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Legal Updates & News

Bulletins

Communications Law Bulletin, January 2008

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The Month in Brief

This edition of our Bulletin, like the July/August edition we put out last summer, covers two months rather than one. The two months that included the Holiday season have not been quiet, however, at the Congress, the

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state legislatures, the courts, or the Federal Communications ("FCC" or "Commission").

The principal events of December and January are covered here, along with our usual list of deadlines for your calendar.

President Renominates Commissioner Adelstein

On December 3, 2007, the White House submitted Commissioner Jonathan Adelstein's name to the Senate for another term on the FCC. If confirmed by the Senate, Adelstein's term will run until June 30, 2013.

With ongoing friction between the Martin FCC and the Congress, and against the uncertain background of an election year, Senate reconfirmations of Adelstein (and of Commissioner Deborah Taylor Tate) are in doubt. The Senate might decide to await the outcome of the general election before deciding whether to give Adelstein an additional five-year term.

Forbearance Controversy Continues in Washington

Ongoing controversy regarding the FCC's forbearance process has led to new developments at the FCC, the D.C. Circuit Court of Appeals, and the Congress.

At the agency, the FCC released a Notice of Proposed Rulemaking ("NPRM") on the procedural rules that should apply to forbearance petitions. The FCC seeks comment on some specific proposals made by a coalition of competing local exchange carriers ("CLECs") (*see* "Broadband Forbearance Procedures Subject of Intense Focus at FCC" in our September 2007 Bulletin), plus some broader questions the FCC raised. Although the CLEC petition had sought immediate rules without a rulemaking, the FCC decided to proceed with an NPRM, albeit on a fairly short pleading cycle. Comments are due 30 days after publication of the NPRM in the Federal Register, and replies are due 45 days after publication in the Federal Register.

Among other issues, the FCC seeks comment on:

- Whether the APA's notice-and-comment rules should expressly be applied to forbearance petitions;
- Whether the FCC should impose various form and content rules, such as a "complete-as-filed" requirement, specified information required to make a *prima facie* showing, or a clear burden of proof on the petitioner;
- The scope and use of protective orders, including whether all parties should have access to confidential information, whether parties should be able to use this information in other forbearance proceedings invoking similar relief, and whether states should be able to use this information in related state proceedings;
- Whether the FCC should establish a timetable, including a limited period for the cure of minor defects, a specific vehicle for state public utilities commission ("PUC") input, a standard comment cycle, and a time limit on substantive *ex partes*;
- Whether petitioners should be required to provide supporting data at the wire center level;
- Whether the FCC should be required to issue a written order on all forbearance petitions, including those previously deemed granted;
- Whether the FCC has the authority to adopt procedural rules governing pending forbearance proceedings (not just future proceedings);
- Whether, in light of serious concerns expressed by companies and the Congress, forbearance is an effective means for the FCC to regulate, and whether there are unintended consequences; and
- The appropriate remedy for a violation of any procedural rules adopted.

Both Commissioners Copps and McDowell noted that only the Congress can permanently fix the forbearance process, but that the FCC can implement rules to mitigate some of its more egregious problems.

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Commissioner McDowell also specifically noted that the FCC should look at the impact of forbearance petitions on the FCC's broader rulemaking responsibilities.

The FCC also ruled on another forbearance petition – that of Verizon seeking forbearance from offering certain unbundled network elements in six metropolitan statistical areas ("MSAs"). The FCC unanimously ruled (with Commissioners Copps and Adelstein concurring) that Verizon and the evidence on the record failed to meet the forbearance standard and denied the requested relief in full in all six MSAs, distinguishing these MSAs from earlier forbearance grants affecting the Omaha, Nebraska MSA and the Anchorage, Alaska MSA. When faced with a forbearance denial, most companies in the past have withdrawn their petitions prior to the statutory deadline, and Verizon's failure to do so probably indicates that Verizon is preparing for an appeal.

The D.C. Circuit issued an order in December on various appeals of the controversial automatic grant in March 2006 of Verizon's broadband forbearance petition due to the failure of a split FCC (2-2, with Commissioner McDowell abstaining) to act by the statutory deadline. Various parties argued that the deadlocked vote should be considered a denial of the petition, or, alternatively, that the "deemed" grant was arbitrary and capricious. The court held that neither the deadlocked vote nor the press release was a reviewable order of the FCC and did not constitute agency action (which requires a majority vote and the agency's reasoning). Where the FCC neither grants nor denies a forbearance petition, the court said that Congress has dictated the outcome and the petition is "deemed granted." Because Congress, and not the FCC, effectuated this grant, the court stated that there is no action of the FCC for the court to review.

In the Congress, Senator Inouye (D-Hawaii), citing the recent D.C. Circuit decision, introduced a bill in December that would eliminate the controversial "deemed granted" language in the statutory provision establishing the forbearance process. Although companies would still be able to petition for forbearance, FCC inaction by the deadline would no longer lead to an automatic grant of the petition. This bill is a companion to a House bill introduced earlier in 2007 by Congressman Dingell (D-Michigan).

Net Neutrality Isn't Dead Yet…

Following two petitions in the fall raising net neutrality issues in response to Comcast's reported blocking or degrading of content, December brought a new petition focused this time upon text messaging. (For reports on the two petitions, see "Series of Cable and Telco Incidents Reinvigorate Calls for Net Neutrality and Trigger Consumer Petition and Complaint," from our October 2007 Bulletin; see also "New Calls for Net Neutrality," from our November 2007 Bulletin.) On December 11, 2007, several public interest groups filed a petition for declaratory ruling with the FCC, seeking a ruling that text messaging and short codes are either Title II services or, alternatively, if they are information services, that the FCC should use its Title I ancillary jurisdiction to nonetheless subject text messaging to Section 202's non-discrimination requirements.

These petitioners argue that text messaging and short codes have become a major method of communications and speech, and they assert that mobile carriers are discriminating by blocking controversial and/or competing services. As examples, petitioners point to Verizon Wireless' initial refusal to issue a short code to NARAL Pro-Choice America and to the actions of several carriers who allegedly block short codes for Rebtel (a VoIP competitor). They argue that such blocking would be illegal with respect to voice communications, and that it should also be illegal in the context of text messaging.

In comments to reporters on these recent net neutrality petitions, Chairman Kevin Martin said that the FCC would investigate all of them to ensure no customers are being blocked. He noted that the issue with Comcast is whether its practices were reasonable network management (which is permitted under the FCC's policy statement on the issue), but he indicated that reasonable network practices should be publicly disclosed. Soon after these statements, Chairman Martin made good on his promises by placing all three of the recent petitions out for public comment. Although the outcome of these proceedings is far from certain, these proceedings will give all segments of the industry the opportunity to air their views on the need for net neutrality regulation and might flesh out the scope of permissible and reasonable network management. In addition, the FCC reportedly issued letters of inquiry ("LOIs") to both Comcast and Verizon Wireless to investigate the specific incidents described in the petitions.

Meanwhile, those interested in net neutrality continue to await legislation expected to be introduced in the near future by Representative Edward Markey (D-Massachusetts).

FCC Revises Slamming Rules

The FCC has issued an order revising its requirements for proper verification of a consumer's intent to switch carriers. In short, these changes include a requirement that the verification process record the date on which

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the verification was made, and an expansion and clarification of the disclosure obligations of third-party verifiers. In particular, the new rules require verifiers to clearly state that the transaction is a carrier change, not a "service upgrade," "bill consolidation," or other misleading description. Given the expense and abuses of international calling plans, the new rules also require verifiers to confirm that the customer understands that long distance service includes international service.

The FCC left some of the precise form of implementation of these new rules to the carriers, as some carriers may already have mechanisms in place that collect or provide the required information. Carriers need to review their own procedures to determine if they already comply with the new requirements, or if they need to implement changes to their procedures. The new rules will be effective thirty (30) days after publication in the Federal Register.

Universal Service Fund Developments

FCC Clarifies Toll Revenue Requirements for USF Contribution Purposes

The FCC released a long-awaited declaratory ruling addressing the treatment of toll revenues for purposes of contributing to the universal service fund ("USF"). Overall, the decision is a reasonably positive result for the wireless industry, although to the extent wireless carriers use traffic studies to determine revenues, carriers may need to change their traffic study methodologies going forward.

The FCC clarified that, consistent with the definition set forth in its *2006 Contribution Methodology Order*, "toll services" are "telecommunications services that enable customers to communicate outside of their local exchange calling areas," which for wireless carriers, means "outside the customer's plan-defined home calling area for an additional charge." Accordingly, toll revenues reported for USF purposes generally would not include in-plan revenues (which would be reported as "mobile services"). For example, in the case of a calling plan that provides nationwide calling for a bucket of minutes, toll service revenue only would include the additional fees that are assessed for calls made outside that calling plan (such as international calls).

The FCC also noted that revenues associated with toll services are predominantly the result of domestic long distance and international calling and is often much higher than the per-minute revenue associated with a plan's bucket minutes. Therefore, the FCC clarified that on a going-forward basis, traffic studies must ensure that toll service revenues are accurately accounted for by weighting that traffic appropriately. The traffic studies "must account for toll service traffic that is assessed an additional charge(s) in a manner that reflects accurately both the jurisdiction of this traffic and the associated revenue."

Proposed Order Would Cap High-Cost USF Support

FCC Chairman Kevin Martin is circulating an order that would cap high-cost USF payments at June 2007 levels for competitive eligible telecommunications carriers ("ETCs"), which are primarily wireless carriers. According to a recent report by the Federal-State Joint Board on Universal Service, high cost disbursements totaled $4.1 billion of the $6.6 billion that was distributed from the USF in 2006, a $300 million increase from 2005. The report attributed the increase to competitive carriers receiving more monies.

The cap would be similar to a condition recently imposed in two wireless mergers involving large wireless rural carriers (the recent acquisition of Alltel Corporation by two private equity groups and the merger of AT&T Inc. and Dobson Communications Corporation). Some industry players, however, believe that Chairman Martin currently does not have the votes to adopt the cap. Republicans Chairman Martin and Commissioner Deborah Taylor Tate, reportedly support the cap while Democratic Commissioner Michael Copps opposes the cap. Republican Commissioner Robert McDowell and Democratic Commissioner Jonathan Adelstein have not yet stated their views and continue to be subject to significant lobbying efforts by parties on both sides of the issue. Commissioner McDowell appeared to question whether the item is necessary given that the Commission's goal of curbing growth of the high-cost fund on an interim basis may have been accomplished by the conditions imposed in the wireless mergers. Rather, "it might make more sense to move directly to long term USF reform," according to McDowell.

Appropriations Act Extends USF Accounting Exemption and Prohibits Primary Line Restrictions

The Consolidated Appropriations Act of 2008 (Pub. Law No. 110-161), enacted December 26, 2007, extends the exemption of the USF from the accounting requirements of the Anti-Deficiency Act ("ADA") for one more year. Under the ADA, the USF administrator must keep cash on hand to cover all of its funding obligations, instead of its past accounting practices which allowed it to make commitments based upon monies it will collect in the future. Without the exemption, the USF administrator would have to change its accounting practices from GAAP (generally accepted accounting principles) to government accounting principles. The exemption now expires December 31, 2008.

The Consolidated Appropriations Act of 2008 also included language that prevents the FCC from using any of

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the appropriated funds to "modify, amend, or change its rules or regulations for universal service support payments to implement the February 27, 2004 recommendations of the Federal-State Joint Board on Universal Service regarding single connection or primary line restrictions on universal service support payments."

FCC Inspector General Reports That Additional Oversight of the USF Is Necessary

In its semi-annual report to the Congress, the FCC's Office of the Inspector General ("OIG") concluded that the FCC has been successful in establishing better oversight of the USF, but that further funds are necessary to support audits and investigations. For the first time, OIG has audited all components of the USF. The 459 audits completed by the OIG showed that although general compliance with USF rules and policies was high, erroneous payment rates exceeded nine percent. In the high-cost fund alone, the OIG discovered approximately $909 million in erroneous FCC payments and approximately $385 million in improper collections from USF contributors.

The Congress, in the Consolidated Appropriations Act of 2008, provided that funds "not to exceed $21,480,000 may be transferred from the Universal Service Fund in fiscal year 2008 to remain available until expended, to monitor the Universal Service Fund program to prevent and remedy waste, fraud and abuse, and to conduct audits and investigations by the Office of Inspector General."

The USF Contribution Factor Decreases to 10.2 Percent

The USF contribution factor will decrease for the first quarter of 2008 from 11.0 percent to 10.2 percent. The contribution factor had risen sharply in the second quarter of 2007 from 9.7 percent to 11.7 percent, but since then has continued to drop.

Wireless Carriers End Seven-Year Tax Feud with Missouri Cities

Sprint Nextel recently joined other wireless carriers (including AT&T Mobility and Verizon Wireless) in settling a seven-year dispute regarding their liability for local telephone service gross receipts taxes, for which the carriers will pay in total more than $150 million of back local taxes to several hundred Missouri municipalities. The several years preceding the settlements were marked by voluminous litigation, frequent trips to the Missouri legislature, and protracted negotiations between the carriers and the Missouri Municipal League.

The wireless carriers initially claimed they were not liable for the local taxes because they did not provide "telephone service," in contrast to the many traditional landline telephone companies that were subject to such taxes. Several cities disputed these claims, and brought suits for back taxes. Some readers, who use their mobile phones and services much like they use their landline phones, may question why wireless carriers would seriously argue that that their services were not telephone services. But the wireless carriers raised some worthwhile arguments to oppose the taxes, including that (1) these local tax ordinances, many drafted well before the advent of wireless services, were expressly limited to "local" or "exchange" services or telephone services "within the city" that traditionally applied to only local telephone companies and services; and (2) for the cities to expand the traditional scope of these taxes to reach wireless services by administrative interpretation, without voter approval, may have increased local taxes in violation of the Missouri Constitution.

However, one federal court was not persuaded, holding that wireless carriers were engaged in the business of providing "telephone or telephonic" services subject to the tax under the plain language of the ordinance. *City of Jefferson v. Cingular Wireless, L.L.C. et al.*, No. 04-4099-CV-C-NKL (W.D. Mo. July 3, 2007). The court concluded simply that the meaning of "telephone" was unambiguous and unchanged since the turn of the twentieth century, and constituted the use of an instrument by which two persons may talk directly to each other, whether or not connected by wires.

In 2005, while numerous similar court cases were pending in Missouri, the carriers and cities turned to the Missouri legislature for some relief. Without going into the details, the ensuing law, known as the Municipal Telecommunications Business License Tax Simplification Act (H.B. 209), was viewed by several municipalities as unfair and constitutionally infirm. The Missouri Supreme Court agreed, and struck the law down as an invalid and unconstitutional "special" law. *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177 (Mo. 2006). The carriers and cities then returned to the legislature to correct the law, but this time the legislation stalled. Recognizing the financial risk of continuing not to pay the tax or recover it from their customers, several wireless carriers began to pay the tax under protest, but the cities could not spend these protested tax monies under Missouri law. Thus, left on their own to resolve the dispute and finding themselves at a financial impasse, the carriers and cities finally reached the above settlements.

Under these settlements, the carriers have also agreed to pay these local telephone service taxes going forward to almost 400 municipalities. Of course, the brunt of these taxes prospectively will be borne ultimately by wireless service customers who will see varying increases in their wireless service costs, because the carriers will pass through these local telephone service taxes via surcharges. Even with these settlements,

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though, the controversy may not be over as certain wireless carriers have not settled and continue to fight their liability for the local telephone service taxes in the Missouri courts.

FCC Seeks Comment on Satellite Radio and WCS Issues

The FCC released an NPRM seeking comment on various interference and licensing issues concerning satellite digital audio radio service ("SDARS") in the 2.3 GHz band. The NPRM was initially going to be adopted at the FCC's December open meeting, but the item was pulled from the meeting agenda voted on circulation before the meeting.

Sirius Satellite Radio Inc. and XM Radio Inc., the two SDARS providers that have been licensed by the FCC, have already deployed satellite systems and are providing commercial services despite the lack of a regulatory framework for operating SDARS repeaters. The NPRM seeks to update the record and resolve interference issues between SDARS repeaters and the proposed operations of terrestrial wireless communications service ("WCS") licensees in the adjacent band by adopting new or modifying existing rules so that SDARS and WCS licensees may coexist.

The NPRM specifically seeks comment on proposals made by Sirius and the WCS Coalition including: (1) power limits and out-of-band emissions; (2) restrictions on collocation of SDARS and WCS stations; (3) coordination, notification, and recordkeeping requirements; (4) grandfathering of existing SDARS repeaters; (5) compliance with international agreements; (6) environmental and other safety issues; (7) licensing procedures; (8) use of SDARS spectrum for repeaters; (9) retransmission of regional spot beams; and (10) local programming from SDARS repeaters. SDARS and WCS providers have heavily criticized each other's proposals.

Comments and replies in response to the NPRM are due February 14 and March 17, respectively.

Wireless Developments

Bids Start Rolling in for the 700 MHz Auction
The 700 MHz auction began on January 24 as scheduled, in which 214 entities have an opportunity to bid on 1099 licenses covering 62 MHz of "beachfront" spectrum. The auction, however, which some hope will produce revenues of $10-$15 billion, started the week that U.S. economic markets fell sharply due to fears of a recession. Only time will tell how these fears will affect the auction, although it appears the economic downturn may already have affected at least one major player, Frontline Wireless, which could not secure funding in time to participate in the auction.

The FCC initially received 266 "short form" applications from entities seeking to participate in the auction. After the FCC returned 170 of them as incomplete and asked for additional information, ultimately 214 of the applications were approved, 119 of which qualified to receive designated entity ("DE") bidding credits. Although national carriers T-Mobile USA and Sprint Nextel did not file applications, AT&T Mobility and Verizon Wireless were approved, as were several cable companies, including Advance/Newhouse Communications, Cablevision Systems, and Cox Communications. Many regional and smaller companies also were approved, including Alltel, MetroPCS Communications, and Leap Wireless. Rural and smaller companies generally are expected to bid on the smaller Cellular Market Area licenses that are located in the lower portion of the 700 MHz band. Other notable applicants include Google, Inc., EchoStar Communications, and Qualcomm.

A surprising exclusion from the list of approved applicants, however, was Frontline Wireless. Although Frontline Wireless filed an initial short-form application, it was unable to secure the necessary funding to submit the auction upfront payment. Frontline Wireless was widely expected to bid on the D Block license, which will be responsible for constructing and operating a shared nationwide public safety-private wireless network. The FCC set the reserve price for the D Block license at $1.33 billion, which likely limits potential bidders to larger more established companies that have access to significant resources. Frontline Wireless' absence from the auction creates some concern that no one will win the D Block license, but Chairman Kevin Martin has said he is optimistic that the reserve price for the license will be met.

Frontline Wireless had been successful in convincing the FCC to relax some of its rules to help DEs bid on the D Block license. Verizon Wireless sought reconsideration of the FCC's decision, as did Council Tree Communications, Bethel Native Corp., and the Minority Media and Telecommunications Council. Now that Frontline Wireless is not participating in the auction, however, the issue may become moot if no other DEs bid on the D Block license.

CMRS Competition Report Stalled

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The release of the FCC's annual competition report on the market for commercial mobile radio services ("CMRS") has been delayed by four months. For the last three years, the report was released in September. After various delays, the FCC placed the report on the agenda for its December open meeting, but pulled it prior to the meeting. The 2007 edition reportedly contains data regarding competition by census block in response to prior criticism that measurements based upon larger market areas did not provide an accurate competitive picture.

FCC Seeks Comment on Cellphone Alerts

Pursuant to the Warning Alert and Response Network ("WARN") Act, the FCC released an NPRM seeking comment on recommendations from its Commercial Mobile Service Alert Advisory Committee (the "Committee") regarding the voluntary deployment of wireless emergency alerts. Although it is generally believed that many carriers will participate in the wireless alert program, concerns that they may be required to target alerts to very small geographic areas may discourage participation.

The Committee stated that the goal of the alert system is to "deliver geo-targeted alerts," but acknowledged that technical limitations may prevent targeting small geographic areas. The Committee suggested that alerts be disseminated on a county basis, except in certain urban areas with populations exceeding one million people where more precise targeting would be utilized. Although FCC Chairman Kevin Martin has strongly supported targeting below the county level, the NPRM reaches no tentative conclusions on this issue.

The NPRM also seeks comment on the availability of existing and new technologies (e.g., SMS, 3G, point-to-point, and point-to-multipoint) that can facilitate wireless alerts and whether the alert system should use a Common Alerting Protocol and character limits. In addition, the NPRM asks what role the federal government should take in the alert program, whether alerts should be disseminated in languages other than English, and how carriers should inform customers about the availability (or lack thereof) of wireless alerts.

The WARN Act provides a fairly rapid implementation timeline – the FCC must adopt technical standards and procedures to enable wireless alerts by April 2008. The FCC then must establish within 90 days the process by which wireless carriers can choose to carry the alerts. Carriers will have 30 days to decide whether to participate. Comments and replies to the NPRM are due February 4 and 19, 2008, respectively.

FCC Adopts New Media Ownership Rules

Despite Congressional bipartisan legislation, public statements, threats from the Hill, criticism from his own fellow Commissioners (the Democrats), and a barrage of lobbying, FCC Chairman Kevin J. Martin did not postpone the December 18, 2007 media-ownership vote. The vote took placed as promised, 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.

The new rule presumptively permits cross-ownership in the largest markets if: (1) the market is one of the 20 largest Nielsen Designated Market Areas ("DMAs"); (2) the transaction involves the combination of only one major daily newspaper and only one television or radio station; (3) the transaction involves a television station, at least eight independently owned and operating major media voices (defined to include major newspapers and full-power TV stations) would remain in the DMA following the transaction; and (4) the transaction involves a television station, that station is not among the top four ranked stations in the DMA.

Although all other proposed newspaper and broadcast transactions will continue to be presumed not in the public interest, the new rules identify two circumstances when this negative presumption could be reversed. First, waivers may be granted if a media outlet was failing or failed. Second, the negative presumption could be reversed if the proposed transaction resulted in at least seven hours of new local news programming per week on a broadcast station that had not previously aired local news. Applicants attempting to overcome a negative presumption about a newspaper-television combination, however, will need to demonstrate by clear and convincing evidence that post-merger, the merged entity will increase the diversity of independent news outlets (e.g., separate editorial and news coverage decisions) and increase competition among independent news sources in the relevant market. The Commission will also consider the level of concentration in the DMA; the effect on the market's local news; the retention of independent news and editorial staff; the medial outlets' financial condition; and the proposed owner's commitment to invest significantly in newsroom operations.

Chairman Martin lauded the new rules as striking "a balance between preserving the values that make up the foundation of [the] media regulations while ensuring those regulations keep [pace] with the marketplace…." Reactions from fellow Democratic Commissioners Michael Copps and Jonathan Adelstein, and the Hill, were less than warm, however, and there are already predictions of a legal challenge.

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FCC DTV Transition Plan?

The Government Accountability Office ("GAO") released a report December 11, 2007 recommending that the Federal Communications Commission ("Commission" or "FCC") develop a comprehensive digital-television ("DTV") transition plan. The report, which examined efforts by the FCC and the National Telecommunications and Information Administration ("NTIA") to educate consumers about the February 17, 2009 transition deadline, stated that neither agency had a comprehensive plan or strategy in place to manage the process.

The GAO puts most of the blame for the poor planning on the FCC and refused to classify the 96-page document Chairman Kevin J. Martin submitted, which listed all the Commission's DTV transition-related actions, as a plan. Additionally, the GAO said various DTV transition orders currently in the Commission's dockets do not qualify as a strategic plan, because, among other things, neither is sufficiently transparent to guide stakeholders trying to meet the DTV goals to ensure a successful transition.

In its defense, the Commission released a 99-page response that included technical, policy, and consumer outreach goals, some of which were completed years ago and some of which are ongoing. The report explained that the FCC has been planning for the DTV transition for more than 20 years and many of the DTV deadlines and congressionally imposed milestones were driven by the Commission's timeline. Additionally, the report accused the GAO of violating procedural rules by omitting submitted FCC comments.

Comments from the Hill regarding the report's findings echoed the GAO's concern about the negative impact the lack of planning will ultimately have on consumers, especially the elderly and poor. And, based on both the report and the Commission's response, it appears that Commissioner Jonathon Adelstein's summary of the current state of affairs is correct – the FCC does not have a DTV-transition strategic plan and there is no plan to come up with a plan.

More Broadcast News

- In addition to issuing new media cross-ownership rules, the Commission addressed broadcast-ownership diversification and localism in the December 18, 2007 open commission meeting.
    - The Commission released broadcast-ownership diversification rules designed to help eligible entities (new entrants and small and minority-owned businesses) gain access to financing and spectrum, expanding the opportunity to participate in the broadcast industry. The new rules include changes to construction permit deadlines; revisions to the equity/debt plus ("EDP") attribution standard; and modifications to the distress sale policy.
    - The Commission adopted a Report on Broadcast Localism and issued a Notice of Proposed Rulemaking ("Report") in an effort to increase local programming content and diversity in U.S. media markets. Based on more than 83,000 comments and testimony from 500 panelists during six field hearings, the Report tentatively concludes: qualified LPTV stations should be granted Class A status and be required to provide three hours per week of locally produced programming; licensees should establish permanent advisory boards (including representatives of underserved community segments) in each station community of license with which to consult periodically on community needs and issues; and Commission application renewal processing guidelines should ensure that all broadcasters provide some locally oriented programming. The text of the report was released January 24, 2008.
- Broadcasters gained some additional flexibility in making the transition from analog to digital in the Commission's Third Periodic DTV Review Order ("Order") released on December 13, 2007. Under the Order's terms, TV stations may continue to transmit digital broadcasts in analog channel slots until February 18, 2010 in certain situations, and waivers will be considered if a broadcaster is unable to finish building their digital facilities by February 17, 2009. The industry did not, however, get everything they wanted. Notably, the Order did not include waivers for equipment shortages on supplies that were not already ordered or for a requested one-year ramp-up period following the transition deadline.
- In an order released January 24, 2008, the Commission now requires broadcasters to provide local programming information by filing a quarterly standardized programming form. Implemented to facilitate the public's access to local programming information by homogenizing what type of information is provided and where it resides, the types of programming broadcasters must list include local civic, electoral affairs and independently produced programming, as well as public service announcements. Additionally, broadcasters must submit information about their efforts to ascertain various community segments' programming needs and about close captioning and video-described content.

Happenings on the Hill

- Lawmakers spent considerable time and effort in the beginning of December on the FCC Chairman

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Martin's plan to vote on new media-ownership rules at the Commission's December 18 open meeting. In addition to bringing all five FCC Commissioners to testify before the House Commerce Committee on December 5, the Senate introduced and passed a bill (S-2332) that would require the FCC to complete a rulemaking on local programming before proceeding with a vote on the new media-ownership rules. But not even a letter signed by 25 bipartisan senators and sent directly to Chairman Martin stopped him from calling for a vote and adopting new newspaper-broadcast cross-ownership rules that lifted the 32-year-old absolute ban. (*See* "FCC Adopts New Media-ownership Rules," in this Issue).

- Chairman Martin kept the promise he made to the House Energy and Commerce Committee to provide more transparency into the FCC's decision-making process by publishing weekly lists of items on circulation. The first list was published December 5, 2007.
- Broadband mapping legislation (S-1492) stalled in early December after Republicans lodged objections. The House passed a similar bill (HR-3919) in November. Both bills ask the FCC and NTIA to build a publicly available database of broadband subscribers based on zip codes to highlight where service is lacking.
- The Congressional Budget Office ("CBO") gave the Senate municipal broadband bill (S-1853) a "thumbs up," saying it would not violate federal budget rules. If passed, local governments would be allowed to build broadband networks, affecting state and local laws in 15 states that ban such investment. Before public entities could provide broadband service, however, they would have to publish a notice of intent, including details of the services to be offered, and allow private bids for the services.
- Senate Commerce Committee Ranking Member Ted Stevens (R-Alaska) is co-sponsoring the Protecting Children from Indecent Programming Act (S-1780), which would authorize the FCC to fine broadcasters for airing any program that includes a single obscenity or nude image. If passed, the bill would nullify the U.S. Court of Appeals for the Second Circuit's remand of the FCC's fleeting indecency policy. (*See* "Court Rejects FCC's 'Fleeting Expletives' Policy, in the November 2007 issue.)
- Chairman Martin's efforts to use the "70-70" rule, which authorizes the FCC to impose additional rules on cable TV systems once the industry passes "70-70" penetration, spawned new legislation by Representatives Marsh Blackburn (R-Tennessee) and Edophus Towns (D-New York). The Consumer Freedom of Choice in Cable Act would remove the "70-70" tool from the FCC toolbox.
- Both the House and Senate passed "do-not-call" bills in December. The House bills (HR-2096, 2601 and 3541) would make the Do Not Call registry permanent; eliminate the automatic removal of telephone numbers from the registry unless a number is disconnected or reassigned; and give the FCC the power to charge telemarketers $14,850 a year for access to list data in every area code of the nation, or $54 per area code for every numbering area that exceeds the five areas that companies can access for free. The Senate's sister bills (S-781 and 2096) include similar provisions.
- Rural broadband provisions were included in the Farm, Nutrition, and Bioenergy Act (HR-2419 as amended or "Farm Bill"), which the Senate approved on December 14. The telecom riders included providing Rural Utility Service ("RUS") loans to areas where at least 20% of households did not have access to terrestrial-broadband service providers or where there are no more than two existing broadband providers. Additionally, the bill would authorize the designation of a nationwide center to assess and report on rural broadband services and establish a "Connect the Nation" grant program to encourage state broadband initiatives.

Chairman Martin Defends FCC Processes

Chairman Martin told the Congress November 30 that the Commission would begin to publish a weekly list of items on circulation at the FCC. Chairman Martin made the announcement in response to an October 3 Government Accountability Office ("GAO") report criticizing the Commission's handling of information about upcoming meetings, specifically alleging that FCC staffers were leaking information to industry insiders about agenda items. During its review of four completed FCC rulemakings, the GAO discovered that nine of the twelve stakeholders interviewed had access to nonpublic information, giving them a lobbying advantage over those without inside connections. The remaining three respondents said they could not learn what rules were scheduled for vote until the information was publicly released in a Sunshine Act notice approximately a week before open Commission meetings. At the end of the day, those not among the FCC's most favored, which the report identified as consumer and public-interest groups, face a distinct disadvantage when it comes to presenting their sides because the window to lobby regulators closes once the Sunshine notice is released.

On December 5, Chairman Martin made good on his promise and a circulation list that included more than 140 draft orders, notice of proposed rulemakings, enforcement actions, and other items circulating among commissioners' offices en route to a full Commission vote appeared on the FCC's website (and has been updated weekly since then). Chairman Martin touted that, by making all items currently on circulation for a vote public, everyone (insiders or not) will have equal access to issues under consideration and staff leaks would stop.

Wanting even more assurances that the Commission's processes are fair, open, and transparent, House Commerce Committee Chairman John Dingell (D-Michigan) pressed Chairman Martin for a firm commitment

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that the text of proposed rules would also be published before Commission meetings, providing everyone with a chance to review them. In a letter sent to Chairman Martin and the other commissioners, Rep. Dingell also asked for details about the Commission's policies for the retention of internal and external communications and whether they had changed since Martin became chairman.

Chairman Martin responded to Rep. Dingell's request by declining to commit to publish the exact text of a proposed rule in advance of Commission meetings, stating it was not required under the Administrative Procedure Act and not a standard FCC practice. Unlike the staff-leak issue, the GAO report showed that the FCC generally followed the rulemaking process in the four case studies it reviewed; each rulemaking included an NPRM and a notice and comment period. The GAO report also revealed that most ex parte filings complied with the ex parte rules, and there was no evidence that the Commission violated its Sunshine rules. In response to the inquiry about retention policies, Chairman Martin asserted that Commission has had the same policy for more than 20 years.

In a December 13 Senate Commerce Committee hearing, however, Chairman Martin did entertain the possibility that in addition to the publication of the circulation list, the Commission would announce when an item on the list was "white copied" (a term used to signal when the Chairman is going to place an item on the agenda for an upcoming meeting) and make public how commissioners were planning to vote on circulating items. Although Chairman Martin has not made any "white copied" announcements yet, he has contacted the other commissioners in an attempt to set the monthly meeting dates for the next six months. In recent years, monthly meetings were scheduled one at a time and often only a few weeks in advance.

Chairman Martin's publication of the circulation list and move towards longer monthly meeting lead times, however, has not shielded the Commission's processes from continued scrutiny. On January 8, the House Commerce Committee sent a follow-up letter to Chairman Martin, informing him that it had opened a formal probe into the agency's regulatory procedures. The letter directed Chairman Martin to immediately preserve all electronic records in anticipation of a comprehensive document request, and to notify Commission employees about their right to communicate with Congress without the fear of retaliation. The letter was bipartisan in nature – it was signed by House Commerce Committee Chairman John Dingell (D-Michigan), ranking member Rep. Joe Barton (R-Texas), subcommittee Chairman Bart Stupak (D-Michigan), and panel ranking member Rep. John Shimkus (R-Illinois.) – which appears to support Rep. Barton's comments regarding the reasoning behind the probe: "[I]t's time to take a complete review of the FCC. Not political, just pure structural reform. We're in the 21st century now; what we need to do is make it more effective, open, [and] transparent."

Verizon – FairPoint Merger Slowly Obtaining the Necessary Regulatory Approvals

One year after Verizon announced that it intended to sell its wireline local exchange operations in Maine, New Hampshire, and Vermont to FairPoint Communications, each state's regulatory commission continues to review the merger with a critical eye. The FCC, not waiting for the states to decide, narrowly approved the transfer on December 20 without any conditions. The states are concerned that FairPoint is not financially qualified to assume operation of the Verizon assets, which are significantly greater than FairPoint's current operations. They also want to ensure that the networks are upgraded to expand the provision of broadband services.

The first state to approve the merger, Maine, did so after an exhaustive review, including a thirteen hour hearing in early January where the Commissioners grilled representatives of both companies and extracted significant concessions. These concessions include lowering the purchase price, promising to expand the availability of broadband in the state, and a pledge not to claim federal preemption in Maine. The Maine Commission attempted to enforce service quality and privacy commitments, agreeing to reduce basic rates over a five-year period and to freeze DSL rates for two years. In a final effort to gain approval, the FairPoint CEO, Gene Johnson, promised that the company would take "extraordinary measures" if necessary to reduce its debt ratio to investment-grade levels if that had not happened by 2011. If, by that date, FairPoint's leverage ratio is greater than 3.5, the company will cease dividend payments, issue new stock, or sell assets to generate cash that would be applied directly to paying off debt.

In December, Vermont refused to approve the merger but indicated that it would reconsider if the companies revised their applications to address the financial and operational concerns. Soon after the agreement in Maine was reached, Vermont's Department of Public Service and FairPoint reached a similar stipulation incorporating key components of the Maine agreement. The stipulation, which requires approval by the Public Service Board, also requires FairPoint to allow independent third party monitoring of the conversion of Verizon to FairPoint systems, to adopt a dual pole remediation project, and to increase capital expenditures in the state. Despite these concessions, members of the Vermont legislature have questioned whether FairPoint will be able to ensure basic service quality and broadband deployment. A decision is expected on February 11.

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The Vermont stipulation, however, caused Maine's Office of Public Advocate to announce that the Maine Commission may need to reconsider its approval of the deal, as the new investment commitments in Vermont would violate a key feature of Maine's approval barring the companies from accepting any conditions in Vermont or New Hampshire that would have a "material adverse impact" on Maine's conditions for approval. The additional spending required by Vermont would make it difficult for FairPoint to reduce its debt ratio to 3.5 in the time required by the Maine Commission, the Office of Public Advocate said. At this time, the Maine Commission has not announced plans to reconsider its earlier decision in light of the supplemental commitments in both Vermont and New Hampshire.

On January 24, FairPoint announced that it had reached a stipulation with staff of the New Hampshire Public Utilities Commission for approval of the merger. The New Hampshire agreement is consistent with the terms and conditions reached in Vermont and Maine, according to FairPoint, as well as some additional commitments. Verizon will increase its total capital infusion for debt reduction to $297 million from the $235 million agreed to in Maine. FairPoint will invest an additional $254 million in New Hampshire's infrastructure, with $56 million of that earmarked for broadband investment in order to achieve agreed-upon availability levels, and it will remove hundreds of abandoned telephone poles around the state. Hearings are scheduled for February 4 and the PUC expects to issue a decision later in the month.

Despite these agreement and stipulations, the merger remains unpopular with unions in the region. On January 24, the Communications Workers of America and the International Brotherhood of Electrical Workers announced a media campaign against approval. During a swing through New Hampshire as part of the early January presidential primary, former candidate Dennis Kucinich urged regulators to reject the sale. Kucinich criticized FairPoint for only committing to deploy DSL service, rather than fiber. The economic security of the rural region requires fiber, Kucinich stated, and he questioned whether FairPoint would have the resources to upgrade to fiber.

In contrast with the exhaustive state review, the FCC's approval, although a close 3-2 vote, was without conditions. Commissioners in the majority indicated that the merger could produce benefits, such as the increased availability of broadband services in the region. The minority criticized the merger, however, saying that they did not believe that FairPoint could deliver on the promises it has made and will be shackled by the cost of the agreement. If the sale closes, FairPoint will become a Bell Operating Company as it will be a successor or assignee of a Bell Operating Company, Verizon.

FCC Closes Out 2007 and Starts the New Year with a Flurry of Enforcement Activity

Austin Hughes Solutions, Inc. NAL

On December 3, the FCC released a Notice of Apparent Liability for Forfeiture ("NAL") against Austin Hughes Solutions, Inc. ("Austin Hughes") for repeated violations of the FCC's radio frequency interference regulations. Austin Hughes is the U.S. subsidiary of a Hong Kong-based design and manufacturing company offering a broad range of electro-mechanical digital products. Based on a complaint that Austin Hughes was marketing digital devices in the United States without the proper testing and documentation to confirm compliance with the interference regulations, the Spectrum Enforcement Division of the FCC's Enforcement Bureau ("Bureau") sent Austin Hughes a letter of inquiry ("LOI") on June 9, 2006 seeking further information as to its products.

In its response to the LOI, Austin Hughes admitted that it imported nine products manufactured by its Hong Kong parent into the United States without verifying their compliance with the interference rules. Although Austin Hughes asserted that they were not tested for compliance because they were "'[i]mported in limited quantities for demonstration, testing and evaluation for [technical] compliance . . . or marketing suitability,'" the NAL found that these nine products appeared in Austin Hughes' 2005 catalog and that it sold units of five of the nine products. Radio frequency devices may be operated but not marketed in the U.S. prior to authorization or a determination of compliance with applicable technical standards. Because the nine products had been advertised in Austin Hughes' catalog without the required disclaimer that they had not been authorized and could not be offered for sale or lease until authorization was obtained, and because Austin Hughes had sold five of the products, the FCC proposed a forfeiture of $63,000 for the apparent marketing of nine unauthorized digital devices without the required verification testing. The forfeiture was based on a base amount of $7,000 per violation for each of the nine products.

Satamatics, Inc. NAL

On December 6, the Bureau released an NAL against Satamatics, Inc. ("Satamatics") for the unauthorized transfer of control of a blanket authorization for mobile earth stations and an international Section 214 authorization, as well as a violation of the FCC's foreign ownership restrictions. Satamatics holds a blanket license for 20,000 mobile earth terminals used for the provision of Inmarsat D+ mobile satellite service and an international Section 214 authorization. In 2004, the International Bureau ("IB") and Wireline Competition Bureau ("WCB") granted Satamatics Worldwide Limited ("SWL"), a U.K. corporation, authority to acquire Satamatics Holdings, Inc., a Delaware corporation that wholly owns Satamatics ("IB/WCB Order"). The IB and

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WCB held that the public interest would not be served by prohibiting the resulting indirect foreign ownership of Satamatics and permitted an additional indirect investment of no more than 25 percent of Satamatics equity to be acquired by new foreign investors under specified conditions.

Subsequent to the 2004 IB/WCB Order, SWL began issuing capital stock to various foreign investors with the result that, by October 12, 2006, new shareholders had acquired more than a 50 percent interest in SWL, and more than 25 percent of Satamatics' equity was indirectly held by new foreign investors. On that date, SWL's newly formed U.K. corporation, Satamatics Global Limited ("SGL"), then acquired all of SWL's shares from SWL's existing shareholders. Months later, SWL and SGL filed applications for consent to the transfer of control of Satamatics' license and authorization from SWL to SGL, and Satamatics sought a declaratory ruling that the public interest would best be served by permitting a 100 percent indirect foreign ownership of Satamatics by SGL and SGL's foreign shareholders. On July 30, 2007, the IB approved the transfer of control and granted the requested declaratory relief, without prejudice to any future enforcement action.

The NAL concluded that Satamatics violated Sections 214, 310(b)(4) and 310(d) of the Communications Act ("the Act"), as well as the 2004 IB/WCB Order, by transferring control of its license and authorization without prior FCC approval and acquiring more than 25 percent new foreign ownership. The FCC's rules prescribe base forfeitures of $8,000 for unauthorized transfers of control and $8,000 for violations of the alien ownership restrictions. The Bureau accordingly proposed forfeitures against Satamatics of $8,000 each for the unauthorized transfers of control of its license and of its international Section 214 authorization and $8,000 for its violation of the alien ownership restrictions, for an aggregate forfeiture of $24,000.

BP Exploration (Alaska), Inc. Consent Decree
On December 7, the Bureau released an order adopting a consent decree with BP Exploration (Alaska), Inc. ("BP"), an oil exploration and production company and holder of various private wireless licenses, resolving an investigation of BP's compliance with FCC Rule 1.17, which requires truthful and accurate statements to the FCC. In January 2007, BP disclosed to the FCC that it had filed a number of license applications in which it failed to reveal, in response to questions about past felony convictions, its 1999 guilty plea to one felony count of failing to notify the appropriate federal agency of the release of a hazardous substance. Under the consent decree, BP agreed to make a voluntary contribution to the U.S. Treasury of $50,000 and to implement a two-year compliance plan to ensure compliance with Rule 1.17.

The compliance program includes: designation of a single point of accountability ("SPA") for BP license applications, who will be responsible for ensuring their accuracy and who will report to a BP officer; restricting preparation and execution of FCC license applications to the SPA and employees and contractors authorized by the SPA; training for employees authorized to prepare license applications regarding the obligation to maintain the accuracy and completeness of applications, including instructions directing employees to report all possible or suspected instances of non-compliance with Rule 1.17; and mandatory reporting of all instances of non-compliance to the Bureau within 30 days. BP is also required to file a sworn statement with the Bureau verifying its compliance with the consent decree one year after the adopting order is final.

The Hot Lead LLC NAL
On December 26, the FCC released an NAL against The Hot Lead LLC d/b/a The Hot Lead Company ("Hot Lead") for repeated violations of Section 227 of the Act and the FCC's "junk fax" rules. As previously reported in the July-August 2007 Bulletin, the FCC issued a citation to Hot Lead on May 5, 2006 for using a telephone facsimile machine, computer or other device to send unsolicited advertisements to facsimile machines in violation of Section 227 of the Act and the FCC's related rules. Hot Lead never responded to the citation, which resulted in the release of an NAL against Hot Lead on August 14, 2007 proposing a forfeiture of $2,168,500. The December 26 NAL recites that Hot Lead continued to engage in such conduct. Based on complaints filed by 39 consumers, in addition to the complaints underlying the August 14 NAL, that Hot Lead sent another 61 unsolicited advertisements, and the FCC proposed an additional forfeiture of $423,000. The FCC applied a base forfeiture of $4,500 to each of 34 apparent violations and an increased forfeiture of $10,000 to each of 27 additional violations where the consumer had previously requested or attempted to request that Hot Lead discontinue its faxing.

Mexico Marketing, LLC NAL
On December 28, the FCC released an NAL against Mexico Marketing, LLC ("MM") for repeated violations of Section 227 of the Act and the FCC's "junk fax" rules. Based on consumer complaints, the FCC issued a citation on June 30, 2006 to MM pursuant to Section 503(b)(5) of the Act for faxing unsolicited advertisements and warned MM that subsequent violations could result in forfeitures of up to $11,000 per violation. MM never responded to the citation and continued to engage in the same conduct. Based on complaints filed by 25 consumers that MM sent another 61 unsolicited advertisements, the FCC proposed a forfeiture of $335,000. The FCC applied a base forfeiture of $4,500 to each of 50 apparent violations and an increased forfeiture of $10,000 to each of eleven additional violations where the consumer had previously requested that MM discontinue its faxing.

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ABC Indecency NAL

On January 25, the FCC released an NAL against 51 ABC Television Network ("ABC") affiliated 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. 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 - between 6:00 a.m. and 10:00 p.m. The FCC received numerous complaints alleging that the February 25, 2003 episode began with a scene in which a young boy walks in on a naked woman, apparently his mother, in the bathroom. The NAL states that the scene includes "multiple, close-range views of an adult woman's naked buttocks" and concludes that the scene "depicts sexual organs" and is "patently offensive" because it contains "shocking, pandering and titillating" "explicit and graphic depictions of sexual organs," which are "dwelled upon and repeated."

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 affiliates could have edited the program, which was prerecorded, the FCC proposed the maximum forfeiture of $27,500 against each of the 51 affiliates that were the subject of viewer complaints to the FCC. ABC has announced that it will oppose the NAL on the grounds that it departs from precedent and violates the First Amendment. ABC stated that "NYPD Blue" had been running for about five years when this episode aired, and "the realistic nature of its storylines was well known to the viewing public."

Access Charge Issues Continue to Engage the FCC

On November 30, the FCC terminated its investigation of switched access rates in the 2007 annual access tariffs of the 41 rural incumbent local exchange carriers ("RLECs") that were suspended by the FCC's Wireline Competition Bureau ("Bureau") on June 28, 2007. As reported in the July-August 2007 Bulletin, some RLECs were accused of manipulating terminating interstate traffic in order to inflate their terminating access revenues, and the Bureau suspended the switched access tariffs of all of the RLECs that exited from the National Exchange Carrier Association ("NECA") traffic-sensitive pool in 2007 because they allegedly raised "access stimulation issues." On August 24, the Bureau designated certain issues for investigation but established two "safe harbors" by which RLECs could avoid the investigation ("Designation Order"). First, they could add language to their tariffs committing them to modify their local switching and transport tariff rates in the event that they experienced an increase in demand above a threshold level. Alternatively, they could file a waiver request to join the NECA traffic-sensitive tariff.

By September 21, the due date of the RLECs' Direct Cases in response to the August 24 Designation Order, all 41 RLECs had adopted one of these safe harbors. In its November 30 termination order, the FCC concluded that the RLECs "have addressed the concerns underlying the tariff suspensions" by adopting one of the safe harbors, thus obviating the need to continue the investigation. The FCC also found the RLECs' switched access rates "lawful," either because the tariffs incorporated the rate modification commitment or because the RLEC rejoined the NECA traffic-sensitive pool. The FCC noted that the switched access rates of the RLECs that entered the NECA traffic-sensitive pool were lawful because NECA's switched access rates are deemed lawful under the FCC's streamlined tariff rules. The FCC still has pending the related rulemaking proceeding reviewing traffic stimulation issues, reported in the October 2007 Bulletin.

On January 11, Embarq Corporation filed a petition for forbearance requesting that the FCC forbear from application of the "enhanced service provider" ("ESP") exemption to non-local voice calls originated in Internet Protocol ("IP") format and routed to the public switched telephone network ("PSTN"). The ESP exemption from local exchange carrier ("LEC") access charges was created in the 1980's to allow information service providers - then referred to as ESPs - to use the LECs' local business subscriber lines instead of the LECs' switched access services for the termination of non-local enhanced service calls from the ESPs' customers. The rationale for the exemption was that ESPs used different local exchange functions from the carriers that used switched access services and that the exemption was necessary to promote the growth of the nascent enhanced service industry.

Embarq complains that some carriers are claiming incorrectly to be exempt from its access charges for non-local voice calls they deliver to Embarq for termination simply because the calls originated in IP format. Embarq argues that the ESP exemption was never intended to apply to Voice over Internet Protocol ("VoIP") calls, particularly VoIP calls that have been converted to "ordinary voice calls," carried by telecommunications carriers and terminated to the PSTN. The exemption was intended only to apply to ESPs' links to their customers for the provision of enhanced services, such as dial-up information services.

Embarq accordingly requests that the FCC use its forbearance authority to halt what it terms the "misapplication of the ESP exemption" by carriers claiming the exemption for IP-to-PSTN voice calls and argues that the requested forbearance meets the standards set forth in Section 10 of the Communications Act.

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First, it is not necessary to apply the ESP exemption to IP-to-PSTN voice calls to ensure that charges or practices are just and reasonable. In fact, Embarq argues, forbearance is necessary to ensure that access charges will be applied in a nondiscriminatory fashion. Second, the ESP exemption is not necessary to protect consumers. Rather, forbearance will benefit all consumers by ensuring that VoIP calls contribute their fair share of PSTN costs and thereby avoid burdening all non-VOIP consumers with higher costs. Third, forbearance is in the public interest because it will ensure that the exemption does not provide an artificial competitive advantage to VOIP providers and their interconnecting carriers and will maintain support for the PSTN by ensuring that LECs, especially RLECs such as Embarq, are appropriately compensated for use of their facilities for switched access services.

The FCC released a Public Notice on January 14 requesting initial comments on Embarq's petition by February 19 and reply comments by March 14. On the same day that Embarq's petition was filed, US Telecom requested that the FCC combine its consideration of the petition with the mirror-image forbearance petition filed by Feature Group IP ("FGIP") seeking relief from access charges for VoIP and other Internet-based calls and that the comment cycle on the FGIP petition be extended to conform to the comment dates for the Embarq petition. USTelecom argued that the FGIP petition (summarized in the October 2007 Bulletin) and Embarq petition raise "many of the same legal and policy issues." On January 14, the Bureau denied the request to combine the two petitions in one docket but granted the extension request, moving the FGIP petition comment dates to February 19 and March 14.

State Regulatory Developments

So far, the new year has not brought with it a host of new issues for state regulators, as they continue to struggle with the extent of their jurisdiction over VoIP services, to study the role of communications services in protecting public safety, and to consider relaxing retail price regulation for incumbent and competitive carriers.

In Virginia, a number of competitive local exchange carriers have opposed Verizon's request for reconsideration of a Virginia Corporation Commission's (the "VCC") decision setting thresholds for the expansion of retail rate deregulation beyond the major cities where it already is permitted. As adopted by the VCC in a December ruling, Verizon may seek relaxed rate regulation in exchanges if 75% of customers have two alternative local exchange carriers, either resale or facilities-based, and 50% of the customers have access to a facilities-based competitor. Verizon has sought to have the 50% threshold include competitors that lease Verizon loops, not just those that do not rely on incumbent facilities at all. Competitive carriers oppose this modification on the grounds that the federal policy which now requires Verizon to lease these loops to competitors could be repealed in the future, leaving them without alternative last-mile facilities.

In early December the New Jersey Board of Public Utilities (the "BPU") granted Verizon's request to open an investigation into whether the current level of competition justifies broader deregulation of incumbent local carriers' rates. While rates for most Verizon services other than basic local residential and single line business rates are deregulated, other incumbent carriers in the state continue under rate-of-return regulation. In contrast, all competitive carrier rates other than Lifeline rates were deregulated by a BPU decision issued last June (though this decision has been challenged by the state's Public Advocate). In the new proceeding, the BPU will investigate whether Verizon and the other incumbents meet established market tests for competition, which include ease of market entry, presence of active competitors, and availability of comparable retail services in their respective territories. The BPU will schedule hearings in the near future.

Kansas has granted incumbent carrier AT&T's request for retail rate deregulation in nine exchanges where it satisfied the Corporation Commission's competitive tests. Amongst the previously adopted criteria, there must be two competitors to the incumbent in an exchange. This most recent ruling brings to 24 the number of Kansas exchanges where AT&T has obtained retail rate deregulation.

The Michigan Public Service Commission is considering revising its procedures for transferring certificates from bankrupt carriers to replacement service providers. Hearings are scheduled for late January on the proposed rules that will, if adopted, allow for expedited approval, within ten days of filing, for certificate transfers to an already authorized Michigan carrier if the transfer would not increase the carrier's service territory. Transfers that would increase a carrier's service territory or that would be to a carrier that is not certified in Michigan will require the receiving carrier to file a request expansion of its service territory or apply for a state certificate within thirty days of the transfer. Comments on the proposed rules are due February 14.

VoIP related issues continue to attract the attention of state regulators and legislators. In Maryland, the Baltimore city government has asked the U.S. District Court there to allow it to impose the city's $3.50 per subscriber telecommunications tax on Vonage. The dispute, which began in 2003, concerns revisions to the city's tax ordinance made in 2004 specifically aimed at collecting the tax from Vonage. The 2004 revisions define a taxable telecommunications line as any connection that allows communication between a service

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provider and a unique telephone number. Both the city and Vonage have sought summary judgment from the court. This city, which has challenged the court's jurisdiction on the grounds that Maryland state courts should hear the dispute, argues that the Vonage service clearly falls within the scope of the revised ordinance. Vonage claims that its VoIP service is not a telephone service and that it relies on connections separately obtained by the subscriber rather than providing its own telephone lines.

In nearby Washington D.C., unions and community groups oppose a bill that would amend the District's 1996 telecommunications act to include deregulation of VoIP services. Opponents argue that deregulation is premature because VoIP is still a developing service and its future capabilities are uncertain. The bill is scheduled to be voted on February 5.

Finally, Kansas has become the third state commission, after New Mexico and Nebraska, to dismiss claims of federal preemption and require interconnected VoIP providers to contribute the state's universal service fund. Workshops will be scheduled in March to set the formula for calculating contributions and other implementation measures.

California addressed a number of important telecommunications policies at the end of the year. After many years of waiting for federal access charge reform decision, the California PUC (the "CPUC") finally concluded that the FCC was "stalled in its efforts" and moved forward with its own access charge revisions. The early December CPUC decision caps competitive carriers' and two mid-sized incumbents' access charges at levels commensurate with the rates charged by AT&T and Verizon, which were reduced by a CPUC decision issued last year. The two mid-sized incumbents, Frontier Communications and SureWest Telephone will have their rates capped at current levels until the end of 2008, at which time they must remove the transport interconnection charge from the rates. Competitive carriers' rates are capped at 2.5 cents per minute, the current AT&T rate, through the end of 2008. Beginning in 2009, competitive carriers' rates will be capped at the higher of the AT&T or Verizon rate, plus ten percent.

The CPUC also opened a rulemaking to consider whether to adopt rules to govern the incumbent carriers' retirement of copper loop facilities. CalTel, an organization representing local exchange carriers, requested the rulemaking on the grounds that removal of copper loops will have a significant impact on local competition. While current federal regulations require the incumbent carriers to lease copper loop facilities to competitors, there is no comparable requirement for the fiber loops that will replace the removed copper. The CPUC's first task, according to Commissioner Rachelle Chong, will be to determine whether there are any issues that the CPUC may address. She also indicated that there is no intention to bar copper loop replacement, rather, the CPUC will determine whether it is necessary to set any procedures for prior review of any replacements.

The CPUC and the Texas Public Utilities Commission both recently addressed the role of telecommunications in emergency preparedness and disaster recovery. In a report required by a 2006 California statute, the CPUC investigated existing emergency communications systems with the goal of identifying regulatory and legislative actions necessary to maintain telecommunications network performance during disasters and emergencies. The report concluded that there are insufficient standards for backup power supplies, emergency notification procedures, and reverse-911 systems. Without common standards and protocols, the report stated, individuals and emergency responders are unable to communicate with each other, other systems, or the public outside the emergency area. The report comes on the heels of the disastrous fall 2007 Southern California wildfires, which demonstrated the importance of emergency notification systems during a natural disaster. The San Diego reverse-911 system, which is capable of dialing 4,000 calls per minute, was able to notify nearly half a million people who were in immediate danger. In contrast, the Los Angeles system was able to place only 22 calls at a time and was far less effective as an early warning system. The report was delivered to the legislature on January 1.

Texas regulators have ordered all telecommunications providers and other utilities to have in place a comprehensive emergency operation and disaster recovery plan and to file a summary of the plan with the Public Utilities Commission by May 1, 2008. Changes to the plan are to be filed within thirty days. The regulations require all utilities to provide the PUC with real time outage and restoration information during a declared emergency.

California Broadband Task Force Issues Its Report

The California Broadband Task Force, formed by order of Governor Schwarzenegger in 2006, issued its final report on the state of the state's broadband infrastructure in early January. Notwithstanding its conclusion that broadband service in California is the best of anywhere in the U.S, the report urges policy makers to undertake extraordinary measures to bring broadband to every California community. The report found that broadband availability and speeds vary widely across the state, with major metropolitan areas such as Los Angeles and San Francisco having penetration rates of 98% and 99%, respectively, and much lower rates in the rural

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northern and eastern parts of the state. Even where broadband service is available, a significant percentage of households do not subscribe, suggesting that the lack of computers and other economic factors are significant barriers to achieving the economic, educational, and social benefits that broadband can produce.

The report recommends that the state encourage the construction of broadband infrastructure by streamlining the permitting process and encouraging collaboration between providers and adopting economic incentives, such as bond issues, tax credits, and use of existing state programs such as the Emerging Technologies Fund and the Teleconnect Fund, to encourage private investment. In addition, the state should promote the use of broadband through the creation of applications and by weaving it into K-12 education.

Video Competition Developments

FCC Releases Text of Controversial Dual-Carriage Order
On November 30, the FCC released the text of its digital television ("DTV") dual-carriage order ("Order") adopted at its September 11 open meeting. The Order requires cable operators to provide both the analog and digital signals of must-carry stations after the DTV transition. Under the Order, all cable operators may apply for a waiver of the dual-carriage rules, with special weight given to requests from systems with capacities of 552 MHz or less. Cable providers may continue compressing broadcast signals as long as there is no degradation. The rule includes a three-year sunset, although the FCC could extend it beyond the February 12, 2012 expiration date.

After a Long Wait, FCC Imposes Cable Ownership Cap; Effect on Telcos Unclear
In a 3-2 vote with McDowell and Tate dissenting, the FCC adopted a cable ownership cap that prevents any one cable company in the U.S. from serving more than 30% of all pay-TV subscribers. In 2001, Time Warner successfully challenged the 30 percent horizontal ownership cap first established by the FCC in 1993 and amended in 1999. The D.C. Circuit Court remanded the cap back to the FCC to provide further justification. Six years later, the FCC is taking another try at a 30% horizontal cap, explaining that the cap is necessary to ensure that no single cable operator will be able to shut out competitors.

Although the cap clearly applies to cable operators, its applicability to telephone companies offering multichannel video service is less clear. The Commission indicated that the cap might apply to telco offerings like Verizon's FiOS service (which Verizon itself describes as a cable offering). AT&T, however, has taken the position that it is not a cable operator within the meaning of the FCC's rules, even though it too has branched out into the pay-TV market with its AT&T U-verse offering.

The item also includes a further notice of proposed rulemaking seeking comment on the Commission's vertical ownership limits and its cable and broadcast attribution rules. In the cable context, vertical ownership rules could limit the number of total channels a cable operator could allocate for its affiliated programming networks.

State Video Franchising Reform Developments
Though many states enacted video franchising reforms in the past year, 2008 efforts are off to a slow start. Colorado lawmakers had been working with Denver-based Qwest on a state video franchising bill for the 2008 session. Qwest, however, backed off its support for the measure as well as its plans to purchase several video franchises, much to the relief of some cable companies and local franchising authorities.

Private Equity Update

The FCC, by a 5-0 vote, approved the sale of Clear Channel Communications Inc. ("Clear Channel") to a private equity group led by Thomas H. Lee Partners LP and Bain Capital LLC. Although approval of the deal was unanimous, Commissioner Michael J. Copps, in a Concurring Statement and in interviews, raised concerns about the increased prominence of private equity in the media industry.

According to Commissioner Copps, private equity firms are different than traditional broadcast licensees. Unlike public companies, private equity firms are not required to report to the Securities and Exchange Commission, and need not divulge their basic ownership information or their organizational structure, making regulating these entities more difficult. In addition, Commissioner Copps pointed to Standard & Poor's announcement that upon the consummation of the sale it will cut its ratings of Clear Channel two levels deeper into "junk" territory, and may cut them further, because of the subordination of existing debt to new bank debt. Commissioner Copps concluded that it remains unclear whether private equity ownership of media assets is likely to protect, serve and sustain the public interest, and the FCC should at least launch an inquiry to determine the potential impact of private equity ownership in the industry.

The other Commissioners are less concerned with private equity ownership. Chairman Kevin Martin asserted

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that there is no evidence that private equity ownership raises any particular or unique problems, and the FCC's normal attribution and ownership rules are sufficient to deal with any issues that may arise. These remarks are similar to comments Chairman Martin made in a letter he sent to House Democratic leaders in September 2007 when he asserted that private equity firms that own companies regulated by the FCC must meet the same consumer and service obligations applicable to any other company. Commissioner Robert McDowell remarked that, with the recent downturn in the stock and debt markets, this is a particularly bad time to impose more oversight on private equity firms. Commissioner Deborah Tate noted with approval the trend of deconsolidation in the media market and refused to comment on private equity's role.

The Clear Channel transaction is expected to close between mid-February and mid-March.

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.

Date	Event
February 1, 2008	**Form 499-Q due** (Telecommunications Reporting Worksheet for universal service).
February 1, 2008	**Form 502 due** (Numbering Resource Utilization and Forecast report).
February 4, 2008	Comments due on **commercial mobile alert system NPRM.**
February 6, 2008	Oral argument in 6th Circuit on FCC's **video franchise order**.
February 6, 2008	**FCC Summit on 911 and E911 issues**.
February 6, 2008	Comments due on NPRM regarding **exclusive DBS and private cable agreements in multi-dwelling units ("MDUs")**.
February 12, 2008	Reply comments due on **program access and retransmission consent NPRM regarding program tying**.
February 13, 2008	Comments due on (1) **Free Press petition for declaratory ruling on "reasonable network management" exception to Internet Policy Statement** and (2) **Vuze petition for rulemaking on network management practices by broadband providers**.
February 13, 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**.
February 13, 2008	House Commerce Telecom Subcommittee **oversight hearing on DTV transition.**
February 14, 2008	Senate Commerce Committee **hearing on DTV transition**.
February 14, 2008	Comments due on **DARS NPRM.**
February 18, 2008	**Cellular carriers no longer required to provide analog service.**
February 19, 2008	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**.
February 19, 2008	Reply comments due on **commercial mobile alert system NPRM.**
February 28, 2008	Reply comments due on (1) **Free Press petition for declaratory ruling on "reasonable network management" exception to Internet Policy Statement** and (2) **Vuze petition for rulemaking on network management practices by broadband providers**.
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 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**.
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 17, 2008	Reply comments due on **DARS NPRM.**
March 31, 2008	**Circuit addition reports due** (for international private line resellers).

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March 31, 2008 **Circuit status reports due** (for international facilities-based carriers).

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