon and AT&T will continue to grow unchecked and rural and regional wireless carriers will be adversely affected," which in turn will harm consumers, who will have fewer options for service.

Reinstating the spectrum cap has garnered support from several quarters, including FCC Commissioner Michael Copps and several Democrats in Congress, such as Representative Edward Markey (D. Mass.), Chairman of the House Telecommunications and the Internet Subcommittee.

AWS-3 A and 700 MHz D Block Auctions Likely Delayed Until New Administration Takes Office
Although FCC Chairman Kevin Martin had planned to auction before the end of the year additional Advanced Wireless Spectrum in the 2155-2175 MHz band ("AWS-3") and the 700 MHz D Block, he recently conceded that the auctions were unlikely to occur before 2009. Because Martin is unlikely to continue to be chairman after the new White House administration takes office in January, the auctions would take place under the new administration and a different chairman.

Both the AWS-3 and the 700 MHz D Block auctions have been highly controversial. The FCC already has missed a self-imposed deadline of August 14 to complete its AWS-3 rulemaking amid significant opposition from the wireless industry due to interference concerns. Chairman Martin also reportedly was called to the White House earlier this summer to defend his proposal that the AWS-3 licensee be required to provide free national broadband service. Chairman Martin had planned to complete the rulemaking on the re-auction of the 700 MHz D Block in August, although that timetable also has slipped.

Appeals Court Delays Decision on Backup-Power Mandate
A three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit unanimously decided that it would hold in abeyance wireless carriers' appeal of the FCC's rules requiring carriers to install back-up power at cell sites and other facilities. According to the court, the appeal was not yet ripe because the Office of Management and Budget ("OMB") has not reviewed and approved the new rules' reporting requirements. The rules can become effective only after OMB approval.

The court's decision generally pleased the wireless industry. The court had previously stayed the rules pending the appeal, and the most recent decision keeps the stay in place. Carriers objected to the new rules because in many cases compliance would be impossible or prohibitively expensive.

FCC Takes Further Action on Emergency Alerts

The FCC has taken several recent steps in its implementation of the Warning, Alert and Response Network ("WARN") Act, which sets forth various deadlines by which the FCC must establish a process for wireless carriers to elect to transmit emergency alerts to subscribers. Under the FCC's WARN Act rules, wireless carriers may voluntarily elect to participate in the Commercial Mobile Alert System ("CMAS").

In a Second Report and Order ("Second R&O") in PS Docket No. 07-287, the FCC concluded that wireless carriers participating in the program are not required to send test alert messages to subscribers. Members of the wireless industry had expressed concern that test messages could confuse customers and overtax networks. However, carriers "must find alternate methods of ensuring that subscriber handsets will be able to receive CMAS alert messages." The Second R&O also requires participating carriers to engage in monthly testing of the delivery of CMAS messages to their Commercial Mobile System ("CMS") Provider Gateways and within the carriers' own networks. Carriers also must test periodically the interface between the Federal Alert Gateway and each CMS Provider Gateway. In addition, under the Second R&O, non-commercial educational and public television stations must install equipment that creates a redundant, alternate path that enables the distribution of geo-targeted CMAS alerts to wireless carriers. An Order on Reconsideration and Erratum to the Second R&O clarified that participating wireless carriers must begin developing and testing the CMAS within ten months after the government releases the interface design by which they would connect to the Federal Alert Aggregator.

In a Third Report and Order ("Third R&O"), the FCC adopted customer notification requirements for carriers not participating in the CMAS, as well as guidance on how carriers can recover costs associated with participating in the CMAS. The Third R&O explains that the WARN Act requires non-participating carriers (or those only partially participating) to "provide clear and conspicuous notice at the point-of-sale." The FCC made it clear that this requirement applies even if third-party agents act as sellers of service. The FCC, however, did not adopt specific language for displaying such a notification. Existing customers should be notified through "means of an announcement amending the existing subscriber's terms and conditions of service agreement," although carriers need not obtain a written or verbal acknowledgment from existing customers that they received the notice. With regard to cost-recovery, the FCC concluded that the WARN Act prevents carriers from imposing transmission charges on customers for receiving alerts or charging customers for the capability to receive the alerts. However, carriers may recover "CMAS-related development and implementation costs."

FCC Needs More Time to Address Roaming

Amid continuing criticism, the FCC pulled from its August 22 open meeting agenda an item that would have modified roaming rules, adopted in 2007, that exclude carriers from receiving automatic roaming rights from other carriers in areas where the requesting carrier has spectrum usage rights. Several carriers had sought reconsideration of this so-called "home market exclusion," arguing that it harmed competition, although the largest U.S. carriers, AT&T and Verizon Wireless, opposed the petitions. The FCC can expect the wireless industry to continue lobbying the issue.

Chairman Kevin Martin had circulated a draft order proposing to provide Personal Communication Service ("PCS") and cellular carriers one year of relief from the home-market exception, while giving AWS and 700 megahertz band licensees four years. However, the other FCC commissioners asked for more time to consider the controversial proposal.

FCC Begins Rulemaking to Implement NET 911 Act

The FCC issued an NPRM regarding the implementation of the New and Emerging Technologies 911 Improvement Act of 2008 ("NET 911 Act"). The NET 911 Act requires the FCC to complete a rulemaking within 90 days of the enactment to require all carriers (typically incumbent local exchange carriers) to give VoIP service providers access to capabilities needed to deliver 911 calls to the appropriate public safety answering points. The NET 911 Act was signed into law on July 23, 2008. The FCC must issue new regulations by October 21, 2008.

The NPRM seeks comment on the capabilities for which the NET 911 Act affords VoIP service providers a right of access and how VoIP voice service providers can exercise those rights. In addition, the NPRM asks how the FCC can ensure that those capabilities are made available at the same rates and on the same terms and conditions that are provided to commercial mobile service providers. In addition, the NPRM seeks comment on how the regulations would be impacted by the technical, network security, or information privacy requirements that are specific to VoIP service providers.

The FCC established a short pleading cycle in order to meet its statutory deadline on the new rules. Comments are due not later than September 9, 2008, and reply comments are due not later than September 17, 2008.

Video Competition Developments: Sixth Circuit Upholds FCC's Franchising Rules

The United States Court of Appeals for the Sixth Circuit upheld the FCC's video franchising rules in a late June ruling. The court found that the FCC did not overstep its congressionally delegated authority when it ordered local franchising authorities not to delay issuance of franchise to telephone companies and other non-cable video competitors beginning to emerge in the marketplace. The ruling was handed down in *Writing in Alliance for Community Media v. FCC*, in which a coalition of local franchising authorities and the cable industry association National Cable & Telecommunications Association ("NCTA") argued that Congress did not intend to give the FCC authority over the local franchising process. The court disagreed, and declined to find that video franchising disputes are within the exclusive jurisdiction of the courts. Judge Cole opined that "[t]he availability of a judicial remedy for unreasonable denials of franchise applications does not foreclose the agency's rulemaking authority over section 621(a)(1)," and the conclusion that the "FCC possesses jurisdiction over section 621(a)(1) coextensive with that of the courts is buttressed by the Supreme Court's analogous decision[s]" in *AT&T v. Illinois Utility Board* and *U.S. v. Haggar Apparel Co.*

FCC Chairman Martin, AT&T, and Verizon applauded the court's decision. NCTA, although displeased, stated publicly that it had no plans to appeal.

Happenings on the Hill

Bill Prohibiting New State Wireless Taxes
A Senate bill introduced in mid-July would prohibit states and local governments from imposing new taxes on wireless telephone services and wireless infrastructure for five years. The wireless industry's trade group, CTIA – The Wireless Association, voiced support for the bill.

House Hearing on FCC Forbearance Bill
The House held a hearing in mid-July on H.R. 3914, a bill to eliminate the "deemed granted" provision in FCC forbearance proceedings. The "deemed granted" provision requires the FCC to grant a petitioning party's request unless it acts by the statutory deadline of one year (although a 90-day extension can be invoked). Legislators moved to introduce legislation in response to the FCC's automatic grant of Verizon's request for relief from broadband-price rules requirements after Commission inaction during the statutory time period. Representatives Dingell (D-Mich.) and Markey (D-Mass.), among other sponsors, felt that the FCC's failure to deny Verizon's request would harm consumers. House Republicans who oppose the bill argue that the "deemed granted" provision curbs the FCC's regulatory reach and is appropriate in an increasingly competitive telecommunications marketplace.

President Signs VoIP E911 Law
On July 23, President Bush signed into law H.R. 3403, a bill that mandates that VoIP subscribers receive E-911 services. The law also, among other things, recommends a plan to migrate to a national IP-enabled network and guarantees VoIP providers the same liability protection as other carriers for routing of 911 calls. Public safety groups applauded passage of the measure.

House Considering Bill on FCC Processes
The House Commerce Committee Chairman is considering draft legislation to reform FCC administrative processes. The bill's drafter, Representative Barton (R-Tex.), seeks to promote transparency and expedite FCC decisions. Among other things, the bill would require that the text of proposed rules, rather than just a description of the rules, be put out for notice and comment. The FCC would be required to release the specific language of a proposed regulation, provide a 30-day public comment period, 30 additional days to comment on proposed changes, and 30 days during which the FCC would release its own comments on such proposals.

Universal Service Program Developments

There has been a wide range of activity related to the universal service program on a number of fronts this summer.

GAO Report
The Government Accountability Office ("GAO") released a report on July 10 severely criticizing the FCC's management of the universal service high-cost program. The GAO states that the FCC has not established adequate performance goals or measures for the program, thereby hindering "the FCC's ability to assess the risk of noncompliance with program rules and ensure cost-effective use of program funds." Without such goals or measures, "the Congress and FCC are limited in their ability to make informed decisions about the future of the high-cost program." As a result of the program's structure, support is distributed inconsistently across rural America. Smaller rural carriers receive more funding than larger non-rural carriers serving similar high-cost

areas. Because the high-cost program provides support to both incumbents and competitors, "it creates an incentive for competition to exist where it might not otherwise occur." The GAO recommends that the FCC establish short- and long-term performance goals and measures for the program and procedures to produce cost-effective use of high-cost funds.

Leaders of the House Energy and Commerce Committee reacted strongly to the report. Chairman John Dingell (D. Mich.) commented that "[p]roper management of the Universal Service Fund is critical and apparently has been sorely lacking." Ranking member Rep. Joe Barton (R. Tex.) stated that "with some continued bipartisan effort, we can prod the FCC into adopting" the GAO's recommendations. In an appendix to the report, the FCC responded and pledged to issue an NOI "promptly" seeking information on how to further bolster its management of the high-cost program and more clearly define its goals. According to trade press reports, the promised NOI has been approved on circulation by the commissioners.

House Oversight Committee Inquiry
In the wake of the GAO report, Chairman Henry Waxman (D-Cal.) of the House Oversight and Government Reform Committee sent letters in late July to 24 carriers receiving high-cost support, questioning how they spend the funds. The carriers included the top ten recipients of high-cost support as well as the carriers receiving the highest support per line. Chairman Waxman noted the skepticism in the GAO report as to "what the program is accomplishing, whether it has clear objectives and whether it has effective controls over expenditures." He stated that the Committee is concerned about the size and growth of the universal service fund ("USF"), which should be subject to more oversight. He asserted that Congress needs more information on how recipients spend subsidies and how they disclose their activities to consumers and regulators. The letters seek information on data management, sources of subsidies, the status of applications for eligible telecommunications carrier designation, whether the carriers have ever been audited with regard to their use of high-cost funding, how they account for their spending of the funding, and whether they apply any funding to broadband deployment and, if so, how much. Waxman also asked the carriers whether they consider the availability of universal service support funding in planning network buildout or when analyzing potential mergers or acquisitions and what percentage of company revenue comes from high-cost support.

Several carriers stated in their responses to Waxman that the current distribution of high-cost support is ineffective because smaller carriers receive many times more support per line than larger carriers. In some cases, smaller carriers receive thousands of dollars in high-cost support per line annually, while Qwest's annual support averages slightly over $30 per line. Qwest and Windstream suggested in their responses that high-cost support should be distributed entirely on the basis of the high-cost nature of the service area rather than the size of the provider.

Audio Bridging Service Providers Must Have Begun Filing Form 499-Q as of August 1
On July 17, the FCC released a Public Notice reminding audio bridging service providers of their obligation to begin filing FCC Form 499-Q as of the August 1 filing deadline. The FCC determined in the *InterCall Order*, releasedon June 30, that audio bridging services are now required to contribute directly to the USF, necessitating submission of Forms 499-A and 499-Q. Entities that had not previously registered with the FCC and the Universal Service Administrative Company ("USAC") were required to do so prior to the August 1 deadline.

E-Rate Service Eligibility
On July 31, the FCC released a Public Notice ("PN") and related NPRM regarding services eligible for funding under the schools and libraries universal service support mechanism, also known as the E-rate program. E-rate funding enables service providers to offer eligible services to schools and libraries at discounted rates. The PN seeks comment on a draft eligible services list ("ESL") for Funding Year ("FY") 2009, which begins on July 1, 2009, based on the FCC's current rules. The draft ESL was submitted by USAC, which manages the USF. Among the changes proposed by USAC, the draft ESL clarifies that Ethernet is an eligible digital transmission technology, e-mail archiving is not an eligible component of an e-mail service, softphones are not eligible for discounts, and Video-On-Demand servers are not eligible for discounts. The draft ESL also proposes to list intranet web hosting as an ineligible feature of an eligible web hosting service. Based on the comments received in response to the PN, the FCC will issue another PN with the final ESL clarifications at least 60 days prior to the opening of the E-rate funding application filing window for FY2009.

In the NPRM, the FCC proposes to change the rules under which the ESL is determined for FY2009 in order to add certain categories of services or make other changes. The NPRM seeks comment on whether the ESL should include filtering software, dark fiber, text messaging, firewall service, anti-virus/anti-spam software, scheduling service, telephone broadcast messaging, certain wireless Internet access applications, and a broader definition of basic telephone service to include such services as private branch exchange systems and T1 lines. The NPRM also seeks comment on whether to retain interconnected Voice over Internet Protocol as an eligible service. The NPRM asks whether support for these services will encourage access to advanced telecommunications and information services for schools and libraries.

Rural Wireless Carriers Withdraw Petition Challenging Interim CETC High-Cost USF Cap, but May File Appeal

On August 1, the Rural Cellular Association ("RCA") and eight small rural wireless carriers filed a Joint Petition for Reconsideration of the FCC's interim order capping the USF high-cost support that can be distributed to competitive eligible telecommunications carriers ("CETCs") (*see* May 2008 Bulletin). The petitioners requested that the FCC rescind the cap because it is not based on statutory universal service principles, violates the FCC's competitive neutrality rule, and flouts the local service mandate of the Telecommunications Act of 1996. On August 22, RCA and the other petitioners withdrew their reconsideration petition. Sources quoted in the trade press expect that the petitioners will file an appeal of the interim cap order in the U.S. Court of Appeals in September.

FCC Approves XM/Sirius Merger

The Commission voted on July 25, 2008, to approve the contentious merger application of Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Holdings Inc. ("XM").

The approval incorporated acceptance of several voluntary commitments by the applicants. Those commitments include:

- A 36-month price cap on the merged entity's services, subject to conditions and later Commission review.
- New programming packages, including a la carte options.
- Reservation of eight percent of the merged entity's capacity for so-called Qualified Entity use and delivery of educational or informational programming.
- Offering of interoperable radio receivers to after-market channels within nine months of closing.
- Commitment not to grant exclusive rights to manufacture satellite digital audio radio service ("SDARS") receivers; various other requirements as to availability of hardware and software needed to offer SDARS equipment and service.
- Commitment to apply to serve Puerto Rico.

The Commission also approved consent decrees entered into with XM and Sirius concerning FM modulator and terrestrial repeater regulation compliance. In connection with those decrees, the applicants will contribute about $17.4 million (XM) and $2.2 million (Sirius) to the U.S. Treasury and take additional remedial steps.

Chairman Martin and Commissioners Adelstein and McDowell issued statements in support of the merger approval. Commissioner Copps dissented, warning that the ruling endorsed an admitted "merger to monopoly" that eventually would confront satellite radio subscribers with "monopoly price hikes by a company with the incentive and ability to impose them."

FCC Approves Verizon Wireless Acquisition of RCC; Opposition to Verizon Purchase of Alltel Continues

On August 1, 2008, the FCC approved the transfer of the radio licenses of Rural Cellular Corporation ("RCC") to Cellco Partnership d/b/a/ Verizon Wireless ("Verizon Wireless").

The Verizon Wireless/RCC decision was not without controversy. Specifically, Commissioner Copps expressed reservations about the Commission's use of a 95 MHz spectrum screen as a threshold for excessive market concentration, noting that the screen was based in part upon 700 MHz spectrum awarded in an auction earlier in 2008 that "will not even be available for use until February 2009 . . . ." Commissioner Adelstein also objected to the 95 MHz spectrum screen, and Chairman Martin had suggested a higher screen, based in part on inclusion of AWS-1 and 2.6 GHz broadband radio service spectrum.

In the meantime, a number of public interest groups asked the FCC to reject Verizon Wireless's acquisition of Alltel, warning that the merger would stifle rural cellular competition in the absence of strong roaming commitments by the merged entity.

If approved, the Alltel purchase would restore Verizon Wireless's position as the nation's largest wireless carrier.

Third Circuit Court of Appeals Rejects COPA

In July, a panel of the U.S. Court of Appeals for the Third Circuit rejected the Child Online Protection Act

("COPA") as over-broad and vague.

COPA was Congress's second effort, following judicial rejection of the 1996 Communications Decency Act, to regulate indecent online material directed to minors. The statute provided civil and criminal penalties for anyone who "knowingly" makes "harmful" content available to minors "for a commercial purpose."

The court found that COPA's definitions of "material that is harmful to minors" and "commercial purposes" were not narrowly tailored, and that filtering software offered a less restrictive means of restricting minors' access to indecent and otherwise unsuitable online materials.

FCC Maintains Aggressive Enforcement Program

Junk Fax NALs
There has been no letup in enforcement activity this summer. Among the more notable actions were six Notices of Apparent Liability for Forfeiture ("NALs") released in July and August for violations of the FCC's "junk fax" rules prohibiting the sending of unsolicited advertisements to consumers' telephone facsimile machines. The proposed forfeitures ranged from $49,500 to $739,500, the latter amount in the case of perennial violator Hot Lead LLC (*see* July-August 2007 and January, March, and June 2008 Bulletins) for sending 148 junk faxes to 70 consumers. Another junk fax NAL, released against SMC, LLC, for $348,000, noted that the contact person at SMC is also shown as the contact person at Hot Lead.

IDT International Settlements Policy NAL
On July 10, the FCC released an NAL against IDT Corporation ("IDT") for an apparent violation of the FCC's international settlements policy, which governs how U.S. carriers negotiate with foreign carriers for the exchange of international telecommunications traffic. The FCC established the policy to prevent foreign carriers with market power from discriminating against competing U.S. carriers as a strategy to obtain pricing concessions, a practice known as "whipsawing." In order to detect violations of the policy, the FCC requires that U.S. carriers timely file international traffic exchange agreements with the FCC and file a "modification request" prior to implementing any arrangement that offers terms different from those made available to any other carrier serving the same international route. Carriers are also prohibited from implementing such arrangements prior to FCC approval. As international markets have become more competitive, the international settlements policy has been relaxed on certain routes. On November 4, 2004, the FCC lifted the policy as it applied to the U.S.-Haiti route.

In October, 2003, prior to the lifting of the policy on the U.S.-Haiti route, IDT entered into an agreement with Telecommunications D'Haiti S.A.M. for the joint provision of international services on that route. The parties amended the agreement to modify the division of tolls and other terms four times before the policy was lifted. According to the IDT NAL, IDT failed to timely file the agreement and each of the four amendments and implemented them without FCC approval. IDT filed the agreement and amendments only in 2007, in response to an FCC staff request. The NAL accordingly proposed a forfeiture of $1.3 million – $100,000 for each of 13 violations, consisting of IDT's failure to file a copy of the agreement and each of the four amendments, its failure to file modification requests for each of the four amendments, and its implementation of each of the four amendments without FCC approval. The FCC explained that the international settlements policy is critical to the maintaining of vigorous competition in the international service market and that IDT's violations undermined the policy. Although the applicable statutory forfeiture that was effective during the relevant period was $7,600 per day in 2003 and $8,600 per day in 2004, the FCC determined that a lesser penalty of $100,000 per violation reflected the FCC's commitment to ensure compliance, yet would not be unduly burdensome.

Corr Hearing Aid Compatibility NAL
On July 31, the Bureau released an NAL against Corr Wireless Communications, LLC for apparent violations of the hearing aid compatibility rules in the case of its digital handset offerings. Corr offered the required two handset models meeting the standards for inductive coupling, but only after the FCC's compliance deadline of September 18, 2006. In the case of one of the handset models, however, the statute of limitations for proposing a forfeiture expired, permitting a forfeiture only in the case of the second model. Taking into account Corr's size and the fact that, in the case of the second model, Corr was in violation of the rules for almost a year after the deadline, the Bureau increased the proposed forfeiture from the base amount of $15,000 to $30,000. Rejecting Corr's arguments for a downward adjustment, the Bureau also stressed that inadvertent errors or unfamiliarity with regulations or statutory requirements and the absence of harm to any consumer do not constitute grounds for mitigation.

Cardinal Broadband E911 NALs
On August 15, the Bureau released two NALs for apparent violations by Cardinal Broadband LLC ("Cardinal") related to the FCC's E911 rules. The first NAL found that Cardinal apparently violated Section 9.5(b) of the FCC's rules, which requires interconnected VoIP providers to provide E911 service. The Bureau received a

complaint that Cardinal was not providing E911 service along with its interconnected VoIP service to a condominium complex, preventing residents from contacting the police and other emergency responders by dialing 911. In the course of the ensuing investigation, Cardinal admitted that it did not provide E911 service to the complex for at least five months but claimed that, as a reseller of VoIP service, it is not an "interconnected VoIP service provider" under Section 9.5(b) and thus is not required to provide E911 service. The Bureau determined, however, that Section 9.5(b) applies to all providers of interconnected VoIP service, including resellers. This issue does not appear to have been addressed previously.

The Bureau also stated that, although a forfeiture may be imposed only for a violation or violations that occurred within one year prior to the issuance of an NAL – which would encompass the end of Cardinal's violation period in August 2007, the entire period of the violation may be considered in assessing the amount. No specific base amount of forfeiture has been established for violations of Section 9.5(b). Because Cardinal's violation lasted for at least five months, however, and because of the critical public safety function served by E911, the Bureau proposed a forfeiture of $25,000. The Bureau noted that this amount is proportionately higher than those proposed in recent wireless E911 cases, but explained that those cases involved only failures to provide location information, whereas this case involved a total failure to provide any E911 service at all. The Bureau also noted that Cardinal had not filed a Form 499-A in connection with its interconnected VoIP service and warned that it "intends to investigate Cardinal's compliance with" FCC requirements and contribution obligations relating to the Communications Assistance for Law Enforcement Act, customer proprietary network information, Telecommunications Relay Services, local number portability, and universal service.

In the second Cardinal NAL, the Bureau proposed another $25,000 forfeiture for Cardinal's provision of incorrect information about its service without a reasonable basis for believing that the information was correct, in violation of Section 1.17(a)(2) of the FCC's rules. The Bureau cited Cardinal marketing materials and its subsequent admission that it provided interconnected VoIP service as a basis for its finding that Cardinal had no reasonable basis for its earlier statements that it did not provide interconnected VoIP service. The Bureau found that $25,000 is an appropriate forfeiture for this apparent violation, balancing the need for truthful information with the absence of any evidence that the misrepresentation was intentional. The Cardinal NALs demonstrate the need for experienced counsel not only to ensure compliance with FCC requirements, but also to respond accurately to FCC inquiries.

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.

September 8, 2008	Deadline for CMRS providers to submit **WARN Act participation election notices**.
September 9, 2008	Comments due on **Emerging Technologies 911 Improvement Act of 2008 NPRM**.
September 10, 2008	**17/24 GHz BSS** application freeze lifted.
September 15, 2008	Comments due on **commercial mobile alert system FNPRM**.
September 15, 2008	Comments due on CTIA petition for declaratory ruling regarding **timely review of wireless facility siting applications and preemption of certain state and local zoning laws**.
September 17, 2008	Reply comments due on **Emerging Technologies 911 Improvement Act of 2008 NPRM**.
September 18, 2008	Comments due on **E-Rate NPRM.**
September 22, 2008	Comments due on **BRS/EBS FNPRM.**
September 22, 2008	Comments due on **sponsorship identification & embedded advertising NPRM.**
September 22, 2008	Effective date of **commercial mobile alert system** rules(regarding technical rules for Commercial Mobile Service providers who elect to transmit emergency alerts to subscribers).
September 25, 2008	Comments due on **FNPRM regarding assessment and collection of regulatory fees**.
September 25, 2008	**Regulatory fees** for the 2008 Funding Year due by 11:59 p.m., EDT.
September 29, 2008	Reply comments due on **commercial mobile alert system FNPRM**.
September 30, 2008	Reply comments due on CTIA petition for declaratory ruling regarding **timely review of wireless facility siting applications and preemption of certain state and local zoning laws**.

October 3, 2008	Reply comments due on **E-Rate NPRM.**
October 10, 2008	Deadline for **700 MHz licensees to file DTV consumer education report for 3Q 2008**.
October 14, 2008	Effective date of new **commercial mobile alert system** rules (regarding requirement for non-commercial educational and public broadcast television station licensees to install equipment to enable alerts to participating Commercial Mobile Service providers).
October 22, 2008	Reply comments due on **BRS/EBS FNPRM.**
October 22, 2008	Reply comments due on **sponsorship identification & embedded advertising NPRM.**
October 27, 2008	Reply comments due on **FNPRM regarding assessment and collection of regulatory fees**.