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Legal Updates & News

Bulletins

Communications Law Bulletin, July/August 2007

August 2007

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This combined issue of our Bulletin describes events in July and August of this year. Although mid-summer tends to be a quiet time in Washington and the state capitals, there are a surprising number of developments to report in all segments of our industry. Those developments are covered here, along with our usual list of deadlines for your calendar.

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No Summer Vacation for FCC Enforcement Activity

The Federal Communications Commission ("FCC" or "Commission") has had a busy enforcement schedule this summer, involving a variety of regulatory compliance issues. On July 3, two orders were released adopting consent decrees, one between the Enforcement Bureau ("Bureau") and Scientific Games Racing, LLC ("Scientific Games") and one between the FCC and Verizon.

The Scientific Games consent decree settled an investigation of its unauthorized operation of satellite earth stations and unauthorized assignments of earth station licenses. At various periods, Scientific Games acquired and operated satellite earth stations without FCC authorization, although it subsequently obtained licenses, or

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approval for the assignment of licenses, for all of them. Under the consent decree, Scientific Games agreed to make a voluntary contribution to the U.S. Treasury of $215,000.

The Verizon consent decree settled an investigation of MCI's underpayment of its universal service fund ("USF"), numbering administration, number portability, and Telecommunications Relay Service contributions and other regulatory fees. These underpayments resulted from MCI's underreporting of its interstate telecommunications revenues on its FCC Forms 499A and 499Q during the period 2003-05. MCI initially informed the Bureau of its underreporting, and Verizon, which acquired MCI in 2005, paid the amounts owed in full in 2006. Under the consent decree, Verizon agreed to make a voluntary contribution to the U.S. Treasury of $500,000 and to implement a two-year USF contribution reporting compliance program, including Form 499A and 499Q training for its employees, internal Form 499 accounting controls, and independent auditing of its compliance with the internal controls.

On July 17, the FCC adopted another consent decree with Verizon, this time settling an investigation initiated by a Letter of Inquiry ("LOI") of Verizon's compliance with network outage reporting requirements. Verizon agreed to a voluntary contribution to the U.S. Treasury of $1,400,000 and to implement a two-year network outage reporting compliance program, including a training program, internal controls over outage reporting, and annual reports to the Bureau in the form of an affidavit or declaration under penalty of perjury by a Verizon officer verifying that Verizon has complied with the consent decree.

On July 19, the Bureau released Notices of Apparent Liability for Forfeiture ("NALs") against Audio-Video Corporation d/b/a A-1 Communications and Mechanicsville Telephone Co. for violations of the requirement that a corporate officer certify annually that a carrier has adequate customer proprietary network information ("CPNI") operating procedures. In both cases, the companies' responses to Bureau LOIs revealed that they had not prepared proper CPNI certifications for the past five years. Citing consumers' heightened concerns regarding the protection of CPNI, the Bureau proposed a forfeiture of $100,000 in each case. The companies are required to pay the forfeiture or file responses to the NALs in 30 days explaining why the proposed penalty should be reduced or eliminated. Virtually identical NALs proposing forfeitures of $100,000 each for similar violations were issued against Capital Telecommunications, Inc. and Connect Paging, Inc. d/b/a Get A Phone on August 10.

On July 31, the FCC released an NAL against Extreme Leads, Inc., a telemarketer, for 218 violations of the FCC's "junk fax" rules. In response to consumer complaints against Extreme Leads, the Bureau issued a citation to Extreme Leads on June 14, 2006 for using a telephone facsimile machine, computer, or other device to send unsolicited advertisements to facsimile machines in violation of Section 227 of the Communications Act ("the Act") and the FCC's related rules. Extreme Leads did not respond to the citation. Based on 132 additional complaints that Extreme Leads sent another 218 unsolicited advertisements following the citation to consumers without their permission and with whom it had no business relationship, the FCC proposed a forfeiture of $1,377,000. The FCC applied a base forfeiture of $4,500 to each of 146 apparent violations and an increased forfeiture of $10,000 to each of 72 additional violations where the consumer requested or attempted to request that Extreme Leads discontinue its faxing. Extreme Leads has 30 days to pay the forfeiture or respond to the NAL.

On August 14, the FCC released a similar NAL against another telemarketer, The Hot Lead LLC d/b/a The Hot Lead Company ("Hot Lead"), for 356 violations of the "junk fax" rules. In response to consumer complaints, the Bureau issued a citation to Hot Lead on May 5, 2006 for sending unsolicited advertisements to facsimile machines. Hot Lead did not respond but instead sent another 356 unsolicited advertisements to 110 consumers. The FCC proposed a forfeiture of $2,168,500, calculated by applying the $4,500 base forfeiture to 253 apparent violations following the citations and an increased forfeiture of $10,000 to 103 additional violations where the consumer requested or attempted to request that Hot Lead discontinue its faxing. Hot Lead has 30 days to pay the forfeiture or respond to the NAL.

On August 15, the FCC released an NAL against VCI Company ("VCI") for violations of USF rules relating to Lifeline and Link Up services. As a result of audits conducted by the Universal Service Administrative Company ("USAC") and the Oregon Telephone Assistance Program and an investigation by the Oregon Public Utility Commission, the Bureau sent LOIs to VCI regarding its claims for low-income support in various states. Its responses demonstrated that it received reimbursement to which it was not entitled for Lifeline and Link Up support. VCI included thousands of duplicate entries in the total line counts for those low-income services over an 18-month period, continuing well after the initiation of the USAC and state inquiries. VCI blamed these errors on a faulty computer system. The FCC proposed a forfeiture of $1,047,500 for VCI's apparent failure to accurately report the revenues it was forgoing in providing low-income service and for its unlawful receipt of excessive reimbursement for Lifeline and Link Up support. The FCC also warned that it may suspend USF support to carriers not complying with the FCC's USF criteria and will impose larger penalties if the forfeiture methodologies proposed in the NAL are not adequate to deter violations of its USF rules.

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In at least one case, the Bureau had second thoughts about a previous NAL. On July 13, the Bureau released an order cancelling a previous NAL against Blackstone Calling Card, Inc. for its alleged failure to file registration information with USAC in connection with USF and other contribution obligations. In response to a Bureau LOI, Blackstone provided an unsupported statement that it is not a carrier. In response to the subsequent NAL proposing a forfeiture of $20,000, Blackstone provided copies of contracts establishing that it acted as an agent for carriers in distributing prepaid calling cards and that it was not the carrier responsible for providing the underlying services. Because Blackstone was not a regulated carrier, the Bureau was precluded by Section 503(b)(5) of the Act from proceeding with an NAL without first issuing a citation. Accordingly, the Bureau cancelled the NAL and declined to issue a citation.

Senate Committee Approves Broadband, Number Porting, Broadcast Indecency, and Parental Control Bills, While Additional Measures are Introduced in Congress

In July and August, the Senate Commerce Committee approved a number of bills addressing broadband, number porting, broadcast indecency, and parental control blocking technologies. The broadband bill approved by the committee was an amended version of a broadband data collection measure previously introduced by Committee Chairman Daniel Inouye (D-HI). The amendment was intended to address concerns raised by telecommunications companies by allowing the FCC the option of collecting broadband subscription data based upon five-digit or nine-digit zip codes or census tract information, rather than requiring the use of nine-digit zip codes. The amended broadband bill is similar to a draft bill proposed by House Telecommunications Subcommittee Chairman Ed Markey (D-MA). Sen. Markey's draft bill, however, would ask the FCC to identify tiers of transmission speeds that would include all speeds currently deployed and account for different applications and services. The draft bill also would require the FCC to protect proprietary information submitted by service providers.

The Senate committee-approved number porting bill requires the FCC to establish porting deadlines for different types of telephone service. It also establishes requirements for data exchange between service providers and requires annual reports from providers for the first five years. Telephone industry representatives have supported the measure in order to expedite the number porting process.

The indecency bill approved by the Senate Commerce Committee authorizes the FCC to fine broadcast stations for airing expletives and indecent material even if the material is shown only fleetingly. Broadcasters oppose the bill, and the American Civil Liberties Union noted that the bill would invite litigation by reversing a recent appellate court decision rejecting the FCC policy of fining TV stations for broadcasting fleeting expletives. The Senate Appropriations Committee considered, but rejected on a voice vote a similar measure by Sen. Sam Brownback (R-KS). Sen. Inouye opposed that measure on the procedural ground that the Appropriations Committee was not the proper forum to debate the issue.

The Senate Commerce Committee also approved a bill directing the FCC to examine parental control blocking technologies and consider applying them to various platforms including wireline, wireless, and the Internet. The bill would ask the FCC to focus on technologies that would filter language based upon information in closed captioning and that would work independently of ratings assigned by programming providers.

Meanwhile, Sen. Frank Lautenberg (D-NJ) sponsored a bipartisan bill barring states from imposing regulations that would prevent municipalities from providing broadband services. The bill also would require municipalities providing high-speed Internet services to comply with federal telecommunications regulations. Reps. Rick Boucher (D-VA) and Fred Upton (R-MI) introduced a similar measure. The House bill, however, includes measures to ensure that municipalities cannot discriminate against private competitors and requires public disclosure of information so that prospective broadband projects can be evaluated by the public.

Wireline Competition Bureau Suspends and Investigates Switched Access Tariffs of 41 Rural Carriers and Prohibits Call Blocking Arising from "Traffic Pumping" Dispute

On June 28, the Wireline Competition Bureau ("Bureau") released two orders in connection with the growing "traffic pumping" dispute involving rural incumbent local exchange carriers ("RLECs") accused of manipulating terminating interstate traffic in order to inflate their terminating access revenues. The Bureau released an Order suspending for one day and setting for investigation the switched access rates in the 2007 annual access tariffs of 41 RLECs that raised "access stimulation" issues. Carriers challenging the RLECs' tariffs contended that RLECs exiting the National Exchange Carrier Association ("NECA") traffic-sensitive pool in recent years had engaged in access traffic stimulation practices. For example, such RLECs had entered into agreements with third parties to establish businesses such as conference call services that result in increased terminating interstate traffic. Those practices inflated their terminating interstate traffic to levels far exceeding the level of historical demand assumed in setting individual terminating access rates, enabling them to earn excessive terminating access revenue.

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Carriers challenging the RLEC tariffs alleged that some of the RLECs leaving the NECA traffic-sensitive pool this year had engaged in these "traffic-pumping" practices in the past and that many of the RLECs leaving the NECA pool this year could be expected to do so again. They alleged that, because RLECs establishing individual rates based on historical demand know that historical data is not a reliable proxy for future demand that will be artificially stimulated, the RLECs will earn excessive returns if their switched access rates are not investigated.

The Bureau concluded that the switched access tariffs of the RLECs exiting the NECA traffic-sensitive pool "raise questions of whether rates would remain just and reasonable in the face of access stimulation." Because these carriers have set relatively high access rates based on projected low demand, access stimulation activities could generate increased revenues "that likely would result in rates that are unjust and unreasonable," but that are protected by the "deemed lawful" presumption in Section 204(a)(3) of the Communications Act ("the Act") governing access tariffs that are not suspended. Accordingly, the Bureau suspended for one day and set for investigation the switched access rates in the 2007 annual access tariffs of 39 RLECs exiting the NECA pool and two additional RLEC tariffs raising related issues.

The Bureau also released a Declaratory Ruling reiterating the FCC's prohibition of unreasonable call blocking and including within the scope of the prohibition the blocking of interexchange calls to be terminated by the RLECs assessing the disputed access charges. The Bureau noted that RLECs and their customers had complained of blocking or potential blocking of interexchange calls terminating with RLECs as a form of self-help to resolve the recent access charge disputes. "Because the ubiquity and reliability of the nation's telecommunications network is of paramount importance to the explicit goals of the Communications Act," the Bureau clarified that long distance carriers and wireless service providers may not block their customers' interexchange calls to numbers served by RLECs allegedly imposing excessive terminating switched access charges. The Bureau stated that carriers should use appropriate procedures to challenge allegedly excessive access charges "and may not engage in self-help actions such as call blocking." The Bureau pointed out that it has found that, except in very unusual circumstances, call blocking is an unjust and unreasonable practice under Section 201(b) of the Act and cautioned that its initiation of an investigation of RLEC switched access rates is not a basis for questioning the legitimacy of calls to numbers served by those RLECs. The Bureau also noted that complaints raising similar issues have been filed at the FCC and in federal court, which presumably will continue to be litigated.

On August 24, the Bureau's Pricing Policy Division ("Division") released an Order Designating Issues for Investigation regarding the suspended RLEC switched access rates. The designated issues include: whether the RLECs have included in their revenue requirements any amounts they have paid to third parties engaged in access stimulation activities and, if so, the amounts and justifications for such inclusion; whether the filed switched access rates will remain just and reasonable if demand increases dramatically, taking into account any increases in costs resulting from increased demand; whether the switched access tariffs under investigation should contain language requiring refiling if demand increases a specified amount to ensure that the FCC is able to remedy rates that become excessive; and whether the FCC should forbear from enforcing the "deemed lawful" provision in Section 204(a)(3) for such mid-course tariff filings. The Division also excused all but one of the RLECs from responding to these issues if they agree to include tariff language committing them to file revised tariffs if demand doubles over the previous year or if they join the NECA traffic-sensitive tariff. RLECs must file their direct cases by September 20, parties must respond to those direct cases by October 5, and the RLECs may file rebuttals by October 12.

The FCC's tariff and call blocking orders may not resolve all traffic pumping issues. AT&T and Qwest complained in ex parte letters filed on July 30 and August 15, respectively, that targeting RLECs will not solve the traffic pumping problem unless the FCC also takes action to prevent competitive local exchange carrier ("CLEC") traffic pumping. Because CLECs are not subject to tariff regulation, AT&T noted that, as carriers and the FCC have begun to take action to address RLEC traffic pumping, "free" calling services have been moving their operations from RLEC numbers to numbers controlled by CLECs operating in rural areas. Those CLECs typically assess access charges at the same high levels as the RLECs operating in the same areas. AT&T requested that the FCC declare that traffic pumping kickback arrangements, in which CLECs share access revenues with free calling services, are unlawful. Qwest proposed other techniques for controlling CLEC traffic pumping, such as declaring that calls to a free calling service entering into a revenue sharing arrangement with a CLEC do not constitute terminating access traffic, precluding the CLEC from assessing terminating access charges on such calls, or limits on the growth of terminating access traffic to a given local exchange carrier ("LEC").

On August 15, six RLECs and CLECs filed an ex parte letter complaining that larger carriers are wrongfully withholding access payments owed to them. Pointing out that no regulatory body has recognized the term "traffic pumping," they argued that there is nothing wrong with LECs finding ways to increase traffic, such as AT&T Mobility arranging with "American Idol" to provide the service that allows viewers to vote for their favorite finalist by text message or cell phone call. The LECs argued that the FCC has repeatedly upheld the legality of

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the type of revenue sharing arrangements that AT&T now challenges as illegal "kickbacks" and requested that the FCC stop AT&T's and other large carriers' self-help by issuing a Declaratory Ruling that the withholding of payment of access charges, while refusing to file a complaint at the FCC, constitutes a violation of Sections 201(b) and 203(c) of the Act and that the FCC will not accept referrals from federal courts on the reasonableness of access charges in lawfully-filed, effective tariffs.

New 700 MHz Band and Automatic Roaming Rules Apply to the Wireless Industry

Several significant developments have occurred that will have considerable impact on the wireless industry since the last edition of the Bulletin. Specifically, the FCC released an order modifying the rules for the 700 MHz band, scheduled the auction for January 16, 2008, and is seeking comment on the procedures to use in the auction. In addition, the FCC released an order mandating automatic wireless roaming service for voice and certain data services.

700 MHz Band – New Rules Adopted and Auction Scheduled
The FCC released its long awaited order modifying the service rules for the 700 MHz band ("700 MHz Band Order"). The massive order (around 350 pages in all) revises the existing 700 MHz band plan and service rules to facilitate the creation of a national broadband network for public safety communications as well as promote competition and the development of innovative commercial wireless services.

- **Public Safety Allocation.** The FCC modified the public safety portion of the 700 MHz band plan to group narrowband operations in 12 MHz of the upper portion of the band while aggregating 10 MHz of public safety spectrum in the lower portion of the band for broadband operations. The broadband and narrowband operations will be separated by two 1 MHz guardbands.

  The broadband allocation will be licensed to a single non-commercial entity that will represent the interests of the public safety community ("Public Safety Broadband Licensee"). The Public Safety Broadband Licensee will partner with the commercial 700 MHz D Block licensee and together they will develop a shared, nationwide interoperable broadband network for commercial and public safety users. The D Block licensee will be responsible for constructing the network, subject to stringent build-out requirements. The Public Safety Broadband Licensee will have priority access to the 10 MHz D Block network in times of emergency while the D Block licensee will have preemptable access to the public safety portion of the network.

- **Commercial Allocation**. The FCC divided 62 MHz of commercial 700 MHz band spectrum into five spectrum blocks. These blocks will be auctioned in a variety of geographic area-sized licenses, including Cellular Market Areas ("CMAs"), Economic Areas ("EAs"), and Regional Economic Area Groupings ("REAGs").

  To promote deployment of service, the FCC adopted rigorous build out requirements. Specifically, for CMA and EA licenses, carriers must provide service sufficient to cover at least 35 percent of the geographic area of their license within four years, and 70 percent of this area by the end of the license term. For REAG licenses, carriers must provide service sufficient to cover at least 40% of the population of their license area within four years, and 75%of the population of the license area by the end of the license term. Failure to meet the four year benchmark will result in the reduction of the license term from ten to eight years. Failure to meet the end-of-term benchmark will result in the FCC reclaiming the unserved portions of the license area and making them available to other potential users.

  Some of the more controversial provisions in the new rules relate to the 22 MHz C Block license. Specifically, the FCC mandated that the licensee comply with certain open access requirements such that the C Block network is open to all devices and applications, subject to certain network management conditions that allow the licensee to protect its network from harm. In addition, the FCC concluded that the C Block licenses would be auctioned using "package bidding" so that bidders can more easily create a nationwide spectrum footprint.

  In addition, the FCC will set a reserve price for each 700 MHz block that is auctioned. If those reserve amounts are not met, the licenses will be re-auctioned under more lenient service rules.

The ultimate impact of the 700 MHz Band Order continues to be debated by Congress, industry groups, public safety entities, consumer groups, and others. Although few groups appear completely satisfied with the FCC's new rules, participation in the 700 MHz Band auction will likely be high. In addition to a wide range of wireless companies, several non-traditional wireless companies have expressed great interest in participating in the auction.

Shortly after the release of the 700 MHz Band Order, the Wireless Telecommunications Bureau released a

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public notice scheduling the 700 MHz auction (Auction No. 73) to begin on January 16, 2008 and seeking comment on auction procedures. The FCC statutorily is required to start the auction no later than January 28, 2008. Among other things, the public notice seeks comment on using anonymous bidding (*i.e.*, any information that may reveal the bidders' identities would not be released until bidding concludes), package bidding for the C Block license (the Bureau proposes making certain predetermined packages available), and the reserve prices for each block. Comments are due August 31, 2007, reply comments must be filed by September 7, 2007, respectively.

New Automatic Roaming Rules

The FCC released in August an order ("Roaming Order") establishing an automatic roaming requirement on commercial mobile radio service ("CMRS") providers and a further notice of proposed rulemaking ("Further Notice") seeking comment on further extending the automatic roaming requirement. In addition, the FCC maintained manual roaming obligations. Although the FCC declined to regulate roaming rates or require carriers to file roaming agreements, certain aspects of the new automatic roaming obligation could raise concerns for carriers.

The FCC confirmed in the Roaming Order that roaming (automatic and manual) is a common carrier service governed by Title II of the Communications Act. Under the new rules, upon reasonable request, each "host carrier" (*i.e.*, the carrier being roamed on) has a duty to provide automatic roaming to any technologically-compatible "home carrier" (*i.e.*, the requesting carrier with the contractual relationship with the customer), outside of the requesting carrier's "home market" on reasonable and nondiscriminatory terms and conditions. However, this automatic roaming obligation is subject to a "home market exclusion." In other words, a host carrier is not obligated to provide automatic roaming in a requesting carrier's "home market" (i.e., in any geographic area where a requesting carrier has a wireless license or spectrum usage rights that could be used to provide CMRS). This exclusion applies whether or not the requesting carrier actually is providing any service in the overlapping areas. According to the FCC, the home market exclusion is intended to encourage CMRS carriers to construct networks and deploy services in areas where they have access to spectrum, although the FCC also encouraged CMRS providers "to negotiate desired terms and conditions of automatic roaming agreements, including automatic roaming in overlapping geographic markets." The home market exclusion seems to preclude application of the automatic roaming rule even in markets where carriers may have recently obtained new spectrum in the Advanced Wireless Service auction.

The services that are covered by the new automatic roaming rule include real-time, two-way switched voice or data services that are interconnected with the public switched telephone network ("PSTN") that use an in-network switching facility allowing frequency reuse and seamless handoffs of calls.Specific covered services (besides conventional voice) are push-to-talk and text messaging services. The automatic roaming obligation does not apply to non-interconnected services, enhanced data services (*e.g.*, EVDO) or information services generally. However, the FCC requests comment in the Further Notice regarding whether to extend automatic roaming obligations to non-interconnected services and features, information services including wireless broadband, and other non-CMRS services offered by CMRS carriers. The Further Notice also asks about technical and capacity issues associated with such an obligation, the policy implications for innovation and network deployment, and the FCC's jurisdiction to impose such obligations. Comments and replies in response to the Further Notice are due 60 and 90 days, respectively, after Federal Register publication.

FCC Sets Annual Regulatory Fee Deadline and Orders Interconnected Voice Over Internet Protocol ("VoIP") Providers to Contribute

In early August, the FCC released its order on 2007 annual regulatory fees, which are due no later than September 19, 2007 (except for new VoIP payees as noted below).

Of most interest this year, the FCC (as it had proposed) decided to impose regulatory fees on interconnected VoIP providers. Although most commenters favored a numbers-based or subscriber-based approach, the FCC instead adopted a revenue-based approach. Specifically, the FCC decided that interconnected VoIP providers should pay regulatory fees based upon their interstate and international revenues (as reported on the Form 499-A) at the same rate as set forth for interstate telecommunications service providers ("ITSPs"). Because the FCC must provide Congress with 90 days' notice of the addition of this category to regulatory fees, interconnected VoIP providers will pay their fees this year during a separate filing window to be determined later (probably in late 2007 or early 2008). Then in 2008, interconnected VoIP providers will pay during the normal September window along with all other payees.

With respect to international bearer circuit ("IBC") regulatory fees, the FCC (as expected) deferred the issue of real reform to the separate pending rulemaking proceeding on this issue. Commissioners Copps and Adelstein, however, issued separate statements stating that they wished the Commission had taken on more comprehensive reform in this proceeding rather than deferring the issue yet again. The silver lining is that the IBC regulatory fee was reduced from last year, and was even lower than the fee initially proposed for this year.

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Finally, the FCC issued a further notice of proposed rulemaking on the regulatory fees applicable to broadband radio service ("BRS").

FCC Revises EAS Rules and Gives Broadcasters and Minority Groups Additional Time to Compromise on How to Alert Non-English Speakers

The FCC, pursuant to the President's Public Alert and Warning System Executive Order, adopted in July an order ("Order") modifying its Emergency Alert System ("EAS") rules to increase the "reliability, security and efficacy" of the EAS network in the United States. The new rules, which facilitate the dissemination of emergency communications through multiple communications platforms and formats, will help ensure that citizens receive critical public safety and other information in emergency situations. The FCC also released a further notice of proposed rulemaking ("Further Notice"), hoping that additional time will prompt broadcasters and minority groups to compromise on how to provide such information to non-English speakers.

The new rules adopted in the Order are meant to "ensure the efficient, rapid, and secure transmission of EAS alerts in a variety of formats (including text, audio, and video) and via different means (broadcast, cable, satellite, and other networks)." Specifically, the FCC extended its EAS requirements, which already apply to a variety of television, radio and cable systems, to wireline common carriers that provide video programming. Those required to participate in EAS must be able to accept emergency messages using a common protocol, and subject to certain conditions transmit state and local EAS alerts, within 180 days after the Federal Emergency Management Administration ("FEMA") publishes its system standards. In addition, EAS participants must adopt "next generation" EAS delivery systems within 180 days after FEMA releases standards for those systems.

Rather than acting on a pending petition by the Minority Media & Telecom Council regarding alerting non-English speakers of emergencies through the EAS network, the FCC requested additional comment on the issue. The Further Notice specifically seeks information on the best way to disseminate information to those whose primary language is not English, including whether certain localities should be targeted, in what languages the emergency information should be transmitted, who is responsible (broadcasters or government authorities) for translating the emergency messages, and other technical, economic, practice, and legal issues. The Further Notice also seeks comment on making emergency information accessible to persons with disabilities, whether local government authorities should be allowed to initiate emergency alerts, and how the FCC can best monitor EAS operations. Comments and replies in response to the Further Notice are due 30 and 45 days, respectively, after the Further Notice is published in the Federal Register.

Courts Find Unilateral Changes to Web-Based Terms and Conditions and Prohibitions on Class Action Lawsuits by Consumers Unconscionable

In a number of recent cases brought by consumers against telecommunications carriers and web-based retailers, courts have refused to enforce the mandatory arbitration provisions of the contracts when they include a waiver of a consumer's right to bring a class action claim. While these recent cases are precedential only in 9th Circuit states and rely on the court's interpretation of state law, they will likely impact any contract with consumers in other states that have expressed a policy against class action waivers, regardless of the location of the retailer or carrier or the choice of law provisions in the contract.

The most important of these cases is *Douglas v. United States District Court for the Central District of California*, where the 9th Circuit granted a consumer's writ of mandamus challenging the lower court's ruling to compel arbitration in a dispute between plaintiff Douglas and long-distance provider Talk America. *Douglas* addressed the plaintiff's allegation that Talk America had changed the terms and conditions of his service contract by modifying its website without notifying him of the change. One of Talk America's unilateral modifications was the addition of a mandatory arbitration clause and a class action waiver. The lower court had granted Talk America's motion to compel arbitration based on the modified contract and Douglas challenged that decision by filing a writ of mandamus with the 9th Circuit (the writ was required because the Federal Arbitration Act does not permit interlocutory appeals of district court opinions compelling arbitration). The 9th Circuit called the lower court decision enforcing the mandatory arbitration provision a fundamental misapplication of contract law and held that the plaintiff could not be bound by the terms of the revised contract when he was not notified of the changes. The court distinguished this case from others where unilateral changes to terms and conditions posted on a website were found to be enforceable because in those cases the consumers had received separate notice of the modified contract by mail or involved new customers who were required to assent to specific contract terms as a condition of receiving service.

In addition, the *Douglas* court ruled that even if the added mandatory arbitration provision was enforceable, the lower court had further erred by failing to find that the modified terms, in particular the class action waiver, probably would not have been enforceable in California because it conflicted with California's fundamental

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policy as to unconscionable contracts. The validity of an arbitration agreement must be determined using state law principles governing the formation of contracts, and contract choice-of-law provision is not determinative for purposes of this analysis. While the Talk America contract stated that New York law governed, under California's choice-of-law rules a court may not enforce the choice-of-law provision if New York law is contrary to a fundamental policy entrenched in California substantive law and if California has a "materially greater interest" than New York in the determination of the issue. Analyzing each state's law, the 9th Circuit found that under California law, a contract can be procedurally unconscionable if a service provider has overwhelming bargaining power and presents a "take-it-or-leave-it" contract to a customer, even if the customer has meaningful choices as to other service providers. Under New York law, the modified contract would have been enforceable because the customer had meaningful alternative choices for telephone service, therefore foreclosing any procedural unconscionability claim. Therefore, finding New York law to be fundamentally at odds with California's on this point and California's interest in protecting its consumers more compelling that New York's interest in the litigation (in part because Talk America is a Pennsylvania corporation), the 9th Circuit determined that California law applied, and under well-settled California law (as set forth in the 2005 California Supreme Court decision in *Discover Bank v. Superior Court of Los Angeles*), a class action waiver may be substantively unconscionable.

Douglas is an important case because, as the court itself noted, "[t]his the first time any federal court of appeals has considered whether to enforce a modified contract with a customer where the customer claims that the only notice of the changed terms consisted of posting the revised contract on the provider's website." It also highlights a number of significant differences between New York and California law with respect to the enforceability of terms commonly included in contracts for telecommunications services and online retailing.

Douglas has quickly become important precedent even though Talk America has petitioned for *en banc* rehearing. Within a month of its issuance, the 9th Circuit held, in *Shroyer v. New Cingular Wireless Services, Inc.,* that neither the existence of marketplace alternatives nor the payment of the fees and costs of arbitration will make an otherwise unconscionable class action waiver enforceable. As was the case in *Douglas*, the *Shroyer* court found that Cingular's "take-it-or-leave–it" contract was a procedurally unconscionable contract of adhesion even though the consumer had meaningful alternative service choices. In *Shroyer*, the plaintiffs challenged Cingular's practice of requiring its customers to consent to terms of service that included a required renewal of their contracts for a term period, in order to obtain a remedy for service quality problems allegedly caused by Cingular's merger with AT&T. In another recent case, *Oestreicher v. Alienware Corp.*, the U.S. District Court for the Northern District of California found a mandatory arbitration clause in a web-based click-through agreement to purchase a computer to be unenforceable when it included a class action waiver. Both of these cases turned on California law. Although Alienware was based in Miami, Florida, the Northern District found California's interest to outweigh that of Florida's and found the arbitration provision unconscionable with respect to the class action waiver. Similarly, in *Brazil v. Dell*, the U.S. District Court for the Northern District of California found a class action waiver caused an arbitration clause to be unconscionable even when the consumer had clear notice of the terms before purchasing the goods.

In addition to California, Washington state law also precludes class action waivers in consumer agreements. In July, the Washington Supreme Court found the class action waiver in Cingular Wireless's contracts to be unenforceable under the state's Consumer Protection Act. As the California Supreme Court had found in *Discover Bank*, the Washington court found that a class action waiver would protect Cingular from liability for small claims and prevent consumers from pursuing valid claims.

Third Circuit Finally Resolves *Core v. Verizon*

In recent Bulletins we have reported on the decision of the U.S. Court of Appeals for the 3rd Circuit's in *Core Communications, Inc. v Verizon Pennsylvania, Inc.*, where the court held that disputes regarding interconnection agreements must be taken to the public utility commission that approved the agreement before complainants may resort to the federal courts. On June 15, the 3rd Circuit vacated its opinion due to the recusal of one of the judges on the original panel and announced that it would rehear the case at a future date. On July 18, the court's reconstituted panel issued its revised decision in which it reached the same conclusion as the earlier panel, based on the same reasoning. Again, concluding that *Chevron* deference to the FCC's decision requiring parties to first exhaust their remedies with the state public utilities commissions was appropriate, the court found that "… the most sensible harmonization of the Act's structure and the FCC's declarations is a solution under which the bodies that are responsible for overseeing the formation of interconnections agreements [the state public utility commissions] are given the first crack at interpreting and enforcing them."

State Regulatory and Legislative Activity

Many state legislatures have wrapped up their 2007 sessions or have recessed for the summer months, and state regulatory commissions typically slow down in July and August. Despite this summertime break, a

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number of issues have not taken a holiday and continue to be in the headlines. These include VoIP related legislation and consumer protection bills, which continue to advance in a number of jurisdictions.

In New York, Governor Spitzer has signed SB-4611 requiring all interconnected VoIP providers to notify their customers of any material limitations associated with basic or enhanced 911 services. The notifications must be provided before commencement of service and periodically thereafter, and in all marketing materials in television, radio, print media, and online materials. VoIP providers must obtain express acknowledgement of the limitations from their customers and, where service limitations exist, must provide their customers with warning stickers to place on their telephones. Additional notification regarding the need to reinitialize service must be provided to nomadic VoIP consumers. The bill will take effect 120 days after July 18, the day it was signed. On the same day, Governor Spitzer also signed HB-3397 to reduce the costs of collect calls made by inmates from state prisons. The bill codifies an earlier change incorporated into the 2007-08 state budget that eliminated the 57.5% commission paid by MCI, the current inmate pay phone service provider, to the state Department of Correctional Services. The new law prohibits the state from charging a commission on inmate payphone calls in the future and requires that any contract for this service awarded after April 2008 be awarded to the lowest bidder.

In late June, the New York Assembly and Senate each passed and sent to the other similar wireless consumer protection bills. SB-6176 requires the wireless carrier or the authorized retailer to provide a new customer or a customer that has agreed to a change in service that results in an extension of its contract, with written confirmation of the service or service change and other specific information. It also requires all charges for wireless services to be distinguished from taxes, surcharges, and other imposed surcharges, and prohibits carriers from labeling cost recovery fees or charges as taxes. Carriers also must provide the Consumer Protection Board with information for the board to publish an informational guide for the purchase of wireless services, as required by the bill. The comparable Assembly bill, AB-2030, would give the Consumer Protection Board authority to regulate wireless services with respect to consumer protection issues and administer a consumer complaint resolution process. It would also provide consumers with a right to cancel service without termination fees within fifteen days after the first invoice for service is issued, require carriers to disclose detailed service coverage information, and require detailed disclosure of all monthly fees, taxes, surcharges, and other charges for using the service, information about 911 service, estimates of anticipated monthly bills, and a description of the complaint process available at the Consumer Protection Board.

Other year round legislatures are considering VoIP bills. In Pennsylvania, SB-1000 would prohibit any state commission or department from regulating the rates, terms, and conditions of any VoIP or IP-enabled service. The bill will not affect VoIP providers' obligations under state consumer protection laws, the applicability of cable franchise laws, or mandate or prohibit any 911 or other regulatory fees, switched access charges, or intercarrier compensation that may be deemed to apply. The bill was sent to the Senate Communications and Technology Committee on August 9; the Pennsylvania legislature is in recess until September 17. Both houses of the New Jersey legislature have passed and sent to the other VoIP preemption bills. Both bills, HB-4339 and SB-2777, if ultimately passed and sent to the governor, will prohibit the Board of Public Utilities or any other state agency from regulating VoIP or any other IP-enabled telephone service except for 911 fees, telecommunications relay service fees, universal service fees, and intercarrier compensation.

State public utility commissions also continue to relax the regulations they impose on competitive carriers. The Pennsylvania Public Utilities Commission recently eliminated the requirement that long distance carriers file tariffs or price lists, instead requiring them to post their rates at their business offices and online at their websites. Consumer complaints about inadequate notice of price changes will be handled by the state Attorney General, not the PUC. The new rules will take effect upon approval by the Pennsylvania Attorney General and the Independent Regulatory Review Commission. The Texas Public Utility Commission is considering whether to eliminate all review of competitive carriers' mergers and acquisitions, as requested by Level 3. Commission staff has opposed Level 3's request.

The California Public Utilities Commission also continues to reduce its oversight of telecommunications utilities. Its most recent proposal is to eliminate the tariff filing requirements for all incumbent carrier services except basic exchange, resold services, and other limited exceptions. The Commission is authorized by existing state statute to establish rules for detariffing if it finds that a carrier lacks significant market power for the services it seeks to detariff. The draft decision containing the proposal was circulated for comment on July 23 and is scheduled to be considered at the Commission's September 6 public agenda meeting. At its August 23 meeting, the Commission voted to extend for an additional three years its two-year pilot program of streamlined review of uncontroversial small-scale (under $5 million and requiring no environment review) asset transfers by all utilities. Under the pilot program, qualifying mergers, acquisitions, and other transfers may be approved using the less formal advice letter process rather than the more time-consuming formal application. A number of parties sought to make the pilot program permanent, but the Commission determined that two years was not sufficient time to evaluate the program.

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Federal Court Rules that Arizona May Not Include Unbundling Requirements in Interconnection Agreements

In late July, the U.S. District Court for Phoenix ruled that the Arizona Corporation Commission may not include Section 271 unbundling requirements in an interconnection agreement between Qwest and Covad. In a February 2006 decision challenged by Qwest, the ACC had concluded that it was authorized by state law and Section 252(e) to require Qwest to meet Section 271 unbundling obligations. Finding in favor of Qwest, the court held that the ACC's authority under Section 252 does not extend to Section 271 unbundling. While the ACC can advise the Federal Communications Commission on Section 271 bundling issues, its ability to mandate unbundling is limited to that which is authorized by Section 251. Also, since the ACC may not mandate the unbundling of Section 271 network elements, it also is precluded from setting rates for those elements.

Private Equity Update

Over the last several months, private equity has demonstrated an increasing appetite for media and telecom transactions. Examples include the acquisition of Clear Channel Communications Inc. by Thomas Lee Partners LP and Bain Capital LLC, the sale of Alltel Corp. to TPG Capital and GS Capital Partners, and the purchase of Intelsat Holdings Ltd. by a consortium of firms led by BC Partners. These deals were reported in the November 2006, May 2007, and June 2007 editions, respectively, of the Communications Law Bulletin. On June 30th, the Canadian telecommunications operator BCE Inc. agreed to be acquired by the investment arm of Ontario Teachers' Pension Plan, Providence Equity Partners Inc., and Madison Dearborn Partners for a total value, including debt, of $48.5 billion, the largest private equity buyout package in Canadian corporate history.

This trend has not gone unnoticed by members of the U.S. Congress. In July, House Commerce Committee Chairman John Dingell (D-MI.) and Telecommunications and the Internet Subcommittee Chairman Edward Markey (D-MA) sent a letter to FCC Chairman Kevin Martin requesting that he investigate the policy implications of the growing trend of private equity ownership of communications-related entities. The letter noted that, as a generalization, the history of private equity ownership suggests (i) a financial management style focused on cutting costs, increasing revenues, and an ultimately reselling the enterprise, (ii) a management structure that is not overly transparent, and (iii) fluid asset management where actual holdings and control may vary. These characteristics may run contrary to the historic role of FCC licensees as trustees of the public's airways, may not be consistent with many of the core public interest and localism values, and may implicitly undermine the FCC's media ownership rules. On the other hand, the letter noted that some supporters of private equity argue that, by taking entities private, the businesses are better insulated from financial market pressures.

Despite Congressional concern, the marketplace might be decelerating, at least for now, the trend of private equity's growing influence in the communications sector. Across all industries, the volatility in the debt markets has slowed private equity investments. Overall, billions of dollars in funding has been pulled since late June 2007 as investment banks balk at providing financing for deals, and the communications industry has not been spared. The auction of Virgin Media Inc., the United Kingdom cable operator listed on Nasdaq, has been delayed and deals involving Insight Communications Co., Nexstar Broadcasting Group Inc., and Clear Channel Communications Inc. have all been impacted by the squeeze on debt financing.

FCC Releases NPRM Promoting Adoption of Two-Way CableCARD Standard and Grants Waivers of Its Set-Top Box Security Integration Ban

On June 29, the FCC released a notice of proposed rulemaking ("NPRM") seeking comments on proposed standards to ensure two-way plug-and-play capability in consumer cable devices. The NPRM is part of a larger effort to promote competition in the market for set-top navigation boxes by requiring multichannel video programming distributors ("MVPDs") to offer security measures in a modular form like the CableCARD that can be used with independently manufactured devices. CableCARD-ready devices sold in retail stores currently are unable to access the two-way features available on many cable systems, such as on-screen programming guides, video-on-demand, and interactive television. The cable and consumer electronics industries, long-time rivals, have submitted different proposals and the Commission seeks comment on both of them. The Commission also is considering applying two-way capability standards to equipment for services other than cable television, such as satellite, IPTV, and pay-TV services offered by Bell Companies.

Meanwhile, in late June, the FCC granted several requests for waiver of its rule prohibiting the sale or lease of new set-top boxes with integrated security features. Waivers were granted for some smaller cable operators facing difficulties in complying by the Commission's deadline, and a blanket waiver was issued to MVPDs planning to switch to all-digital programming by February 17, 2009.

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FTC Urges Caution on Net Neutrality as Battle Shifts Focus

At the end of June, the Federal Trade Commission ("FTC") released its report resulting from the two-day workshop it held in February 2007 on broadband access regulation (a/k/a network neutrality or "net neutrality"). In short, the report concluded that the U.S. does not need net neutrality regulation, and that lawmakers and agencies should proceed with great caution because the effect of any such regulation on consumers is unclear. The FTC stated that it was unaware of any market failure or consumer harm, and that it has other tools at its disposal to address broadband access issues and any possible consumer harms. The FTC also announced its intention to hold a series of "town hall" meetings in November to explore net neutrality and related issues.

Following this report, the primary battle over net neutrality shifted focus to the upcoming 700 MHz auction and the "open access" rules being urged by some in that rulemaking. The FCC ultimately did adopt a requirement that the winners of the largest 700 MHz spectrum block permit any and all devices and applications to run on their networks (*see* "New 700 MHz Band and Automatic Roaming Rules Apply to the Wireless Industry," this issue).

FCC Reminds Licensees of Bankruptcy Requirements

In a letter to Northwest Airlines, the FCC recently reiterated its role in bankruptcy reorganizations. Specifically, the Northwest reorganization plan stated that the bankruptcy court's approval was the only required governmental consent or approval needed. Nonetheless, Northwest in fact did apply for FCC approval for the assignment of the licenses from the debtor-in-possession to the newly reorganized entity. The FCC granted the requested approval, but cautioned licensees that bankruptcy plans must expressly recognize that any proposed transfer or assignment of licenses requires FCC regulatory approval in addition to court approval.

AT&T's IPTV Offering Is a Cable Service; Video Franchising Reform Continues to Make Progress in Several States

In late July, a federal court in Connecticut ruled that AT&T's U-verse Internet Protocol Television ("IPTV") product is a cable service, meaning AT&T will need to seek a state franchise to sell its service in the state. The court reasoned that two-way transmission of data between customers' set-top boxes and the network causes U-Verse to fall within the definition of cable service set forth in 1984 Cable Act. Prior to the court's ruling, the Connecticut Department of Public Utility Control allowed AT&T to offer IPTV services free from franchising requirements. One week later, AT&T filed a petition seeking reconsideration of the federal district court's ruling. AT&T's efforts to find relief in court may be thwarted by pending state legislation; Connecticut's governor recently signed a law shifting video franchising from municipalities to the public utility commission and extending the franchise requirement to IPTV and all other landline delivery technologies effective October 1.

At the federal level, the FCC's March 5, 2007 order streamlining video franchising is being challenged in federal court by various cities and municipalities, who argue the Commission's action usurps local oversight of pay-TV providers. The U.S. Circuit Court of Appeals in Cincinnati announced an expedited schedule for oral arguments, which likely will be held before the end of the year.

Meanwhile, efforts to transfer video franchising authority to the state level continue to make progress in many states. California, Florida, Georgia, Indiana, Iowa, Kansas, Michigan, Missouri, Nevada, New Jersey, North Carolina, South Carolina, Texas, and Virginia all have passed video franchise reform bills. Recently joining this group is Ohio, which in late June passed a bill shifting video franchising from municipalities to the state Commerce Department. In early July, Illinois passed a bill shifting video franchising from municipalities to the state Commerce Commission. A video franchising reform bill recently was introduced in the Pennsylvania House.

Summer Broadcast Developments Heat Up

The summer heat in Washington, D.C. usually dictates a slower pace during July and August, but Congress and the FCC forged ahead on a variety of broadcast issues despite the rising temperatures. Congress tackled DTV transition education funding and media violence. The FCC also addressed DTV issues as well as

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minority media ownership. Several FCC Commissioners also expressed strong individual views about various media issues.

On the Hill

- Although the FCC only requested $1.5 million to finance a DTV transition education program, the Financial Services Subcommittee upped the amount to $2 million before sending the bill (HR 2829) to the House for debate. The Subcommittee's increase reflected concerns that public awareness of the transition is limited. Passed on June 28, the bill is currently on the Senate legislative calendar. Representative Engle (D-NY) is championing a separate transition education bill (HR 2566), calling for $20 million to educate over-the-air viewers and the creation of a federal DTV advisory committee. According to the Association of Public TV Stations ("APTS"), 61% of households are unaware of the transition and additional funding is needed to reach those most affected by the move to digital.

- Senator Rockefeller (D-WV) is expected to introduce a bill shortly that would expand the FCC's powers to regulate violence on cable, satellite, and broadcast television. Based on comments made during the June 26 Senate Commerce, Science, and Transportation Committee hearing on media violence and its effects on children; however, majority support is lacking for a crackdown on violence. Proponents of the bill condemn the use of screening tools such as the rating system and TV V-chips, characterizing them as a "gigantic joke" and nothing more than "ineffective Band-Aids." Opponents cited concerns about the constitutionality of restricting programming content. Additionally, they defended the $300 million public service advertising campaign to educate parents about content blocking tools, calling it a roaring success with 77% of TV viewers aware of the ads.

At the Commission

- The long-anticipated Digital Television ("DTV") table of channels was released August 7, affecting more than 100 television stations nationwide. The FCC order revealed broadcasters' post-transition slots and the fate of variance requests for previously-awarded channels. Industry response was tentatively favorable upon initial review of the assignment results, although discontent persists with the FCC's freeze on expanding digital signal contours until the transition is complete.

- As DTV consumer education initiatives ramp up, the FCC released an NPRM on July 30 to elicit comments regarding the Commission's authority to require different industries to educate consumers about the digital transition. While many of the groups identified are already taking steps mentioned in the NPRM, the FCC contemplates requiring:
  - television broadcasters to conduct on-air, consumer education efforts, including public service announcements;
  - broadcasters to periodically report on education efforts;
  - cable and satellite providers to send periodic transition notices in customer bills;
  - manufacturers to include notices with television receivers shipped and sold within the U.S.;
  - retailers participating in the converter box coupon program to submit employee training and consumer information plans; and
  - digital television partners listed on the Commission's Web site to reveal education and outreach efforts.

- The FCC officially joined the Digital Television Transition Coalition ("Coalition") in the beginning of July. More than 120 companies and lobbying groups belong to the Coalition, a large and diverse digital TV education group focused on raising awareness of the pending transition. The FCC's membership bolsters the group's standing and reflects Chairman Martin's public promise to collaborate with the National Telecommunications and Information Administration ("NTIA"), other agencies, and private bodies in alerting consumers about the February 2009 analog-cutoff date.

- The FCC issued a broad media-ownership rulemaking on August 1, soliciting comments on 34 media ownership proposals, including 14 that the Minority Media & Telecommunications Council ("MMTC") submitted in an earlier petition. MMTC is pushing for a definition of disadvantaged businesses that is appropriate in the broadcasting context and constitutionally sound, a necessary step, it contends, in tightening up who does and does not qualify as a minority owner. Other MTTC recommendations include letting radio and TV stations sold to socially and economically disadvantaged businesses retain "grandfathered" status, which would allow the licensees to escape ownership rules issued after purchasing a station later determined to be noncompliant.

- Commissioners aired their views on pet media issues during a broadcast localism hearing in Portland, Maine on June 28. Comments included the lack of ownership diversity, the glut of junk-food ads, and the trend towards covering celebrity gossip instead of substantive news.

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Upcoming Deadlines for Your Calendar

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

September 4, 2007	Comments due on **children's TV programming status.**
September 17, 2007	Comments due regarding proposed changes to **annual regulatory fees for Broadband Radio Services ("BRS").**
September 17, 2007	Comments due on **DTV consumer education initiative.**
September 18, 2007	Reply comments due on **E911 NPRM.**
September 19, 2007	**Annual regulatory fees due.**
October 1, 2007	Reply comments due on **children's TV programming status.**
October 1, 2007	Quadrennial regulatory review comments due on **minority and female media ownership.**
October 1, 2007	Reply comments due on **DTV consumer education initiative.**
October 5, 2007	Effective date of **new VOIP rules regarding disability access and TRS requirements.**
October 15, 2007	Reply comments due regarding proposed changes to **annual regulatory fees for Broadband Radio Services ("BRS")**.
October 16, 2007	Quadrennial regulatory review reply comments due on **minority and female media ownership.**

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