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Legal Updates & News

Bulletins

Communications Law Bulletin, September, 2007

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The post-Labor Day quickening of activity at the Federal Communications Commission ("FCC" or "Commission"), the Congress, the state commissions, and the courts gives us a lot to report in this issue of our Bulletin. Developments in all segments of our industry are covered here, along with our usual list of deadlines for your calendar.

DOJ Takes Late Stance Opposing Net Neutrality Requirements

Although the FCC's pleading cycle on its net neutrality notice of inquiry ended in mid-July, the Department of Justice ("DOJ") weighed in on September 6, arguing against net neutrality requirements in an ex parte filing. The DOJ warned that blocking premium services or prohibiting the prioritizing of content (for additional fees) could harm competition and consumer choice and decrease investment. In fact, the DOJ argued, different optional levels of service – similar to speedier delivery options by the U.S. Postal Service – are common in other industries, are efficient, and improve customer satisfaction. In addition, the DOJ noted the significant growth of the Internet, in contrast with only one known example of anti-competitive conduct (that of Madison River blocking Vonage service). Consumers, according to the DOJ, would not want a "one-size-fits-all" service at a single price, which could result in lower quality for some and higher prices for all.

At the same time, the DOJ stated that it will watch for potentially anticompetitive conduct and will bring enforcement action if and when warranted.

Following this filing, a group called Free Press filed a Freedom of Information Act ("FOIA") request seeking information that it alleges could show improper influence of the DOJ by the White House or industry lobbyists.

FCC Relaxes Regulation of BOC Long Distance Services

In an order released August 31, 2007, the FCC substantially liberalized its regulation of the in-region, long distance services of the Bell Operating Companies ("BOCs").

The BOCs, which now include Verizon, AT&T, and Qwest, are the successors to the 23 local exchange carriers that were divested from AT&T, parent company of the Bell system, under the terms of the antitrust consent decree entered in 1982. (The divestiture was not complete until 1984.) The decree prohibited the divested BOCs from providing certain products and services, including long distance services outside specified local access and transport areas ("LATAs").

The Telecommunications Act of 1996 gave the BOCs a pathway to the interLATA service market, but only after the BOCs had made state-by-state demonstrations that the local exchange markets in their home regions had been opened to competition. Where the required showing had been made, BOCs were permitted to provide in-region long distance service, but only through separate subsidiaries. The separate subsidiary requirement was temporary, however, and when that requirement lapsed, the Commission offered BOCs a choice of regulatory regimes: they could continue to provide in-region long distance services through a separate affiliate, under conditions defined in section 272 of the 1996 Act, in which case the service would be regulated on a liberal, "nondominant" basis; or they could provide those services directly, not using a separate affiliate of the kind described in the 1996 Act, under a stricter scheme of "dominant" regulation.

In February of this year, the Commission granted in part a Qwest petition seeking relief from dominant regulation. Under the terms of that order, Qwest was permitted to provide in-region, long distance service on a nondominant basis without using a section 272 subsidiary for that purpose.

In its new order, the FCC agrees with the BOCs that those companies no longer have market power in the provision of in-region long distance services. However, the Commission finds that the BOCs still have the ability to discriminate against their long distance competitors in the provision of access service. Accordingly, the Commission will continue to require the BOCs to observe certain safeguards in the provisioning of access service, but will not continue to apply dominant regulation to the BOCs' unseparated, in-region long distance service.

The new regulatory regime does not include tariffing of BOC long distance service, relieves the BOCs of certain discontinuance and transfer of control obligations, and includes forebearance from certain contract tariff filing requirements. The BOCs also are relieved of so-called "equal access scripting," under which BOCs are required to advise their subscribers of the availability of independent long distance service providers.

The FCC imposed additional conditions, including special access performance metric reporting by the BOCs, revised cost allocation manuals, and the imputation of the companies' tariffed access rates to their long distance services, thereby ensuring that the BOCs charge themselves the same access rates that they charge their long distance service rivals. The BOCs also agreed to offer, for three years, long distance rate plans tailored to the needs of low-volume residential consumers.

Recent Developments in the Wireless Industry

The FCC Rejects 2.1 GHz Band Applications in Favor of a Rulemaking

The FCC rejected the applications and related petitions for forbearance filed by M2Z Networks, Inc. ("M2Z") and six other companies to use the 2155-2175 MHz band ("2.1 GHz band") for wireless broadband services and instead adopted a notice of proposed rulemaking ("NPRM") seeking comment on the service rules for that spectrum. The applicants included M2Z, NetfreeUS LLC, NextWave Broadband, Inc., Commnet Wireless LLC, McLeroy Electronics Corp., TowerStream Corp., and Open Range Communications, Inc. According to the FCC, all of the proposals submitted by the applicants had merit; thus, it was in the public interest to solicit broader comment on how the 2.1 GHz band should be used.

M2Z has appealed the FCC's decision to the U.S. Court of Appeals for the District of Columbia Circuit, requesting that the court overturn the FCC's order and compel it to grant M2Z's application. According to M2Z, the FCC violated various provisions of the Communications Act governing deployment of new technologies and services and FCC treatment of forbearance petitions. NextWave and TowerStream do not intend to challenge the denial of their applications, while the other applicants still are considering their options.

The NPRM seeks comment on the proposals set forth in the applications filed by M2Z and other companies. The NPRM also asks about the best way to allocate the 2.1 GHz band, such as through the auction process, authorizing it for unlicensed use, or another approach. Although the NPRM proposes to apply the FCC's more flexible Part 27 rules to the 2.1 GHz band, the NPRM also seeks comment on whether certain base station and mobile handset transmissions should be restricted given the asymmetrical nature of the spectrum (i.e., it consists of one block of unpaired spectrum rather than two paired blocks). In addition, the NPRM seeks comments on other licensing and operational requirements, including license term, band configuration, renewal criteria, performance requirements, and power and emission limits. Comments on and replies to the NPRM are due 60 and 30 days, respectively, after publication in the Federal Register.

Parties Challenge Provisions of 700 MHz Order

Verizon Wireless has appealed a limited portion of last month's FCC decision regarding the rules for the 700 MHz band spectrum that is scheduled to be auctioned in January 2008. Specifically, Verizon Wireless challenges the FCC's decision to require the C Block 700 MHz licensee to allow any devices and applications on its network. According to Verizon Wireless, the FCC's decision violates the U.S. Constitution and the Administrative Procedure Act, and is "arbitrary, capricious, unsupported by substantial evidence and otherwise contrary to law." It is uncertain at this point how the lawsuit will specifically affect the upcoming auction, but it places a cloud over the auction. In addition, several companies have sought reconsideration of various portions of the 700 MHz order, including the FCC's refusal to require the commercial D Block licensee to resell its spectrum at wholesale rates and the suggested minimum prices for some of the licenses that will be auctioned.

The FCC Adopts PSAP-Level E911 Location Accuracy Testing Requirements

The FCC adopted new wireless enhanced 911 ("E911") location accuracy testing rules based upon an eleventh-hour filing by two public safety groups. The Association of Public Safety Communications Officials International and the National Emergency Number Association proposed that the FCC adopt a series of interim benchmarks and defer enforcement of public safety answering point ("PSAP") level accuracy testing for five years. Although the text of the FCC's decision has not yet been released, it appears generally to mirror the public safety groups' proposal.

Under the new rules, wireless carriers will have to demonstrate location accuracy compliance on an Economic Area basis within one year. Within three years, wireless carriers will have to demonstrate location accuracy compliance on a Metropolitan Statistical Area and Rural Service Area basis and demonstrate PSAP-level compliance in 75 percent of the PSAPs they serve. Wireless carriers must have full PSAP-level compliance within five years.

Before the last-minute filing by the public safety groups, FCC Chairman Kevin Martin had been circulating an order that would have required full PSAP-level compliance within one year. Apparently, many of the FCC commissioners' offices did not see the public safety filing until the day before the FCC's September open meeting during which the FCC's new rules were adopted. The order also was adopted before the FCC completed the second portion of the rulemaking regarding PSAP-level accuracy reporting. Even some of the commissioners questioned whether the deadlines are feasible.

The wireless industry has criticized heavily any proposal for PSAP-level location accuracy testing, arguing that it is not technically feasible to comply with such a mandate. Rather, the wireless industry has suggested that the FCC create an advisory group to study this issue. It is likely that members of the wireless industry will challenge the decision once the text has been released, with several carriers arguing that the FCC's decision violated the Administrative Procedure Act.

In related matters, it appears that the House Telecommunications Subcommittee is making progress towards completing a bill that would facilitate deployment of Internet Protocol-enabled 911 and E911 services. The bill is discussed in greater detail in this month's legislative developments article.

Recent Developments Regarding the Universal Service Fund

Several developments have taken place within the past month concerning the Universal Service Fund ("USF") which will affect the communications industry going forward. The FCC adopted new rules strengthening its oversight of the USF. The USF contribution factor is decreasing to 11 percent. Sprint is settling for $30 million a class action lawsuit based upon overcharging USF fees to its customers. In addition, the Federal-State Joint Board on Universal Service released tentative conclusions regarding the future of the high-cost USF program.

The FCC Strengthens Oversight of the USF Programs

The FCC took a significant step in strengthening its oversight of the USF programs. Those that participate in the USF programs, including carriers that contribute to the USF, should be aware of the new requirements and adjust their internal operations accordingly. Specifically, the FCC adopted several measures to safeguard against waste, fraud, and abuse as well as improve the administration and management of the program:

- **Debarment.** The FCC expanded its debarment rules from the schools and libraries (or E-Rate) program to the other USF programs, including the high-cost, low-income, and rural healthcare programs.
- **Late Fees.** The FCC increased its fees and penalties for failure to timely file forms or make contributions to the USF.
- **Recovery of Funds.** The FCC determined that funds for all USF programs that are disbursed in violation of an FCC rule should be recovered (as is already true for the E-Rate program). In addition, the FCC clarified that sanctions, including enforcement action, are appropriate in cases of waste, fraud, and abuse, but not in cases of clerical or ministerial errors.
- **Document Retention.** Although the FCC declined to impose additional audit requirements at this time, it strengthened its document retention requirements for some of the USF programs to facilitate existing auditing efforts. For example, the FCC required participants in the high-cost program to retain all records for five years. USF contributors also now must retain their records for five years. The FCC also clarified that parties must retain all information – including information that may be in the possession of consultants, contractors, and the National Exchange Carrier Association ("NECA") – that is necessary to show compliance with USF rules and regulations and make such documentation available to the FCC and USF administrator.
- **Statute of Limitations and Administrative Limitations Periods.** The E-Rate program already has a five-year administrative limitations period – i.e., the timeframe for audits and investigations – and the FCC applied the same standard to the other USF programs. Although the administrative limitations period does not affect the statute of limitations, a recent enforcement case (discussed in greater detail in the July/August edition of this Bulletin) appears to modify the FCC's interpretation of the one-year statute of limitations period for forfeitures under Section 503 of the Communications Act. Specifically, in a Notice of Apparent Liability issued against VCI Company for alleged violations of the low-income program rules, the FCC concluded that it would consider the failure to timely file any required USF forms as a continuing violation rather than individual violations. Thus, according to the FCC, the one-year statute of limitations period would not begin to run until the violation is cured. This is contrary to past practice in which the FCC found that the one-year period began to run on the date an individual form was due.
- **Performance Measures.** The FCC adopted performance measures for each USF program in order to comply with the Government Performance and Results Act of 1993.

The USF Contribution Factor Slightly Decreases to 11 Percent

The USF contribution factor will decrease for the fourth quarter of 2007 from 11.3 percent to 11.0 percent. The contribution factor had risen sharply in the second quarter of 2007 from 9.7 percent to 11.7 percent, but it has dropped slightly in the last two quarters.

Sprint Settles for $30 Million in USF Surcharges Case

Sprint Communications Company, L.P. has settled for $30 million a class action suit alleging that it overcharged customers for USF fees between August 2001 and March 2003. The lawsuit is part of a complex litigation involving several class action cases against Sprint, AT&T Corporation, and WorldCom Network Services, Inc. Under the settlement, Sprint will distribute $25 million worth of $20 and $50 phone cards to qualifying business and residential class members. Sprint also agreed to pay $4.7 million in attorneys' fees and $250,000 in litigation expenses to class counsel. The settlement has received preliminary approval from a Kansas federal district court judge and a final hearing on the settlement is scheduled for March 3, 2008.

USF Joint Board Releases Statement on Comprehensive Reform of the High-Cost Program

The Federal-State Joint Board on Universal Service announced in a short statement that it is taking a "fresh look" at high-cost USF support and, in doing so, made tentative conclusions regarding long-term reform of the program. The Joint Board stated that in the future high-cost support should focus on: (1) voice, (2) broadband, and (3) mobility. In addition to the principles set forth in the Communications Act, the high-cost program also should be guided by: (1) cost control, (2) accountability, (3) state participation, and (4) infrastructure build out in unserved areas. The Joint Board further stated that "the equal support rule will not be part of future support mechanisms." The Joint Board's statement, which resembled only a brief outline, was released two months after it was approved at the summer meetings of the National Association of Regulatory Utility Commissioners.

Broadband Forbearance Proceedings Subject of Intense Focus at FCC

The FCC's September open meeting was scheduled on the deadline for action on Qwest's pending petition for broadband forbearance. Although Chairman Martin reportedly had circulated an order addressing several upcoming broadband forbearance decisions (including those of Qwest, AT&T, Embarq, and Frontier), in the face of last-minute lobbying by all parties, the commissioners were unable to reach a consensus that granted relief that Qwest found acceptable. (The commissioners reportedly considered a partial forbearance grant that would apply only to interstate, interexchange services.) The forbearance item was pulled from the open meeting agenda the day before the meeting, leaving the fate of the Qwest petition in limbo.

Shortly before the statutory deadline, Qwest withdrew its petition, and then refiled it (in essentially identical form) the next day, presumably in the hopes of obtaining broader relief than the deadline compromise was likely to provide. The FCC immediately placed the petition out for a one-week comment cycle. Accordingly, Qwest theoretically can now remain a part of an omnibus draft order, which would now face a deadline of October 11, 2007 (which is the statutory deadline for action on the AT&T petition).

Before its withdrawal, Qwest had filed an ex parte letter arguing that the partial interexchange relief being considered was effectively a denial of the requested relief. In mid-September, AT&T officially withdrew part of its similar pending petition, stating that it no longer needed relief for interstate, interexchange services in light of the FCC's recent order relaxing long distance regulation of the BOCs (*see* "FCC Relaxes Regulation of BOC Long Distance Services," this issue). With this narrowing of the petitions, the primary services remaining at issue are special access services, which remain an issue of intense concern to wireless carriers and large business customers.

Shortly after these developments, a group of competitive local exchange carriers ("CLECs") filed a petition for procedural rules to govern the conduct of forbearance proceedings. The CLECs envision rules similar to those that were adopted to govern the BOC Section 271 long distance entry proceedings. The CLECs asked that the rules include a ban on last-minute submissions, burden-of-proof requirements, adequate notice and comment periods, access to relevant documents, standard time lines for the proceedings, and the requirement of a written order on petitions, among other rules.

Proposed Forfeitures Totaling over $50,000,000 Highlight Aggressive FCC Enforcement Activity

The FCC's vigorous enforcement schedule continued this past month with notices proposing heavy penalties for apparent E911 deficiencies and in connection with a Section 214 revocation hearing, a consent decree regarding customer proprietary network information ("CPNI") compliance, and lesser proposed penalties for relatively minor infractions.

On August 30, the FCC released three Notices of Apparent Liability for Forfeiture ("NALs") against wireless carriers for their failure to meet an Enhanced 911 ("E911") deadline for wireless carriers using handset-based E911 Phase II location technology. The FCC proposed forfeitures of $1,325,000 for Sprint Nextel Corporation, $1,000,000 for Alltel Corporation, and $500,000 for United States Cellular Corporation ("USCC") for their failure to achieve 95 percent penetration among their subscribers of location-capable handsets by December 31, 2005. In each case, the FCC previously denied waivers of the December 31, 2005 handset penetration deadline because the carriers' efforts to encourage subscribers to upgrade non-compliant handsets were insufficient, and their filings lacked a "clear path" to full compliance.

In the case of Sprint Nextel, the FCC explained that it proposed the maximum possible forfeiture of $1,325,000 under Section 503(b)(2)(B) of the Communications Act (the "Act") on the basis of the required statutory factors. These factors include Sprint Nextel's substantial noncompliance – a penetration rate by the deadline of 81.3 percent for the pre-merger Sprint Nextel and only 74.2 percent for Nextel Partners – and large customer base of over 51 million customers. In addition, the critical functions served by E911 location-capable handsets in promoting and safeguarding life and property, the six years that carriers were on notice of the deadline and received repeated warnings of potential enforcement actions if the deadline was not met, Sprint Nextel's continuing failure as of the date of the NAL – 20 months after the deadline – to meet the 95 percent penetration threshold, and its size and revenues justified a substantial proposed forfeiture "to serve as an effective deterrent to future violations of the E911 requirements." The FCC concluded that Sprint Nextel "did not undertake the level of commitment we would expect from a Tier I carrier." The FCC also noted that Sprint Nextel spent less on compliance efforts relative to its customer and revenue bases than Alltel or USCC, which are both Tier II carriers.

Alltel's and USCC's lower proposed forfeitures were based on most of the same considerations. The FCC noted that, by the deadline, Alltel reached an 84 percent penetration rate for its 10.6 million customers and that it did not reach a 95 percent penetration rate until May 31, 2007, 17 months after the deadline. USCC reached an 88.76 percent penetration rate by the deadline for its 5.5 million customers and did not reach a 95 percent rate until August 31, 2006, eight months after the deadline. The FCC noted in the USCC NAL that a forfeiture lower than the statutory maximum is appropriate because USCC was the first of the three carriers to reach compliance and demonstrated "an aggressive and innovative set of efforts, as well as significant expenditures relative to its customer and revenue bases." The companies are required to pay the forfeitures or file responses to the NALs in 30 days explaining why the proposed penalties should be reduced or eliminated. In a separate statement, Chairman Martin stressed that the three carriers "failed to meet this critical [E911] deadline by a significant margin, despite the clear requirements of the Commission and the needs of their customers. . . . Our actions today underscore the critical importance that 911 services play in the lives of the public."

On August 31, the Enforcement Bureau ("Bureau") released an order adopting a consent decree with AT&T resolving an investigation of AT&T's compliance with certain customer proprietary network information ("CPNI") rules. The investigation began when AT&T notified the FCC that, due to a shortage of CPNI notices, AT&T had failed to include CPNI notices in certain customer bills. Based on the incorrect assumption that those customers had received the notices and had not "opted out" of AT&T's proposed marketing use of their CPNI, AT&T used the CPNI of 10,967 customers without their consent to market services to them. Under the consent decree, AT&T agreed to make a voluntary contribution to the U.S. Treasury of $350,000 and to implement a compliance plan in order to ensure that no CPNI is used for marketing purposes unless the customer receives a CPNI opt-out notice prior to such marketing. The plan includes training for marketing personnel and immediate reporting of any noncompliance to the Bureau. The plan expires two years after the effective date of the consent decree or upon the termination of the FCC's opt-out requirements, whichever is earlier.

On September 10, the FCC released an Order to Show Cause and Notice of Opportunity for Hearing to determine whether the authority granted to Kurtis Kintzel and his brother, Keanan Kintzel, and to entities in which they are principals, to operate as common carriers under Section 214 of the Act should be revoked ("Kintzel Order"). This proceeding arises from an earlier investigation of Business Options, Inc. ("BOI"), an entity controlled by the Kintzel brothers, which led to an evidentiary hearing against BOI addressing a variety of alleged violations. That proceeding was terminated in 2004 with a consent decree, under which the Kintzel brothers agreed to make a voluntary contribution to the U.S. Treasury of $510,000 in installments, to pay all outstanding USF and Telecommunications Relay Services ("TRS") fund assessments, and to obtain all necessary authorizations prior to discontinuing services ("BOI Decree").

In 2006, the Bureau received information that the Kintzel brothers had ceased making the contributions under the BOI Decree and that another entity they controlled, Buzz Telecom Corporation ("Buzz"), had discontinued service without authorization and failed to pay required USF and TRS assessments. The FCC also received slamming and cramming complaints involving Buzz. In December 2006, the Bureau sent a Letter of Inquiry ("LOI") to Buzz and BOI concerning these allegations, but the Bureau never received a complete response. The Kintzel Order accordingly requires the Kintzel brothers to show cause why the Section 214 authority held by BOI, Buzz, and other entities controlled by them should not be revoked on account of their repeated unauthorized service discontinuances, failure to pay USF and TRS contributions, failure to make the voluntary contribution required by the BOI Decree, failure to respond fully to the LOI, and repeated slamming complaints. The FCC also ordered that the hearing determine whether to impose a forfeiture order of $1,538,533.52 for the alleged violations resolved in the BOI Decree, a forfeiture of $15,900,000 for the failure to make voluntary contributions under the BOI Decree, a forfeiture of $32,060,000 for the post-BOI Decree failure to pay required USF and TRS contributions and unauthorized service discontinuances, and a forfeiture of $130,000 for each subsequent slamming violation.

The FCC concluded that this extensive list of apparent violations "plainly suggest[s] that the Kintzel brothers and the entities they control have little regard for the Commission's rules and the compliance responsibilities of a common carrier. Such egregious behavior is patently inconsistent with the obligations of a Commission regulatee and calls into question whether the Kintzel brothers are qualified to be and remain interstate common carriers." The Kintzel Order is clearly intended to deter any future violations of consent decrees or repeated violations following a consent decree. The forfeiture amount proposed for the failure to make the voluntary contribution under the BOI Decree ($15,900,000) is over *70 times* the underlying unpaid obligation ($224,700 as of September 10). Similarly, the proposed forfeiture of $32,060,000 is intended to deter violations of USF and TRS payment obligations, especially where there is a pattern of repeated violations. Compliance with consent decrees and with the rules at issue in consent decrees must be a carrier's top economic, as well as regulatory, priority.

Finally, on September 24, the Bureau released NALs against Liberty Phones, Inc. ("Liberty"), Ultimate Medium Communications Corp. ("UMCC"), and Rally Capital, LLC ("Rally"). The first two NALs involve Liberty's and UMCC's failures to satisfy repeated requests for responses to LOIs concerning their compliance with regulatory program filing and contribution requirements. Neither had filed all of its required Telecommunications Reporting Worksheets (Forms 499). The FCC determined in each case that the total failure to respond to the

LOI threatens the FCC's ability to adequately investigate rule violations, justifying an increase in the base forfeiture of $3,000 for failure to file required forms or information and $4,000 for failure to respond to an FCC communication, to a total proposed forfeiture of $20,000. Liberty and UMCC were also directed to respond to the unanswered LOIs or face further penalties.

The Rally NAL involves Rally's transfer of control of Telesphere Networks Ltd. ("Telesphere") to Rally prior to FCC approval in violation of Section 214 of the Act. Rally, a creditor of Telesphere, had converted its Telesphere debt to a majority interest in Telesphere equity shortly before Rally and Telesphere applied for FCC approval of the transfer of control of Telesphere to Rally. Rally claimed that it did not seek approval until after the transfer because Telesphere's "exigent financial circumstances precluded . . . timely . . . consent from" the FCC, but the FCC stated that such circumstances do not qualify as the type of transaction exempted from the prior approval requirement. The FCC found no reason to adjust the base forfeiture amount of $8,000 for unauthorized transfers of control and proposed a total forfeiture of $16,000 for the unauthorized transfers of Telesphere's domestic and international Section 214 authorities.

Federal Appeals Court Rules that States Lack Authority to Regulate Rates or Impose Requirements Under Section 271

On September 6, the United States Court of Appeals for the First Circuit decided *Verizon New England, Inc. v. Maine PUC*, involving state regulators' role in applying Section 271 of the Communications Act (the "Act"). The court held that state regulators lack authority to set rates or impose any other requirements under Section 271, which governs the conditions under which Regional Bell Operating Companies ("BOCs") may provide long distance services in their local service areas. The case arose from appeals of federal district court rulings reviewing orders by the Maine Public Utilities Commission ("Maine PUC") and New Hampshire Public Utilities Commission ("NH PUC"). The state PUC orders addressed Verizon's obligations to provide certain network elements to competitive local exchange carriers ("CLECs") and the rates it must charge for those elements as a condition of entry into the long distance service market under Section 271.

Resolution of these appeals required the court to construe the relationship of two sets of requirements imposed by the Telecommunications Act of 1996. Sections 251 and 252 of the Act establish a regime under which incumbent local exchange carriers ("ILECs"), including BOCs such as Verizon, may be required to provide unspecified unbundled network elements ("UNEs") to CLECs to facilitate local service competition. The FCC determined that UNE rates must be based on total element long-run incremental costs ("TELRIC"). Section 271(c)(2)(B) of the Act requires a BOC to meet a competitive checklist, including compliance with unbundling requirements similar to those imposed by Sections 251 and 252, as a condition of authority to enter the long distance market. The elements required to be unbundled are specified in Section 271(c)(2)(B).

Initially, the FCC imposed unbundling requirements under Sections 251 and 252 that overlapped substantially with the unbundling requirements spelled out in Section 271(c)(2)(B). In the *Triennial Review Order* and follow-up orders, however, the FCC held that local service competition would not be impaired if CLECs did not have access to certain UNEs, and "delisted" them from the Section 251/252 unbundling requirements. The FCC also held that the network facilities provided under Section 271 and delisted from Section 251/252 requirements would not have to be offered at TELRIC prices.

Verizon sought to enter the long distance markets in Maine and New Hampshire. Both states' PUCs endorsed Verizon's requests, conditioned on its tariffing of its Section 251/252 UNE offerings, to which Verizon agreed. Following the FCC's approval of Verizon's provision of long distance services under Section 271, disputes arose in both states as to the extent of required unbundling in the wake of the FCC's delisting of UNEs. Both PUCs required Verizon to continue providing the disputed elements under Section 271, and at TELRIC prices. Verizon sued to enjoin these requirements in federal district courts in Maine and New Hampshire. The former upheld the Maine PUC's interpretation that Section 271 required that the delisted elements continue to be offered and its authority to require TELRIC pricing under Section 271, while the latter held that Verizon had only agreed to tariff UNEs required by Sections 251 and 252 and that the NH PUC's imposition of TELRIC pricing would be preempted by the FCC's contrary policy.

On appeal, the First Circuit held that the PUCs' positions violate the statutory language, history, and policy of Section 271. Although Sections 251 and 252 provide for a dual federal-state enforcement regime, with state regulators overseeing the application of FCC policies, authority under Section 271 is granted exclusively to the FCC. Cross-references to Sections 251 and 252 in Section 271 do not delegate authority to the states to implement Section 271. The court also noted that judicial precedent and most state commissions support this conclusion. The PUCs argued that state law also requires the unbundling and TELRIC pricing they ordered, but the court held that such state requirements were preempted by the FCC's contrary policies. In particular, states may not require the unbundling of elements delisted under Sections 251 and 252 and not required by Section 271(c)(2)(B). Finally, as to those elements that the Maine PUC interpreted as being required to be unbundled by Section 271(c)(2)(B), the court held that the issue should be referred to the FCC for its interpretation of the Section 271(c)(2)(B) requirements. The Maine district court's ruling accordingly was vacated and remanded with instructions to refer the remaining issue to the FCC. The New Hampshire district court's ruling was affirmed.

The FCC Built a Disaster Information System; Will Communications Companies Come?

Communications companies (e.g., wireless, wireline, broadcast, and cable providers) have a new online tool to keep the FCC informed of infrastructure status during crisis – the Disaster Information Reporting System ("DIRS"). The FCC's Public Safety and Homeland Security Bureau ("PSHSB") created DIRS in response to the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks' recommendations regarding the collection of disaster-related outage and other situational awareness information. DIRS use is voluntary, but PSHSB has included easy-to-use data templates designed for each communications sector to entice organizations to participate. The FCC also attempted to foreclose any concerns about how the sensitive information would be handled and used, assuring communications companies that it would be treated as presumptively confidential when filed and not made publicly available. The FCC will share the information, however, with the Department of Homeland Security's National Communications System ("NCS") on a confidential basis as necessary.

Third Circuit Skeptical of FCC's Super Bowl Fine

The FCC did not receive a friendly audience in presenting its oral arguments to the U.S. Court of Appeals for the Third Circuit regarding the indecency fine it levied against CBS for Janet Jackson's alleged "costume malfunction" during the 2004 Super Bowl halftime show. The court grilled the government about the logic of the $550,000 penalty, which the FCC assessed based on its treatment of Ms. Jackson as a CBS employee. The bench criticized the agency's logic and warned that one likely effect of the FCC decision would be broadcasters refusing to exercise any control over performers for fear that they would then be held vicariously liable for the performers' actions. Although the court seemed most skeptical of the FCC's actions, CBS did not escape unscathed. The court questioned whether the network took all reasonable precautions to avoid the incident, highlighting that the broadcaster did not use available videotape delay technology, which would have prevented the airing of the incident. CBS was also asked to defend its contention that the FCC inadequately assessed the community standards that Ms. Jackson allegedly offended. When asked why the FCC was not allowed to base its decision on a general common-sense understanding of society, CBS responded that the FCC had "not demonstrated any expertise in [the] area." The consensus of observers at closing of oral arguments was that the case would be remanded to the FCC.

On a related indecency note, both houses of Congress are considering obscenity bills (HR-3559 and S-1780) that would re-empower the FCC to fine broadcasters for the airing of a single obscene or indecent scene. The bills were introduced in response to the U.S. Court of Appeals for the Second Circuit's remanding of the FCC's fleeting expletive policy. Broadcasters assert the bills will have a chilling effect on creativity, and the ACLU contends they are counter to the First Amendment.

FCC Chairman Martin Serves Up DTV Dual-carriage Concessions

All four commissioners voted to pass the controversial digital television ("DTV") dual-carriage order ("Order") on September 12, after FCC Chairman Kevin Martin handed out last-minute concessions, modifying his draft order. The draft order not only drew criticism from the commissioners, but also spawned a surge of lobbying from cable groups, including one threatened lawsuit. As written, the order required cable operators to carry some TV stations' analog and digital signals during the DTV transition, but without any exemptions based on operator size or capacity, or a defined ending date. In response to the outcry that dual-carriage imposed oppressive financial and capacity burdens on small rural cable operators, forcing them to reallocate bandwidth from profit-generating services (such as broadband) to accommodate the must-carry stations, and a full-court press by the commissioners, Chairman Martin incorporated a number of changes into the new Order. 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. And, the rule includes a three-year sunset, although the FCC could extend it beyond the February 12, 2012 expiration date.

Response was mixed to the incorporated compromises. Chairman Martin hailed it as a win for analog cable customers who will still get some signals beyond February 17, 2009. The American Cable Association was disappointed that a blanket exemption for small systems was excluded. Wall Street analysts saw the revision as blunting the blow to the cable industry, but still impacting it negatively. And, broadcasters, although they generally liked the modified rule, vowed to raise the program bits issue again nearer the DTV transition due to the lack of an objective standard for gauging the material degradation of picture quality during retransmission.

FCC Authorizes Use of Fixed Microwave Antennas in the 11 GHz Band

On September 10, the FCC issued an order allowing fixed service ("FS") operators in the 10.7-11.7 GHz ("11 GHz") band to use smaller two-foot (instead of four-foot) antennas. The rule change was intended to allow FS operators to benefit from the lower costs and enhanced capabilities associated with the smaller antennas, and to promote competition in the wireless backhaul market. The FCC adopted the rule change over the objections of satellite industry representatives, who raised concerns regarding the potential for harmful interference to mobile satellite service gateway earth stations operating in the 11 GHz band.

House Subcommittee Conducts Hearing on E911 Legislation, While Other Measures Are Introduced in Congress

In September, the House Telecommunications Subcommittee conducted a hearing to consider a bipartisan bill intended to spur deployment of Internet Protocol ("IP")-enabled 911 and E911 services. The bill would extend to Voice over Internet Protocol ("VoIP") providers the same liability protection enjoyed by wireline and wireless providers. VoIP providers also would be entitled to access the 911 infrastructure to complete emergency calls. Public safety groups and the VoIP industry expressed support for the bill. However, USTelecom, a trade association representing the telecommunications industry, stopped short of a full endorsement. The association raised concerns that the bill would grant access rights beyond those enjoyed by wireless carriers and would unduly restrict use of 911 database information for public policy purposes.

Meanwhile, Sens. Amy Klobuchar (D-MN) and Jay Rockefeller (D-WV) introduced legislation that would improve cell phone service for customers by requiring providers to prorate early termination fees and provide customers with more readable billing statements and detailed service quality maps. The measure also would require the FCC to examine unlocking handsets to allow customers to keep their phones when switching carriers. As expected, wireless industry representatives have criticized the bill as overly regulatory, while consumer groups endorsed the bill's pro-consumer provisions. The National Association of Regulatory Utility Commissioners also expressed support for the measure because it would allow state commissions and attorneys general to enforce its provisions.

FCC Extends Ban on Exclusive Programming Deals; Delays Cable Franchising Order

The FCC extended for an additional five years the ban on certain exclusive programming deals. On September 11, 2007, the Commission voted to maintain the prohibition on exclusive contracts between cable operators and their vertically integrated programmers until October 5, 2012. The ban has been in effect since the 1990s, but was set to expire October 5, 2007. Proponents of the exclusivity ban say such restrictions continue to be necessary to promote competition in the pay-TV marketplace by ensuring that cable companies cannot prevent competitors from accessing popular programming. In extending the ban, the Commission imposed newly expanded discovery requirements on cable operators, for example requiring them to produce all documents requested by a competing programmer filing a program access complaint.

Meanwhile, the Commission delayed indefinitely action on cable franchise reform when the item was pulled from the September 11 open meeting agenda. The cable franchising order would have addressed the authority of municipalities in refusing to award competitive franchises, and would have considered the further application of such restrictions on local authority in regards to incumbent franchisees.

FCC Begins to Pay Attention to Consumer Concerns over Early Termination Fees

Early termination fees, commonly imposed by wireless carriers and increasingly by other communications providers, are coming under increasing scrutiny by both state and federal regulators and Congress (see related article regarding recently introduced legislation). The requirement that wireless customers commit to multi-year service terms and the imposition of early termination fees on those consumers who terminate service prior to completion of the term have been a major source of consumer complaints against wireless carriers. Increasingly sensitive to these complaints, FCC Chairman Kevin Martin and Commissioner Robert McDowell recently urged the wireless industry to find a "consensus" solution to these complaints or risk having the FCC impose a solution on the industry. Both commissioners have hinted in recent public statements that prorating early termination fees would be a good start. Commissioner McDowell has stated, however, "[t]he government rarely does as good a job as the private sector when it comes to these sorts of things." Chairman Martin has warned that if the FCC does consider early termination fees this fall, it will not be limited to wireless services, as an increasing number of incumbent carriers and cable providers are imposing early termination fees on their customers.

State Regulatory Developments

The California Public Utilities Commission ("CPUC") recently issued several more decisions in its ongoing efforts to adopt pro-competitive policies for telecommunications services. In the first of two related decisions issued on September 6, D. 07-09-018, the CPUC further revised the rules governing "URF carriers" – those incumbent carriers that qualify for the relaxed regulatory scheme it has been implementing over the last year and a half – and allowed the URF carriers to request detariffing of services for which they do not have significant market power. Cal. Pub. Util. Code Section 495.7 requires the CPUC to find that the URF carriers do not have significant market power before it can permit detariffing of specific services. Section 495.7 only allows non-basic service to be detariffed and the CPUC specifically identified a number of other services for which detariffing is not in the public interest, including 911 services and dial-around or other forms of direct connection to interexchange carriers. In its second decision, D. 07-09-019, the CPUC adopted revised telecommunications industry rules to implement the detariffing decision and an expedited advice letter filing process for services that remain subject to tariff. For those services that continue to be subject to tariffs, most rate and service changes may be implemented via informal advice letters that will be effective on the day filed, although filings may be challenged up to 20 days after the filing date. Contracts for detariffed services will not need to be filed with the CPUC, although carriers may not unilaterally increase the rates or impose other more restrictive terms and conditions unless they provide customers with 30 days' notice and an opportunity to opt out of the contract. In response to consumer concerns, the CPUC made it clear that carriers may not amend or eliminate tariffs that include conditions or requirements imposed as a result of enforcement, merger, or complaint proceedings. Earlier this year AT&T (formerly SBC) sought to eliminate, by an advice letter, filing tariff provisions that had been imposed on SBC as a sanction in an investigation into marketing abuses. The CPUC previously suspended that filing and has scheduled hearings for later this year to consider whether it is appropriate to lift those sanctions.

California also revised its High Cost Fund B to reduce the subsidies provided to the incumbent carriers serving "high-cost" geographic areas. The High Cost Fund B subsidizes carriers serving geographic areas previously identified as high-cost and hard to serve. The CPUC determined, however, that a great number of the areas originally determined to be "high-cost" were now suburbs facing competition from both incumbent and competitive carriers. The CPUC decision will reduce the High Cost Fund B from $336 million to $121 million per year by the end of 2008, with the surcharge dropping from the current 1.3% of intrastate end-user charges to .5% on January 1, 2008. The CPUC reasoned that eliminating the subsidy will benefit competition by reducing the subsidies and the surcharge paid by consumers to support the fund.

The Maine Public Utilities Commission ("MPUC") also detariffed all retail services offered by competitive carriers and the retail service bundles and intrastate interexchange services offered by incumbents. In an Order issued on September 5 in Docket No. 2007-234, the MPUC rejected AT&T's request to retain tariffs for those services where it claimed that it cannot create a contract with customers, specifically for so-called casual calling and LEC-Connect calls, finding it "ironic" that AT&T should seek special consideration for these traditionally high-priced services. Despite detariffing and the concurrent elimination of the filed rate doctrine for the detariffed services, the MPUC concluded that the competitive telecommunications market is still transitional and that consumers will continue to expect a level of assistance from the Commission when disputes arise. Accordingly, the Order requires that utilities maintain web pages containing the rates, terms, and conditions for all services that have been granted detariffed status.

The Minnesota Public Utilities Commission has opened a proceeding to investigate how local exchange carriers recover public interest surcharges, including E911 charges, from business customers. The Commission initiated the investigation after the state's Commerce Department reported having received a number of consumer complaints about fee overcharges. The Commission has asked carriers to provide it with information regarding which services are subject to the surcharges and how they determine trunk and line equivalency.

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.

October 5, 2007	Effective date of **new VOIP rules regarding disability access and TRS requirements**.
October 15, 2007	Reply comments due regarding proposed changes to **annual regulatory fees for Broadband Radio Services**.
October 16, 2007	Quadrennial regulatory review reply comments due on **minority and female media ownership.**
October 29, 2007	Comments due on **roaming FNPRM.**

November 1, 2007	**Form 499-Q (Telecommunications Reporting Worksheet) due for universal service.**
November 5, 2007	Comments due on **17/24 GHz BSS reverse band FNPRM.**
November 19, 2007	**Hearing aid compatibility report** due.
November 28, 2007	Reply comments due on **roaming FNPRM.**