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Communications Law Bulletin, April 2008

April 2008

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Communications Law Bulletin, April 2008

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The Month in Brief

April, 2008, brought continuing developments at the Federal Communications Commission ("FCC" or "Commission"), the state commissions, and on Capitol Hill, on issues ranging from net neutrality to the DTV transition to video franchising. Those developments are covered here, along with our usual list of deadlines for your calendar.

Provider Changes and Customer Retention Efforts in FCC Spotlight

In two different proceedings, the FCC is considering issues surrounding provider changes by customers and customer retention efforts by carriers.

In one proceeding, Verizon has filed a petition for declaratory ruling, asking that the FCC declare that incumbent cable operators are required to accept video service cancellation requests from a new video provider that has won a customer (such as is done in the voice service context). Verizon alleges that although voice service provider transfers are accomplished easily without further effort by the customer, video provider changes are more difficult for the customer, often requiring the customer to call the old provider to cancel service. According to Verizon, this further entrenches the incumbent cable providers' market positions.

In the other proceeding, several cable companies filed a complaint against Verizon, alleging that the company illegally uses voice service porting requests to trigger efforts by Verizon to retain customers. The cable companies alleged that upon receiving a porting request from a competing carrier, Verizon would contact the customer and offer price incentives to stay with Verizon, and – if successful – would then cancel the porting request. The cable companies alleged that this practice violates Section 222 (the statutory provision applicable to the permissible uses of customer proprietary network information ("CPNI")) and is an unjust and unreasonable practice under Section 201(b).

In mid-April, the Enforcement Bureau issued a recommended decision in this complaint proceeding. The recommended decision: (a) recommended that the FCC deny the complaint as to all of the Section 222 CPNI claims; (b) did not reach a conclusion on the Section 201 claim, as this was not accepted onto the FCC's accelerated docket; and (c) recommended that the FCC promptly issue a notice of proposed rulemaking ("NPRM") on customer retention marketing practices across all platforms. The Enforcement Bureau noted that the FCC does not have a consistent policy, and that specific rules (and rulings) have varied among different types of service providers. The Enforcement Bureau did not take a position on whether retention marketing should be allowed, encouraged, or prohibited, but stated that in this world of increasing intermodal competition, the rules should be consistent in order to achieve regulatory parity. The full Commission is expected to rule on this complaint proceeding by the end of June.

Wireless Developments

The wireless industry was affected by several new and ongoing developments in April. The recent 700 MHz auction continues to be both praised and vilified. The FCC also has taken more steps to implement a mobile alert system and investigate fraudulent 911 calls. These and other developments are discussed below. In addition, FCC Chairman Martin has indicated that the Commission intends to deny a pending petition regarding wireless open access, which is further discussed in this issue. (*See* "Chairman Martin and FCC Active in Net Neutrality and Open Access Matters," below.)

700 MHz Auction Debate Continues
Lawmakers, regulators, the communications industry, and the public safety community continue to debate whether the recently concluded 700 MHz auction (Auction No. 73) should be considered a success or a failure. Although the auction brought in more revenues than any other prior auction and included open access rules, it is tainted by the failure to attract serious bidders for the D Block nationwide license that was supposed to serve as part of a public-private interoperable broadband public safety network. In addition, the auction has been disparaged for various competitive issues.

A recent hearing held by the House Energy and Commerce Committee's Telecommunications and the Internet Subcommittee probed the events leading up to and during the auction. Witnesses included the FCC commissioners as well as various members from the wireless industry and public safety community. There appeared to be general consensus at the hearing that the FCC did not provide sufficient information and details about the D Block public-private partnership for companies to make informed bids. Lawmakers and hearing witnesses alike agreed that the FCC will need to take a more active role going forward to resolve the technical, legal, and economic issues triggered by the partnership before reauctioning the D Block.

Chairman Martin recently circulated a draft second further notice of proposed rulemaking that seeks comment on the best way to reauction the D Block. Chairman Martin hopes to adopt new rules in the July-August timeframe and reauction the D Block by the beginning of the fourth quarter this year, although other commissioners expressed concern that this may not provide sufficient time to resolve the numerous D Block issues.

The FCC commissioners and members of Congress also expressed concern at the hearing about the relationship between the Public Safety Spectrum Trust ("PSST") and Cyren Call Communications Corporation, its for-profit advisor. The PSST and Cyren Call, however, tried to allay those concerns, noting that the PSST had few options other than partnering with Cyren Call because lawmakers had provided the PSST with no funding with which it could operate. The FCC's Office of Inspector General ("OIG") investigated allegations that meetings held by Cyren Call may have prevented Frontline Wireless from attracting the capital necessary to obtain the D Block and discouraged other bidders. The OIG concluded, however, that a proposed spectrum lease payment amount of $50-55 million per year for the D Block that was conveyed to Frontline and other carriers was only informational and one of myriad factors that resulted in the companies' decisions not to bid on the D Block.

Lawmakers, regulators, and industry members at the hearing also generally disagreed regarding whether the 700 MHz licenses won at auction would foster competition. Incumbents Verizon Wireless and AT&T were the biggest auction winners, collectively accounting for $16.3 billion of the total bids. As a result of the auction, Verizon Wireless and AT&T will have more than 95 MHz of Commercial Mobile Radio Service ("CMRS") spectrum in 8 of the top 10 markets and 17 of the top 25 markets in the United States. These spectrum holdings top the 95 MHz spectrum "screen" used by the FCC to evaluate whether a merger or acquisition raises competitive concerns. Smaller wireless carriers also argued that the auction design (e.g., using larger geographic license areas) made it difficult for small and midsized carriers to bid in the auction.

FCC Adopts Technical Requirements for Cell Phone Alerts

Pursuant to the Warning, Alert, and Response Network ("WARN") Act, the FCC issued an order setting forth the technical requirements for the voluntary deployment of wireless emergency alerts by cell phone and other mobile devices. The new technical rules are based in large part on the recommendations from the FCC's Commercial Mobile Service Alert Advisory Committee (the "Committee").

Under the new rules, wireless carriers participating in the mobile alert program will initially transmit text-based alerts to subscribers, but eventually may include audio and video transmissions. Carriers must target alerts at the county level as recommended by the Committee, except that where the propagation area of a paging system or cell site exceeds a single county, the alert may extend beyond the county's boundaries. Carriers also must transmit messages with both vibration cadence and audio attention signals to ensure that subscribers with disabilities can receive the alerts. Subscribers also should be able to receive alerts when roaming on another carrier's network, assuming the subscribers' handsets are technically capable of receiving alerts from the networks on which they are roaming. Subscribers will receive messages regarding "Presidential Alerts" (national emergency-related alerts that preempt any other pending alerts), "Imminent Threat Alerts" (alerts with information on emergencies that may pose an imminent risk to the public), and "Child Abduction Emergency/AMBER Alerts" (alerts regarding missing or endangered children due to an abduction or runaway situation).

The order, however, does not designate which federal agency will be responsible for forwarding alerts to wireless carriers. Several FCC commissioners expressed great concern that no agency stepped forward to be the gatekeeper for the alert system. The Federal Emergency Management Agency ("FEMA"), which played a substantial role in drafting the Committee's recommendations, was criticized in particular for subsequently taking the position that it could not perform the gatekeeper functions for statutory and other reasons.

Most wireless carriers are expected to voluntarily participate in the mobile alert program. Participating carriers must comply with the new technical rules within 10 months of the date that a federal agency has been designated to collect and transmit the alerts. The WARN Act provides a fairly rapid implementation timeline for the mobile alert system. Within 90 days after adopting the new rules, the FCC must establish the process by which wireless carriers can choose to carry the alerts. Carriers then will have 30 days to decide whether to participate.

FCC Seeks Comment on Fraudulent Wireless 911 Calls

The FCC released a Notice of Inquiry ("NOI") seeking comment on fraudulent 911 calls made from discarded handsets. The public safety community had filed a petition with the FCC stating that such calls waste and misdirect valuable resources away from those who dial 911 seeking assistance during real emergencies. The petitioners noted that public safety answering points ("PSAPs") receive thousands of prank 911 calls from "uninitialized" wireless phones each month. These calls are untraceable, however, because they have no service contracts that have a name or address associated with them and do not provide Automatic Number Identification ("ANI") or other call back information.

The FCC's rules currently require wireless carriers to transmit all 911 calls to PSAPs or 911 call centers, but do not prohibit carriers from blocking fraudulent 911 calls. Blocking such calls, however, has raised myriad technical and legal concerns by the wireless industry and public safety community. The NOI seeks comment on the extent of this problem, including legal and technical issues, and potential solutions.

FCC Makes Procedural Changes to Recent HAC Order

The FCC issued an Order on Reconsideration and Erratum ("Recon Order") making various procedural changes to its February 28 Hearing Aid Compatibility ("HAC") Order which modified its HAC rules. (*See* the March edition of the Bulletin for a more detailed description of the HAC Order.) First, the Recon Order extended, until 30 days after the HAC order is published in the Federal Register, the deadline by which at least half of the handset models offered by wireless carriers must meet at least an M3 rating for radio frequency interference reduction. This change ensures that carriers are not considered out of compliance with the old rules before the new rules become effective. Second, the Recon Order codified the delegation of authority to the Wireless Bureau and Office of Engineering and Technology ("OET") to approve new versions of the ANSI C63.19 technical standard that do not raise major compliance issues and that are approved for use only as optional alternatives to the other approved versions of the standard.

CTIA Adopts Location-Based Privacy Best Practices

The board of CTIA – The Wireless Association approved guidelines establishing "best practices" for guarding the privacy of users of wireless location-based services ("LBS") that track caller or user locations. CTIA intends to share the guidelines with the FCC, but will not ask the FCC to formally adopt the guidelines. CTIA's guidelines focus in large part on providing notice to LBS users regarding how their location information may be used. The guidelines are based upon LBS privacy principles that CTIA proposed in a 2000 petition for rulemaking, which was rejected by the FCC in 2002.

FCC Extends LMDS Build-out Deadline

The FCC acted on 678 applications to extend the construction deadline for local multipoint distribution service ("LMDS") licensees. Most of the applicants were small companies, but larger companies such as AT&T, CenturyTel, Alltel, and Level 3 also sought extensions. The applicants now have until June 1, 2012, to show they provide "substantial service." Although LMDS spectrum is considered well-suited for data and video services, the applicants argued that affordable equipment is not yet widely available. The FCC declined to set procedures for LMDS license renewals at this time, but is expected to do so in the next several months.

Court Rejects Challenge to Anti-Collusion Rule

The U.S. Court of Appeals for the District of Columbia upheld an FCC decision regarding the scope of its auction anti-collusion rule in *Star Wireless, LLC v. FCC*. The court's decision is a reminder that parties participating in *any* stage of an FCC auction must remain extremely vigilant about communications with other applicants.

The case concerns a 2002 auction of lower 700 MHz spectrum in which two carriers (Star Wireless and Northeast Communications of Wisconsin) were applicants and held discussions about the auction during the auction quiet period. Both carriers had filed short forms, but only Northeast Communications had made an upfront payment and bid in the auction. The FCC subsequently issued a $75,000 fine for violating the anti-collusion rule, which Star Wireless appealed. The court rejected Star Wireless' argument that the FCC did not provide sufficient notice that Star Wireless was deemed an "applicant" for purposes of the anti-collusion rule when it filed a short-form application. The court noted that the FCC staff had issued guidance regarding who is an "applicant" in a now well-known 2000 Wireless Telecommunications Bureau letter known as the "Pettit Letter," which was cited by the FCC in the public notice announcing the procedures for the 2002 auction.

FCC Increases Globalstar's ATC Spectrum

The FCC issued an order increasing by more than 8 MHz the spectrum in which code division multiple access ("CDMA") operations of Mobile Satellite Service ("MSS") low-earth orbit satellite systems may provide ancillary terrestrial component ("ATC") service. The FCC also proposed to modify the ATC authority of Globalstar, Inc., the only such authorized MSS provider, to implement this decision.

Specifically, the FCC increased the amount of ATC spectrum in the Big LEO (1.6/2.4 GHz bands) L-band by 2.275 MHz from 1610-1615.5 MHz to 1610-1617.775 MHz, and in the Big LEO S-band by 6 MHz from 2487.5-2493 MHz to 2483.5-2495 MHz. The FCC rejected arguments from the terrestrial wireless industry that increasing Globalstar's ATC spectrum would result in interference to adjacent licensees. However, the FCC adopted rules requiring Globalstar to adhere to stricter out-of-band emission standards to ensure that the ATC operations would not cause harmful interference to others.

Globalstar has 30 days from the publication of the FCC's decision in the Federal Register to protest the proposed license modification. The FCC delegated authority to the International Bureau to modify Globastar's license in the event no new or novel issues are raised regarding the license modification.

Chairman Martin and FCC Active in Net Neutrality and Open Access Matters

Chairman Martin (at both a House Telecom Subcommittee hearing on the 700 MHz auction and earlier at CTIA

WIRELESS 2008) indicated that – in light of industry moves toward a more open wireless platform – he was circulating an order dismissing a petition filed by Skype seeking the application of Carterfone "open access" rules to the wireless industry. Industry analysts expect a 3-2 vote to dismiss the petition.

In mid-April, the FCC also held its second hearing on network management and net neutrality issues. Comcast and other large network operators declined invitations to testify, with the result that advocates of increased net neutrality regulation outnumbered defenders of the *status quo.* Further, the FCC itself appeared to be split, with Commissioners Copps and Adelstein urging further action, and Commissioners Tate and McDowell warning against additional regulation. Chairman Martin appeared to fill the unusual role of being the swing vote, arguing that the existing regulation was sufficient, but that companies should perhaps be required to provide clear disclosure of their network management practices to customers. At this hearing, Chairman Martin asked several questions crafted to determine if Comcast's earlier description of its network management practices was accurate.

During the next week of April, Chairman Martin was a witness at a Senate Commerce Committee hearing on net neutrality issues. Chairman Martin argued that the FCC's existing Policy Statement provides sufficient authority, and that the FCC is prepared to enforce the obligations set forth in the Policy Statement. He also set forth his suggested framework for analyzing and evaluating complaints of allegedly unreasonable network management practices as follows: (1) whether the practice distinguishes between legal and illegal activity; (2) whether the practice is adequately disclosed to both consumers and application developers; and (3) whether the practice arbitrarily blocks or degrades a particular application (which he believes should be subject to higher scrutiny). With respect to the pending Comcast complaint, Chairman Martin stated that the FCC has not yet drawn any conclusions, but strongly hinted that Comcast had used particularly "blunt" means of network management.

Meanwhile, Comcast announced that it had reached an agreement to work with BitTorrent to resolve certain network management issues. Comcast also announced that it would team with technology company Pando Networks to develop and lead a broader private sector effort to create a consumer "bill of rights" for P2P sharing. It is not clear that these efforts will lower the heat on Comcast at the FCC, however.

States Tackle VoIP Regulation, Universal Service, and Other Regulatory Reform

Various developments at the state level could have a significant impact on service providers' operations. Individual states continue to battle over whether and how to regulate voice-over-Internet-protocol ("VoIP") services. In addition, states continue broad regulatory reform efforts, including state universal service programs.

The ***South Carolina*** Supreme Court upheld a decision by the South Carolina Public Service Commission ("SCPSC") denying a petition by Time Warner Cable Information Services, LLC for state certification as a local exchange service to offer VoIP services in rural areas. Time Warner sought certification so it could more easily negotiate interconnection agreements with local carriers, but rural carriers said granting the petition would threaten the availability of affordable rural telephone services. The court concluded that the SCPSC was correct in finding that Time Warner did not need a certification to negotiate interconnection agreements.

The ***District of Columbia*** Council passed, and Mayor Adrian Fenty is expected to sign, a bill exempting providers of any IP-enabled telecommunications services, including VoIP services, from any District regulation of rates, terms, market entry, or provisioning. The measure, however, retains jurisdiction over public safety, consumer protection, and deceptive trade practices.

Indiana passed a 911 law that requires VoIP service providers to collect and remit fees for E911 services. The law also forms an emergency alert system advisory commission and takes other steps to make the state's 911 operations more efficient and effective.

Kansas enacted a law requiring VoIP providers to contribute to the state universal service fund. The new law, however, includes a provision that would nullify the requirement if it is prohibited by federal law. The nullification provision was included in light of a federal court ruling that Nebraska was preempted from enforcing a similar state universal service contribution requirement.

Pursuant to a mandate by the state legislature, the ***Texas*** Public Utility Commission ("TPUC") began a comprehensive review of the state universal service program last year that recently ended in a settlement between the TPUC, the Office of Public Utility Counsel, and various carriers. Under the settlement, high-cost support will be reduced by 36.5 percent ($144 million annually) over three years. In addition, universal subsidies would not be allocated in deregulated exchanges with populations over 30,000 and only allocated in deregulated exchanges with populations less than 30,000 if market rates exceed "reasonable" specified levels. Large incumbent carriers would be allowed to increase rates to offset the reduction in subsidies. In addition, Lifeline discounts would be increased.

The ***Wisconsin*** Public Service Commission's ("WPSC") efforts to overhaul its telecommunications regulatory regime met with wide-ranging and divergent comments from all segments of the industry. Issues included consumer protection, interconnection, access charges and intercarrier compensation, universal service, and competition. Although the WPSC did not intend on a reply round, it ultimately sought reply comments that focused on potential consensus, not "hyperbole, vitriol and point-by-point rebuttals of other comments." The WPSC is to report its conclusions and recommendations for reform by November 21.

In addition, ***California*** is considering legislation that would reduce the oversight authority of the state Public Utilities Commission ("CPUC") over mergers. Current law requires the CPUC to find: (1) that there are quantifiable savings for merging companies and benefits for consumers, (2) that the merger is fair to affected communities, and (3) that the merger will not harm competition. Carriers as well as various state and local business groups have supported the bill, claiming that the existing requirements are too onerous, although some consumers argue that the existing requirements protect consumer interests.

Recent Universal Service Developments Include a Novel ETC Designation Limited to Lifeline Service and Two Important NALs

FCC Majority Favors Interim Cap on CETC High-Cost Support

It has been reported that FCC Chairman Kevin Martin has rounded up the votes of the two Republican commissioners, Robert McDowell and Deborah Tate, in support of the cap on high-cost universal service fund ("USF") support for competitive eligible telecommunications carriers ("ETCs") recommended by the Joint Board last year. Although he has not yet circulated a draft order, the cap reportedly would be set at March 31, 2008 support levels. That is welcome news to wireless providers because a March 31 cap would be higher than the cap recommended by the Joint Board, which would have cut competitive ETC ("CETC") support back to 2006 levels. The order apparently also will grant more than 40 pending applications for ETC designation.

Because Chairman Martin will not agree to a sunset date for the cap, as recommended by the Joint Board, it will run until the FCC approves comprehensive high-cost reform. Observers fear that an "interim" cap with no sunset date may become a semi-permanent cap. Chairman Martin has stated that he would agree to Commissioner McDowell's proposed edits carving out tribal lands from the coverage of the cap.

FCC Announces Stricter Forfeiture Calculation Methodology for USF Violations

On April 9, 2008, signaling a sharp escalation in its approach to the assessment of penalties for violations of USF contribution requirements, the FCC released Notices of Apparent Liability for Forfeiture ("NALs") against Global Crossing North America, Inc. ("Global") and Compass Global, Inc. ("Compass"). The Universal Service Administrative Company ("USAC") referred Global to the Enforcement Bureau to investigate what the Global NAL characterizes as "a pattern of delinquency" by Global and its affiliates since December 2003. Global often failed to make full or timely USF or Telecommunications Relay Service ("TRS") contributions for long periods of time and then would make large payments just prior to USAC's transfer of the past-due amounts to the FCC for collection under the Debt Collection Improvement Act of 1996 ("DCIA"). The FCC emphasized that nonpayment of USF contributions "bestows on delinquent carriers an unfair competitive advantage by shifting to compliant carriers the economic costs and burdens associated with universal service." The fact that the outstanding USF balance has risen as high as over $11 million for one Global subsidiary "demonstrates the potential magnitude of competitive harm" from such noncompliance.

The Global NAL stated that, in the past, the FCC has applied the applicable one-year statute of limitations by proposing penalties only for USF contribution violations that began during the 12-month period immediately prior to an NAL. Because "our previous forfeiture calculation methodology did not deter the Global Crossing Companies from attempting to exploit USAC's referral procedures," the FCC modified its penalty approach to "reflect not only the violations that began within the last twelve months, but all violations, *whenever they began, unless they were cured more than one year ago*." Under that methodology, the FCC found Global apparently liable for 31 continuing USF contribution nonpayment or underpayment violations since February 2007 and four continuing violations of its 2006 and 2007 TRS contribution obligations. The FCC proposed a base forfeiture amount of $20,000 for each of 15 USF contribution nonpayment violations and a base amount of $10,000 for each of 16 USF underpayment and four TRS violations, for a total base USF contribution forfeiture of $460,000 and a total base TRS forfeiture of $40,000. Adding an upward adjustment of one-half of the unpaid USF and TRS contributions, the FCC proposed a total USF forfeiture of $9,898,722 and a total TRS forfeiture of $619,291. The magnitude of the proposed penalty was also reflected in an unusual requirement in the NAL requiring Global to submit within 30 days not only a payment of the forfeitures, or a statement seeking reduction or cancellation of the proposed forfeitures, but also a sworn report detailing how it plans "to come into compliance with the reporting and payment obligations discussed herein" going forward.

In the Compass NAL, the FCC applied its new strict forfeiture calculation methodology to violations of the USF, TRS, and other regulatory contribution obligations. The NAL also addressed Compass's claim that its provision of access to its prepaid calling-card switching platform is not a telecommunications service and thus not subject to USF and other contribution obligations. Compass argued that it markets its services to other carriers, rather than to the public, and that its network transmits voice and data communications only in Internet Protocol and thus constitutes an information service. The FCC rejected these arguments, explaining that the wholesale basic transmission of voice and data communications constitutes telecommunications service, irrespective of the presence or absence of end user customers or the technology or protocol used to provide the service. Compass provides no enhanced functionality or net protocol conversion that would qualify as an information service, and the FCC has recognized for many years that packet-switched interstate transmission services are properly classified as telecommunications services.

Stating that Compass "has a history of failing to comply with the Commission's rules," the NAL noted that Compass failed to file Form 499 Worksheets from the beginning of its services in 2005 until September 2007, thereby avoiding its payment obligations. The FCC concluded that the failure to file a Form 499 Worksheet constitutes a continuing violation for which the statute of limitations is tolled until the violation is cured. Nevertheless, the FCC exercised its prosecutorial discretion and declined to propose forfeitures for Compass' failures to file Worksheets more than one year prior to the date of the NAL. The FCC warned, however, that "future enforcement actions may consider *all failures to file Worksheets* as continuing violations subject to forfeiture action." The FCC applied its stricter forfeiture methodology to Compass' nonpayment violations, including a proposed total base USF contribution forfeiture of $440,000 for 22 USF nonpayment violations from May, 2005, to March, 2007. Combined with the proposed forfeitures for all of Compass' other categories of nonpayment violations, with upward adjustments for unpaid balances, the NAL proposed a total forfeiture against Compass of $828,613.44.

TracFone Granted Limited ETC Status for Lifeline Service Support
On April 11, 2008, the FCC released an order granting TracFone Wireless, Inc. ("TracFone") ETC status in ten eastern and southern states and the District of Columbia, but only for the purpose of receiving Lifeline support for low-income subscribers. TracFone had previously been granted forbearance from the "facilities" requirement of Section 214(e) of the Communications Act so that it could qualify for limited ETC status as a reseller of prepaid wireless service. The prepaid nature of its service is particularly appealing to low-income users concerned about usage charges. The FCC conditioned the grant of ETC status on TracFone's certification that it is in full compliance with any applicable 911/E911 obligations. In a separate statement, Commissioner Copps noted that "sometimes we lose sight of the fact that there is an entire segment of consumers who would lack a phone at all . . . were it not for the support of the Lifeline program. I am very pleased that today the Commission takes a moment to focus on making it easier for low-income consumers to receive wireless phone service."

FCC Reaffirms USF Contribution Methodology for Intrastate and International Services
On April 11, 2008, the FCC reaffirmed various aspects of its USF contribution policies in the *USF Reconsideration Order*. The FCC addressed two petitions for reconsideration of the FCC's 1999 *Fifth Circuit Remand Order*, which responded to the Fifth Circuit's decision in *Texas Office of Public Utility Counsel v. FCC* ("*TOPUC*"). *TOPUC* reversed and remanded in part the FCC's methodology for assessing USF contributions on international and intrastate revenues.

In the *Fifth Circuit Remand Order*, the FCC modified the assessment of contributions on international revenues so that contributors whose interstate revenues comprise less than eight percent of their combined interstate and international revenues would contribute based only on their interstate revenues (the "limited international revenues exemption"). The purpose of the exemption was to ensure that application of the USF contribution factor, which was approximately eight percent at that time, would not result in a total USF contribution amount greater than a contributor's total interstate end-user revenues. The FCC also removed intrastate revenues from the contribution base for the schools and libraries and rural health care programs.

Bellsouth Corporation filed a petition for reconsideration requesting that the FCC order retroactive refunds for contributions based on intrastate revenues and clarify that CMRS providers may lawfully recover the cost of their USF contributions through charges associated with all of their telecommunications services. Arya International Communications Corporation ("Arya") sought reconsideration of the limited international revenues exemption, arguing that the eight percent threshold was arbitrary and capricious, and that any prior contributions in excess of the threshold should be refunded.

In the April 11, 2008 *USF Reconsideration Order*, the FCC reconfirmed that CMRS providers may recover their USF contributions through rates charged for all of their services and rejected Arya's claim that the eight percent threshold is arbitrary and capricious. The FCC explained that the eight percent threshold "provided sufficient margin of safety based on the contribution factors at the time," thus ensuring that a contributor's total USF contribution would not exceed its interstate end-user revenues, and that the threshold was raised to 12 percent in 2002 to match the increased contribution factor, ensuring that a carrier's total contributions would continue to be no greater than its interstate end-user revenues.

The FCC also rejected the retroactive refunds sought by petitioners. It explained that refunds would burden current USF contributors and millions of their customers through an increased contribution factor to pay refunds of more than one billion dollars to millions of customers paying USF fees in 1998 and 1999. The administrative costs of such refunds would be enormous, and many of the carrier contributors due a refund and the billing records of their former customers no longer exist. The potential benefits of refunds, which would be "minute" for any individual consumer, thus "are extremely speculative," and "the costs and burdens of a refund requirement are concrete." The FCC concluded that "imposing an unworkable refund obligation for only the most speculative of benefits does not serve the public interest or comport with our statutory obligations under section 254." Accordingly, "considerations of fairness and equity . . . defeat the presumption of retroactivity." The increased contribution factor needed to generate the refunds "would cause manifest injustice for today's consumers, as they shoulder higher bills while bearing no culpability for the refund problem."

Tennessee and Louisiana Move Closer to State-Level Video Franchising While Maine Reaffirms Local Control

Tennessee Finally Brings Parties Together on Video Franchising
While Tennessee has not yet joined the many states that passed video franchising reform bills in the past year, it may finally have a bill to please all interested parties. Build-out obligations lay at the center of the controversy. The new bill is endorsed by the governor and was advanced by the Tennessee House in early April. A similar bill was withdrawn by its primary sponsor in May 2007, who cited insufficient time in the final two weeks of the 2007 legislative session to defeat persistent opposition to the measure from various cities and towns. (*See* May 2007 Communications Law Bulletin.) Since then, AT&T, cable providers, and local franchising authorities have agreed on a compromise that would enable new video entrants like AT&T to obtain state video franchises. Under the 2008 bill, new entrants will be required to offer service to certain percentages of households (some portion of which must be low-income neighborhoods) under a series of build-out deadlines. The Tennessee House Finance Committee made additional revisions providing for an annual fee of up to $100,000 on state franchisees to offset administrative costs, as well as discounts on pole attachment rates associated with broadband build-out to currently unserved areas. The bill now advances to the House floor for a vote.

Louisiana Senate Advances Video Franchising Reform Bill
In late April, the Louisiana Senate commerce committee approved a bill shifting video franchising authority to the state level. The bill is backed by AT&T but faces stiff opposition from local authorities, who fear revenue loss resulting from loss of franchising control. The bill now goes to the full state Senate for a vote.

Maine Adopts Model Cable Franchise Agreements
While Maine continues to franchise video service at the local level, it has taken steps to standardize cable franchising agreements. Maine's governor signed into law in early April a bill creating a model cable franchise agreement that municipalities could adopt for new or renewed video franchises. The model agreement, which will be drafted by the state Office of Information Technology, will include provisions for, among other things, franchisee build-out obligations, customer service, public access channels, and franchising fees.

Vermont Telephone Company Requests Declaratory Ruling as to Interconnection Rights of VOIP Providers Under Sections 251 and 252

On April 11, 2008, the Vermont Telephone Company ("VTel"), an independent rural incumbent local exchange carrier ("ILEC") serving southern Vermont, filed a petition for declaratory ruling asking the FCC to clarify whether VoIP providers may request interconnection with ILECs under Sections 251 and 252 of the Communications Act ("Act"). VTel's petition arose from a January 11 request by Comcast Phone of Vermont, LLC ("Comcast"), a VoIP provider holding a certificate as a competitive local exchange carrier ("CLEC") in Vermont, for interconnection with VTel pursuant to Section 251(a) and (b) of the Act. Comcast's request included direct and indirect network interconnection, number portability (as well as any VTel switch upgrades necessary to provide portability), reciprocal compensation at "bill-and-keep" rates, and access to directory listings and directory assistance.

The service for which Comcast requests interconnection is "Digital Voice," a VoIP service. VTel points out in its petition that, although interconnection rights under Sections 251 and 252 are expressly limited to telecommunications services and carriers, the FCC has not classified VoIP as a telecommunications service. VTel also notes that Comcast has frequently denied that it is a telecommunications carrier in a variety of contexts and states that "Comcast, following its admirable entrepreneurial traditions, seeks to have it both ways: To enjoy all the benefits from interconnection as a 'telecommunications carrier,' but at the same time dodge the regulatory obligations and statutory duties of a 'telecommunications carrier.'" In order for VTel to understand its obligations in response to Comcast's interconnection request, VTel accordingly requests that the FCC clarify whether Section 251/252 interconnection rights are restricted to telecommunications carriers and whether VoIP providers, such as Comcast, are entitled to interconnection under those provisions. The FCC released a Public Notice on April 18 requesting comments on VTel's petition on May 19 and replies on June 9, 2008.

Of potential relevance to VTel's petition is an Iowa federal district court decision reported on April 16, 2008, upholding a 2005 Iowa Utilities Board ("IUB") ruling that Sprint Communications is a telecommunications carrier entitled to interconnection arbitration under Sections 251 and 252 for wholesale VoIP services resold by a telecommunications carrier, MediaCom Cable's affiliate, MCC Telephony ("MCC"). Sprint had sought interconnection with Iowa Telecom and 26 other rural ILECs, which objected on the grounds that, because Sprint sold its VoIP services to MediaCom, which is not a telecommunications carrier, Sprint had no Section 251/252 interconnection rights. The IUB found that Sprint was acting as a common carrier and thus entitled to interconnection arbitration. The federal court upheld the IUB, finding that Sprint "offers its services indiscriminately to MCC and other cable companies with last-mile capabilities." The court noted that a carrier offering services in a competitive market can negotiate individual contracts with specific customers and still be a common carrier.

April 2008 Is DTV Enforcement Month

FCC Releases Flood of DTV-Related Enforcement Orders
In early April, the Commission released a flood of enforcement actions amounting to millions of dollars in fines related to the digital television ("DTV") transition. Over the past year, the Commission has been investigating equipment manufacturers and retailers, among others, for possible violations of an array of DTV-related regulations, including those related to equipping all new televisions with DTV tuners and with V-Chips designed to screen and block content in digital broadcast signals. Retailers also play a significant role in consumer education efforts, because they are required to display warning labels on all televisions that lack digital tuner equipment.

Specifically, the Commission released seven Notices of Apparent Liability ("NALs") totaling more than $3 million for violations of the DTV warning label requirements against Sears, Roebuck, K-Mart; Wal-Mart Stores/Sam's West; Circuit City; Fry's Electronics; Target; Best Buy; and CompUSA. Sears *et al.* received the highest fine of the lot ($1,096,000) for a total of 137 alleged violations.

Two consumer electronics manufacturers, Syntax-Brillian and Precor Inc., received a Forfeiture Order and Further Notice of Apparent Liability, and an NAL, respectively, for failing to install digital television receivers in their television products as required by Section 15.117 of the Commission's rules. Precor was fined $357,900 and Syntax-Brillian was fined $1,266,100.

Finally, several equipment manufacturers were investigated for installing V-Chips in their digital television receiving equipment that were not capable of responding to changes in the content rating system. Even though Section 15.120(d)(2) of the FCC's rules requires this capability, no changes to the current television rating system are planned. Nonetheless, the Commission released NALs against several companies, and entered into consent decrees to end investigations with others. Polaroid Corporation and Proview Technology, Inc. received NALs for violations of the digital V-Chip rules, together totaling $1,075,000. The other investigations were resolved by consent decree between the FCC and the following parties: LG Electronics, Philips Consumer Electronics, Sanyo Corporation, Vizio, Inc., Panasonic Corporation, Westinghouse Digital Electronics, and Audiovox Corporation, together totaling $3,445,000 in voluntary contributions. The consent decrees provide for a variety of different compliance and remedial measures, including submitting compliance reports to the FCC, notifying customers about possible problems with their television equipment, and providing software and hardware fixes to upgrade V-Chip capabilities in some products.

Recon Order Revises DTV Consumer Education Rules and Establishes May 2008 Deadline
Even in the midst of its enforcement efforts, the Commission continues to struggle with finalizing many other DTV rules. On April 23, 2008, it released a Reconsideration Order of its DTV Consumer Education Rules, which, among other things, made several changes to Section 15.124. The rules require manufacturers to provide notices with their equipment regarding the DTV transition. The FCC has designated May 30, 2008, as the start date for manufacturers to comply with the revised rules, and it will refrain from enforcement of the original Section 15.124 for manufacturers until the revised Section 15.124 goes into effect.

New Local HD Rules for Direct Broadcast Satellite System Operators

The FCC released the new local high definition ("HD") rules for direct broadcast satellite ("DBS") system operators on March 27, 2008. The phased plan, which was proposed by DirecTV and Dish Networks, is touted as striking a balance between achieving digital-transition goals and accommodating DBS infrastructure and capacity challenges. The Order:

- Extends mandatory satellite carriage in local-into-local markets for digital-only stations, regardless of whether the station is a new entrant or an existing station returning analog spectrum;
- Addresses the nondiscriminatory treatment of HD signals by requiring satellite carriers to carry each station in the market in the same manner, including carriage of HD signals in HD format if any broadcaster in the same market is carried in HD;
- Establishes a four-year, phased-in schedule to progressively transition to HD carry-one, carry-all, beginning February 2009 and concluding February 2013; and
- Mandates that satellite carriers must carry the over-the-air digital services, such as closed-captioning information and V-Chip information, which are associated with the broadcaster's primary digital video programming.

Happenings on the Hill

- *Sen. Dorgan Still Waging War on New Media Ownership Rules*: Sen. Byron Dorgan (D-N.D.) continues to champion his resolution of disapproval (SJ Res 28), vowing to prevent the FCC from implementing the new media ownership rules. If Sen. Dorgan successfully garners Senate approval (the resolution currently has 20 bipartisan co-sponsors), the resolution proceeds to the President for his signature. President Bush's advisors, however, have already announced they will recommend a veto should the resolution make it to the White House. A veto will suspend the rule for 30 days, allowing Congress to vote on overriding the veto. A similar resolution is circulating in the House (HJ Res 79).

- *Common Carriers Face Possible Dual-Agency Regulation*: Introduced April 8, 2008, the Federal Trade Commission Reauthorization Act of 2008 would eliminate the FTC Act common carrier exception, which bars the FTC from addressing certain telecom common carrier activities that are FCC-regulated. Specifically, the Reauthorization Act would authorize the FTC to investigate common carriers' practices for unfair and deceptive acts and unfair methods of competition, and clarify that the federal government would not preempt state telecom laws that are more restrictive than federal requirements. Driven in part by consumer complaints about the mobile phone industry, the Reauthorization Act would allow the FTC to look into criticisms about early termination fees, advertising practices, and cell phone spam. The FTC reiterated that removing the exemption would not affect the FCC's jurisdiction; it would only give the FTC the ability to protect consumers from the same or related unfair and deceptive practices regardless of whether the activities originate with a common or non-common carrier.

- *Senate Commerce Committee Requests Monthly DTV Transition Status Reports*: Confidence in the FCC's and the National Telecommunications and Information Administration's ("NTIA") DTV transition efforts continues to wane among Senate Commerce Committee members. At the oversight hearing on April 8, 2008, Committee members expressed concerns about the FCC's perceived lack of focus on consumer education, pointing to a recent Consumers Union survey that found 74 percent of consumers who were aware of the DTV transition had major misconceptions as to what the transition meant to them. Despite FCC Chairman Kevin Martin's reassurances that the Commission would take whatever steps necessary to minimize the potential burden on consumers, Committee members asked Chairman Martin and NTIA Acting Administrator Meredith Baker to submit monthly status reports detailing their efforts.

- *House Committee Introduces Bill to Ban Cell Phone Use on Airplanes*: On April 15, 2008, several House members introduced legislation to ban the use of cell phones during airline flights. The bill was introduced by five sponsors, including Rep. Oberstar (D-Minn.), the Chairman of the House Transportation and Infrastructure Committee. The HANG UP Act would prohibit only voice calls and would allow use of the Internet and text messaging. With technological advances expected to enable a variety of wireless communications capabilities for in-flight airplanes, the bill's sponsors hope a ban on voice calls will prevent unwilling captive audiences to others' voice conversations on crowded flights. The bill is expected to go to markup in late April.

- *House Seeks Five-Year Moratorium on Discriminatory Mobile Phone Taxes*: Rep. Lofgren (D-Calif.) introduced a bill banning all new discriminatory state and local taxes on mobile phone services and service providers for five years. Under the Cell Tax Fairness Act, a discriminatory tax would be defined as one that applies only to mobile services, mobile service providers, or mobile service providers' property or applies a higher rate to the same. The bill would not affect current taxes or Universal Service Fund fees, and would not apply to new taxes that replace existing taxes and do not increase the resulting amount of tax revenues. Wireless service providers, noting that approximately 15% of customer bills already constitutes taxes and fees, strongly support the bill.

FCC Provides More Advance Notice of Open Meeting Agenda Items

Continuing the recent trend toward more transparency, FCC Chairman Martin recently announced that he will now provide three weeks' advance public notice of items being considered for the next open meeting. Historically, the first notice of intent to vote on an item at an open meeting occurred with the publication of the "sunshine" notice one week prior to the meeting, after which further *ex parte* contacts are prohibited. Accordingly, this new process will give interested parties time to schedule *ex parte* meetings on items that are to be imminently considered.

The Chairman announced that two items are being considered for the May 14, 2008 open meeting: (1) a second Further NPRM on the 700 MHz public/private partnership between the D Block licensee and the Public Safety Broadband Licensee; and (2) a reconsideration/clarification order on narrowbanding.

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 1, 2008	**Quarterly Form 499-Q due** (Telecom Reporting Worksheet).
May 1, 2008	Deadline for certifying compliance with **rate averaging/rate integration rules.**
May 19, 2008	Reply comments due on **three USF reform NPRMs**: (1) Joint Board high-cost reform recommendation, (2) identical support rule, and (3) reverse auctions proposal.
May 19, 2008	Comments due on Vermont Tel petition seeking **clarification of interconnection rights of VoIP providers**.
May 19, 2008	**FCC Summit on Emergency Alert System**.
May 30, 2008	Reply comments due on **BAS relocation NPRM.**
June 9, 2008	Reply comments due on Vermont Tel petition seeking **clarification of interconnection rights of VoIP providers**.
June 11, 2008	Reply comments due on **broadcast localism NPRM.**