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Communications Law Bulletin, February 2008

February 2008

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Communications Law Bulletin, February 2008

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The Month in Brief

February saw developments on a number of fronts that could fundamentally alter the regulatory landscape. Notably, net neutrality – the idea that broadband service providers should be required to make their networks and services available to applications providers, content providers, and other third parties on a nondiscriminatory basis – continued to gain traction in Congress and at the Federal Communications Commission ("FCC" or "Commission"). Also, the Commission announced an end to the ban on common ownership of broadcast stations and newspapers in the same markets, and tentatively concluded that high-cost support for telecommunications service should be allocated on the basis of "reverse auctions" rather than more traditional methods.

These and other developments are covered here, along with our usual list of deadlines for your calendar.

Net Neutrality Remains in the Spotlight

February saw comments and reply comments filed on two petitions at the FCC regarding broadband network management.

Meanwhile, in mid-February, Representatives Edward Markey (D-Mass.) and Chip Pickering (R-Miss.) introduced the long-awaited Internet Freedom Preservation Act of 2008. The bill – touted as a compromise measure – mandates that the FCC study the consumer Internet access policies of broadband Internet access providers and conduct at least eight public broadband summits, then report back to Congress (with FCC recommendations) at the end of this process. The bill does not require the FCC to adopt any regulations (and thus differs from Markey's previous net neutrality bill), but would codify broad language supporting network neutrality principles in general, which could potentially permit the FCC to adopt net neutrality regulations in the future. Because the bill does not mandate any regulation, it is considered to be somewhat more likely to pass than previous bills.

The FCC also held a public hearing on broadband network management practices at Harvard Law School on February 25. Witnesses included public interest groups, academics, technology experts, and representatives of broadband service providers, among others. In addition to discussing Comcast's much publicized blocking or delaying of BitTorrent, panelists also discussed (i) the need for network management to be transparent and disclosed to customers (this was from Chairman Martin), and (ii) whether the problem is actually insufficient broadband capacity, and thus whether the FCC needs to "jump-start" competition (Rep. Markey).

Another Step Towards Transparency in FCC Processes

Fueled in part by the new ownership rules, the House Commerce Committee ("Committee") is making good on its promise to investigate the FCC's procedures and has begun to request information related to its inquiry. (See "Chairman Martin Defends FCC Processes," in the December 2007 / January 2008 Bulletin.) In addition to the requests, referred to as "Dingellgrams" (after Commerce Committee Chairman John Dingell), the Committee is encouraging Commission staff to come forward with information and seeking assurances from Chairman Martin that there will be no retribution against FCC employees who cooperate with the probe.

In the wake of the Committee's announcement that it had opened a formal probe into the FCC's regulatory procedures and Sen. Byron Dorgan's (D–N.D.) statement that he is asking the Senate Commerce, Science, and Transportation Committee to launch a similar investigation, Chairman Kevin J. Martin took another step towards making FCC procedures more transparent. At a February 8 news conference, the Chairman discussed six items he "white-copied" for the February 26 meeting. Chairman Martin alluded to the possibility of announcing white-copied items during a December 13 Senate Commerce Committee hearing, but remained noncommittal even though lawmakers and fellow commissioners favored the idea. (See "Chairman Martin Defends FCC Processes," in the December 2007 / January 2008 Bulletin.) Chairman Martin is now championing the idea, calling for the Commission to regularly publish the items circulated for action at monthly meetings, at least three weeks in advance. The three-week advance notice parallels the FCC's traditional practice of circulating agenda items among commissioners three weeks before each meeting. FCC commissioners, lawmakers, and public interest groups all herald the move as a positive step. Announcing white-copied items follows on the heels of the Commission's earlier decision to publish a weekly list of all items in circulation.

Happenings on the Hill

- President Bush signed two bills into law addressing the "Do-Not-Call" registry on February 15. The Do-Not-Call Improvement Act (HR-3541) ("Improvement Act") ensures that consumers' phone numbers are not purged from the list until the numbers change hands. The Improvement Act was drafted in response to the previous law, which called for the removal of numbers from the registry after five years, forcing consumers to reregister. The Improvement Act's sister law, the Do-Not-Call Registry Fee Extension Act (S-781) ("Extension Act"), gives the Federal Trade Commission ("FTC") the authority to collect funds for registry maintenance. Going forward, an annual fee will be assessed on those accessing the registry, either on a per-area-code or full-registry basis. The FTC will determine fee increases based on changes in the consumer price index. The Extension Act also requires the FTC to submit reports to Congress detailing the number of consumers on the list, the number of people paying for list access and how much they paid, as well as an assessment of the agency's outreach and enforcement efforts.

- The House Telecom Subcommittee is drafting a consumer protection bill targeting wireless cell phone contracts. The circulating draft imposes federal consumer protection laws, preempting state consumer laws. The draft also requires the FCC to set standards for wireless phone contracts, which would include offering at least one service plan that has no early termination fees. Additionally, the bill gives the Commission the power to set early termination fees and examine carriers' methods for disclosing contract details. Carriers would also be required to provide service area maps showing coverage based on signal strength. Although the Commission would have the authority to enforce the standards, states would also have the authority to enforce these federal standards by bringing civil actions on behalf of residents for suspected violations. Federal law would guide penalties, but states could levy higher fines or more punitive civil and criminal penalties. A similar Senate cell phone consumer-issues bill (S-2033), which would also require wireless companies to give clear explanations of their contracts, fees, surcharges, and monthly rates, was introduced last fall.

- The National Cable & Telecommunications Association ("NCTA") has endorsed Senate bill S-428, which gives Voice over Internet Protocol ("VoIP") providers access to incumbent phone companies' E-911 network and offers them the same liability protection as wireline and wireless providers. The bill fills a 2005 FCC rule gap, which mandated that VoIP companies provide E-911 service and subscriber location information, but did not give VoIP providers equal access to the necessary tools. The House passed a companion bill (HR-3403) in November 2007.

- During the National Association of Regulatory Utility Commissioners winter meeting, representatives from congressional offices and committees predicted that Congress would be focusing on discrete bills with individual constituencies instead of comprehensive reform in 2008. The reasoning: discrete issues have a better chance of making progress because broad bills provide lawmakers with more opportunities for disagreement. Examples of comprehensive measure unlikely to be resolved in 2008 include net neutrality and a rewrite of the 1996 Telecommunications Act. Examples of hot agenda items are VoIP E-911 service, caller ID spoofing, DTV transition awareness, and rural broadband service. Video franchising, another discrete issue, has dropped off Congress's radar because federal lawmakers recognize that Bell companies have refocused their efforts at the state level.

Practice Tip: Lockbox Change

On February 14, 2008, U.S. Bank replaced Mellon Bank as the lockbox bank for all FCC programs except auction-related payments. The new lockbox bank address is: U.S. Bank, 1005 Convention Plaza, SL-MO-C2-GL, St. Louis, MO 63101. FCC forms and payment type codes will remain the same.

Delivery hours are 24 hours per day, 7 days per week. Filings can be hand-delivered to the U.S. Bank at its office at 1005 Convention Plaza, St. Louis, Missouri 63101, located at the intersection of 10th and Convention Streets. Couriers are allowed to park in the visitor section of the Operation Parking Lot to deliver filings. The courier will provide the FCC filing, in a sealed envelope, to U.S. Bank's Front Desk Security Officer, who will time/date-stamp a receipt and provide a copy of the receipt to the courier/customer. The time/date-stamped receipt can be used as proof of filing.

Beginning February 14, 2008, any filings or wires received at Mellon Bank will be returned to sender. In order to avoid any delays, the FCC strongly encourages filers to electronically submit payments. Electronic payments can be submitted through the FCC's website, http://www.fcc.gov/fees/feefiler.html. Electronic payments allow for faster processing of applications and eliminate concerns that payments are being sent to the wrong location.

Also, the receiving bank for wire payments will be the Federal Reserve Bank, New York, New York, as of February 14, 2008. Applicants are required to fax FCC Form 159 one hour before the wire to U.S. Bank. Form 159, for non-auction wire payments, must be faxed to 314-418-4232. New instructions for making wire payment are posted at http://www.fcc.gov/fees/wiretran.html.

New Bureau fee filing guides are available at http://www.fcc.gov/fees/appfees.html.

FCC Imposes Two Indecency Fines Just Prior to Five-Year Statutory Deadline as Well as 13 NALs for Failing to Respond to Informal Complaints

NYPD Blue Forfeiture

On February 19, the FCC released a Forfeiture Order against 45 ABC Television Network ("ABC") affiliated and ABC-owned and -operated stations for violating the FCC's indecency rules during the broadcast of an episode of "NYPD Blue" aired at 9:00 p.m. Central Standard and Mountain Standard Time on February 25, 2003. The Forfeiture Order was the expected follow-up to a Notice of Apparent Liability for Forfeiture ("NAL") against the same stations (reported in the December 2007 / January 2008 Bulletin). The five-year statute of limitations in Section 2462 of Title 28 required that the Forfeiture Order be issued in time for suit to be brought against any licensee failing to pay the fine by February 25, the fifth anniversary of the broadcast at issue. Apparently, the NAL had languished on the FCC's 8th floor for almost two years awaiting a majority Commission vote before it was released on January 25, necessitating a rushed Forfeiture Order prior to the statutory deadline.

FCC regulations implementing Section 1464 of Title 18 of the U.S. Code prohibit the broadcast of indecent material – defined as material that depicts or describes sexual or excretory activities or organs in terms patently offensive, as measured by contemporary community standards for the broadcast medium. The episode at issue began with a scene in which a young boy walks in on a naked woman, apparently his mother, in the bathroom. In affirming its conclusion in the NAL that the broadcast material was indecent, the FCC rejected the licensees' arguments that buttocks are not sexual or excretory organs, finding that they are "widely associated with sexual arousal and closely associated by most people with excretory activities" and thus "typically kept covered because their public exposure is considered socially inappropriate and shocking." The FCC also rejected the licensees' arguments that the complained-of material was not patently offensive, finding that the "graphic, repeated, pandering, titillating, and shocking nature of the scene's visual depiction of a woman's naked buttocks warrant a finding that it is patently offensive under contemporary community standards for the broadcast medium, notwithstanding any artistic or social merit and the presence of a parental advisory and rating."

The FCC also rejected various procedural arguments, including arguments directed to the sufficiency of the complaints underlying the NAL and the relatively short period of time – 17 working days – allowed to the licensees to respond to the NAL. Although Section 1.80 of the FCC's rules provides that a respondent to an NAL "'will be afforded a reasonable period of time (*usually* 30 days from the date of the notice)'" to respond to the NAL, the FCC noted that the rules "do not state that the reasonable period of time will *always* be 30 days." The licensees' substantive responses demonstrate that they were not harmed by the shortened response time. The FCC also rejected a licensee's argument that a satellite station of a full-power station should be held to a less stringent indecency standard for the same programming. Finally, the FCC rejected licensees' First Amendment arguments, citing *Action for Children's Television v. FCC* for its holding that the "'broadcast media are properly subject to more regulation than is generally permissible under the First Amendment.'" The FCC rejected arguments that its indecency standard, which was applied by the Supreme Court in *FCC v. Pacifica Foundation*, is unconstitutionally vague.

The FCC's base forfeiture amount for the transmission of indecent or obscene material is $7,000, and the statutory maximum is $27,500. Noting that the licensees could have edited the program, which was prerecorded, the FCC imposed the maximum forfeiture of $27,500 against each of 45 stations that were the subject of the NAL. The total fine of almost $1.24 million is reported to be the second-largest indecency forfeiture ever imposed by the FCC. Because of the looming deadline, the stations were given only two days, until February 21, to pay the fines, apparently in order to give the FCC another two working days to find a U.S. Attorney to sue any nonpaying station for recovery of the fine by February 25. This Forfeiture Order and its procedural background demonstrate that regulated entities often have to bear the burden of FCC delays, regardless of the resulting prejudice. It was reported that ABC paid the fine immediately and appealed the Forfeiture Order to the U.S. Court of Appeals for the Second Circuit on February 21.

Married by America Forfeiture

On February 22, the FCC released an indecency Forfeiture Order against 13 FOX Television Network stations for an episode of "Married By America," a "reality-based" program, broadcast on April 7, 2003. This broadcast was the subject of an NAL released on October 12, 2004, finding 169 FOX stations apparently liable for forfeitures in the amount of $7,000 per station. Although there was over a three-year delay between the release of the NAL and the circulation of a Forfeiture Order, the Commission, facing a five-year enforcement deadline of April 7, acted quickly once the Order was circulated.

The broadcast in question included scenes from bachelor and bachelorette parties for two sets of would-be brides and grooms who agreed to be engaged to be married, even though they had never met previously. The parties featured sexually oriented entertainment provided by nude or semi-nude female and male strippers, including sexually provocative dancing and scenes in which participants licked whipped cream off strippers' breasts and other body parts. The FCC rejected the licensees' arguments that the broadcast material was not indecent, finding that the scenes at issue were "designed to stimulate sexual arousal" and depicted sexual organs. The FCC found that the digitally shaded images of body parts "did not obscure the overall graphic character of the depiction" and that the material was presented in a pandering and titillating manner.

The FCC also rejected licensee arguments that the broadcast was similar to a live sporting event, in that audience participation in a voting process precluded a sufficient opportunity to review the material in advance. Licensees are ultimately responsible for the material that they air, regardless of the source, and they could have reviewed a tape before broadcasting the episode. The FCC also rejected the licensees' argument that their network affiliation agreement with FOX deprived them of the ability to review and reject undesirable episodes, pointing out that FCC rules require that network affiliation agreements not hinder or prevent licensees from rejecting unsuitable network programs. The FCC also rejected constitutional arguments similar to those raised by the ABC licensees with regard to the "NYPD Blue" episode.

Following the enforcement approach taken in the "NYPD Blue" Forfeiture Order, the FCC, noting its "policy of restrained enforcement in indecency proceedings," narrowed the scope of the penalties originally proposed against 169 stations in the NAL to the 13 stations that serve markets from which viewer complaints were received. The total fine was thereby reduced from $1.18 million to $91,000. It was reported that some commissioners wanted to limit the fine to stations drawing complaints from people who actually watched the episode in question, an even smaller subset. Although the FCC noted that the penalty in the base amount of $7,000 proposed for each station in the NAL was "unduly low in light of the nature and gravity of the violation," the impending five-year enforcement deadline of April 7 precluded issuing a revised NAL with higher penalties "at this late date." Accordingly, the 13 stations were ordered to pay a forfeiture of $7,000 each within 30 days, giving the FCC two weeks to refer unpaid fines to a U.S. Attorney for collection by April 7. A FOX spokesman stated that the network "strongly disagrees" with the FCC's conclusions and "will be actively considering our options."

Informal Complaint NALs
On February 19, the Enforcement Bureau released NALs against 13 carriers for failing to respond to informal complaints that the FCC had received from consumers or other parties and served on the defendant carriers. The Bureau noted that it had reminded all carriers on March 2, 2007, of the importance of responding to informal complaints and the penalties for failure to do so. All of the NALs concerned informal complaints served after that date in 2007, and most of the informal complaints were served in April, 2007. In each of the NALs, the Bureau proposed to assess, for each unanswered informal complaint, the base forfeiture of $4,000 imposed for any failure to respond to an FCC communication.

The largest proposed penalty, $96,000, was against AT&T, Inc., which failed to respond to 24 informal complaints. In six of the NALs, the Bureau proposed a total fine of $4,000 for failing to respond to a single informal complaint. In three of the NALs, the defendants failed to respond to informal complaints from payphone service providers for unpaid payphone compensation, and the rest involved consumer complaints served by the Consumer & Governmental Affairs Bureau.

FCC Initiates Long-Awaited Universal Service Reform Effort

On January 29, the FCC released three Notices of Proposed Rulemaking ("NPRMs") exploring possible reforms of the high-cost universal service fund ("USF"): (1) an NPRM requesting comment on the Joint Board's November 20, 2007 Recommended Decision ("RD") proposing a restructuring of the high-cost USF program ("Restructure NPRM"); (2) an NPRM tentatively concluding that the FCC should develop a "reverse auction" mechanism (in which the lowest bid wins) to distribute high-cost USF support ("Reverse Auction NPRM"); and (3) an NPRM proposing that competitive eligible telecommunications carriers ("CETCs") receive universal service support based on their own costs, rather than incumbents' costs ("CETC Support NPRM"). These USF reform issues have been gathering momentum for some time at the FCC and were the subjects of different Joint Board proceedings in 2007. The USF reform issues raised by these NPRMs are intertwined, and the Restructure NPRM incorporates the other two NPRMs, facilitating combined comments. The NPRMs also conflict at certain points, however, although there is no express recognition of those inconsistencies.

Restructure NPRM
The Restructure NPRM attaches the Joint Board's RD, which proposes that each of the five existing high-cost USF funds be capped at its current level, totaling about $4.5 billion annually, and that they be reorganized into three separate funds: a Broadband Fund, initially set at a support level of $300 million annually; a wireless fund, or, to use the RD's nomenclature, a Mobility Fund, initially set at the current total amount of annual CETC support; and a Provider of Last Resort ("POLR") Fund. Grants would be awarded by the states, based on federal standards, to only one of each type of provider in each high-cost service area. The NPRM contemplates that the POLR Fund recipient would be the incumbent local exchange carrier ("ILEC") in each service area, although the NPRM suggests that CETCs, including wireline CETCs, should continue to receive support for a transition period.

The Broadband Fund would be used to provide grants for the construction of new facilities in unserved areas and, secondarily, to provide grants for new construction in areas with substandard service and operating subsidies to broadband Internet providers in areas that cannot support broadband operations economically. Similarly, the Mobility Fund would be used to subsidize new construction for wireless services in unserved areas and, secondarily, to provide operating subsidies in areas that cannot support ongoing wireless operations economically. The NPRM does not describe a structure for the POLR Fund other than to continue all current incumbent high-cost support programs at their current levels.

Although the RD warns against "duplicate" support from the three separate funds, it contemplates that wireless carriers seeking support from the Mobility Fund also "would likely need only marginal Broadband fund dollars to add broadband" to their networks, suggesting the possibility of at least some support from both funds. The RD suggests a similar approach to wireline recipients of POLR support applying for Broadband Fund support. More recently, one of the Republican Commissioners, Deborah Tate, has questioned the wisdom of creating new USF support funds, particularly different funds that support the same customers.

Reverse Auction NPRM

The Reverse Auction NPRM tentatively concludes that the FCC should develop a reverse auction mechanism to distribute high-cost support. The NPRM points out that reverse auctions offer several potential advantages over current high-cost mechanisms by driving the level of support down to the minimum level of subsidy required to achieve universal service goals. FCC Chairman Kevin Martin, who has long championed the use of reverse auctions to distribute high-cost support, notes that they "could provide a technologically and competitively neutral means of controlling the current growth in the fund and ensuring a move to the most efficient technologies over time."

The NPRM requests comment on whether there should be separate auctions in each service area for wireline and wireless carriers or a single auction in which all carriers would participate. Presumably, a common reverse auction including all carriers would require a single funding source, rather than the three funds recommended in the RD, but this potential conflict is not acknowledged in the Restructure NPRM or the Reverse Auction NPRM. The Reverse Auction NPRM tentatively concludes that there should be only a single winner receiving support from each reverse auction. It requests comment, however, on proposals under which some or all of the non-winning bidders also receive support, but at a lower level than the lowest bidder, in light of the USF goals of predictability and sufficiency. The NPRM also seeks comment on other points relating to how reverse auctions should be structured, including eligibility for participation in such auctions and the obligations that should be imposed on the winning bidders.

Both of the Democratic Commissioners, Jonathan Adelstein and Michael Copps, dissented, stating that it was premature for the FCC to tentatively conclude that it should adopt a reverse auction mechanism. Most observers doubt that the FCC will be able to work through the implementation complexities of such a contentious issue during the remainder of Chairman Martin's tenure.

CETC Support NPRM

The CETC Support NPRM proposes eliminating the "identical support" rule, under which CETCs receive the same level of high-cost USF support per line as ILECs serving the same areas, and requiring CETCs to conduct cost studies under a Part 32-like accounting regime in order to base their support on their own costs. Most observers agree that this proposal is the most likely of the three items to be adopted in the near future. The NPRM requests comment on a variety of issues addressing how wireless and other competitive carrier costs could be measured. Although the CETC Support NPRM does not acknowledge the potential impact of the Reverse Auction NPRM, adoption of a reverse auction mechanism would appear to moot the CETC Support NPRM. Under a reverse auction mechanism, the lowest bid, rather than cost accounting studies, would determine the level of high-cost support.

Because these NPRMs have not been published in the Federal Register, there are no due dates yet for comments. Noticeably absent from the issues raised by these NPRMs is the CETC interim support cap recommended by the Joint Board last May as a stopgap measure to preserve the high-cost fund.

Wireless Developments

700 MHz Auction Nears Conclusion

Bidding in Auction No. 73, which began on January 24 and has gone through more than 100 rounds, is winding down with minimal activity now in each round. Provisionally winning bids have been placed for the vast majority of the 1099 licenses that cover 62 MHz of "beachfront" spectrum at a value of more than $19.5 billion.

Bidding continues on a handful of A and E Block Economic Area licenses, as well as some B Block Cellular Market Area ("CMA") licenses. Many believe the E Block spectrum is well suited for video broadcast to cell phones. Prices for the B Block have been higher than anticipated, likely because a large number of bidders have been interested in, and are better positioned to afford, the smaller CMA licenses over the larger licenses. The auction reserve prices for the A, B, and E Blocks have been met, and thus the blocks will not be re-auctioned. The C Block Regional Economic Area licenses have generated winning bids totaling around $4.71 billion, which is unlikely to increase given that the last activity for any C Block license occurred in round 40. Because the $4.6 billion reserve price for the B Block has been met, it too will not be re-auctioned and will be subject to the open access conditions imposed by the FCC.

Although the auction proceeds vastly exceed the expected $10 billion to $15 billion, not everything went according to plan. Only one bid for $472 million, placed in round one, has been received for the D Block nationwide license that is supposed to serve as part of a public-private interoperable broadband public safety network. Given that the bid is significantly below the $1.33 billion reserve price for the D Block license, it is unclear whether the FCC will immediately revise the conditions placed on the license and re-auction it with a lower reserve price, or whether it will pursue other options. The Rural Cellular Association has asked the FCC to suspend its anti-collusion rules after Auction No. 73 concludes even if the D Block license must be re-auctioned. Congressional leaders are paying close attention to the auction, and House Commerce Committee Chairman John Dingell (D-Mich.) has stated that he intends to work closely with the FCC, public safety officials, and industry members on the D Block issue.

DC Circuit Vacates FCC Ruling Regarding Environmental Impact of Wireless Towers

The U.S. Court of Appeals for the District of Columbia Circuit vacated in large part a 2006 decision in which the FCC rejected a petition by various environmental groups to study the environmental impact of 6,000 communications antenna towers in the Gulf Coast region and suspend registering antennas in that region until the FCC completes its environmental review. The environmental groups expressed concern in particular with the impact of towers on migratory birds in light of estimates by the U.S. Fish and Wildlife Service ("FWS") that 5 million to 50 million birds die annually from collisions with towers.

The court concluded that the FCC failed to: (1) apply the proper National Environmental Policy Act ("NEPA") standard; (2) provide "a reasoned explanation on consultation" with the FWS; and (3) provide sufficient notice of pending individual tower applications to allow meaningful public involvement. The court's decision was split 2-1, with Judge Brett Kavanaugh dissenting and arguing that the case was unripe because the FCC has since initiated a rulemaking proceeding to assess the impact of all communications towers in the United States, including those in the Gulf Coast region. The immediate impact of the court's decision is uncertain. The decision seems to focus on the adequacy of FCC processes, but the pending rulemaking could impose additional, more onerous regulations on tower companies and wireless carriers.

FCC Approves AT&T-Aloha and T-Mobile-SunCom Transactions

The FCC approved without conditions two notable wireless transactions in late January and February. First, the FCC approved AT&T, Inc.'s ("AT&T") $2.5 billion acquisition of Aloha Partners L.P.'s ("Aloha") 700 MHz spectrum, which consists of 281 Cellular Market Area licenses that cover the top ten U.S. markets and 70 of the top 100 U.S. markets (total population 196 million people). Second, the FCC approved T-Mobile USA, Inc.'s ("T-Mobile USA") $2.4 billion acquisition of SunCom Wireless Holdings, Inc., which provides wireless services in 27 markets in five southern states, Puerto Rico, and the U.S. Virgin Islands.

The FCC concluded in both cases that the transactions would not have an adverse impact on competition in the wireless market and would serve the public interest. While the T-Mobile-SunCom transaction was unanimously approved, however, Commissioner Michael Copps dissented and Commissioner Jonathan Adelstein concurred in the case of AT&T-Aloha. Copps and Adelstein both expressed concern that the AT&T-Aloha decision was hasty and lacked a substantive competitive analysis, and criticized the use of the 95 MHz spectrum screen that the FCC adopted in the order approving the AT&T-Dobson Communications merger in 2007.

Carriers Appeal E911 Location Accuracy Requirements

The Rural Cellular Association ("RCA"), T-Mobile USA, and Verizon Wireless appealed to the U.S. Court of Appeals for the District of Columbia Circuit the new enhanced 911 ("E911") location requirements that the FCC adopted in September 2007. RCA, T-Mobile USA, Sprint Nextel, and Verizon Wireless had previously requested that the FCC stay implementation of the new rules pending judicial review, but the FCC has not yet acted on the stay request. The appellants, as well as numerous other wireless industry members, argue that it is technologically impossible to comply with the new rules, which establish various milestones within a five-year period by which wireless carriers must measure Phase II E911 location accuracy on a public safety answering point level. The FCC recently clarified that the first milestone – carriers must achieve E911 location accuracy on an Economic Area ("EA") basis by September 11, 2008 – does not apply to carriers that operate in areas smaller than an EA.

Report Declaring CMRS Industry Competitive Finally Released

The FCC released in late January its long-awaited Twelfth Annual Report regarding the status of competition in the commercial mobile radio service ("CMRS") industry. The report, typically released in September, was delayed by four months due to concerns about how the FCC statistically measures competition. The report included new, more detailed data on the service boundaries of U.S. wireless carriers, which allowed the FCC "to estimate: (1) the percentage of the U.S. population covered by a certain number of providers, and (2) the percentage of the population covered by different types of network technologies based on census blocks, rather than counties."

The report concluded that 99.8% of Americans have access to at least one facilities-based wireless carrier, more than 95% of Americans have access to at least three carriers, and more than 50% of Americans have access to at least five carriers. According to the report, 99.3% of rural Americans have access to at least one wireless carrier. Approximately 82% of Americans have access to at least one wireless broadband provider.

Controversy, however, continues to surround the report. Commissioners Robert McDowell and Deborah Tate expressed concern that it does not take into consideration consumer preferences and product and service differentiation. Commissioner McDowell "strongly caution[ed] against attempts to 'spin' the data contained in this report into an ex post facto justification of regulatory mandates." Commissioner Michael Copps noted that the report "still fails to define the term 'effective competition.'"

On the heels of the release of the Twelfth Annual Report, the Wireless Telecommunications Bureau recently issued a public notice seeking comment for the Thirteenth Annual Report. Comments and replies are due on March 26 and April 10, respectively.

Challenges to Designated Entity Rules Continue

The U.S Court of Appeals for the Third Circuit gave the FCC 30 days to tell the court when it would act on a petition seeking reconsideration of the FCC's designated entity ("DE") rules that were adopted shortly before the 2006 advanced wireless service auction. The court mandate is the latest development in an attempt by Council Tree Communications, Inc., Bethel Native Corp., and the Minority Media and Telecommunications Council ("Challengers") to overturn the more restrictive DE rules.

In 2007, the court dismissed the Challengers' judicial appeal of the DE rules based on jurisdictional grounds because their petition for reconsideration was still pending before the FCC. Shortly thereafter, the Challengers petitioned the court for a writ of mandamus to compel the FCC to act on the reconsideration petition. Although the FCC argued that it had already denied the petition for reconsideration, the court in its most recent decision rejected the argument and confirmed that the reconsideration petition still is pending. Although the court denied the petition for a writ of mandamus, the court directed the FCC to inform the court when it will act on the reconsideration petition.

State Regulatory Developments

NARUC Rejects Controversial Wireless Consumer Resolution While Unanimously Approving Other Telecom Resolutions

At its annual winter meeting, the National Association of Regulatory Utility Commissioners ("NARUC") decided in a 16-9 vote not to approve a resolution that would call for states to enforce national wireless consumer protection standards. The proposed resolution provided for states to enforce national standards developed by a federal-state joint board or similar body and resolve consumer complaints regarding wireless services. Many feared that the standards, however, which would establish both the floor and the ceiling for state authority, would cede state authority to impose stricter consumer protection requirements and hamper state ability to respond to new types of market abuses. NARUC sent the resolution back to its Telecom Committee and Consumer Affairs Committee for further deliberation.

By unanimous vote, NARUC also approved and adopted three other telecommunications-related resolutions. The first resolution urges the FCC to act promptly to improve and standardize its forbearance review policies and give states and third parties a more meaningful opportunity to participate in and influence the FCC's forbearance decisions. The second resolution supports "digital literacy" programs that promote more effective use of broadband Internet access. The third resolution supports amending the universal service Lifeline and Link-Up programs to subsidize broadband services, such as relay services, used by low-income, disabled individuals.

NARUC's proposed wireless resolution was triggered in part by states' continued interest in wireless consumer protection issues. According to NARUC, state legislatures proposed more than 1,500 bills in 2007 regarding wireless consumer protection, and this trend persisted in early 2008. Maryland, Hawaii, Washington, Illinois, and Oklahoma all are considering wireless consumer protection bills in 2008. Various states, including Virginia, Indiana, Illinois, and Iowa, are considering bills that target use of wireless devices while driving. Utah is considering two wireless-related bills, one of which would require public wireless Internet access service providers to include access controls to prevent minors from accessing harmful material, and another which would require public schools to implement policies regarding possession and use of wireless devices. Michigan also is considering a bill that would require retailers of prepaid wireless phones to see a photo ID and record the name and address of purchasers.

Verizon-FairPoint Merger Receives Final State Approvals

The Vermont Public Service Board ("VPSB") approved FairPoint Communications, Inc.'s ("FairPoint") acquisition of certain landline operations of Verizon Communications, Inc. ("Verizon"), subject to certain conditions. The conditions go beyond the January settlement agreement between FairPoint, Verizon, and the Vermont Department of Public Service in which FairPoint agreed to: (1) make $40 million in capital expenditures for each of the first three years after the sale, and (2) expand broadband services to all customers in at least 50% of its markets by the end of 2010. The conditions imposed by the VPSB include Verizon depositing $6.7 million in an escrow account that will pay for removing numerous dual poles in Vermont, and allocating $25 million to pay for FairPoint to remedy various service quality issues under a performance enhancement plan.

The New Hampshire Public Utilities Commission ("NH PUC") also recently approved the transaction in a 2-1 vote. The parties had reached a settlement with NH PUC staff, but the NH PUC staff added four new conditions to the settlement: (1) FairPoint must establish a trust fund for pension liabilities for Verizon workers that move to FairPoint; (2) Verizon must pay FairPoint up to $15 million per year for two years if more landline customers are lost than the parties project; (3) FairPoint must notify the NH PUC if its debt rating is downgraded; and (4) FairPoint must obtain NH PUC approval before moving or closing a call center in Littleton, NH or a data center in Manchester, NH.

As reported in the December 2007 / January 2008 Bulletin, FairPoint and Verizon already have obtained the approval of the FCC without conditions and the approval of the Maine Public Utilities Commission with conditions. FairPoint and Verizon, now with all necessary regulatory approvals for the transaction, have set a March 31 closing date.

State Deregulatory Efforts

Various states are considering further deregulation of communications services, including traditional telecommunications services and VoIP services. The Wisconsin Public Service Commission ("WPSC") opened a new proceeding (Case No. 5-TI-1777) to comprehensively review its oversight of telecommunications service providers and determine what services may be deregulated. The WPSC seeks comment on what regulations are necessary for the protection of consumers and service quality, maintenance of a competitive market, promotion of broadband development, and continuation of universal service. Comments are due to the WPSC by March 25. In addition, the District of Columbia delayed until March 4 its consideration of an ordinance that would disclaim jurisdiction over and deregulate VoIP services (Bill No. B17-0332).

FCC Relaxes Media Ownership Rules and Increases Regulation of Leased Access

Democratic Commissioners and U.S. Senate Unhappy with Media Cross-Ownership Rules

On February 4, 2008, the Commission released the December 2007 order ending the 32-year-old absolute ban on a newspaper's ability to own television or radio stations. Subject to certain criteria and limitations, newspapers are now allowed to own one television or one radio station in the 20 largest U.S. markets. For a full discussion, see the December 2007 / January 2008 Bulletin.

Commissioners Copps and Adelstein released a joint statement criticizing the media ownership proceeding, explaining that the relaxation of the cross-ownership ban is "chock-full of loopholes" that permit any broadcast station to merge with any newspaper in virtually any market in the country, and expressing skepticism that the "hurdle" posed by the need to apply for rule waivers would slow media consolidation in light of the Commission's practice of routinely granting such waivers. In particular, Copps and Adelstein were troubled that the order "casually" grants five permanent waivers to proposed newspaper-broadcast combinations under the old rules. These waivers, they explain, would not have withstood the "public interest presumption" used for the top-20 markets and non-top-four TV stations under the new rule.

The U.S. Senate appears to share Adelstein and Copps' concerns. Senator Dorgan (D-N.D.) announced that the Senate may vote soon on a resolution to overturn the new media ownership rules. No action will take place, however, until the rules are published in the Federal Register.

FCC Changes Leased Access Rates to Promote Availability of Independent Programming

In early February, the FCC released an order adopted in November that revises the cable leased access rules in ongoing efforts to promote program diversity. Cable operators have a statutory obligation to set aside channel capacity for commercial use by unaffiliated video programmers. Under the current rules, cable operators calculate leased access rates differently for access to programming tiers with more than 50% subscriber penetration versus those with less than 50%. The order harmonizes the rate calculation methodology for full-time carriage of independent programmers and now will calculate leased access rates based on the cost and revenue characteristics of the tier on which the leased access programming seeks to be placed, with a maximum allowable leased access rate of $0.10 per subscriber per month.

The Commission hopes the new rules will reduce barriers for smaller programmers to bring a more diverse array of television shows to cable subscribers. Leased access initiatives have been criticized as primarily benefiting programmers of program-length infomercials. The order explicitly excludes infomercial programmers from the revised rate regime, but an NPRM seeks comment on, among other things, whether to include those programmers in the new rate structure.

The order's new rules will take effect 90 days after the order is published in the Federal Register, and the rest of the rule changes will become effective 30 days after publication, though some changes require OMB approval. Comments on the NPRM portion of the order will be due 30 days after publication.

Public Education About the Digital Television Conversion Ramps Up

In mid-February, the Commission voted 5-0 to adopt its long-awaited digital television ("DTV") consumer education order. The measure requires broadcasters to run public service announcements about the upcoming DTV transition. Pay-TV providers like cable companies must place DTV transition information on monthly customer bills. As pay-TV providers wanted, there is no requirement of a separate pamphlet or bill insert.

Video Franchising Reform Bills Continue in Several States Even as Federal Courts Defend the Rights of Incumbent Cable Companies

Legislative efforts shifting video franchising authority made progress in the following states:

- **Wisconsin:** In early February, a Wisconsin federal court dismissed the City of Milwaukee's lawsuit against AT&T in which the city argued that AT&T's U-Verse IPTV service was subject to local franchising authorities. The court ruled that a 2007 state video franchising law, which eliminated local franchising authority in favor of franchising at the state level, made the case moot.

- **Pennsylvania:** Pennsylvania's House of Representatives held hearings in early February to shift video franchising authority to state-level utilities regulators. Among other things, state franchisees would be subject to buildout requirements in their service areas.

- **Tennessee:** The Tennessee House is pursuing its own bill to shift video franchising authority from municipalities to the state level. Reform efforts in 2007 stalled due to disputes between incumbent cable providers and new video entrants like AT&T over, among other things, buildout requirements incorporated into state franchises. AT&T had backed a statewide franchising bill that did not include buildout requirements, whereas incumbent cable interests pushed rules to require new entrants to expand into lower-density areas.

Meanwhile, the Fifth Circuit reversed a September 2006 lower court dismissal of the Texas Cable Association's ("TCA") challenge to a 2005 Texas law shifting franchising authority to the state level. In its original suit, TCA claimed the law was unfair to incumbent cable companies because incumbents were ineligible for state franchises for their existing service areas and new entrants were not subject to the same regulatory restrictions as incumbents. The lower court ruled that TCA lacked standing to challenge the law because it failed to show actual injury. The Fifth Circuit found that TCA in fact had alleged actual injury because the law denies incumbents the option of state franchises for existing service areas and thus inflicts an economic harm. TCA also had standing under the alternative theory that unequal treatment of cable companies and new video entrants could deny TCA equal protection of the law guaranteed by the Fifth Amendment. The case goes to the U.S. District Court in Austin for trial.

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.

March 1, 2008	**Annual CPNI compliance certification due.**
March 1, 2008	**Form 477 due** (local competition and broadband reporting form).
March 7, 2008	Reply comments due on NPRM regarding **exclusive DBS and private cable agreements in MDUs**.
March 7, 2008	**Effective date of new rules banning exclusive cable agreements in MDUs.**
March 7, 2008	Comments due on **pole attachment NPRM.**
March 7, 2008	Comments due on **forbearance procedures NPRM.**
March 14, 2008	Comments due on **Public Knowledge petition for declaratory ruling that text messages and short codes are Title II services or otherwise subject to non-discrimination requirements**.
March 14, 2008	Reply comments due on (1) **Feature Group IP petition for forbearance from access charges for VoIP** and (2) **Embarq petition for forbearance from ESP access charge exemption for IP-originated voice traffic that terminates on the PSTN**.
March 14, 2008	Comments due on **broadcast localism NPRM.**
March 17, 2008	Reply comments due on **DARS NPRM.**
March 24, 2008	Reply comments due on **forbearance procedures NPRM.**
March 24, 2008	Effective date of **new newspaper-broadcast cross-ownership rules** in top 20 markets.
March 24, 2008	Effective date of **new local number portability ("LNP") rules for interconnected VoIP providers**.
March 24, 2008	Comments due on NPRM on **extension of additional numbering rules to interconnected VoIP providers**.
March 31, 2008	**Circuit addition reports due** (for international private line resellers).
March 31, 2008	**Circuit status reports due** (for international facilities-based carriers).
April 1, 2008	**Form 499-A due** (Telecom Reporting Worksheet).
April 7, 2008	Reply comments due on **pole attachment NPRM.**
April 14, 2008	Reply comments due on **Public Knowledge petition for declaratory ruling that text messages and short codes are Title II services or otherwise subject to non-discrimination requirements**.
April 14, 2008	Reply comments due on **broadcast localism NPRM.**
April 21, 2008	Reply comments due on NPRM on **extension of additional numbering rules to interconnected VoIP providers**.