MORRISON | FOERSTER

Legal Updates & News

Bulletins

Communications Law Bulletin, May 2008

June 2008

Communications Law Bulletin, May 2008

In this issue:

The Month in Brief

May 2008 brought many significant developments at the Federal Communications Commission ("FCC" or "Commission"), the state commissions, on Capitol Hill and in the courts, on issues ranging from the reauction of the 700 MHz D-block public safety spectrum to universal service reform to net neutrality. Those developments are covered here, along with our usual list of deadlines for your calendar.

Maryland Federal Court Subjects VoIP to Baltimore Telecommunications Tax

In the first court decision specifically addressing whether Voice over Internet Protocol ("VoIP") services are subject to a particular state and local transaction tax, a Maryland federal district court held in *Mayor and City Council of Baltimore v. Vonage*, 2008 WL 1757753 (D. Md. Apr. 16, 2008), that Vonage America Inc., a VoIP service provider, "sells a telecommunications line" subject to the Baltimore Telecommunications Tax.

The tax in question was an assessment of $3.50 per line per month – a far- from-trivial addition to the cost of telephone service in the present, highly competitive environment. The decision to uphold the tax as applied to VoIP was, by the court's admission, "an extremely close one." Given its implications for Internet-based telephone services around the country, the decision is worth describing in detail.

The decision was entered in response to motions and cross-motions for summary judgment that raised three issues: "(1) whether the City's Telecommunications Tax [was] a valid and enforceable excise tax or an impermissible tax on intangible personal property; (2) assuming it is a valid excise tax, whether Vonage 'leases, licenses, or sells a telecommunications line' within the meaning of [the Baltimore City Code]; and (3) whether Vonage's counterclaim should be dismissed for lack of subject matter jurisdiction pursuant to the Tax Injunction Act . . . ." The first two issues are the most significant for VoIP providers faced with state and local tax assessments.

The first question – the excise tax vs. property tax conundrum – was based upon a Baltimore City Charter provision that prohibits the City from taxing any intangible personal property. The City argued that the Telecommunications Tax was a permissible excise upon the privilege of providing a telecommunications line. Vonage argued that it did not lease, license, or sell any such lines to its customers, making the tax nothing more than a levy upon the intangible telephone numbers assigned to Vonage's customers. The court ruled that the language and methods of imposing and fixing the tax made it clear that the privilege of providing the line, and not the customer's ownership of a telephone number or any other property, was the taxable event. Accordingly, the tax was not an unlawful assessment upon intangible personal property.

The second question – whether Vonage leased, licensed, or sold a telecommunications line – posed the more difficult issue. The record showed that customers accessed Vonage's service through their broadband Internet connections, which typically were provided by the local cable operator or telephone company. Vonage furnished the customer with a routing device and a telephone number, but did not own or control any telephone lines. Instead, Vonage maintained "contractual agreements with different third-party carriers, which [were] responsible for connecting the call from Vonage's gateway to the third-party carrier's telephone switches." Given this service architecture, Vonage argued that it was at most a user of services that involved transmission of communications over telephone lines, but was not a provider of telecommunications lines to its customers.

In resolving this "extremely close" question, the court relied upon the decision of the United States Court of Appeals for the D.C. Circuit in *Vonage v. FCC,* 489 F.3d 1232 (D.C. Cir. 2007), in which the court upheld the Federal Communications Commission ("FCC") order requiring Vonage to contribute to the federal universal service fund ("USF"). The FCC's decision was based upon the language of the Communications Act ("Act"), which permitted USF contribution obligations to be imposed upon any provider of interstate telecommunications services. In the FCC's view, Vonage's interconnected VoIP service "provided" telecommunications to end users because that service included telecommunications as a component. The Court of Appeals found that this interpretation of the word "provide" was reasonable.

Citing the reasoning of the appellate court in *Vonage v. FCC* with approval, the court in *Baltimore v. Vonage* found that just as Vonage was "providing" telecommunications within the meaning of the Communications Act for purposes of USF obligations, it also was selling a service that included a "telecommunications line" for purposes of the Baltimore Telecommunications Tax.

As the court in *Baltimore v. Vonage* acknowledged, the authority of states and localities to impose telephone service taxes on VoIP providers is a close one. Litigation concerning that question will turn heavily on the language of the particular tax laws at issue and judicial precedents in the individual states. FCC decisions interpreting the status of VoIP services under the Communications Act are of doubtful relevance to these disputes.

As VoIP services continue to displace traditional telephone service, more litigation of this kind can be expected.

FCC Grants AT&T Forbearance from Cost Assignment Rules

In late April, the FCC granted AT&T forbearance from several cost assignment rules ("CARs"), subject to conditions. The FCC relied heavily on the fact that AT&T has moved from rate- of-return regulation to price cap regulation (to the extent its services are still regulated at all). The FCC concluded that there is no current federal need for these CARs as they apply to AT&T. The FCC also noted that AT&T remains subject to various statutory obligations that will serve as a "backstop," as well as dominant carrier regulation of its interstate exchange access services and price cap regulation of most exchange access services. The FCC thus rejected the argument that it was effectively deregulating interstate access service rates. Further, the FCC noted that if AT&T's cost accounting data are relevant to any future special access reforms, the FCC can request such data at that time.

The FCC conditioned the forbearance grant as follows:

(a) AT&T must provide any cost accounting data that the FCC requests for regulatory purposes, including rulemakings or adjudications, and AT&T must provide such information on a timely basis and in a usable format;

(b) AT&T must implement a method of preserving the integrity of its accounting system to ensure that data requested by the FCC in the future will continue to be available;

(c) AT&T must file a compliance plan that explains how it will satisfy condition (b), how it will impute access costs to itself and its affiliates per Section 272(e)(3) of the Act, and an annual certification that it complies with the statutory ban in Section 254(k) of the Act on cross-subsidization between competitive and non- competitive services; and

(d) The granted relief will not be effective unless and until AT&T's compliance plan is approved by the Wireline Competition Bureau ("Bureau").

The FCC acknowledged that it had relied on the existence of the CARs as recently as 2007 when it permitted Bell Operating Companies to offer in-region long distance services on a nondominant basis even when integrated with their exchange access services. The FCC attempted to distinguish that general rulemaking from this specific application of forbearance.

The FCC discounted concerns that this decision will result in a different accounting system for AT&T than for the other Regional Bell Operating Companies ("RBOCs"), arguing that financial accounting does not require absolute uniformity. In his separate statement, Commissioner McDowell specifically noted that he looks forward to granting similar relief to other similarly situated carriers as soon as possible.

With respect to state public utility commissions' need for cost accounting information, the FCC held that it does not have the authority to require data that are needed solely for intrastate purposes. The FCC emphasized that it did not preempt any state accounting requirements, nor does it believe that its forbearance grant prevents states from adopting similar requirements of their own. Further, AT&T committed to work with state commissions to ensure they have sufficient data to meet their needs.

Commissioners Copps and Adelstein issued a joint dissent, arguing (a) that the FCC has ongoing statutory obligations under Sections 201 and 202 of the Communications Act, (b) that the CARs are an important part of the FCC's regulatory framework (and relied upon in other deregulatory actions taken), (c) that the FCC needs such data for intercarrier compensation and universal service reform, and (d) that the states need this data to perform their own duties. The dissenters therefore rejected AT&T's "just trust us" approach. In addition, they noted that such changes should be considered in an industry-wide rulemaking, not in piecemeal forbearance petitions.

Following the FCC's grant, several competitive carriers filed a letter suggesting procedures for the review and implementation of AT&T's plan. These carriers emphasized the critical importance of cost assignment data, and suggested the following procedures: (a) that the Bureau put AT&T's plan out for public comment; (b) that the Bureau withhold approval until AT&T has actually made all necessary modifications to its accounting systems to ensure that the integrity of its information is preserved; (c) that the Bureau establish procedures for review of future proposed changes to AT&T's compliance plan; and (d) that AT&T make its new accounting information resulting from the compliance plan publicly available (such as by posting it on its website) in a searchable format.

Following this grant (and Commissioner McDowell's invitation above), Qwest and Verizon have already begun lobbying the Commission for similar relief. Meanwhile, several competitive carriers and large users have filed a petition for reconsideration of the AT&T forbearance grant.

Annual Regulatory Fee Proceeding Seeks Comment on IBC Fees

In May, the FCC released its notice of proposed rulemaking ("NPRM") regarding annual regulatory fee payments, which will be due in August or September. As the NPRM was released much later than usual this year, the item has a very short pleading cycle – comments were due May 30 and replies are due June 6.

There are two items of particular interest in this NPRM. First, the FCC granted a pending petition for rulemaking filed by VSNL International Canada (formerly Teleglobe) seeking revisions to the regulatory fee methodology for international bearer circuits ("IBCs"). The NPRM thus now requests formal comment on whether the FCC should retain the existing capacity-based IBC regulatory fee, or whether the FCC should change the methodology, and if so, how it should be changed. (Meanwhile, the FCC proposes for this year a fee of $1.09 per 64K circuit, up slightly from $1.05 per 64K circuit last year.) The VSNL petition was filed in early 2006, and the annual regulatory fee proceedings in 2006 and 2007 did not address the issue other than to note that this separate petition was pending. This year, however, it appears that a majority of the commissioners are open to addressing this issue in the context of the annual rulemaking proceeding. The likely outcome of this proceeding, and the effective date of any changes that might be adopted, are unclear at this point.

Second, the NPRM also contained an order concluding that the FCC will continue the current practice of assessing a flat fee per license on broadband radio service and educational broadband service ("BRS/EBS") providers until the transition to the new band plan is completed. Although the FCC proposed a revised system in 2007, because the FCC now expects this transition to be completed in 2009 or 2010, it determined that the costs of imposing a revised interim system that would be in effect for only one year were not worthwhile.

Martin Anticipates June Vote on XM/Sirius Merger

FCC Chairman Martin announced at a press conference on May 23, 2008, that he expects a vote by June 30 on the merger of XM Satellite Radio Holdings ("XM") and Sirius Satellite Radio ("Sirius"). Martin also announced that the Commission will consider the merger on circulation, rather than at a public meeting.

In the meantime, two senators, Olympia Snowe (R-Maine) and Claire McCaskill (D-Missouri), advised Martin by letter that if the merger is approved, the new entity should make some of its spectrum available for assignment to competitors. A number of other officials and consumer groups have advocated that the merger be made conditional, and the FCC staff reportedly has given Chairman Martin a list of conditions that the commissioners might wish to consider.

The Department of Justice approved the proposed XM/Sirius merger in March of this year.

States Consider Various Deregulatory Measures as Well as Universal Service, VoIP, and E911 Issues

The Kansas legislature passed a bill that would preclude the state public service commission from reviewing mergers and acquisitions between incumbent local exchange carriers under price cap regulation. AT&T and Embarq currently are the only price cap carriers in Kansas. Similarly, the California Assembly is considering a bill that would repeal the state public utility commission's authority to review mergers of larger telecommunications companies, specifically those with more than $500 million in annual California revenue.

In addition, before Missouri's 2008 legislative session concluded in May, legislators approved a bill that would essentially end state price regulation of local telephone service where the service provider faces competition for at least 55 percent of its subscribers. The supporters of the bill hope that it will encourage local telephone companies to further invest in broadband access, but others are concerned that the companies will be able to raise rates in some areas that lack significant competitive choices.

The Texas Public Utility Commission ("TX PUC") by unanimous vote agreed to reduce over time the state high-cost universal service fund by 36.5 percent. The fund will decrease from $395 million to $251 million and the current 4.4 percent monthly universal service fee will decrease to 3.4 percent by 2012. The TX PUC also agreed to reduce or end high-cost support in competitive deregulated exchanges. The decision approved a settlement proposal reached by the major wireline, cable, and wireless providers in Texas and the state consumer counsel and TX PUC staff.

Responding to a request for rulemaking from the National Emergency Number Association and Association of Public Safety Communications Officials, the Ohio Public Utilities Commission ("OH PUC") concluded that it would not conduct a rulemaking regarding next-generation, emergency 911 systems based upon Internet protocol technology. The proposed systems would have the capability of transmitting video and data to emergency responders. The OH PUC said most issues raised in the rulemaking request were better suited to ongoing national 911 industry forums.

In addition, Voice over Internet Protocol ("VoIP") service providers are one step closer to having to contribute to the state emergency 911 fund. In an ongoing inquiry by the West Virginia Public Service Commission ("WV PSC"), a 911 task force recently proposed rules that would require such contributions. The 911 task force specifically recommended that the WV PSC adopt the same definition of "interconnected VoIP" service that the FCC has adopted and that interconnected VoIP providers contribute to the state 911 fund if a VoIP service's place of primary use is located in West Virginia. The task force, however, did not propose a specific contribution amount.

Court Remand Adds Uncertainty to Broadband over Powerline Services

A recent decision by the U.S. Court of Appeals for the District of Columbia Circuit upholding a challenge to the FCC's broadband over powerline ("BPL") rules could impact the future development of BPL services. The lawsuit arose from a Freedom of Information Act request involving the 2004 and 2006 FCC decisions establishing various BPL technical rules. The court remanded the case to the FCC for further action.

The court concluded that the FCC violated the Administrative Procedure Act by not fully disclosing technical studies conducted by the FCC's Office of Engineering and Technology upon which the FCC relied when it promulgated the BPL technical rules. The FCC redacted pages from the studies under the theory that they were "preliminary or partial results of staff opinions." The court's remand directs the FCC to make public the redacted portions of the studies and provide parties with a reasonable opportunity to comment on them. The court also concluded that the FCC failed to provide a reasoned analysis as to why it adopted a particular extrapolation factor used to gauge BPL emissions. The court directs the FCC on remand to provide such an explanation for that or another extrapolation factor.

Recent Judicial and Legislative Developments Could Impact VoIP Services

The United States Court of Appeals for the Eighth Circuit agreed to stay a request for a permanent injunction that would bar the Nebraska Public Service Commission ("NPSC") from requiring VoIP service providers to contribute to the state universal service fund ("NE USF"). The NPSC had previously ruled that VoIP provider Vonage Holdings Corporation must contribute to the NE USF, but Vonage challenged the decision. Concluding that the NPSC was preempted by federal law, a U.S. District Court had granted Vonage's request for a preliminary injunction. Vonage then sought summary judgment and a permanent injunction from the district court, but the NPSC appealed and requested that the Eighth Circuit review the findings of the district court. Without providing an explanation, the Eighth Circuit stayed all activity in the case until 10 days after the appeal is resolved.

In addition, the United States Court of Appeals for the Ninth Circuit upheld the dismissal of a lawsuit that alleged that Time Warner Cable "slammed" a consumer by fraudulently switching it to its VoIP service. According to the court, the lower district court appropriately referred the case to the FCC, noting that it was unclear whether the FCC's slamming regulations apply to VoIP services.

Congress is getting closer to passing a bill that would address the provision of emergency 911 calling capability by VoIP providers. The conference report for the bill (S-428) currently is being drafted, but conferees have reached an "agreement in principle" regarding some provisions that have been the subject of disagreement concerning a database that would collect customer location information and provider access to 911 components. Specifically, a provision restricting use of the location database for emergency services only reportedly is being dropped from the bill. In addition, the bill would provide VoIP providers with the same liability protection that has been afforded to the wireline and wireless industries regarding the handling of 911 calls. The conference report, once completed, will likely be considered for an expedited vote by the Senate and House.

FCC Imposes Interim High-Cost Support Cap on Competitive Carriers, and Sprint Unveils Universal Service Reform Plan

Interim Universal Service Support Cap for Competitive Carriers
The FCC voted 3-2 on May 1 in support of an interim cap on high-cost universal service support for competitive eligible telecommunications carriers ("CETCs"). The order established a state-by- state limit on total CETC support, measured by the total amount of CETC support received in each state in March 2008, annualized, to be implemented by means of a "state reduction factor" that operates in the manner spelled out in the Joint Board's Recommended Decision ("RD") proposing an interim CETC cap last May. Thus, additional CETCs that begin to receive support after March 31 will cause support to all CETCs in the state to be reduced proportionately. The state-by-state cap will have a particularly harsh effect in states where no CETCs were designated or CETCs received very little support in March 2008. In those states, the cap is $0 or the small amount of CETC support received in March as long as the cap remains in effect, irrespective of the number of

new CETCs designated. CETCs serving Alaska Native and tribal lands are exempted, as are CETCs that can demonstrate their own costs. CETCs that demonstrate their own costs, however, may not receive support for more than one payment per residential account. The interim cap remains in effect until the FCC implements full-scale high-cost universal service reform. The Commission committed in the order, however, to completing a final order on comprehensive reform as quickly as feasible after the comment cycle closes on the pending universal service reform proceedings (as reported in the February 2008 issue of this Bulletin).

In defending the choice of a CETC-only cap, the FCC generally adopted the rationale of the RD and took a radically restricted view of *Alenco Communications, Inc. v. FCC* ("*Alenco*") and other precedents cited by wireless providers in their comments. The order rejected CTIA's argument that CETC support equal on a per-line basis to that received by the incumbent serving the same area is required, citing *Alenco* for the point that both universal service and competition must be realized and that one cannot be sacrificed for the other. The order also stressed that all CETCs must be eligible to receive support, not necessarily that they are entitled to receive support. The order also found that the identical support rule undermines CETC incentives to invest in high-cost areas. Commissioners Copps and Adelstein dissented because this "interim" cap will delay comprehensive universal service reform, notwithstanding the commitment in the order to implement comprehensive reform as soon as possible.

The order also granted, in an Appendix, most of the pending applications for eligible telecommunications carrier ("ETC") designation. The new CETCs are covered by the cap. Thus, each CETC in each state with newly designated ETCs will have its support reduced proportionately.

Sprint's Universal Service Reform Plan

Sprint filed its high-cost universal service support plan ("HCS Plan") on May 12. It essentially would raise incumbent local exchange carrier ("ILEC") end-user subscriber line charge ("SLC") caps while phasing down all carriers' high-cost USF support. Because USF support would be significantly reduced, the USF contribution factor would decline to six percent. The HCS Plan would retain the identical support rule and thus reduce CETC support as ILEC support is reduced. The HCS Plan would replace the interim cap on support for CETCs (discussed above). There are three components of the HCS Plan, which are carried out in four steps. The timing of the steps is not specified, but they could be implemented so as to carry out each step over the course of a year.

The first component raises residential and single-line business monthly SLC caps by $3.50 in three steps, raises the multi-line business monthly SLC cap by $0.80 in the first step and reduces high-cost support by the full amount of the cap increase, whether or not a particular ILEC raises its SLCs accordingly. For the largest ILECs, all of their high-cost support could be replaced through SLC increases of less than $0.50 per month, but for mid- size and small ILECs, SLC increases would average almost $3.00 per month, and for some mid-size ILECs (and presumably some small ILECs as well), the full increase of $3.50 would not be enough to replace all high-cost support. In those cases, the support would continue to the extent not replaced by SLC increases.

The second component consolidates large and mid-size affiliated ILEC study areas in three steps for purposes of calculating high-cost loop support and local switching support ("LSS") and eliminates LSS for CETCs with more than 50,000 lines in a state.

The third component caps or reduces high-cost support in areas with significant CETC penetration. If CETC lines in a study area exceed 25 percent of ILEC lines, support for all ETCs is capped at the per-line amount; if CETC lines exceed 50 percent of ILEC lines, total support in the study area is capped; and if CETC lines exceed 75 percent of ILEC lines, support is eliminated for both ILECs and CETCs in the study area. This component would eliminate almost one billion dollars in support annually.

By the end of step 4, high-cost support would be reduced 68 percent overall, but CETC support would be reduced by 85 percent. The net result would be to greatly reduce high-cost USF support for large and mid-size ILECs and CETCs, slightly reduce support for small ILECs, and reduce the USF contribution factor for all. The share of the reduced high-cost support going to small ILECs would increase from 41 to 81 percent. SLCs for mid -size and small ILECs, however, would be significantly increased. The HCS Plan should help wireless carriers that now contribute significantly to the USF but receive little high-cost support (i.e., those with relatively small CETC operations). While many wireless carriers and large ILECs should like this plan, ILECs that rely heavily on USF support probably will not like it – the higher SLCs they would have to charge their wireline customers could promote loss of lines to CETCs and others.

FCC Initiates "Analog-Only" Consumer Alert Enforcement Proceedings and Escalates Its Campaign Against USF Contribution Violators

Continuing its stepped-up enforcement activity relating to the transition to all-digital television broadcasting, the

FCC released Notices of Apparent Liability for Forfeiture ("NALs") on May 9 against Toys "R" Us, Inc. ("Toys") and Value City Department Stores, Inc. ("Value City"). The NALs propose penalties for Toys' and Value City's apparent failures to place the required Consumer Alert label next to television receiving equipment containing an analog broadcast tuner but no digital broadcast tuner. In preparation for the digital transition on February 17, 2009, the FCC promulgated a rule requiring retailers to display, at the point of sale of any television receiving equipment that does not contain a digital television tuner, a Consumer Alert notifying the customer that the equipment has only an analog broadcast tuner and will require a converter box after February 17, 2009, to receive over-the-air broadcasts with an antenna.

After the rule became effective, the Enforcement Bureau ("Bureau") inspected retailers around the country and issued citations to Toys and Value City for offering for sale analog-only television equipment without the required Consumer Alert. Following the citations, the Bureau inspected Toys and Value City stores again and found additional violations, resulting in additional citations in the summer of 2007. The Bureau found numerous additional violations in various Toys and Value City stores after the second round of citations. The NALs find Toys and Value City apparently liable for willful and repeated violations of the Consumer Alert labeling rule. Because of the similarity of the analog-only labeling rule and the wireless hearing-aid compatibility labeling requirements, the NALs apply the same base forfeiture amount of $8,000 per unlabeled model to the Toys and Value City apparent violations. Accordingly, the FCC finds Value City apparently liable for a $216,000 base forfeiture and Toys apparently liable for a $248,000 base forfeiture.

On May 19, the FCC released an Order of Forfeiture against Local Phone Service, Inc., d/b/a Best Phone ("LPSI") for its failures to timely submit Telecommunications Reporting Worksheets ("TRWs") and to timely contribute to the USF. The Order grew out of an NAL issued against LPSI on August 29, 2006. Although LPSI began providing long distance telecommunications service in 2002, it informed the FCC in August 2005 that it had not filed any TRWs or paid any USF contributions or other regulatory fees or assessments but intended to take corrective measures by early October 2005. The Bureau initiated an investigation in October 2005 regarding LPSI's USF and other regulatory payment compliance. LPSI filed a revised 2003 TRW and its 2004 and 2005 TRWs in December 2005, made its first USF contribution payment in May 2006, and paid the remaining outstanding USF contributions in August 2006, nearly a year after it brought its violations to the FCC's attention.

In the NAL, the FCC proposed a forfeiture of $50,000 for each of LPSI's four apparent failures to timely submit TRWs and a base forfeiture of $20,000 per month for each of the 15 months in which LPSI apparently failed to pay USF contributions, and added an upward adjustment of one-half of LPSI's unpaid contributions, or $29,000, for a proposed total forfeiture of $529,000. In the Order, the FCC rejected LPSI's arguments for elimination or mitigation of the NAL, two of which are worth noting. First, it found that LPSI's voluntary disclosure did not justify rescinding or reducing the NAL because LPSI was not diligent in correcting its violations once it disclosed them. The FCC rejected LPSI's argument that the FCC's refusal to discount the forfeiture amount would discourage voluntary disclosure, finding that imposition of the full forfeiture will encourage companies both to voluntarily disclose and to correct violations promptly. Second, the FCC rejected LPSI's argument that the forfeiture is excessive, relative to the amount of USF contribution owed – less than $74,000 – all of which was paid by the date of the NAL. The FCC noted that it has rejected similar arguments in past orders, stressing LPSI's repeated failures to pay USF contributions over a substantial period of time. Adjusting the proposed forfeiture for amounts invoiced for a period in which LPSI was found to be a *de minimis* carrier and thus exempt from USF contributions, the Order imposed a total forfeiture of $436,765 against LPSI.

The LPSI Order demonstrates that carriers must both voluntarily disclose violations as soon as they become aware of the problem and take steps to correct the violations promptly in order to have any chance of mitigating the ultimate forfeiture on the basis of their disclosure. Because of the FCC's practice of multiplying a base forfeiture by each relevant period covered by an ongoing violation, the Order also underscores the continual need for carriers to monitor internal regulatory compliance in order to prevent or at least correct violations as soon as possible.

Comcast Appeals FCC's Refusal of Its CableCARD Waiver; State Video Franchising Reform Proceeds in Louisiana and Tennessee; Verizon Meets Resistance in Manhattan

Comcast Appeals CableCard

In mid-May, Comcast lost its D.C. Circuit appeal of the FCC's 2007 ruling refusing to waive CableCARD rules on certain of Comcast's cable set-top boxes. The FCC's CableCARD rules require that cable companies like Comcast separate the security and navigation functions in the set-top boxes they lease or sell to customers. In its 2005 CableCARD order, the FCC ruled that set-top boxes with "advanced services" do not qualify for waiver. The court found that the FCC was entitled to substantial deference on its finding that Comcast's purportedly "low-cost" set-top boxes were nonetheless "advanced" and not eligible for the waiver.

The D.C. Circuit, in denying the appeal, stated that Comcast could not base its case on alleged discriminatory or inconsistent applications of the waiver rules by the FCC Media Bureau. Rather, Comcast should have sought review of the Media Bureau's waiver decisions at the FCC commissioner level, because unchallenged bureau-level decisions cannot be considered FCC precedent. Comcast has not stated whether it will pursue this matter further.

State Video Competition Developments

In state video competition developments, two more states joined the many others that have shifted video franchising authority to the state level. In mid-May, Tennessee's governor signed a bill shifting video franchising from municipalities to the Tennessee Regulatory Authority ("TRA"). The bill allows the TRA 45 days to act on state-franchise applications from large telephone or cable companies or incumbent cable companies, but allows 180 days for all other applicants. The bill becomes effective July 1, 2008.

In mid-May, Louisiana made progress in its own video franchise reform efforts when the stateSenate passed a bill to transfer video franchising authority from municipalities to the Secretary of State. Under the legislation, the Secretary of State would have 30 days to act on applications from any kind of applicant. While ultimate franchising authority would remain at the state level, a new entrant would be required to file copies of its state-franchise application with each municipality within its proposed service area on the same day it files the application with the state.

New York Consumer Groups Seek Delay of Verizon Video Franchise

Consumer groups and elected officials in New York City joined forces to seek delay of a May 27 vote on a 12-year statewide video franchise sought by Verizon for its FiOS services. Opponents of the franchise caution that too few public interest obligations have been imposed on Verizon, and want further public comment on public access channel and consumer protection provisions.

Wireless Developments

FCC Starts Rulemaking to Reauction 700 MHz D Block License

The FCC at its May open meeting unanimously adopted a further notice of proposed rulemaking ("FNPRM") seeking comment on how to reauction the 700 MHz D Block license that was not acquired in the recent Auction No. 73. The FNPRM seeks comment on a wide range of issues, including whether the proposed public/private partnership should be retained and overhauled, and draws no tentative conclusions.

The FCC hopes to maximize the public safety and commercial benefits of the D Block by providing potential bidders additional certainty regarding the opportunities and obligations associated with the license. The FNPRM asks whether in the first instance it should maintain the public/private partnership in which the D Block licensee would help construct a nationwide, interoperable public safety broadband network. It questions what rules and policies that govern the partnership should be modified as well as the technical requirements of the shared public/private network. The FNPRM also seeks comment on whether the D Block should be allocated to one or several licensees and whether that allocation should be based upon geography, population, or some other factor. The FNPRM also asks whether the D Block should be auctioned and licensed solely for commercial use and, if so, how a public safety broadband network would be constructed in the partnership's absence.

The FCC intends to form a technical advisory committee and hold an en banc hearing this summer regarding the D Block. Comments and replies regarding the FNPRM are due June 30 and July 14, respectively. The FCC then intends to release another notice of proposed rulemaking seeking comment on more specific proposed rules.

Auction of Leftover PCS and AWS Licenses Scheduled

The FCC has scheduled August 13, 2008, for the start of Auction No. 78 in which 55 broadband personal communications service ("PCS") and advanced wireless service ("AWS") licenses will be available. The licenses consist of 35 AWS licenses and 20 PCS licenses that were not purchased at prior auctions or were returned to the FCC. The FCC also established the procedures for the auction, which generally comport with the procedures followed in previous auctions, including imposing eligibility restrictions on some of the PCS licenses. Specifically, nine of the PCS licenses will be available only to entrepreneurs in closed bidding.

Court Upholds FCC Rebanding Mandate that Sprint Nextel Vacate Frequencies by June 26

Sprint Nextel suffered a blow by the United States Court of Appeals for the D.C. Circuit when that court upheld an FCC order confirming that the carrier must vacate its spectrum by June 26, 2008, even though the spectrum to which it is supposed to move is not yet clear.

Significant delays have occurred in the 800 MHz rebanding process that is intended to reduce interference to public safety operations. In fact, many public safety entities will not be able to vacate until 2009 or 2010 the spectrum to which Sprint Nextel is supposed to move. The FCC, however, issued an order in September 2007 stating that Sprint Nextel still had to vacate its spectrum even if the public safety spectrum to which it is supposed to relocate is unavailable.

Sprint Nextel appealed, but the court affirmed the FCC's decision. According to the court, Sprint Nextel did not adequately raise various arguments before the FCC and thus did not preserve them for appeal. The only issue that was preserved was whether the FCC "unreasonably changed the rebanding process from a synchronized spectrum swap to an asynchronous exchange." The court concluded that the FCC did not act arbitrarily or capriciously and that there was never a synchronized spectrum swap planned. Rather, the FCC had always required Sprint Nextel to vacate the spectrum by June 26, 2008, regardless of whether it had spectrum to which it could relocate.

Sprint Nextel has sought a waiver from the FCC so that it can remain on some of its existing spectrum until the public safety licensees are ready to vacate their own spectrum; however, the FCC has not yet acted on the request.

Rural Group Petitions to Prohibit Exclusive Deals Between Carriers and Handset Manufacturers
The Rural Cellular Association ("RCA") petitioned the FCC for a rulemaking to prohibit exclusive distribution contracts between wireless carriers and manufacturers of wireless handsets. According to RCA, the five largest U.S. carriers enter into such arrangements to exert "monopolistic control over the sale price of a particular handset and absolute control over the market availability of a particular handset" while smaller rural carriers often are able only to obtain basic, low-end handsets. RCA further argues that the lack of competitive handset suppliers prevents many consumers from obtaining premium equipment at reasonable prices because they reside in rural areas where the sole carrier that may offer a popular, exclusive handset does not operate. CTIA – The Wireless Association disagreed with RCA, however, noting that "consumers have an incredible array of wireless devices from which to choose" and that "consumers can purchase handsets from a number of sources."

FCC to Hold En Banc Hearing on Early Termination Fees
The FCC has announced that it will hold an en banc hearing on wireless carriers' practice of charging early termination fees ("ETFs") when subscribers terminate their contracts prior to the end of their terms. Although wireless carriers and consumer groups have held ongoing discussions regarding ETFs, Chairman Martin recently acknowledged that they have been unable to reach a compromise on formal rules to govern ETFs. The en banc hearing will be held June 12 directly after the FCC's monthly open meeting.

First DTV Test Market Chosen; Media Ownership Rules Under Attack; Congress Calls on FCC to Probe Television Appearances of Military Analysts

First DTV Test Market Chosen; Early Cutoff Begins Fall 2008
Wilmington, North Carolina, was selected as the country's first (and possibly only) digital television ("DTV") transition test market. Several of the city's commercial broadcast stations will terminate analog signals on September 8, 2008, leaving viewers in the market with only digital signals. Wilmington's PBS affiliate, however, is not participating in the test due to public safety and technical concerns. Local cable operators, including Time Warner Cable, will participate in the test by configuring cable head-ends to receive digital-only broadcasts. Wilmington was chosen in part based on its high density of pay-TV subscribers (93%) who do not rely on over-the-air broadcasts, as well as the fact that nearly all local stations have completed construction of digital broadcasting facilities. Wilmington area retailers have reported dramatic increases in sales of DTV converter boxes since the announcement was made.

The FCC had selected nine other cities, including Santa Barbara, California, and Madison, Wisconsin, as potential test markets because of their early completion of digital broadcast facilities through the market. Those other markets either were removed from consideration or opted out themselves. Some of the cities that declined to participate cited concerns that cutting off analog broadcasting this year, rather than February 17, 2009 (the national cutoff date), would confuse consumers who have been seeing public service announcements on the national cutoff date as part of the FCC's DTV consumer education initiative.

Senate Passes Resolution Revoking FCC's Media Ownership Rules, but Faces Veto
President Bush has promised to veto a Senate resolution overturning the FCC's media ownership rules. The White House defended the FCC's newly relaxed media ownership rules, which it says "further[] the public interest by providing greater financial flexibility to newspaper and broadcast outlets struggling to survive in today's intensely competitive media environment." FCC Commissioners Copps and Adelstein, who voted against the media ownership rules when the FCC enacted them, applauded the Senate's efforts to defeat the rules through legislative means.

House Democrats Seek FCC Probe of Networks' Use of Military Analysts

Two prominent Democratic lawmakers wrote a letter to the FCC in early May asking it to probe many television networks' practice of using military analysts. House Commerce Committee Chairman John Dingell (D-Michigan) and Representative Rosa DeLauro (D-Connecticut) want the FCC to investigate whether networks properly disclose military analysts' ties with the U.S. Department of Defense and/or private defense contractors.

Section 507 of the Communications Act, 47 U.S.C. § 508, requires anyone who provides money or other consideration to another in exchange for speaking about a particular issue during a broadcast to disclose that fact to the television station in advance of the broadcast. The television station must, in turn, broadcast a sponsorship identification announcement as required by Section 317 of the Communications Act.

The House probe began after an April 20 *New York Times* article about 75 retired military personnel who have appeared as analysts on several cable and broadcast shows. The letter to the FCC stated that it appears that these analysts received special access to current senior military leaders and as a result were "indirectly paid for fostering the Pentagon's views." After the letter was sent, the Pentagon reported that it had suspended programs involving military analysts and is investigating whether such programs comply with applicable laws.

Happenings on the Hill

- *Sen. Stevens Seeks Phantom Traffic Solution.* Sen. Ted Stevens (R-Alaska), whose constituents include rural telephone companies, proposed a bill in late April requiring voice providers to ensure that calls have sufficient billing information. Rural phone carriers in particular incur losses by terminating untraceable phone traffic. If passed, the bill mandates the FCC to take action to resolve phantom traffic within 12 months, including ordering studies of carriers' technological and equipment limitations, current signaling standards, and implementation costs. Although phantom traffic solutions are already under consideration as part of the FCC's intercarrier compensation reform efforts, that proceeding has been open for the past several years with no end in sight.

- *Senate Passes Resolution Disapproving FCC Media Ownership Rules.* In mid-May, the Senate passed Senate Joint Res. 28, a resolution to overturn the FCC's recently relaxed media ownership rules. President Bush has promised to veto the measure. For more information, see "Senate Passes Resolution Revoking FCC's Media Ownership Rules," above.

- *Rep. Barton Seeks Legislative Solution to USF Reform.* In late April, Representative Joe Barton (R-Texas) introduced legislation aimed at reforming the Universal Service Support system, an effort already underway at the FCC. The bill would cap the entire USF fund at the amount of support collected in the previous year and would use "reverse auctions" to allocate support from the high-cost funds. Reverse auction winners would be granted carrier of last resort ("COLR") status. The FCC would hold periodic reverse auctions thereafter, with auction reverse prices limited to no higher than the previous winning bid for each service area. Critics of the bill argue, among other things, that it does not provide adequate incentives for broadband deployment because it allows for only one ETC per service area to get USF support.

- *Sen. Nelson Seeks Broader Disclosure Rules for Prepaid Calling Cards.* Under a bill introduced by Sen. Nelson (D-Florida), prepaid calling card service providers would be required to disclose rates and fees at the point of sale and honor the cards until at least a year from first use. The Federal Trade Commission would be charged with overseeing prepaid calling card providers. While many states regulate calling card providers, Sen. Nelson's bill would initiate federal oversight and impose consistent national consumer protection standards.

- *Other Developments.* Congress also introduced bills on net neutrality (H.R. 5994, "Internet Freedom and Nondiscrimation Act of 2008") and VoIP service (S. 28, "IP-Enabled Voice Communications and Public Safety Act of 2007"), discussed in greater depth in separate articles in this month's Bulletin.

Practice Tip: Enhanced CORES Security Measures Effective May 20, 2008

Security features applicable to new FCC Registration Number ("FRN") passwords and reset passwords became effective on May 20. The new features include:

- New passwords must contain at least six characters and at least three of the following four character types:
  - Numeric
  - Upper case letters
  - Lower case letters
  - Special characters (i.e., **!**, **#**, **$**, *****, etc).
- New passwords cannot be identical to the previous four (4) passwords.
- Registrants using the FCC's Commission Registration System ("CORES") Update module cannot save any changes unless their password complies with the above requirements; if their existing password does not comply, then they will have to update their password.
- The CORES auto-password assignment method provides for strong temporary and assigned passwords. New auto-assigned passwords contain eight randomly generated alphanumeric characters, including both upper- and lower- case letters.
- Individual registrants viewing the Registration Update or New Registration confirmation screens can view only the last four digits of their SSN.

There is also a new lockout feature. After five unsuccessful login attempts, the user's account is locked for 15 minutes. A warning is issued informing the user of the number of invalid login attempts before a lockout occurs. Once the account is locked, the user may: wait 15 minutes for the lock to expire; call the Help Center to reset the password: **877-480-3201** , option 1 (Mon.-Fri. 8 a.m.-6 p.m. ET); or reset the password at http://esupport.fcc.gov/password.htm in order to unlock the account.

New Net Neutrality Legislation Introduced, but Action Seems Unlikely This Year

In early May, House Judiciary Committee Chairman John Conyers (D-Michigan) and co-sponsor Rep. Zoe Lofgren (D-California) introduced a new antitrust- based net neutrality bill that would affirmatively require operators to ensure equal treatment of all content, applications, and services. The Internet Freedom and Nondiscrimination Act (HR 5994) would amend the Clayton Act to prohibit discrimination, while permitting providers to use non-discriminatory traffic management practices. (This bill thus goes much further than the earlier-introduced Markey-Pickering bill.) The Conyers-Lofgren bill would also (a) require providers to permit customers to attach nonharmful devices to the network, (b) require providers to clearly disclose any service limitations, and (c) prohibit providers from charging additional fees for prioritization or quality of service enhancements. The bill, however, would permit providers to (x) give priority to emergency communications, (y) prevent violations of law or comply with court orders, and (z) offer consumer protection services such as parental controls.

Meanwhile, evidencing the overlapping jurisdiction on this issue, the House Telecommunications and Internet Subcommittee (of the House Energy and Commerce Committee) held a hearing on the Markey -Pickering bill (HR 5353), which would require the FCC to assess whether broadband network providers' traffic management practices are non-discriminatory. At this hearing, most Republicans, and even a few Democrats, strongly urged that no legislative action is necessary at this time, raising concerns that an FCC investigation could lead to regulation. Some opponents argued that such regulation could hinder legitimate traffic management practices and the ability of providers to block access to things like pirated versions of copyrighted materials and child pornography. Commerce Committee Chairman John Dingell (D-Michigan), however, stated that he wants to ensure that network management practices are transparent and non-discriminatory and that the FCC has sufficient authority to protect consumers against discriminatory practices.

Given the lack of consensus regarding such legislation, a common view in Washington is that network neutrality legislation is unlikely to be passed this term.

Finally, across the northern border, there have been two net neutrality- related developments. First, a net neutrality bill was introduced at the end of May in the Canadian House of Commons (by a member of the minority New Democratic Party). This bill would prohibit discriminatory treatment of content based upon its source, ownership, or destination, but would permit reasonable network management practices. Operators would also be required to disclose these network management practices to customers.

Second, the Canadian Radio-television and Telecommunications Commission ("CRTC") has launched an investigation of alleged "throttling" of wholesale DSL traffic by Bell Canada. The Canadian Association of Internet Providers ("CAIP") had requested an immediate order directing Bell Canada to cease and desist from its traffic management practices. Although the CRTC did not grant this request, it found that CAIP had raised a significant issue. Accordingly, the CRTC has now ordered Bell Canada to provide detailed data regarding network congestion and the degree to which it is caused by peer-to-peer ("P2P") traffic, the necessity of its traffic management/traffic shaping practices, alternative approaches it considered and rejected, and other issues. The CRTC also directed CAIP to document its claims and data. The pleading cycle in this proceeding will close by the end of June, and the CRTC has stated that it intends to issue a decision within 90 days after the record closes.

Upcoming Deadlines for Your Calendar

Note: Although we try to ensure that the dates listed below are accurate as of the day this edition goes to press, please be aware that these deadlines are subject to frequent change. If there is a proceeding in which you are particularly interested, we suggest that you confirm the applicable deadline. In addition, although we try to list deadlines and proceedings of general interest, the list below does not contain all proceedings in which you may be interested.

June 6, 2008	Reply comments due on **annual regulatory fee NPRM.**
June 9, 2008	Reply comments due on Vermont Tel petition seeking **clarification of interconnection rights of VoIP providers**.
June 10, 2008	**Auction No. 78 (AWS and broadband PCS)** seminar.
June 11, 2008	Reply comments due on **broadcast localism NPRM.**
June 19, 2008	Short-form applications due in **Auction No. 78 (AWS and broadband PCS)** .
June 19, 2008	DTV Consumer Education Workshop on converter boxes.
June 20, 2008	Comments due on **700 MHz FNPRM.**
June 27, 2008	Comments due on **DTV consumer education initiative NPRM.**
June 30, 2008	Comments due on NOI on **fraudulent 911 calls from non-service initialized ("NSI") handsets**.
June 30, 2008	Comments due on **diversification of broadcast ownership**.
July 7, 2008	Comments due on **BRS/EBS FNPRM.**
July 7, 2008	Reply comments due on **700 MHz FNPRM.**
July 14, 2008	Effective date of rules **prohibiting exclusive telecom services in residential multiple tenant environments ("MTEs")**.
July 14, 2008	Reply comments due on **DTV consumer education initiative NPRM.**
July 14, 2008	Reply comments due on **diversification of broadcast ownership**.
July 17, 2008	Upfront payments due in **Auction No. 78 (AWS and broadband PCS)** .
July 29, 2008	Reply comments due on NOI on **fraudulent 911 calls from NSI handsets**.
July 31, 2008	**Annual traffic and revenue reports** due for all international carriers.