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The Month in Brief

As economic turmoil continued to dominate the news and the government's attention in March, the Administration made two important regulatory nominations and the new Federal Communications Commission ("FCC" or "Commission") began to take shape. On other fronts, the stimulus package and its broadband deployment programs advanced, the debate over Net neutrality was revived, and the digital television transition deadline grew closer. These and other developments are covered here, along with our usual list of deadlines for your calendar.

Genachowski, Adelstein Nominations Advance

President Obama has formally nominated Julius Genachowski as the new Chairman of the FCC and has nominated former FCC commissioner Jonathan Adelstein as Administrator of the Rural Utilities Service (“RUS”).

Genachowski is slated to complete Adelstein’s term on the Commission, which expires in 2013. The Administration referred the nomination to the Senate Commerce Committee, in hopes that the Senate will act on the nomination between its return from the Easter break and its adjournment for the Memorial Day recess.

In the meantime, Adelstein’s nomination to the RUS position will be taken up by the Senate Agriculture Committee, which has not yet set a date for hearings.

If and when Genachowski is confirmed, the Commission will have two Democratic commissioners and one Republican commissioner, leaving the Administration to nominate one additional Republican and one additional Democrat before the full complement of commissioners is in place.

All Eyes Turn to Broadband Grant Programs in March

In March, the FCC and the National Telecommunications and Information Administration (“NTIA”) began in earnest the rollout of a national broadband strategy and broadband grants program established by the American Recovery and Reinvestment Act of 2009 (“ARRA”), enacted in February. Both the FCC and NTIA are offering several opportunities for public comment on various broadband programs, with comment deadlines through March, April, and May.

- **NTIA and RUS Issue Request for Information on ARRA’s Broadband Stimulus Program.** NTIA and the RUS have begun assembling the nuts and bolts of the ARRA’s Broadband Technology Opportunities Program (“BTOP”). See [February issue](#) of this Bulletin. NTIA announced plans to hold at least three rounds of applications for broadband grants and loans, in April–June 2009, September–October 2009, and April–June 2010. NTIA is tentatively planning three additional programs under which parties could apply for funding in addition to the broadband deployment projects – for broadband mapping, broadband demand stimulation, and broadband service to public computer centers.

NTIA’s swift planning for grant rounds is driven by the ARRA’s mandate that all grant awards be made by the end of fiscal year 2010 (09/30/2010). On March 12, NTIA and RUS released a joint Request for Information (“RFI”) seeking input on fifteen key issues, including how to apportion the total BTOP funds across the several statutory goals of the program; the role of the states in administering the BTOP; identification of entities eligible for grants and loans; criteria for evaluating applications and choosing grant recipients; broadband demand stimulation; broadband mapping; and measuring and monitoring the success of BTOP grants. **Comments on the RFI are due April 13, 2009.**

NTIA and RUS also held several public hearings between March 16 and March 24 on various elements of their respective ARRA programs, four in Washington, D.C. and two in Las Vegas, Nevada and Flagstaff, Arizona. The hearings featured roundtable discussions, each with four to six participants representing a broad array of views and backgrounds, and an allotted time for questions from the audience. The roundtables focused on how to define key terms in the ARRA (for example, “broadband” and “underserved”); what are the unique challenges of building out broadband to rural and difficult-to-serve areas; how NTIA should identify entities eligible for BTOP grants; how NTIA should implement the ARRA’s requirement that BTOP grantees adhere to rules requiring open and nondiscriminatory network management practices; and how to ensure post-award compliance and oversight.

- **FCC Seeks Comment to Assist and Consult with NTIA.** The FCC is required under ARRA to develop a National Broadband Plan (“NBP”) and to assist NTIA and RUS with their broadband programs. The NBP development will begin at the April 8 Open Meeting.

Congress did not give the FCC any funds to distribute under the ARRA, but the Commission will offer its expert, technical advice to NTIA and develop the NBP. Acting FCC Chairman Copps promised an “open, participatory, public process with a far-reaching notice of inquiry to marshal the data and expertise we need to . . . [give] Congress and the American people a national broadband strategy worthy of the name.”

In a March 24 Public Notice, the FCC established procedures for public comment as part of the

Commission's "consultative role" in the ARRA's broadband programs. Because the FCC's role is confined to assisting NTIA with broad policy matters, the Commission stated explicitly that it would not accept meetings on individual projects or requests for funding. Rather, commenters should weigh in on how the FCC can help NTIA and RUS craft key definitions of terms set forth in the ARRA; the non-discrimination obligations that will be contractual conditions of BTOP grants; and the network interconnection obligations that will be contractual conditions of BTOP grants. **Comments are due April 13, 2009 in GN Docket No. 09-40.**

- **Rural Broadband Strategy Under the 2008 Farm Bill.** On March 10, the FCC called for comment on developing a rural broadband strategy, which the Commission was required to develop under the Food, Conservation, and Energy Act of 2008 ("Farm Bill"). The FCC must submit its report to Congress by May 22, 2009. The rural broadband strategy developed in this comment cycle will be incorporated into the FCC's role as consultant to the NTIA under the ARRA. Among other things, the FCC's rural broadband strategy should include recommendations to promote interagency coordination of federal policies, procedures, and resources; coordinate existing federal rural broadband or rural initiatives; coordinate both short- and long-term needs assessments and solutions for a rapid build-out of rural broadband; and identify specific federal agency programs and resources that can best respond to rural broadband requirements. **Comments were due March 25, 2009 in GB Docket No. 09-29.**
- **Omnibus Appropriations Bill Contains \$3 million for FCC Broadband Grants.** Even though, as noted above, the FCC will not award broadband grants under the ARRA, the Omnibus Appropriations Act, signed into law in mid-March, provides \$3 million for an FCC-administered broadband grant program. The Commission will receive \$342 million overall for its operating expenses, with the \$3 million set aside for a "State Broadband Data and Development" matching grants program for broadband mapping and "broadband demand aggregation activities."

FCC Continues to Revise DTV Rules as Transition Looms

During March, the FCC struggled to balance consumer education initiatives on the digital television ("DTV") transition with broadcasters' need for flexibility in determining when to cease analog programming. With the June 12, 2009 hard deadline for the DTV transition less than three months away, the FCC continued to release orders implementing the DTV Delay Act (S. 352) (changing the DTV transition date from February 17, 2009) and revised yet again the procedures the broadcasters must follow if they plan to transition early. The delay aims to give consumers more time to plan for the end of analog broadcasting, and NTIA announced on March 24 that the backlog for \$40 DTV converter box coupon requests had been cleared and that additional funding had been secured to respond to ongoing coupon requests.

The Commission's most significant challenge arises when several broadcasters in a given market plan to follow newly established procedures for ending analog programming before June 12, thus leaving viewers with no or reduced analog service for the next three months. At the March 6 FCC Open Meeting, all three FCC commissioners expressed concern that some consumers would experience DTV reception problems because of stations' decisions to make early transitions. Although periodically scanning available DTV channels through a consumer's converter box will help identify available DTV signals, the FCC fears consumers will be confused. FCC Call Centers reported that the vast majority of technical questions received to date related to scanning and reception issues.

The Commission also has been continuously revising its DTV Consumer Education rules to mitigate burdens on broadcasters while providing consumers with accurate and timely updates on the transition. On March 3, the Commission announced a temporary waiver of the requirement that television stations begin airing a 100-day DTV transition countdown. The waiver was in effect pending release of further rules implementing the DTV Delay Act, which came out 10 days later.

On March 13, the FCC released its Third Report and Order and an Order on Reconsideration ("Third R&O") implementing the DTV Delay Act. The rules adopted require further actions by broadcasters to prepare consumers for the DTV transition while maintaining some flexibility for broadcasters planning an all-digital switch prior to June 12. At this time, stations still broadcasting in analog may not switch to all-digital broadcasts before April 16, 2009. The Third R&O will probably cause some stations that were considering transitioning to all-digital broadcasting before the June 12 hard DTV deadline to reconsider in light of additional filing and consumer education requirements imposed.

Highlights of the DTV Third R&O:

- *Expanded Procedures for Stations Planning to Terminate Analog Service Before June 12.*

The FCC previously required stations that have not yet terminated analog service to file a binding notice of their proposed analog service termination date by March 17, 2009. The Third R&O adopts the new Analog Service Termination Notification form ("ASTN"), which must be filed by every station that has not yet terminated analog service.

Any station that does not properly file its ASTN will not be permitted to terminate analog service prior to June 12, 2009, except in the case of equipment failure, natural disaster, or other unforeseeable emergency.

Those stations that end analog broadcasting before April 16, 2009 now must air viewer notifications for at least 30 days before they cease analog service. No new viewer notifications are imposed on stations transitioning on June 12.

Noncommercial stations experiencing significant financial hardship may terminate analog service beginning on March 27.

- *Major Networks and Their Affiliates Must Broadcast Critical News and Emergency Information Until the End of the DTV Transition.*

Affiliates of the major networks (ABC, CBS, Fox, and NBC) planning to terminate analog service prior to June 12 must certify on the ASTN that at least 90% of each station's analog viewers will receive continuing analog service from another major network affiliate through June 12.

The remaining analog service may be regular analog programming or "enhanced nightlight" service (*i.e.*, critical news, public affairs, and emergency information).

If more than 10% of the analog viewers of a major network affiliate lose service from all major network affiliates, then that major network affiliate is responsible for other public interest conditions, including requirements for walk-in help centers, consumer referral telephone numbers, and DTV education and outreach.

- *DTV Consumer Education Initiative Expanded for All Broadcasters, Regardless of Early Analog Termination Plans.*

The Third R&O adopts new and additional DTV education requirements, all effective April 1, 2009:

- If the FCC's Signal Loss Report predicts that 2% or more of the population in a station's Grade B analog service contour will not receive the station's digital signal, the station must air service loss notices.
- All stations must include information about the use of antennas as part of their consumer education campaign, including information concerning a station's change from the VHF to UHF bands.
- All stations must include information in their consumer education campaigns to inform and remind viewers about the importance of periodically using the rescan function of their digital televisions and digital converter boxes.
- Every station must air notices providing the location and operating hours of walk-in DTV help centers in the station's market area; the FCC Call Center telephone number and TTY number; and the station's telephone number for receiving consumer referrals and calls from local viewers.

The Third R&O eliminates other DTV education requirements. For example, stations that participate in the post-transition Analog Nightlight Program are now exempt from post-transition consumer education obligations broadcast on the new digital station.

State Commissions Address Carriers' Interconnection Rights

State commissions have issued inconsistent rulings on the right of Intrado Communications, Inc. to interconnect with incumbent local exchange carriers ("ILECs") in order to provide its Internet protocol-enabled 911 service to public safety answering points ("PSAPs"), the public safety agencies that receive 911 calls. Section 251(c)(2) of the Communications Act ("the Act") requires ILECs to provide to requesting carriers interconnection with the ILEC's network on specifically defined terms to enable requesting carriers to provide "telephone exchange service," *i.e.*, local telephone service, as well as access services. The Florida Public Service Commission, on reconsideration of its previous order, and the Illinois Commerce Commission, in a proposed arbitration decision, recently found that Intrado's 911 service does not constitute "telephone exchange service," while the Ohio Public Utilities Commission ("Ohio PUC") found that it does. Meanwhile, the North Carolina Utilities Commission is holding in abeyance an arbitration between Intrado and Verizon on this issue pending resolution of an FCC proceeding involving similar Intrado interconnection issues in which the FCC preempted the Virginia Corporation Commission under Section 252 of the Act.

The Act defines "telephone exchange service" as service that is either "*intercommunicating service* of the character ordinarily furnished by a single exchange" or "comparable service . . . by which a subscriber can *originate and terminate* a telecommunications service." The FCC has found that "intercommunicating service" is one that "permits a community of interconnected customers to make calls to one another." The commissions ruling against Intrado found that its 911 service is not exchange service because: (1) it only permits calls by end users to PSAPs, rather than enabling "intercommunicating" among a wide community of interconnected users, and (2) it does not include call origination because its PSAP customers only receive or redirect 911 calls using Intrado's service; they cannot originate calls with it. Those commissions rejected Intrado's argument that a PSAP's ability to redirect a call to another PSAP by means of Intrado's "hookflash" feature constituted a form of call origination.

The Ohio PUC found, on the other hand, that even the "minimal" amount of intercommunication between end users and PSAPs and among PSAPs enabled by Intrado's 911 service met the "intercommunicating" criterion and that the ability of one PSAP to call another PSAP, in redirecting an end user 911 call, met the call origination and termination requirement. Accordingly, the Ohio PUC determined that Intrado is entitled to all Section 251(c)(2) interconnection rights of a competing provider of exchange services. None of these decisions addressed rights under other subsections of Section 251(c) afforded to providers of "telecommunications service," a broader term than the services covered by Section 251(c)(2).

It should be noted that, according to the Florida commission, although Intrado cannot obtain the specific interconnection rights afforded to a competing provider of local exchange service under Section 251(c)(2), Intrado can still negotiate agreements under the more general interconnection rights available to all carriers under Section 251(a) of the Act. Carrier interconnection rights under Section 251(a) and Section 251(c)(1), which require ILECs to negotiate the terms and conditions of the rights afforded to all local exchange carriers ("LECs") under Section 251(b), was addressed in a recent Michigan Public Service Commission ("PSC") order involving Comcast Phone of Michigan, LLC. Although Comcast withdrew from providing regulated local exchange and toll service in Michigan in 2007, the PSC found that, as a licensed LEC in Michigan, Comcast has the right to negotiate interconnection agreements under Sections 251 and 252. The PSC pointed out that carriers often negotiate interconnection agreements before they start providing service and that requiring carriers to serve customers before they negotiate agreements would effectively block new entry. The PSC rejected TDS's argument that Comcast should not be allowed to retain its license because it does not provide local or toll service currently, explaining that an arbitration proceeding is not the appropriate forum for challenging the validity of a license.

Enforcement Actions Address Unlicensed and Unauthorized Service Issues

On March 3 and 11, the Spectrum Enforcement Division ("Division") of the Enforcement Bureau ("Bureau") released Notices of Apparent Liability ("NALs") alleging unlicensed satellite operations. The March 3 NAL states that SES Americom, Inc. ("SES") apparently operated the Satcom C-3 geostationary C-band satellite for nearly three months after its license expired in December 2007. SES failed to notice its lapse until March 2008, when it filed a request for special temporary authority to continue operating Satcom C-3 and, a week later, a request for an extension of the license until the end of 2010, which was granted in June 2008.

The Division proposes a forfeiture of \$12,800, based on a number of factors. It proposes the full \$3,000 base forfeiture amount for failure to timely file a request to extend the license but only half of the base amount of \$10,000, or \$5,000, for operating a station without authority, explaining that a licensee operating a station with an expired license is in a better position than a pirate broadcaster who lacks any prior authority. "To ensure that

forfeiture liability is a deterrent," however, the Division then adjusts the aggregate base forfeiture of \$8,000 upward to \$16,000 in light of SES's size and ability to pay, but adjusts that amount downward to \$12,800 because SES voluntarily disclosed its violation and undertook corrective measures prior to any FCC inquiry or enforcement action.

The March 11 NAL alleges that Lockheed Martin Corp., Inc., continued to operate two satellite earth stations after their licenses expired in August 2007 and failed to file a petition for reinstatement of expired licenses until May 2008. In its petition, Lockheed also admitted that it used one of the earth stations to communicate with a satellite, and to operate on frequencies, not previously authorized for that earth station following the expiration of the station's license.

The Division proposes a forfeiture of \$24,800 for the unauthorized operation of the two earth stations, based on similar factors as the proposed SES forfeiture. The main difference is that, in the case of the earth station operated in a manner that had never been authorized, the \$10,000 base forfeiture for operating a station without authority is not reduced. Thus, the aggregate base forfeiture is \$8,000 for one earth station, similar to SES's base forfeiture, but \$13,000 for the other. The resulting aggregate base forfeiture is adjusted upward to \$31,000 in light of Lockheed's size and ability to pay, but then is adjusted downward to \$24,800 in light of Lockheed's voluntary disclosure. These NALs are textbook illustrations of the FCC's application of forfeiture adjustments and should be kept in mind in assessing what to do in case a licensee discovers that it is in violation of FCC rules.

On March 23, the Bureau released an order adopting a consent decree with Yukon-Waltz Communications, Inc. ("Yukon") terminating an investigation of Yukon's possible provision of international telecommunications service without authorization and without registering with the Universal Service Administrative Company ("USAC"). Apparently, the investigation grew out of Yukon's disclosure of facts related to its compliance with the FCC's interstate and international authorization and USAC registration requirements. Under the consent decree, Yukon agrees to establish and maintain a compliance plan for two years, including an education program for the company's managers and other personnel responsible for federal regulatory compliance regarding the company's responsibilities to maintain appropriate FCC authorizations and the USAC registration requirements. If it is unclear about implementation of this plan, Yukon agrees to consult with regulatory counsel and will file periodic compliance reports with the Bureau. Yukon also agrees to make a voluntary contribution to the U.S. Treasury of \$40,000. This consent decree illustrates the need to obtain all required authorizations and that even proactive voluntary disclosures do not relieve a carrier of potential liability for noncompliance.

Legislative Developments

Congress considered a wide variety of telecom and media legislation during March, covering everything from satellite to wireless spectrum to prepaid calling card issues.

- **House and Senate Continue to Consider Satellite Re-authorization Issues:** Congress announced plans in March to undertake a comprehensive review of the Satellite Home Viewer Improvement Act ("SHVIA"), some sections of which expire in 2009. Potential legislation likely will focus on the regulated rates that satellite operators pay for use of copyrighted content, which some consider to be below market. If Congress eliminates the current royalty system, content owners could initiate individual negotiations for what satellite systems pay to carry their programs. Congress will also consider rules that regulate carriage of distant network signals (*i.e.*, NBC, ABC, CBS, and Fox programming from large metropolitan markets) to be offered to satellite customers all around the country, particularly in markets where terrestrial broadcasting is not available. Congress could require satellite operators to offer customers signals from the closest local market. Broadcasters will be lobbying for a requirement that satellite carriers provide this "local-into-local" service in all 210 markets before 2011.
- **Spectrum Inventory Legislation Proposed in Senate:** On March 20, Senator Kerry (D-Mass.) introduced S. 649, the Radio Spectrum Inventory Act, a bill to require NTIA and the FCC to prepare comprehensive inventories of all radio spectrum that each agency regulates. Inventories would have to be finished within 6 months of the bill's enactment. Because it would potentially free up new spectrum for commercial use, the measure enjoys the support of the wireless telephony industry.
- **Proposed Ban on New Wireless Phone Taxes:** In the House, Representatives Lofgren, (D-Calif.) and Franks (R-AZ) introduced H.R. 1521, a bill prohibiting states and localities from levying new taxes on mobile phone services for 5 years.

- **Fairness Doctrine Back in the News:** In early March, the Senate passed a bill that included an amendment to prohibit the FCC from reinstating the Fairness Doctrine. The Fairness Doctrine, which was abolished in 1987, was an FCC policy requiring broadcasters to present controversial issues of public importance in an equitable and accurate manner. About a week later, however, the Senate rejected the amendment, which had been attached to the 2009 Appropriations Bill that passed March 9.
- **2009 House Telecom Subcommittee Priorities:** Representative Boucher (D-Va.), Chair of the House subcommittee that oversees telecommunications, announced the top three priorities for the year: (1) the satellite re-authorization bill; (2) Universal Service Fund issues; and (3) Internet privacy legislation. Boucher also promised close oversight of the NTIA's use of \$650 million to support the DTV transition and NTIA/RUS spending under the broadband appropriation in the American Reinvestment and Recovery Act of 2009 (the stimulus bill).
- **Satellite Tax Relief Bill:** House Judiciary Chairman Conyers (D-Mich.) and Representative Boucher (D-Va.) introduced H.R. 1919, a bill to grant tax relief to satellite TV operators. States would be prohibited from imposing different tax rates for different technology platforms for delivery of multichannel video programming (*i.e.*, cable, IP-TV, etc.). Several states impose higher tax rates on satellite operators than on other kinds of providers.
- **Senate Renews Attempts to Crack Down on Prepaid Calling Cards:** Senator Nelson (D-Fla.) introduced the Prepaid Calling Card Consumer Protection Act of 2009 legislation on March 10. The bill would place new regulations on prepaid calling card providers, including restrictions on undisclosed fees, calling rates, and cards that expire shortly after purchase.
- **House Approves Cellphone Recycling Bill:** In late March, the House Science and Technology Committee approved H.R. 1580, the Electronic Devices Recycling Research and Development Act. The legislation aims to facilitate and increase recycling of wireless phones and certain other kinds of consumer electronics devices.

Net Neutrality Issues Revived in Broadband Stimulus Debate

Net neutrality issues are again front and center, now in the context of the broadband stimulus program. (See "All Eyes Turn to Broadband Grant Programs in March," this issue.) NTIA and the FCC are seeking comment on a range of specific issues, including what nondiscrimination obligations should be contractual conditions of broadband stimulus grants. At a minimum, the American Recovery and Reinvestment Act of 2009 requires grant recipients to comply with the principles contained in the FCC's 2005 Broadband Policy Statement. Proponents of Net neutrality are lining up to support more specific open access requirements on grant recipients, while others warn that a major battle on this issue could thwart the impact of the broadband stimulus program.

Meanwhile, Rep. Rick Boucher (chairman of the House Telecommunications Subcommittee) has announced that he is having discussions with "two major opposing parties" in the Net neutrality debate in an attempt to reach an understanding of what constitutes appropriate network management practices. Rep. Boucher hopes that such an understanding might be adopted by a broader group and thus forestall the need for specific Net neutrality legislation, or alternatively serve as a blueprint for legislation if Congress later decides that it needs to act on the issue.

FCC Overhauls Submarine Cable Regulatory Fees

In a long awaited decision, the FCC modified its methodology for assessing regulatory fees for submarine cable circuits. The FCC had committed last August to reevaluate these fees. The new methodology substantially follows the proposal that was submitted by the cable operator industry last year. It will go into effect this fiscal year.

The existing methodology for assessing regulatory fees on undersea cables is based upon the capacity of submarine international bearer circuits ("IBCs"). The new methodology will calculate regulatory fees for submarine cable systems on a flat per cable landing license basis, with lower fees for smaller systems. Regulatory fees will no longer be assessed on individual submarine IBCs. The new methodology applies to all cable systems and does not distinguish between common carrier and non-common carrier systems.

The FCC will categorize each submarine cable as a “large” system or a “small” system, and the small systems will be further subdivided depending on capacity. Each large system will be assessed one “payment unit” and each small system will be assessed a percentage of one payment unit depending on its size, according to the following scale:

Large systems	20 Gbps or greater	One payment unit
Small systems	10 Gbps or greater, but less than 20 Gbps	50% of one payment unit
	5 Gbps or greater, but less than 10 Gbps	25% of one payment unit
	2.5 Gbps or greater, but less than 5 Gbps	12.5% of one payment unit
	Less than 2.5 Gbps	6.25% of one payment unit

The FCC warns, however, that this allocation may change from year to year depending upon the FCC’s revenue requirements, conditions in the submarine cable industry, and other factors. Any changes would be considered in the FCC’s annual regulatory fee Notice of Proposed Rulemaking (“NPRM”). The amount of a payment unit also will be determined in each year’s regulatory fee NPRM, which is usually released in May or June. The FCC did not modify its methodology for calculating regulatory fees for terrestrial or satellite IBCs, which remain capacity-based fees.

The decision adopts a much simpler structure for assessing regulatory fees on submarine circuits, and thus will likely result in increased uniformity and compliance within the submarine cable industry. However, the specific monetary impact of the decision will not be known until the FCC issues its annual regulatory fee NPRM and until the industry decides if and how to pass through these fees to their customers under existing and future contracts.

Wireless Developments

FCC Rejects Another STA Request for Prison Demonstrations of Jamming Technologies

The FCC’s Wireless Telecommunications Bureau has rejected CellAntenna Corporation’s latest request for special temporary authority (“STA”) to demonstrate its cell phone jamming technology for prison facilities. Despite the Bureau’s initial grant of a similar STA request under the administration of former FCC Chairman Kevin Martin, the latest decision represents the second STA denial under the Acting Chairman Michael Copps.

Prison administrators and other government officials want to use jamming equipment to obstruct inmates’ efforts to smuggle illegal cell phones into prisons, but the wireless industry continues to oppose the use of the technology because it would interfere with lawful communications. In this case, CellAntenna sought an STA to conduct jamming tests at the Pine Prairie Correctional Center in Louisiana. CellAntenna argued that because the Louisiana prison houses federal inmates, it is exempt from Section 333 of the Communications Act, which bars the use of jamming equipment. The Bureau, however, rejected this argument and concluded that the proposed tests would violate Section 333.

CellAntenna, however, is not giving up. It hopes to convince a federal law enforcement agency, such as the Federal Bureau of Prisons, who are exempt from the jamming prohibition, to conduct a demonstration. CellAntenna also stated that a state prison that houses federal inmates may seek an STA in its own right.

Appeals Court Rejects AWS-3 Challenge by M2Z

The U.S. Court of Appeals for the District of Columbia Circuit rejected M2Z Networks, Inc.’s (“M2Z”) legal challenge of the FCC’s 2006 decision to reject the company’s application and related forbearance petition to provide free nationwide broadband service in the 2155-2175 MHz advanced wireless service (“AWS”) spectrum. The FCC instead decided that it would likely auction the spectrum.

M2Z had argued that the FCC violated the Communications Act when it denied M2Z’s request by not fully

considering the competitive market conditions and concluding that M2Z would not offer a new technology or service (thus not shifting the burden to those opposing M2Z's proposal to show why it was not in the public interest). Although the court found M2Z's arguments "ingenious" and "creative," it also concluded that they had no legal merit. According to the court, "the FCC's analysis of the effects of M2Z's breathtakingly broad petition on competitive market conditions was so plainly unobjectionable that it didn't warrant any further discussion by the Commission." The court further concluded that the FCC correctly assessed the public interest.

The FCC is still considering final service rules for the AWS-3 band. Under former FCC Chairman Kevin Martin's proposal, the spectrum would be auctioned to a nationwide provider on the condition that the licensee provides free broadband service using a fraction of the network's capacity. Martin's proposal, however, was opposed by various industry groups and carriers and was not addressed before Martin departed. It is anticipated that the FCC will take up this issue again after the rest of the commissioners are appointed.

Legislation Would Mandate Inventory of Spectrum

Senator John Kerry (D. Mass.) has introduced the Radio Spectrum Inventory Act (S.649) that would require the FCC (which manages non-government spectrum) and the National Telecommunications and Information Administration ("NTIA") (which manages government spectrum) to inventory all spectrum between 300 MHz and 3.5 GHz. Co-sponsors include Olympia Snowe (R. Maine), Bill Nelson (D. Fla.), and Roger Wicker (R. Tenn.) The legislation is intended to help ensure that all frequencies are used as efficiently and wisely as possible.

The agencies would have to finish the first inventory within 180 days of the bill's enactment and biennially thereafter. They also would be required to establish a publicly accessible portal or website that would be updated regularly. The inventory also is supposed to include information about the number of intentional radiators and unlicensed operators, and contour maps showing signal strength and coverage. Licensees, however, could seek confidential treatment for any information the disclosure of which might harm national security. The bill received early praise from the wireless industry.

Wireless Medical Devices Receive More Spectrum; Additional Spectrum May Be Allocated

The FCC unanimously approved an order establishing a new Medical Device Radiocommunication Service ("MedRadio") in the 401-402 and 405-406 MHz bands. The order represents the culmination of a rulemaking that started in 2006. The new service also incorporates the existing Medical Implant Communications Service ("MICS") in the 402-405 MHz band. Devices operating on the MedRadio spectrum must do so on a secondary, non-interfering basis. However, the new rules provide additional flexibility to accommodate body-worn and implanted medical devices, including devices that use "listen-before-talk" monitoring or other methods.

The FCC also began a rulemaking to consider adopting new service rules and allocating 20 MHz of spectrum in the 413-457 MHz band for implanted neuromuscular microstimulators. Prompted by a proposal by the Alfred Mann Foundation, the medical devices would expand the use of electric stimulation to restore sensation, mobility, and function to paralyzed limbs and organs. The devices would in effect create a wireless broadband network within the human body. The proposed operations would be limited to diagnostic and therapeutic purpose and only under the direction of authorized health care professionals.

According to the FCC, the ability to use new medical wireless technologies "will improve the diagnosis and treatment of a wide variety of medical conditions and, most importantly, improve quality of life for people coping with such conditions." Acting Chairman Michael Copps noted that "few uses of our spectrum could be more important than supporting new medical technologies that can extend and improve lives."

States Consider Deregulating Telephone Services and Abolishing State Universal Service Support

Legislators in Alabama, Tennessee, Virginia, and Florida have introduced legislation that would deregulate telephone companies by giving ILECs, and in some cases competitive local exchange carriers ("CLECs"), additional pricing flexibility. The bills were prompted by increasing pressure from competitors, including wireless and voice-over-Internet-protocol ("VoIP") service providers.

The Alabama Senate Commerce, Transportation, and Utilities Committee approved a bill that would abolish the state public service commission's authority over the rates and terms and conditions of basic telephones service. In Tennessee, the House of Representatives and Senate have introduced companion bills that would allow a LEC or provider of intrastate long distance services to elect to operate under market-based regulations. Similarly, Virginia lawmakers have passed a bill that would require the State Corporation Commission to consider wireless carriers as

“facilities-based competitors... reasonably meeting the needs of consumers” when determining whether telephone services are competitive in the state. Carriers operating in “competitive” areas would be subject to market-based regulations. The Florida House Energy and Utilities Policy Committee also voted to limit the state regulator’s authority over basic telecommunications services (including price increases and customer service complaints) and exempt price cap carriers from regulation of their telecommunications service contracts.

In addition, the Tennessee Regulatory Authority (“TRA”) has proposed rules in which price cap incumbent LECs and competitive LECs could petition the TRA to lift rate regulation of the carriers. Incumbent LECs subject to rate-of-return regulations would not be able to seek relief from regulatory oversight. Petitioning LECs must demonstrate that at least two non-affiliated competitors offer services to customers in the LECs’ service area, one of which must have its own facilities. Cable companies offering telephone service and wireless carriers could be considered competitors, although VoIP service providers could not. The TRA intends to hold a hearing on April 20 to consider the proposed rules.

The Georgia House of Representatives passed legislation abolishing the state universal service fund. The fund, established in 1995, was created to help support small telephone companies after the state passed a law reducing intrastate access rates to interstate levels. The sponsor of the bill, Representative Clay Cox, argues that the fund is no longer necessary. However, lawmakers representing Georgia’s rural areas disagree, claiming small telephone companies still need financial assistance. They also expressed concern that the state legislature was making telecommunications policy rather than the state public service commission. The Georgia Senate now will consider the legislation.

FCC Parental-Control Inquiry Spans TV, Wireless, Satellite, and Internet

The FCC issued a Notice of Inquiry (“NOI”), seeking comment on a variety of issues raised in the Child Safe Viewing Act (“CSVA”). Enacted in late 2008, the CSVA is intended to improve the technologies that are available to parents to control the content their children access on various electronic devices. Under the CSVA, the FCC must report to Congress by August, 29, 2009 on the existence and availability of advanced blocking technologies that are compatible with various communications devices and platforms.

The NOI asks about the availability of parental controls that are compatible with television receivers and wireless, cable, and satellite technologies. For example, the NOI seeks comment on the effectiveness of the current U.S. TV rating system and V-Chip technology, as well as ways to improve their use. It asks whether a new “open V-Chip” that could accommodate multiple program ratings might replace the existing V-Chip. Noting that content can be accessed via the Internet, the NOI also asks about using parental controls online and whether video-hosting websites should be included in the FCC proceeding. Because carrier-provided content and third-party content are available over wireless devices and portable wireless devices present unique challenges, the NOI observes that parents might require access to multiple types of advanced blocking technologies for wireless content.

In his statement concerning the NOI, acting Chairman Michael Copps criticized the media for creating and releasing an excess of “graphically violent and indecent content.” Commissioner Jonathan Adelstein stated that the FCC has been derelict in addressing indecent and inappropriate material and that this proceeding should have started sooner. Commissioner Robert McDowell expressed hope that the NOI would expose “gaps or weaknesses in existing parental control mechanisms.”

Comments and replies on the NOI are due April 16 and May 18, respectively.

Universal Service Developments

Lawmakers Support Extending USF Support To Broadband

Members of the House Subcommittee on Communications, Technology, and the Internet expressed strong support for including broadband as a universal service fund (“USF”) subsidized service at a hearing held on the future of high-cost USF subsidies. Hearing witnesses, which included representatives from a wide range of telecommunications carriers, also championed extending USF support to broadband services but several opposed requiring eligible telecommunications carriers (“ETCs”) to provide broadband services as a condition of receiving USF subsidies.

Subcommittee Chairman Rick Boucher (D. Va.) stated that he and Representative Lee Terry (R. Neb.) intend to reintroduce legislation to reform the USF and that they were looking for input on whether and how the bill should be

modified from the one they introduced last term. Chairman Boucher expressed significant interest in how the broadband incentives in the recent stimulus package might or should affect USF support for broadband services. He also stated that Congress has been meeting with the agencies involved with the broadband stimulus program and will have a hearing on the issue in the “near future.”

Witnesses generally agreed that USF should be allocated and measured based on something smaller than a study area (e.g., by wire center or zip code). Some witnesses argued that classifying a carrier as “rural” or “non-rural” based on large study areas causes carriers that operate in rural areas to be considered non-rural and ineligible to receive necessary USF support. Witnesses also disagreed on the use of reverse auctions to distribute USF monies.

FCC Waives Limitation on Uncapped High-Cost Support for Tribal Lands

The FCC on its own motion waived the limitation on the availability of uncapped high cost USF support for ETCs serving tribal areas. In its order last year establishing an interim cap on the USF high-cost program, the FCC limited the availability of uncapped per line support to competitive ETCs to tribal lands to one payment per each residential account. The FCC, however, decided to waive this limitation, concluding that “providing uncapped high cost support for all competitive ETCs in [tribal lands] will help remedy the low penetration rates and poor telecommunications services in these areas.”

FCC Issues Orders to Help Encourage Wireless Lifeline Services

The FCC issued two recent orders to promote wireless services under the USF Lifeline program. First, the FCC agreed to allow TracFone Wireless to “self certify” that it provides 911 and enhanced 911 service to Lifeline customers if a public safety answering point (“PSAP”) does not respond to TracFone’s request for such a certification. The certification requirement was originally imposed by the FCC when it granted TracFone’s request for ETC status to provide Lifeline services in various states. However, upon implementation the carrier found that PSAPs were slow or failed to respond.

In addition, the FCC approved Virgin Mobile’s applications to offer Lifeline service as an ETC in New York, Virginia, North Carolina, and Tennessee. The order represents the second ETC designation of a major resold prepaid wireless provider (TracFone being the first). As in the case of TracFone, the FCC agreed to forbear from the statutory requirement that ETCs provide coverage at least in part using its own facilities. Virgin Mobile also must comply with the same requirements that it imposed on TracFone when it designated TracFone as an ETC.

USF Contribution Factor Fluctuates Dramatically

The USF contribution factor for the second quarter of 2009 will increase by almost 2% from 9.5% to 11.3%. The contribution factor had decreased last quarter by almost 2% from 11.4 % to 9.5%, but the latest increase sets the contribution factor back at 2008 levels.

FCC Revises the Form 499-A

The FCC revised its Form 499-A and related instructions, which service providers use to report revenues and which the USF administrator uses to calculate service providers’ USF contributions. According to the FCC, the revised form and instructions “incorporate non-substantive clarifications to ensure that all contributors are properly reporting revenues and are treating similar revenues uniformly.” One of the amendments directs filers that cease to provide services to submit a letter to the USF administrator with the termination date and the name of the provider’s successor (if any). Although the administrator’s practice has been to informally ask service providers to file such a letter, this is the first time it has appeared in the instructions.

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.

April 1, 2009

Form 499A due (Telecom Reporting Worksheet).

April 10, 2009	Deadline for 700 MHz licensees to file DTV Consumer Education Report for 1Q09.
April 13, 2009	Comments due on broadband initiatives in American Recovery and Reinvestment Act of 2009 .
April 16, 2009	Comments due on Child Safe Viewing Act NOI .
April 27, 2009	Comments due on CUT FATT petition for rulemaking and declaratory ruling regarding DTV patent licensing .
April 28, 2009	Comments due on video competition NOI (with data for 2007 and 2008).
May 1, 2009	Form 499Q due (Telecom Reporting Worksheet).
May 1, 2009	Deadline for certifying compliance with rate averaging/rate integration requirements .
May 18, 2009	Reply comments due on Child Safe Viewing Act NOI .
May 27, 2009	Reply comments due on CUT FATT petition for rulemaking and declaratory ruling regarding DTV patent licensing .