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Legal Updates & News

Bulletins

Communications Law Bulletin -- April, 2007

May 2007

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The Month in Brief

In April, legal developments in our industry came from sources as diverse as the Congress, the States, the Federal Trade Commission and the U.S. Supreme Court. Among other news, the Federal Communications Commission ('FCC' or 'Commission') adopted sweeping new customer privacy rules, and the Federal Trade Commission asked Congress to extend that agency's jurisdiction to common carriers, including companies licensed and regulated by the FCC. These and other emerging stories are discussed here, along with our usual list of deadlines for your calendar.

FCC Releases Tough New CPNI Rules That Could Require Substantial Modifications to Some Carriers' Practices

As widely expected, the FCC in early April released new rules for the protection of customer proprietary network information ("CPNI") by telecommunications carriers.

The new rules are very detailed, but in summary they:

- Prohibit the release of call detail information in response to a customer-initiated telephone inquiry unless the customer provides a password;
- Require mandatory passwords for on-line account access;
- Exempt carriers from the password rules for certain business customers;
- Require customer notification of certain types of account changes;
- Require notification to law enforcement and customers in the event of a CPNI breach;
- Expand the circumstances under which carriers must obtain opt-in consent from customers before disclosing CPNI to joint venture partners or independent contractors for marketing purposes;
- Require carriers to file with the FCC an annual CPNI certification (by March 1 of each year for the previous calendar year) that includes a summary of all consumer complaints regarding unauthorized release of CPNI; and
- Apply to interconnected Voice over Internet Protocol ("VOIP") providers.

The new rules also go beyond specific substantive requirements to impose an enforcement "presumption" that any unauthorized release of CPNI will result in an inference that the carrier did not take sufficient steps to protect CPNI. Carriers are expected to take "every reasonable precaution," which includes not only compliance with the new rules, but also any and all additional steps that are feasible for the carrier. Accordingly, it is clear that the FCC intends to interpret its rules very strictly for future enforcement purposes.

The new rules become effective six months after publication in the Federal Register. Carriers need to begin work now to review their internal processes and procedures across all departments to determine any changes in policies and/or procedures that must be implemented to comply with the new rules. Many observers expect a carrier appeal of at least the new opt-in requirement for sharing of CPNI with joint venture partners and independent contractors.

In addition, the FCC adopted a further notice of proposed rulemaking ("FNPRM") regarding possible additional measures it should impose on carriers. The FNPRM asks:

- Whether mandatory password protection should be extended to non-call detail CPNI;
- Whether to mandate audit trails;
- Whether to mandate protections (such as encryption, audit trails, logs, etc.) for the physical transfer of CPNI among companies;
- Whether to adopt data retention limits; and
- Whether to adopt rules to secure the privacy of customer information stored in mobile communications devices (such as mandating an ability for customers to erase data).

Comments on the FNPRM are due 30 days after publication in the Federal Register, and replies are due 60 days after publication in the Federal Register.

Broadcast Issues Have High Profile at FCC in April

On the enforcement side, the FCC released the $12.5 million payola settlement under which Citadel, Clear Channel, CBS Radio, and Entercom will be required to document gifts from music labels to station employees, including promotional items. Though such practices are not prohibited, and the four broadcasters will make no admission of guilt, in addition to the substantial settlement payment, each must maintain databases tracking all gifts valued at $25.00 or more and must make such data available for FCC inspection upon request.

On the regulatory side, at the April 25 open meeting, the FCC adopted three measures related to the upcoming digital television transition. One order requires retailers to post warnings on or close to analog-only televisions to advise consumers that the device will not receive broadcast signals after the February 17, 2009 analog cutoff date. In the second item, the Commission initiated its third periodic review of procedures and rule changes necessary to effect the digital television ("DTV") transition, focusing on making efficient use of vacated broadcast spectrum to increase consumer choice and maximize spectrum available for public safety use. Finally, the Commission issued a Public Notice seeking comment on various proposals to ensure that cable customers, even those with analog-only sets, can view must-carry television channels after the DTV transition.

On the legislative side, the Commission issued a long-awaited report to Congress on the impact of excessively violent television programming on children. Citing findings that exposure to violence on television can increase aggressive behavior in children, and citing the inadequacy of measures like television ratings and the V-Chip, the FCC recommends legislative action to address the issue. Though the report does not ask Congress to ban television violence, which would raise potential First Amendment concerns, it does suggest that narrowly tailored restrictions clearly tied to substantial government interest in protecting children would be consistent with Supreme Court precedent. Accordingly, the report recommends time-of-day restrictions and requiring cable and satellite providers to offer a la carte service to allow parents to purchase only those channels they

consider appropriate for their household.

On another children's television issue, the FCC released a Public Notice seeking comment on the status of children's television programming and compliance with the Children's Television Act and the FCC's rules. Comments will be due 30 days after publication in the Federal Register.

Finally, on the transactional side, FCC waivers will be required to complete an announced deal under which Tribune Company's broadcasting assets will come under private ownership. Tribune must acquire five waivers of the Commission's newspaper-broadcast cross-ownership ban, one for each market where it owns both a television station and a daily news publication. One of the markets previously escaped the ban due to grandfathering, one market currently operates under a waiver that will remain valid until the FCC finishes its cross-ownership ban proceeding (though the waiver will not transfer to the new owner), and in the other three markets the stations are in the process of renewing their broadcast licenses.

Lawmakers Attempt to Strengthen E911 Access

Both Congress and the FCC continue to express concern regarding consumer access to enhanced 911 ("E911") functionality via VOIP and wireless technologies and are delving into potential solutions that could require service providers to make operational changes to increase E911 reliability. A chief issue at a recent Senate Commerce, Science, and Transportation Committee ("Committee") hearing concerned how to fund new and upgraded 911 communications networks and call centers to handle 911 calls from varying platforms (*i.e.,* wireline, wireless, Internet, etc.). According to public safety representatives, lack of adequate funding will only exacerbate the existing disparities among public safety answering points ("PSAPs").

In addition, Senate hearing witnesses were asked how they could enable deployment of E911 to VOIP customers who do not yet have E911 capability. A representative of Vonage Holdings Corporation noted that approximately 75 percent of its remaining non-E911-capable customers do not have technological E911 access and the remaining 25 percent face PSAPs that refuse to accept calls out of concern over liability issues. The Committee also recently approved the IP-Enabled Voice Communications and Public Safety Act (S.428) ("Bill"), which, among other things, would ensure that VOIP service providers can access 911 communications facilities controlled by incumbent telephone companies and non-dialable pseudo automatic number identifications ("pANIs"). The Bill would require the FCC to adopt implementing regulations within 90 days of the Bill's enactment.

Lawmakers at the Committee hearing also questioned whether the FCC's location measurement methodologies for wireless E911 services should be revised because global positioning system ("GPS") technology does not work as well as cell-site-based triangulation in determining the location of calls that originate inside buildings. Public safety representatives further noted at the hearing that wireless E911 location accuracy does not meet expectations. The Association of Public Safety Communications Officials International ("APCO") intends to release a report in May – believed to be the first independent evaluation of carriers' location technology – with test results showing that callers' locations could not be pinpointed with sufficient accuracy in many cases. The Bill discussed above also would require the FCC to pay for the completion of a study and report regarding wireless E911 location issues conducted by Dale Hatfield, former chief of the FCC's Office of Engineering and Technology.

FCC Chairman Martin reportedly has circulated to his fellow commissioners a draft declaratory ruling and further notice of proposed rulemaking regarding wireless E911 location-accuracy issues. The declaratory ruling reportedly concerns a petition filed in late 2004 by APCO urging the FCC to clarify that location accuracy should be measured on the PSAP level. The wireless industry and other public safety groups, however, argue that statewide measuring is more appropriate. The further notice purportedly seeks comment on ways to make handset-based and network-based E911 location technologies more reliable, including the use of hybrid handset/network-based technologies.

On a related note, Dobson Communications entered into a consent decree with the FCC to terminate an investigation regarding the carrier's alleged failure to ensure that its operations in Michigan and other states comply with the FCC's E911 rules. Under the terms of the consent decree, Dobson agreed to make a voluntary contribution of $700,000 to the U.S. Treasury and to implement an E911 compliance program to better manage its E911 deployments.

Federal Trade Commission Wants to Regulate Common Carriers

The Federal Trade Commission ("FTC") is empowered to scrutinize unfair, deceptive, and anticompetitive business practices of all kinds, giving it one of the broadest mandates of any federal agency. Its jurisdiction is

limited, however, by specific exceptions that prevent the agency from regulating banks, common carriers, and other designated industries.

In hearings before the Senate Commerce Committee on April 10, all five of the FTC commissioners agreed that Congress should repeal the common carrier exemption. In the words of Chairman Majoras, the FTC increasingly is "bumping up against" the exemption, with the result that carriers "stymie [the FTC's] enforcement efforts."

If the FTC gets its way on this question, telephone companies and other carriers will find themselves increasingly subject to conflicting obligations in areas where FTC and FCC rules overlap. Such confusion already is apparent in telemarketing regulation, where FTC requirements are in some ways more confining than those of the FCC. Elimination of the common carrier exemption could exacerbate these tensions, and might subject carriers' rates and other practices to an agenda different from the deregulatory policies of the FCC.

Department of Justice Requests More Information on XM-Sirius Merger

The Department of Justice ("DOJ") is taking a careful look at the proposed merger of XM and Sirius, the principal providers of mobile, satellite-based radio entertainment services. According to XM and Sirius filings with the Securities and Exchange Commission, the DOJ has requested more information from those companies and also might request input from customers, advertisers, and competitors.

The proposed merger has been controversial ever since it was announced, with the National Association of Broadcasters and some members of Congress strongly in opposition. The fact that the DOJ now has made two informational requests increases the likelihood that the merger will be rejected – an outcome that many observers, on Wall Street and elsewhere, considered at least an even bet even before the second request was made.

Supreme Court Upholds Private Right of Action to Enforce FCC Regulations

On April 17, the Supreme Court, by a vote of 7-2, upheld the right of Metrophones Telecommunications, Inc. to recover damages in court from Global Crossing Telecommunications, Inc. for Global Crossing's violation of the FCC's payphone compensation regulations. Global Crossing had argued that there is no private right of action under Section 207 of the Communications Act ("Act") for a violation of those regulations, a position that would have significantly undermined enforcement of a large portion of the FCC's regulations if it had prevailed.

The FCC's payphone compensation regulations required telephone companies carrying payphone calls to reimburse payphone providers $0.24 per call, and, in promulgating those regulations, the FCC determined that a carrier's refusal to pay the required compensation amounts to an "unreasonable practice" under Section 201 (b) of the Act. Metrophones, a payphone provider, brought a complaint in federal district court against Global Crossing for payphone compensation. Metrophones claimed that Global Crossing's refusal to pay violated Section 201(b), thereby permitting Metrophones to sue for payphone compensation under Section 207 of the Act. The district court agreed, and the Ninth Circuit affirmed.

Justice Breyer, writing for the majority, explained that the statutory scheme supported Metrophones' federal lawsuit. In particular, the terms common to Section 207 of the Act, which provides a private right of action against common carriers, Section 206 of the Act, which makes carriers liable for "unlawful" acts, and Section 201(b), declaring any "unjust or unreasonable" charge or practice to be "unlawful," link the private remedy under Section 207 with practices that violate Section 201(b). Moreover, "to violate a regulation [such as the payphone compensation requirement] that lawfully implements §201(b)'s requirements *is* to violate the statute." Litigants have long assumed that they may bring an action under Section 207 for violation of a rule or regulation that lawfully implements Section 201(b).

Applying the deference due under *Chevron U.S.A., Inc. v. NRDC, Inc.*, the Court held reasonable, and thus lawful, the FCC's determination that violation of the payphone compensation rules is an "unreasonable practice" under Section 201(b). The Court pointed out that transportation carriers and communication firms entitled to revenues under rate divisions or cost allocations have long been able to bring lawsuits for compensation or damages under the Act or parallel provisions of the Interstate Commerce Act. The Court rejected Global Crossing's argument that Section 207 does not authorize actions for violations of regulations, pointing out that Metrophones sought damages for violation of Section 201(b)'s prohibition of an unreasonable practice.

Justice Scalia dissented, arguing that the payphone compensation regulations are substantive rules, rather

than interpretive rules, and thus cannot provide a predicate for a violation of Section 201(b), but the majority found no basis in the statute for such a distinction. "Insofar as Justice Scalia uses adjectives such as 'traditional' or 'textually based' to describe his distinctions, and 'novel' or 'absurd' to describe ours, we would simply note our disagreement."

Text of Net Neutrality NOI Released, Setting Pleading Cycle for What Promises to Be a Lively Debate

As we described in our last edition (see "FCC Tees Up Lively Debate with Net Neutrality" in March 2007 Communications Law Bulletin), the FCC voted in March to adopt a notice of inquiry ("NOI") on broadband industry practices (a/k/a net neutrality). In mid-April, the text of the NOI was released. Although the text contained few surprises, it did request detailed and verifiable examples of any problems in the marketplace, and asked whether the FCC has legal authority to enforce its Internet Policy Statement in the event of any specific problems or market failures.

Comments on the NOI are due June 15, 2007, and replies are due July 16, 2007.

Legislative Developments

On April 23, House Energy and Commerce Committee members Rick Boucher (D-VA) and Lee Terry (R-NE) introduced a bill to reform the federal Universal Service Fund ("USF") by broadening the base of USF contributions, controlling distributions from the USF, and facilitating deployment of broadband services. The measure would require providers of services that substitute for traditional telephone service and providers of connections to the broadband network to contribute to the USF. The measure also would control the growth of the USF by capping all high-cost support mechanisms. Additionally, the bill would facilitate broadband deployment, particularly in rural areas, by allowing recipients to use USF funds to deploy broadband within their service areas and by requiring recipients to deploy broadband services with a download speed of at least 1 megabit per second within five years of enactment. The bill is intended to reflect broad areas of consensus among industry representatives and others with an interest in the universal service system.

Earlier in April, Rep. Mike Ferguson (R-NJ) introduced legislation requiring the FCC to initiate a rulemaking to re-channel public safety spectrum in the upper 700 MHz band to accommodate commercially available broadband applications. (For other 700 MHz developments, see separate article, "FCC Adopts Order and Further Notice Regarding 700 MHz Band," in this edition.) During the prior Congressional session, Rep. Ferguson introduced a similar measure as an amendment to the telecommunications reform bill, but the amendment was eliminated in conference, and the reform bill failed to gain passage.

With respect to E911 issues, see separate article in this edition ("Lawmakers Attempt to Strengthen E911 Access").

FCC Releases Annual Regulatory Fee NPRM

The FCC released its annual regulatory fee Notice of Proposed Rulemaking ("NPRM") in mid-April. Although the FCC proposes to retain most of its existing procedures and methodologies for regulatory fees (which are due in August or September), the most interesting aspect of the NPRM is the FCC's proposal to impose regulatory fee obligations on interconnected VOIP providers (who are now subject to USF and certain other regulatory requirements). The NPRM asks whether interconnected VOIP regulatory fees should be imposed based upon revenues (similar to interstate telecommunications service provider regulatory fees) or based upon numbers (similar to commercial mobile radio service regulatory fees).

With respect to international bearer circuit regulatory fees, the FCC again deferred any reform action to a separate petition for rulemaking proceeding that has been pending for over a year.

Comments on the NPRM are due May 3 and replies are due May 11.

Congressional Pressure Continues on USF Reform While Joint Board Expected to Recommend Capping High-Cost Distributions

Amid continuing pressure from Congressional lawmakers regarding the sustainability and reform of the USF (see related article, "Legislative Developments," in this issue), the Federal-State Joint Board on Universal Service is expected to recommend that the FCC temporarily cap monies distributed to eligible telecommunications carriers ("ETCs") under the USF high-cost fund. Adoption of the Joint Board's recommendation could freeze funding to competitive ETCs – mostly wireless carriers – and discourage states

from approving new competitive ETCs.

Following a House Telecommunications Subcommittee FCC oversight hearing in March, Subcommittee Chairman Markey (D-MA) sent a letter to FCC Chairman Martin seeking specifics regarding how he plans to control the USF's "explosive growth" and a "blueprint for achieving affordable broadband service" for all Americans. Markey also asked Chairman Martin to quantify the effect of the FCC's decision to classify wireline broadband service as an information service that no longer is subject to USF contribution requirements and whether the FCC intends to broaden the contribution base of the USF to make up any shortfall from the FCC's decision. Chairman Markey also posed questions regarding the use of reverse auctions to distribute high-cost monies.

In addition, Republican Senators Sununu (NH), DeMint (SC), McCain (AZ), and Ensign (NV) wrote to Chairman Martin urging him to ensure that any caps on USF distributions should be neutral and not target or favor one group of service providers over others. The Senators also argued that caps should only be temporary while the FCC pursues further USF reform. Further, the Senators argued that reverse auctions would guarantee "regulatory parity" and offer "market-oriented solutions" to support the "emergence of new technologies to many markets." Representatives Boucher (D-VA), Terry (R-NB), and Pickering (R-MS), however, also sent a letter to Chairman Martin opposing reverse auctions.

The Joint Board is expected to recommend shortly that the FCC cap high-cost USF monies for two years to provide the FCC with time to adopt more permanent reform measures. The cap reportedly would be applied at the state level to competitive ETCs – i.e., the high-cost disbursements to competitive ETCs would be capped in each state. Other options may include applying the cap on a nationwide or local wire center basis. The FCC is required to act on the Joint Board's recommendation within one year.

Video Franchise Developments

In early April, several municipal groups filed petitions in six courts seeking to block the FCC's recent video franchise order. The six appeals were consolidated and scheduled for consideration by the Sixth Circuit Court of Appeals. Oral arguments are expected to be heard because the challenge to the video franchise order implicates larger issues such as whether federal regulators can preempt the authority of municipalities.

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

- Nevada's House passed a bill in late March that would shift franchising authority from municipalities to the secretary of state. The state would have 35 days to act on franchise applications, consisting of 15 days to decide whether an application is complete, and 20 additional days to issue a franchise. The bill allows incumbents to opt out of existing municipal video franchises in favor of a state franchise.
- Minnesota's House passed a new bill in late March shifting video franchising from municipalities to the state Public Utilities Commission ("PUC"). The PUC would have 30 days to act on applications for franchises and would be required under the law to consider factors such as the applicant's prior video service experience and its customer service plan. Under the bill, incumbents may not opt out of existing municipal franchises.
- The Iowa House passed a video franchising bill, which now returns to the State Senate for concurrence with House amendments that require incumbent cable providers to continue to meet public-access channel obligations to the end of the term of their current local franchises, even if they apply for a state franchise. The bill shifts video franchising authority to the Iowa Utilities Board, which would have 15 days to act on applications.
- Georgia's legislature passed a video franchise reform bill in mid-April that would allow new video providers either to seek a state franchise from the secretary of state or to negotiate with municipalities for a local franchise. Incumbent providers, similarly, could either keep their existing local franchises or seek a state franchise. For providers seeking state franchises, the secretary of state would have 45 days to act on applications.
- Tennessee state senators representing the state's rural areas sought amendments to a video franchise bill introduced in March that would make universal rural broadband a condition for companies seeking a state video franchise.

Meanwhile, a video franchise bill in Wisconsin has been delayed due to concerns over how much it will cost the state to take over video franchising and process customer complaints. Rather than pass it as expected, the State Senate sent the bill back to the budget committee for a more detailed cost assessment.

Recent Wireless Developments

FCC Adopts Order and Further Notice Regarding 700 MHz Band

The FCC adopted at its April 25, 2007 open meeting a Report and Order ("Order") and Further Notice of Proposed Rulemaking ("Further Notice") concerning the rules that govern 60 MHz of commercial and public safety spectrum in the 700 MHz band. The long-awaited item is the latest piece of an extremely complicated puzzle involving transitioning broadcasters off the 700 MHz spectrum as part of the DTV transition (see separate article in this edition, "Broadcast Issues Have High Profile at FCC in April"), a statutory mandate to commence the auction of the commercial 700 MHz spectrum by January 28, 2008, another statutory mandate to allocate 36 MHz of the spectrum for commercial use and 24 MHz of the spectrum for public safety use, and multiple competing proposals regarding how to configure the band plans for both the commercial and the public safety allocations. The favorable propagation characteristics of the 700 MHz band make the outcome of this proceeding exceptionally important for the wireless and public safety communities as well as consumers.

The Order and Further Notice tackle issues relating to three ongoing FCC proceedings concerning the 700 MHz commercial allocation, guard bands, and public safety allocation. According to the FCC, the item "will allow the FCC to offer a variety of licenses in the 700 MHz auction and facilitate the provision of new and innovative services to consumers across the country, as well as clearing the path for nationwide, interoperable wireless broadband services for the public safety community."

- **700 MHz Commercial Allocation.** The Order concludes that a mix of geographic area sizes will be auctioned, although the Further Notice presents and seeks comment on multiple band plans and asks whether combinatorial bidding should be used when auctioning the upper 700 MHz band. The Order also adopts various technical rules, such as power limits, and allows commercial carriers to operate at higher power limits in rural areas. The Order further applies the FCC's 911/E911 and hearing aid compatibility rules to any commercial mobile radio services, including those provided over the 700 MHz commercial spectrum. In addition, the Order adopts a ten-year license term for 700 MHz commercial licenses. The Further Notice seeks comment on replacing the current "substantial service" build-out requirement with more stringent geographic-based requirements. The Further Notice also asks for input on a consumer coalition's proposal to apply open-access rules to the 700 MHz spectrum.
- **700 MHz Guard Bands.** The Order replaces the current guard band manager spectrum leasing rules with the spectrum leasing rules established in the FCC's Secondary Market proceeding. The Further Notice tentatively concludes that the FCC will not adopt proposals to restructure the guard band that would allocate more than 24 MHz of spectrum for public safety use, and seeks comment on a recent guard band restructuring proposal filed by Access Spectrum, LLC and Pegasus Communications Corporation.
- **700 MHz Public Safety Allocation.** The Further Notice tentatively concludes that the existing allocation for wideband public safety operations should be limited to broadband applications consistent with a nationwide interoperability standard. The Further Notice also recommends that the broadband allocation be placed in the lower portion of the public safety allocation, while the narrowband allocation should be consolidated in the upper portion of the 700 MHz band. In addition, the FCC seeks comment on the viability of public-private spectrum-sharing initiatives, including a proposal from Frontline Wireless, LLC.

The issues raised in the Further Notice are hotly contested, not only within the industry, but also among the FCC commissioners. In fact, the open meeting was delayed from 10:30am to 7pm while the commissioners reportedly continued to negotiate the item.

Although the FCC reportedly intends to commence the auction of the 700 MHz commercial spectrum this fall, the release of the Further Notice raises serious questions as to whether this timing is feasible. FCC Chairman Martin stated that he hopes to adopt final rules in June, although this seems to be an ambitious schedule.

Comments and reply comments will be due 21 days and 28 days, respectively, after publication of the Further Notice in the Federal Register. After the pleading cycle has run its course, a decision on these complex and controversial issues must be made, written, and released. Assuming a decision is made in June and prospective bidders are given the typical six months' preparation time, the auction would begin in December.

Oral Arguments for AWS Auction Appeal Scheduled

The United States Court of Appeals for the Third Circuit is tentatively scheduled to hear arguments on May 25 regarding the lawfulness of new designated entity ("DE") rules adopted in 2006 and the Advanced Wireless Service ("AWS") auction held shortly thereafter. Council Tree Communications, Inc., Bethel Native Corp., and the Minority Media and Telecommunications Council previously sought and were denied a stay of the auction pending judicial review of the new DE rules. The appellants recently requested that the court expedite oral arguments and disposition of the case prior to the FCC's upcoming 700 MHz auction. If the court remands the

case, it could leave significant issues unresolved leading into the 700 MHz auction.

Proceeding Terminated Regarding Use of Cellular Phones on Airplanes

FCC Chairman Kevin Martin has followed through on his promise (first reported in the March edition of the Communications Law Bulletin) to terminate a proceeding regarding the use of cellular telephones aboard airplanes. According to the FCC, the record developed on this issue was insufficient to determine whether such use would cause harmful interference to terrestrial wireless operators. The FCC noted that the Federal Aviation Administration currently is studying this issue, and that the FCC may reconsider this issue in the future.

FCC Acts on Wireless Hearing Aid Compatibility Waivers

The FCC acted on 19 wireless regional carriers' requests to waive portions of the FCC's hearing aid compatibility rules. Under the FCC's rules, non-nationwide wireless carriers were required to offer by September 16, 2005, at least two hearing aid-compatible handsets for each type of wireless network technology (e.g., CDMA, GSM, TDMA) and comply with certain handset labeling requirements. The FCC granted five waiver requests in whole and five in part, denied six waiver requests, and dismissed as unnecessary three waiver requests. Although each carrier presented different circumstances, the FCC generally granted waivers in cases where compliance was delayed because the availability of certain certified compliant handsets before September 2005 was uncertain. The FCC referred to the Enforcement Bureau for further review the cases in which the FCC denied carriers' waiver requests in whole or in part.

FCC Begins Inquiries on Broadband Data and Deployment

On April 16, the FCC released two notices addressing broadband deployment:

- NOI on advanced telecommunications (broadband) deployment, and
- NPRM on broadband data collection on Form 477 and elsewhere.

The Broadband Deployment NOI was released pursuant to Section 706 of the Telecommunications Act of 1996. This is the fifth "periodic" NOI since passage of that Act. The result will be another report on "whether broadband services are being deployed to all Americans in a reasonable and timely fashion," as required by Section 706. The FCC asks questions similar to those in earlier NOIs:

- What is "Advanced Telecommunications Capability?" The NOI asks how to define "broadband" in light of the rapid technological changes in the marketplace. In particular, it asks about the impact of mobility and new higher-speed services and new platforms, such as wireless broadband services, and the impact of ownership of wireless companies by companies with substantial wireline broadband and public switched telephone network facilities.
- Is Advanced Telecommunications Capability being deployed to all Americans? The NOI includes questions about the availability of broadband, especially in rural and hard-to-serve areas, the economics of deployment and level of competition, the impact of pricing, and trends in developing technologies, with some questions focused on wireless and mobile network technologies, such as EV-DO, WCDMA/HDSPA, and WiMAX.
- Is broadband deployment reasonable and timely? The NOI asks whether the FCC should examine the availability of broadband services to different groups of consumers, such as rural consumers, students, low income and minority consumers, and the disabled. It also seeks comment on comparable data on speed, price, availability, and adoption of broadband services in other countries.
- What actions can accelerate deployment? Are there groups for whom the pace of deployment justifies action under Section 706 to remove barriers to investment or to promote competition?
- What are the patterns of consumer adoption and usage of service using Advanced Telecommunications Capabilities? What factors affect consumers' decisions to acquire broadband services?

Comments are due on May 16, 2007, and replies on May 31, 2007.

The Broadband Data NPRM responds to concerns expressed many times by Commissioner Copps that the broadband reports required by Section 706 are not based on appropriate measurements. The NPRM explores ways to collect information that the FCC needs to set broadband policy in the future. It asks:

- Detailed questions on how the FCC can improve the data it collects about broadband deployment nationwide, particularly in rural and other hard-to-serve areas, including tribal lands;

- How the FCC can improve the data about *wireless* broadband Internet access that it collects on Form 477, such as:
    - whether to revise the Form 477 instructions to require mobile wireless providers to report, separately, the number of month-to-month (or longer-term) subscriptions to broadband Internet access service designed for wireless devices that have their own browsers ("full Internet browsing"), such as laptop computers and personal data assistants;
    - whether to require mobile wireless providers to report, separately, the number of month-to-month (or longer-term) subscriptions for broadband-speed browsing of customized-for-mobile web sites ("mobile web browsing" for purposes of this Notice); and
    - whether to require mobile wireless providers to report, separately, the number of unique mobile voice service subscribers who are *not* month-to-month (or longer-term) subscribers to an Internet access service, but who nevertheless made any news, music, video, or other entertainment downloads to the subscriber's handset at broadband speed during the month preceding the Form 477 reporting date;
- Whether to modify the FCC's collection of "speed tier" information;
- How to best collect information on subscribership to interconnected VOIP services; and
- How the FCC can develop a more accurate picture of current broadband deployment (including by developing more granular measures and extrapolating from more accurate estimates or representative urban, metropolitan, exurban, low-income, tribal, and rural areas), as well as gather information on price, other factors that affect consumer uptake of broadband services, and international comparisons.

The NPRM states that although the FCC recognizes that additional data collection could impose an increased burden on reporting entities, improved information about broadband availability and deployment would enable the FCC to fulfill its statutory mandate to encourage the timely deployment of broadband services to all Americans.

Comments are due 30 days after the NPRM is published in the Federal Register, and replies are due 60 days after Federal Register publication.

In his separate statements on the broadband proceedings, Commissioner Copps was extremely critical of the FCC's failure to gather better broadband data in the past, stating, with regard to the NPRM, that "[a]n item like this should have been voted ten years ago. But we take what we can get" and concluding that "I … hope it isn't too late" to begin the steps tentatively outlined in the NPRM. In his statement on the NOI, he decried the "commercial and regulatory missteps" that have led to the United States' decline to 15th place in the world in broadband penetration and asserted that "it will be years before we will have the benefit of the kind of FCC data we need" to enable the FCC "to reverse our nation's slide into technological and communications mediocrity." In his separate statement on the NPRM, Chairman Martin stated that he is "proud of the progress we have made in broadband deployment," but "there is more we can do."

State Developments

State Legislatures Continue to Address VOIP-Related Issues

VOIP continues to be a subject of interest to state legislatures this session, with Maryland and Arkansas joining other states that already have passed VOIP-related legislation. In April, the Maryland General Assembly sent SB-864 to the Governor for signature. This bill, if signed, will deny the Maryland Public Service Commission ("PSC") jurisdiction over rates, terms and conditions, and customer complaints related to VOIP services. It will allow the PSC to assess E911 and TRS fees, however. In addition, if a telecommunications company moves a customer from a PSC-approved tariffed service to a VOIP-type service, the company must notify the customer that the PSC does not have jurisdiction over the VOIP service and that any customer complaints must be filed with the Maryland Attorney General's office. The Governor is expected to sign the bill.

On March 29, the Arkansas Governor signed SB-236. This law increases the existing monthly E911 surcharge from $.40 to $.50 and extends the charge to prepaid cellular services, VOIP, and other "nontraditional phone services" that interconnect with the public switched network.

Developments in the Missouri Complaint Against Comcast's VOIP Service

As reported in previous Bulletins, the Missouri PSC staff last September filed a complaint at the PSC against Comcast, alleging that Comcast's Digital Voice VOIP service was intrastate voice telecommunications service and that Comcast was providing the service without PSC authority. The PSC staff claims that it has jurisdiction over the VOIP service and, as part of its efforts to prosecute its complaint, has issued data requests to Comcast seeking financial and operational information about the service. In the most recent development in this dispute, the full PSC has ordered Comcast, over its objections, to answer the staff data requests on the

grounds that the information sought, in particular Comcast's revenue information, is relevant in the event that the PSC decides to sue Comcast in state court for failure to comply with its state certification requirements. Comcast continues to argue that the PSC does not have jurisdiction over its Digital Voice VOIP service.

California CPUC Revives Its Service Quality Rulemaking

In a Ruling issued on March 30, California Public Utilities Commission ("CPUC") Commissioner Rachelle Chong has brought back to life a long dormant service quality rulemaking for the purpose of considering whether the existing service quality rules should be amended to conform to the CPUC's current policy of deregulation of telecommunications services. In the Ruling, Commissioner Chong requests comments on whether the CPUC should require and publish annual customer satisfaction surveys, whether it should monitor the quality of local exchange carriers' services, and whether it should continue to require carriers to file certain service quality reports. The Commissioner notes that the record in the existing rulemaking is four years old and therefore must be refreshed before she can formulate any new recommendations for full Commission consideration. Furthermore, since the original rulemaking was initiated, the Commission's regulatory policies have evolved towards greater reliance on competition and symmetric regulation of all telecommunications carriers. Opening comments on Commissioner Chong's specific proposals are due on May 14, and reply comments are due on June 15.

Other State Regulatory News

Virginia Governor Tim Kaine has vetoed legislation that would have stripped the Virginia Corporation Commission of jurisdiction to review mergers of telecommunications companies, and the Virginia legislature has failed to gather a sufficient number of votes to override his veto. As reported in past Bulletins, earlier this year the Virginia legislature passed HB-1755, which would have prevented the Corporation Commission from reviewing any telecommunications company merger or acquisition. In vetoing the bill, the Governor stated that the legislature failed to consider other reasonable alternatives to broad prohibition. Given its failure to override the veto, the legislature will need to wait until next year if it wants to reintroduce the bill.

In early April Massachusetts Governor Deval Patrick approved a plan to reorganize the Department of Telecommunications and Energy ("DTE"), the state body with regulatory oversight of telecommunications and energy utilities, into two separate entities. Telecommunications and cable-related matters will be regulated by the new Department of Telecommunications and Cable ("DTC") in the Office of Consumer Affairs and Business Regulation. Energy matters will be regulated by the Commonwealth Utility Commission ("CUC"), part of the Executive Office of Environmental Affairs. The old DTE had five commissioners. The new DTC and CUC will have one and three members, respectively. With this change, Massachusetts will be the only jurisdiction in the country with a single-member telecommunications regulatory agency.

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.

May 3, 2007	Comments due on **annual regulatory fee NPRM.**
May 7, 2007	Reply comments due on **NPRM in local video franchise order**, including whether preemption of certain local video franchise processes should be extended to incumbent cable operators.
May 7, 2007	**Rural health care pilot program applications** due.
May 7, 2007	**CMRS market competition** comments due.
May 11, 2007	Reply comments due on **annual regulatory fee NPRM.**
May 14, 2007	**Auction No. 71 (broadband PCS) mock auction**.
May 14, 2007	Deadline for **broadband Internet access and VOIP providers to comply with CALEA requirements**.
May 15, 2007	Replies to oppositions/comments due on **Skype petition for rulemaking regarding application of *Carterfone* rules to wireless networks**.
May 16, 2007	**TV license post-filing announcements due** for Delaware and Pennsylvania.
May 16, 2007	**Auction No. 71 (broadband PCS) begins**.
May 16, 2007	**Prepaid calling card reports to transport service providers** due.
May 16, 2007	Comments due on **broadband deployment NOI.**
May 21, 2007	Upfront payments due for **Auction No. 72 (Phase II 220 MHz)**.
May 22, 2007	Reply comments due on **CMRS market competition.**

May 23, 2007	Reply comments due on **migratory birds NPRM**.
May 31, 2007	Reply comments due on **broadband deployment NOI.**
June 1, 2007	**TV license expiration date** for New York and New Jersey.
June 1, 2007	**TV license post-filing announcements due** for Delaware and Pennsylvania.
June 15, 2007	Comments due on **net neutrality NOI.**
June 16, 2007	**TV license post-filing announcements due** for Delaware and Pennsylvania.
June 18, 2007	**Mock auction for Auction No. 72 (Phase II 220 MHz)**.
June 18, 2007	Comments due on **NPRM on delivery of multichannel video to multiple-dwelling units (MDUs)**.
June 20, 2007	**Auction No. 72 (Phase II 220 MHz) begins.**
June 30, 2007	**Prepaid calling card provider certifications due to FCC.**