

## Legal Updates & News

### Bulletins

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#### Communications Law Bulletin, July 2009

July 2009

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#### The Month in Brief

The new Federal Communications Commission (“FCC” or “Commission”) continued to take shape in July as the Senate confirmed Meredith Baker, Republican and Mignon Clyburn, Democrat, as commissioners by a vote taken on Friday, the 24<sup>th</sup>. As a result of the Senate vote the FCC, which has been operating with three commissioners since Chairman Kevin Martin left the agency in January 2009, soon will have its full complement of five commissioners in place.

July also saw the confirmation of Jonathan Adelstein to head the Rural Utilities Service and a number of other developments that are covered here, along with our usual list of deadlines for your calendar.

### **D.C. Circuit Upholds FCC Forbearance Decision**

On July 17th, 2009, the United States Court of Appeals for the D.C. Circuit Court issued a decision upholding the FCC's grant of partial forbearance (from dominant carrier regulation, but not from basic common carrier regulation) to AT&T, Embarq, and Frontier for certain special access services (*i.e.*, special access not based on time-division multiplexing, or TDM, technology). Although the Court noted that the issue was "eminently debatable," it found the FCC's decision to be reasonable under the deferential standard of review appropriate to the case. The Court noted, however, that there is a special access rulemaking proceeding pending at the FCC, which would allow the FCC to reassess these issues, and so the forbearance decisions on appeal were not "chiseled in marble."

### **FCC Announces National Broadband Plan Schedule; NTIA/RUS Open First Round of Applications for Stimulus Funding**

#### ***FCC Announces National Broadband Plan Implementation Schedule***

At the July 2, 2009 Open Meeting, the FCC announced a schedule for development of the National Broadband Plan (the "Plan"), as required by the American Reinvestment and Recovery Act of 2009 ("Recovery Act"). Blair Levin, the FCC's coordinator for broadband initiatives, announced a schedule of staff workshops that cover various topics relating to the Plan, including wireline and wireless technologies, broadband adoption, opportunities for disadvantaged businesses, healthcare applications, and deployment strategies.

The staff workshops are designed to replace the usual *ex parte* meetings as a means of communicating with FCC decision-makers, and the public will be able to listen in on the workshops over streaming Web feeds. The staff workshops begin August 12, 2009 and close September 3, 2009 with a workshop focusing on "best practices" and "big ideas." Although the workshops are open to the public, the intent is for "key constituents," such as service providers, equipment providers, applications providers, community groups, and other groups that have a stake in the future of broadband, to participate. Members of the public may suggest topics and submit questions for the workshops at the following link: [http://esupport.fcc.gov/askfccapp/extapp/submitMsg.action?dept\\_id=bband](http://esupport.fcc.gov/askfccapp/extapp/submitMsg.action?dept_id=bband)

Interested parties have already had the opportunity to file comments and reply comments pursuant to a March Notice of Inquiry that made suggestions for the goals and structure of the Plan. A new round of comments, responding to the proposed staff workshops, is due to be filed by September 11, 2009.

Traditional *ex parte* meetings also are available. Beginning July 20, 2009, interested parties have been invited to schedule meetings with Commission staff through the General Counsel's office.

A new FCC website, <http://www.broadband.gov>, will be a clearinghouse for all important dates and developments on the Plan.

#### ***NTIA and RUS Issue Notice of Funds Availability for Stimulus Funds***

On July 1, 2009, the National Telecommunications and Information Administration ("NTIA") and the Rural Utilities Service ("RUS") jointly issued a Notice of Funds Availability ("NoFA") and solicitation of applications. The NoFA describes the availability of funds and application requirements for the broadband initiatives contained in NTIA's Broadband Technology Opportunities Program ("BTOP") and the RUS Broadband Initiatives Program ("BIP"), both of which are Recovery Act measures. BTOP and BIP collectively hold \$4.7 billion. BTOP funds are intended to support the deployment of broadband infrastructure in unserved and underserved areas, enhance broadband capacity at public computer centers, and promote sustainable adoption of broadband service. RUS projects funded through the BIP must serve areas where at least 75 % of the population lacks sufficient broadband access.

Up to \$1.6 billion in BTOP funds is available to be awarded under the July 1 NoFA and is allocated as follows:

- Up to \$1.2 billion in the "Broadband Infrastructure" category for projects that deliver broadband service through "last mile" or "middle mile" facilities to unserved and underserved areas. Any last-mile projects must provide service to the entire territory of each census block included in the service area unless a waiver is granted.
- Up to \$50 million in the "Public Computer Center" category to fund projects that expand computer center

capacity and for entities that permit the public to use these computer centers, such as community colleges and public libraries.

- Up to \$150 million in the “Sustainable Broadband Adoption” category for projects that promote broadband demand (*i.e.*, projects focused on broadband education, awareness, training, access, equipment, or support, particularly among vulnerable populations.)

BTOP applicants must have 20% in privately raised matching funds for each project. No project may be funded unless the applicant demonstrates that projects would not have been built without public funds.

Trade press coverage indicates that large numbers of qualified applicants are likely to seek stimulus money under this first NoFA, even with the nondiscrimination rules imposed on all grant recipients. These rules require recipients to offer interconnection “on reasonable rates and terms,” including the ability to connect to the public Internet and physical interconnections for the exchange of traffic. While the FCC has yet to decide the extent to which Net Neutrality or similar regulations should be part of the National Broadband Plan, the NoFA process will offer key insights into whether regulatory nondiscrimination mandates affect incentives to invest in and build broadband networks.

Finalists for grants under this first NoFA are expected to be announced by September 15, 2009, at which time NTIA will analyze the financial viability of the finalists. Winner of grant funding should receive the money by early November. Additional funds will be available in subsequent funding rounds, and all awards must be made no later than the statutory deadline of September 30, 2010.

#### **Comment Sought Under Broadband Data Improvement Act**

On July 24, the FCC released a Public Notice seeking comment on how to implement specific provisions of the Broadband Data Improvement Act of 2008 (“BDIA”). The BDIA requires the FCC to allow eligible entities access to the broadband data collected on FCC Form 477, but only subject to confidentiality requirements. Commenters should discuss strategies for aggregating Form 477 data before releasing it to eligible entities and how much Commission oversight is needed to enforce the confidentiality rules. Comments were due **July 30, 2009**, and reply comments are due **August 4, 2009**.

#### **Legislative Developments**

- **Private Broadband Investment Bill Introduced:** In mid-July, Senator Hutchison (R.-Tex.) introduced S. 1447, a bill to allocate \$1 billion of the \$7.2 billion in broadband stimulus funds for investment tax credits and bonds to encourage more private sector spending.
- **Spectrum Inventory Bills:** Both the House and Senate have introduced bills to require an inventory of federally-controlled radio spectrum to identify bands for reallocation for commercial use. The Senate bill, S. 649, approved by the Senate Commerce Committee July 8, would require the government to inventory spectrum from 300 MHz to 3.5 GHz. The scope of the House bill (H.R. 3125) is slightly broader, requiring inventory of spectrum from 225 MHz to 10 GHz. The Senate bill would amend the Communications Act, while the House bill would revise the National Telecommunications and Information Administration Organization Act. Both the House and Senate versions require the FCC and NTIA to conduct joint inventories of spectrum regulated by each agency. The House bill could more rapidly facilitate reallocation, because it requires both the FCC and NTIA to offer specific recommendations for superior uses for spectrum deemed eligible for conversion to commercial use. Both bills are still in preliminary stages, and any significant movements are unlikely until after the August recess at the earliest.
- **Senate Continues to Debate Cell Phone Jamming Bill:** Public safety organizations, states, and wireless industry players continue to lobby on proposed cell phone jamming legislation. The Safe Prisons Communications Act of 2009 (S. 251), introduced in January 2009, would legalize use of technology to jam cell phone signals in prisons. Officials from several states support the bill, while public safety and the wireless industry representatives oppose the technology and want Congress to find another way to prevent inmates from making calls on smuggled wireless devices. Senator Hutchison, who sponsored the bill, announced she would make revisions to S. 251 to accommodate the bill’s critics. For more information, see the *Wireless Developments* article in this month’s issue.

#### **FCC Seeking Comment on Spectrum Allocation for Medical Body Area Networks**

Traditionally, healthcare facilities rely on wired telemetry networks to monitor and collect patients' physiological data such as temperature, pulse, blood glucose level, blood pressure, and respiratory function. In these wired networks, patients are connected to monitoring equipment by cables, and each of their physiological functions are monitored by separate and uncoordinated links.

The FCC recently opened a rulemaking to allocate spectrum for Medical Body Area Networks ("MBANs") to monitor physiological data wirelessly, using body sensors placed on the patients. MBANs would eliminate the need for tethering patients to equipment and facilitate the aggregation and transfer of physiological data (to, for example, a remote location for evaluation). Such networks would "improve the safety, efficiency and quality of care provided to millions of American hospital patients," Commissioner Robert M. McDowell said.

The FCC adopted a Notice of Proposed Rulemaking ("NPRM") on June 29, 2009, seeking comment on allocating spectrum for MBANs in the 2.3, 2.4, or 5.2 GHz bands for operation of MBANs.

In particular, the Notice seeks comment on the allocation of the 2.3 – 2.4 GHz band and service rules to enable the operation of body sensor networks ("BSNs"). That band is used on a primary basis by federal and non-federal aeronautical mobile telemetry, federal radiolocation, and non-federal amateur services.

The NPRM also seeks comment on an alternative allocation proposed by the Aerospace and Flight Test Radio Coordinating Council in the 2.3 – 2.305 GHz and 2.395 – 2.4 GHz bands, and on the possibility of allowing MBANs operations in other bands, such as the 2.4 – 2.4835 GHz or 5.15 – 5.25 GHz bands.

The Notice also asks for input on potential interference with incumbent operations and possible approaches to mitigation.

Finally, the Notice seeks comment on service and eligibility rules, and various licensing schemes that would be appropriate for any of these bands under consideration.

### **Deregulation and Rule Streamlining Continue at State Level**

Certain service providers may find operating in Hawaii, Indiana, and California a bit easier following state efforts to deregulate and streamline requirements. Hawaii Governor Linda Lingle allowed S-603, which eliminates the requirement for the Hawaiian incumbent wireline carrier to obtain approval for new products and price increases, to become law without her signature. The new law references the "meteoric rise of wireless subscribers and Voice over Internet Protocol service" as competitive alternatives to traditional wireline services. Similarly, under state law 27-2006, the Indiana Utility Regulatory Commission ("IURC") will no longer regulate basic telecommunications services. The IURC, however, will continue to issue operating certificates to carriers, and will continue to be involved in other issues, including relay service, universal dialing codes, slamming, cramming, universal service, video franchising, resolution of carrier disputes, and providers of last resort.

The California Public Utilities Commission ("CPUC") recently updated and streamlined its service quality reporting requirements. According to the CPUC, General Order 133-C, as updated, relaxes service-quality testing requirements and eliminates monopoly-era reporting mandates. Going forward, carriers must notify the state of outages and report how long they take to install and repair service and to deal with customer inquiries. Carriers also must periodically report on service performance. Monopoly service providers have the most onerous reporting requirements, while resellers, wireless carriers, and Voice over Internet Protocol service providers can request exemptions. The information on service quality is similar to the data carriers currently file with the FCC. Wireless carriers also are required to display coverage maps on company websites and in stores.

### **Telecommunications Industry Comes Under Antitrust Scrutiny**

Antitrust law and the telecommunications industry have a tumultuous history. In fact, the competitive markets for electronic communications services in the U.S. today are largely a result of the landmark antitrust case that brought the divestiture of the massive Bell System monopoly in 1984.

Although today's telecommunications industry bears no resemblance to the monolithic Bell System of old, various segments of the industry still attract scrutiny from antitrust enforcers.

In July, that scrutiny came from the Department of Justice, which reportedly is conducting an internal review of competitive practices of wireless carriers, and from Senator Herb Kohl (D.-Wis.), who sent a letter to the Justice Department requesting an investigation of possible barriers to competition in the cell phone marketplace.

The specific focus of the Justice Department's internal review are not known, although reports suggest that the Department is interested in exclusive handset arrangements, rising rates for text messages, possible strengthening of roaming obligations, and access of smaller carriers to wireless spectrum.

### **New Chairman Focuses on FCC Public Safety Preparedness**

New FCC chairman Julius Genachowski began his term by directing a thorough review of the FCC's readiness to handle a public safety crisis. Genachowski sent a memorandum to David Furth, then-acting chief of the Public Safety and Homeland Security Bureau ("Public Safety Bureau"), asking various questions about the FCC's ability to function in a crisis. Genachowski had noted in the confirmation process that public safety is one of his top priorities, and the review appears to be the first step in ensuring the agency is fully prepared for any disasters that might occur.

The Genachowski memo specifically asked for a description of the FCC's emergency plans, including its primary responsibilities during a crisis that may affect communications infrastructure and services in the United States, as well as continuity of government operations. The memo further inquired about the FCC's crisis-training programs and exercises, and the FCC's performance in implanting its emergency plans in past "real world" incidents. In addition, the memo asked about the FCC's ability to detect and respond to cyber-attacks and public-health emergencies.

Chairman Genachowski also named Rear Admiral (ret.) Jamie Barnett as the new chief of the Public Safety Bureau. FCC veterans David Furth and Jennifer Manner took positions as bureau deputies.

### **Corrections Departments File Rulemaking Petition to Allow Cell Phone Jamming in Prisons**

More than two dozen states and two cities petitioned the FCC for a rulemaking to obtain permission to jam wireless signals from cell phones in prison facilities. The petition, signed by officials from 27 corrections departments, comes after months of heated clashes between prison administrators and other government officials, who want to use jamming equipment to obstruct inmates' efforts to smuggle illegal cell phones into prisons, and the wireless industry, which is concerned that the jamming equipment will cause significant harmful interference. Various public interest and public safety groups also have opposed the use of jamming equipment.

Section 333 of the Communications Act bars the use of jamming equipment, but the federal government may permit federal agencies to use jamming technology. The petition acknowledged the "legitimate" concerns of the wireless industry, but argued for a "strict framework that restricts jamming only to those correctional facilities where it can be configured to eliminate any impact on any legitimate spectrum users." It is unclear what position Julius Genachowski, the new FCC chairman, holds on this issue.

Congressional lawmakers also are debating vigorously whether prisons should be allowed to use wireless jamming technologies. Senator Kay Bailey Hutchison (R.-Tex.) has introduced legislation that would allow states to jam cell phone signals inside prison facilities and the Senate Commerce Committee has taken up the issue. These and other Congressional developments are discussed in the *Legislative Developments* article above.

### **Universal Service Fund Developments**

#### ***Congressional Committee Reports***

On July 7 and 9, 2009, the House and Senate Appropriations Committees released reports raising issues regarding the FCC's administration of the universal service fund ("USF") program. In a report accompanying the fiscal year 2010 financial services and general governmental appropriations bill, the House Appropriations Committee expressed concern "that some recipients of USF moneys have been the subject of unduly burdensome audits and that the results of those audits have not been effectively presented to improve expenditures from the USF going forward." In a similar report accompanying the Senate appropriations bill, the Senate Appropriations Committee also expressed concern "about the FCC's lack of proper oversight over USF programs" and "unnecessarily burdensome" audits of carriers receiving USF support. The Senate Committee directed the FCC to report within 60

days on its USF audit activities since fiscal year 2007, and noted that an analysis conducted by the Universal Service Administrative Company “reported no instances of fraud . . . and has recognized a generally high level of program compliance.”

#### **AT&T USF Contribution Methodology Petition**

On July 10, 2009, AT&T Inc. filed a “Petition for Immediate Commission Action to Reform its Universal Service Contribution Methodology,” in which AT&T reiterated its arguments in support of the telephone-numbers-based USF contribution methodology that AT&T and Verizon proposed last September. AT&T pointed out that the proposed third-quarter USF contribution factor - the percentage of interstate end-user revenues that a service provider must contribute to the USF -- of 12.9 percent is an all-time high and threatens the viability of the USF. AT&T argued that the jump of 3.5 percentage points in the contribution factor since the first quarter of 2009 underscores the fragility of the current revenue-based contribution system and the immediate need for reform. The instability of the current interstate revenue base, which is shrinking as consumers switch to other technologies, virtually guarantees that the contribution factor will grow, increasing the urgency of transitioning to a numbers-based system. Various “band-aids,” such as the cap on competitive eligible telecommunications carrier USF support, have not worked. “We are quickly reaching the point at which all voice services will be just one of many applications on the Internet, some of which contribute to universal service but the majority of which will not.”

AT&T pointed out that the volume of working telephone numbers, which are used for a variety of communications technologies, continues to grow, ensuring a stable, low per-number contribution fee. Moreover, a numbers-based system would be far easier to administer and more difficult to evade than the current revenue-based system. AT&T also noted that a numbers-based system would shift more of the burden of supporting the USF from residential to business users. Finally, a numbers-based system would meet the statutory goals of predictability and sufficiency far better than the current regime, and only a numbers-based system is sufficiently robust to support any new universal service broadband initiatives. AT&T Senior Vice President Robert Quinn emphasized the need for immediate action, noting that moving to a numbers-based system will require 12-18 months to implement once the FCC acts.

Given the new FCC Chairman and commissioners, some observers stated that the AT&T petition is likely to spur the FCC to refresh the record on USF contribution issues, although others pointed out that the record is complete. Verizon endorsed the petition, while Dan Mitchell, Legal Vice President of the National Telecommunications Cooperative Association (“NTCA”), which represents rural carriers, condemned it as “a propaganda piece.” NTCA filed a response to the petition on July 28 stating that the contribution factor is not unreasonably high, given the rising costs of other consumer goods and services, and noted that it amounts to only \$0.80 per month on a typical residential landline telephone bill and \$2.13 on a typical monthly residential wireless bill. NTCA asserted that a telephone-numbers-based system would lock USF contributions into a backwards-looking technology that is becoming increasingly irrelevant in a broadband world not based telephone-number connections. It accused AT&T of advocating a numbers-based system so that AT&T could later avoid USF contribution obligations by moving its customer base away from telephone-number-based services. NTCA argued that the FCC should retain the current revenue-based contribution system, while requiring contributions from all broadband providers to ensure long-term stability of the USF revenue base.

#### **Nebraska/Kansas Intrastate VoIP USF Petition**

On July 16, 2009, the Nebraska Public Service Commission (“Nebraska PSC”) and Kansas Corporation Commission filed a petition requesting that the FCC declare that state universal service funds may assess intrastate revenues from “nomadic” voice over Internet protocol (“VoIP”) services, *i.e.*, services that enable VoIP users to make and receive calls at any location where they can find an Internet connection. The petition also requests that the FCC set forth a “safe-harbor” mechanism for calculation of assessable intrastate revenues for state universal service contribution purposes. The petition notes that the FCC has already taken the position that its rules do not preempt state universal service fund assessments on intrastate nomadic VoIP revenues, as long as the intrastate revenues are calculated in a way that does not conflict with the calculation of interstate VoIP revenues for purposes of universal service contributions.

The petition was filed in response to a decision by the United States Court of Appeals for the Eighth Circuit, applying the FCC’s 2004 *Vonage Preemption Order*. In the 2004 order, the FCC preempted state entry and rate regulation of nomadic VoIP services on the ground that the FCC’s decision not to subject those services to authorization and tariff regulation would be frustrated by state entry and rate regulation because of the impossibility of determining whether nomadic VoIP calls are interstate or intrastate in nature. In May of this year, the Eighth Circuit interpreted the *Vonage Preemption Order* to preempt the Nebraska PSC from requiring Vonage Holdings Corp. to collect a state universal service surcharge from the customers of its nomadic VoIP service. Based on the

position taken by the FCC in its *amicus* brief to the Eighth Circuit, which the court ignored, the state petition argues that, unlike state entry and rate regulation, assessment of intrastate revenues for purposes of a state universal service program does not conflict with the FCC's assessment of interstate revenues for federal USF contribution purposes. The petition also argues that, because the Eighth Circuit opinion was based on a prior FCC order, the FCC is not precluded by that opinion from issuing a new order on the issue. The petition notes that its position is strongly supported by the FCC's 1997 ruling that state assessment of wireless carriers for USF contribution purposes does not constitute state entry or rate regulation of wireless carriers.

The states' concern about the potential impact of the Eighth Circuit opinion is well-founded. Based on that opinion, a federal district court in New Mexico has now dismissed a lawsuit filed by the New Mexico Public Regulation Commission seeking to subject Vonage to a state USF surcharge. There may be more such litigation as state commissions seek to subject nomadic VoIP services to state USF contribution obligations.

### 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.

<b>August 3, 2009</b>	Effective date of <b>local number portability rules requiring completion of simple wireline-to-wireline and simple intermodal port requests</b> within one business day.
<b>August 3, 2009</b>	Comments due on <b>NPRM regarding further changes in local number portability rules</b> .
<b>August 4, 2009</b>	Reply comments due on provision of <b>aggregate Form 477 data</b> .
<b>August 5, 2009</b>	<b>Auction No. 86 (BRS)</b> seminar.
<b>August 5, 2009</b>	Filing window opens for applications for <b>Auction No. 86 (BRS)</b> .
<b>August 18, 2009</b>	Short-form applications due for <b>Auction No. 86 (BRS)</b> .
<b>August 21, 2009</b>	Comments due to NTIA on <b>Commercial Spectrum Enhancement Act NOI</b> .
<b>August 31, 2009</b>	Reply comments due on <b>NPRM regarding further changes in local number portability rules</b> .