

Legal Updates & News

Bulletins

Communications Law Bulletin, September 2008

October 2008

Communications Law Bulletin, September 2008

Related Practices:

- [Communications & Media Law](#)

In this issue:

- [The Month in Brief](#)
- [Wireless Developments](#)
 - [FCC Moves Forward on Re-auction of 700 MHz D Block License](#)
 - [Ninth Circuit Deals Blow to Wireless Carriers](#)
 - [FCC Seeks Comment on Remanded Location-Accuracy E911 Rules](#)
- [Universal Service Developments](#)
 - [FCC Initiates Inquiry Regarding USF Oversight](#)
 - [Rural Carriers Appeal CETC Cap](#)
 - [Fourth Quarter USF Contribution Factor Established](#)
- [XM-Sirius Merger Challenged in Court of Appeals](#)
- [State Regulators Address Video Equipment, Industry Billing Practices, and State Universal Service](#)
- [CPNI Compliance Reminder](#)
- [Comcast Appeals Net Neutrality Decision and Files Compliance Plan](#)
- [FCC Increases Application Processing Fees](#)
- [Industry Feverishly Lobbies Proposed Reforms of Intercarrier Compensation and Universal Service Reform](#)
- [Legislative Developments](#)
 - [Congress Passes Broadband Data Collection Act; President Expected to Sign](#)
 - [Congress Seeks Prepaid Calling Card Reform](#)
- [FCC Reporting Requirements – FCC Grants ARMIS Forbearance](#)
- [Upcoming Deadlines for Your Calendar](#)

The Month in Brief

As the general election season draws to its close, the industry continues to sort out the shape of the competitive environment that was created in the Telecommunications Act of 1996. As discussed further below, fundamental regulatory issues such as universal service funding, intercarrier compensation, and preemption of local regulation of telecommunications services are in play at the Federal Communications Commission (“FCC” or “Commission”), the courts, and the states. At the same time, as two “tip boxes” in this issue point out, the FCC has increased applications fees and stepped up enforcement of its customer proprietary network information rules.

These and other developments are covered in this issue of our Bulletin, along with our usual list of deadlines for your calendar.

Wireless Developments

FCC Moves Forward on Re-auction of 700 MHz D Block License

The FCC adopted, at its September open meeting, a Third Further Notice of Proposed Rulemaking (“Third Notice”) suggesting new licensing rules for the 700 MHz D Block license. Earlier this year in Auction No. 73, the FCC was unable to attract serious bidders for the D Block license that was supposed to serve as part of a nationwide public-private interoperable broadband public safety network. The FCC hopes that revised

licensing rules will provide potential bidders with additional information and details about the D Block public-private partnership for companies to make informed bids.

Adoption of the Third Notice, however, was not without controversy. Several Commissioners expressed concern about the re-auction, particularly given the faltering economy and questionable ability of bidders to obtain financing. Commissioners Michael Copps and Jonathan Adelstein also criticized the decision for making several complex technical and economic assumptions without first vetting them with experts. Chairman Kevin Martin also had planned on making comments and replies due 14 and 7 days, respectively, after publication of the Third Notice in the Federal Register. However, several House democrats objected to the expedited pleading cycle. Comments and replies are now due November 3 and November 12, respectively. Chairman Martin hopes to approve final rules in December, which would result in a mid-2009 auction.

The Third Notice proposes to license the D Block spectrum either as a single nationwide license or as 58 regional licenses based upon public safety regions. Whether the D Block will be licensed on a nationwide or regional basis would be decided during the re-auction based upon the greatest population coverage and highest bids. If the D Block is licensed on a regional basis, the re-auction results also would determine the particular air interface technology that would be deployed across the nation by the D Block licensees – either WiMAX or Long Term Evolution (“LTE”) – to help ensure the interoperability of the public-private network.

The Third Notice also proposes to decrease the reserve price for the D Block to \$750 million. In addition, the proposed rules ease the build-out requirements, which would have required coverage of 99.3% of the population in 10 years, but now would require coverage of 90% in the most rural areas and up to 98% in the most urban areas within 15 years. The new rules also include “baseline hardening” of the network and other technical requirements. In addition, the Third Notice proposes to change the operating parameters of the Public Safety Spectrum Trust, which controls the Public Safety Broadband Licensee.

Ninth Circuit Deals Blow to Wireless Carriers

An en banc panel of judges of the U.S. Court of Appeals for the Ninth Circuit reversed itself regarding the authority of local jurisdictions to limit the siting of wireless towers. The case concerned Sprint Nextel’s challenge to a San Diego County ordinance that placed certain limits on the design, placement, and size of towers. The Ninth Circuit concluded that the ordinance is not preempted by Section 253(a) of the Communications Act of 1934, as amended.

Section 253(a) states that the federal government may preempt local laws that prohibit a telecommunications carrier from entering the market. In 2001, in a dispute between the City of Auburn, Washington and Qwest, the Ninth Circuit concluded that the city’s regulation was preempted by Section 253(a). According to the court, Section 253(a) was a “virtually absolute” preemption and that only local requirements “directly related to management of the rights of way” are not preempted under the savings clause in Section 253(c).

In 2007, following the Ninth Circuit’s Auburn decision, a federal district court permanently enjoined the enforcement of San Diego County’s ordinance under Section 253(a). The Ninth Circuit’s en banc panel reversed, however, stating it had previously misinterpreted Section 253(a). The court announced that Section 253(a) must be read as requiring a telecommunications company to show that a local regulation is “actually prohibiting or effectively prohibiting service to an area and that means a higher standard in terms of evidence on the carrier’s part.” The panel then concluded that Sprint Nextel failed to meet this evidentiary burden. The panel’s decision largely comports with another, recent decision by the U.S. Court of Appeals for the Eighth Circuit.

FCC Seeks Comment on Remanded Location-Accuracy E911 Rules

As anticipated, a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit vacated and remanded the FCC’s 2007 enhanced 911 (“E911”) rules that required wireless carriers to measure their location accuracy at a public safety answering point (“PSAP”) level within five years. The wireless industry heavily opposed the new rules, arguing that it would be technologically impossible to comply with them. The Association of Public-Safety Communications Officials – International and the National Emergency Number Association, which previously supported PSAP-level measurements, subsequently modified its position and opposed the requirement. Several wireless carriers also proposed new, less stringent, E911 rules.

The FCC voluntarily requested that the court remand the case so it could consider the proposals of the public safety and industry groups. The proposals generally reflect an agreement among those parties to achieve E911 accuracy compliance at the county-level and measure location accuracy on a county basis. Shortly after the court’s remand, the FCC issued a public notice seeking comment on the new proposals. Comments are due October 6, 2008; reply comments are due by noon on October 14, 2008.

Universal Service Developments

FCC Initiates Inquiry Regarding USF Oversight

The FCC initiated a Notice of Inquiry (“NOI”) regarding oversight of the administration of the universal service fund (“USF”), in response to a negative report on USF management by the Government Accountability Office. The NOI seeks comment on ways to further strengthen the management, administration, and oversight of the USF, including:

- Additional measures the FCC can take to prevent improper USF payments, to safeguard the USF from waste, fraud, and abuse, and to ensure that all providers are properly contributing the amounts they have collected from their subscribers to the USF;
- Whether the FCC should adopt an independent audit requirement for program beneficiaries and contributors, and whether different safeguards are necessary for each of the four USF support disbursement programs;
- Whether the FCC should adopt additional rules regarding document retention and enforcement;
- Whether the FCC should adopt specific qualitative or quantitative goals for the USF;
- Whether the FCC should continue to use a permanent administrator for the USF or if it should obtain the services of a contractor or contractors to perform the USF administrator’s functions;
- Additional metrics the USF administrator should collect and report to illustrate the quality of service it provides to stakeholders;
- Additional performance management techniques the FCC could adopt to improve the administration and operation of the USF;
- Information on the efficiency and effectiveness of the FCC’s process for the USF administrator and methods for parties to obtain timely guidance concerning interpretation of the rules, especially with regard to the administration of the USF programs; and
- Whether the FCC should take additional measures concerning the National Exchange Carrier’s Association’s relationship with USAC.

Comments and replies concerning the NOI are due 30 and 60 days, respectively, after publication in the Federal Register.

Rural Carriers Appeal CETC Cap

Rural wireless carriers continue to fight the cap that the FCC imposed this summer on universal service high-cost support that is available to competitive eligible telecommunications carriers (“CETCs”). As anticipated, the Rural Cellular Association and several carriers appealed the FCC’s support cap to the U.S. Court of Appeals for the District of Columbia Circuit. The parties had previously sought reconsideration of the decision from the FCC, but withdrew their reconsideration petition to pursue the judicial appeal.

Fourth Quarter USF Contribution Factor Established

The FCC announced that the proposed USF contribution factor – the proportion of long distance end-user revenue that service providers must contribute to the USF – for the fourth quarter of 2008 will be 11.4%. The contribution factor remains unchanged from the third quarter.

XM-Sirius Merger Challenged in Court of Appeals

As reported in the [July-August 2008 issue of our Bulletin](#), the FCC voted on July 25, 2008 to approve the merger of Sirius Satellite Radio Inc. (“Sirius”) and XM Satellite Radio Holdings Inc. (“XM”). The approval incorporated several voluntary commitments by the applicants, including offerings of interoperable receivers to the aftermarket, a 36-month price cap on the merged entity’s services, and new programming packages that include à la carte options. Commissioner Copps dissented from the approval.

In September, U.S. Electronics asked the U.S. Court of Appeals for the District of Columbia Circuit to overturn the Commission’s approval of the merger. U.S. Electronics cited the failure of XM and Sirius to comply with existing mandates to market interoperable radios, and contended that the FCC should have set the merger request for hearing. In the meantime, Mel Karmazin, CEO of the merged entity, acknowledged that the consummation of the merger was rushed, and included less-than-optimal financial terms, in order to close the deal before challengers could request a stay of the merger.

State Regulators Address Video Equipment, Industry Billing Practices, and State Universal Service

The Connecticut Department of Public Utility Control (the “Department”) released a preliminary decision concluding that AT&T must obtain municipal approval before it can install its video equipment boxes (called VRAD cabinets) on utility poles and other properties. The decision was triggered by a petition filed by several

cities that were concerned over the safety and location of the equipment. According to the Department, AT&T “should have acted in a more responsible manner” by notifying public officials and seeking consent before installing the equipment. Connecticut’s State Attorney General plans to direct AT&T to seek retroactive permission for equipment that already has been installed.

The Department also has initiated an investigation regarding the billing practices of telecommunications and cable companies. According to the Department, the proceeding will address companies’ procedures for detecting, notifying customers of, and correcting billing system errors.

The Iowa Utilities Board (the “Board”) is seeking comment on whether it should create a state universal service fund (“SUSF”). Although the Board concluded in 2003 that it would not implement a SUSF at that time, the market and industry changes require a fresh look at the issue. The Board specifically seeks comment on the necessity of a SUSF, what services it would support, which service providers would receive subsidies, how contributions would be set and collected, and who would administer the state USF. Comments are due by October 13.

In addition, the Kansas Corporation Commission (“KCC”) has directed fixed and nomadic Voice over Internet Protocol (“VoIP”) providers that are connected to the public switched telephone network to contribute to the state universal service fund. The KCC concluded that VoIP providers can calculate their state contributions by measuring actual intrastate traffic or by using a traffic study or the FCC’s “safe harbor” to estimate intrastate traffic. VoIP providers must begin contributing in January 2009.

CPNI Compliance Reminder

The FCC’s Enforcement Bureau appears to be sending out a wave of letters of inquiry (“LOIs”) to carriers regarding their compliance with the FCC’s rules governing the protection of customer proprietary network information (“CPNI”), including the mandatory filing of compliance certifications. This is a good reminder for carriers to ensure that their internal CPNI compliance procedures are up-to-date and that the required certifications have been filed. If you have any questions regarding CPNI compliance, please contact any of the attorneys in [Morrison & Foerster’s Communications Group](#).

Comcast Appeals Net Neutrality Decision and Files Compliance Plan

Comcast and three other entities filed appeals of the FCC’s decision ordering the company to change the way it manages its broadband Internet traffic. ([See “FCC Rules against Comcast on Net Neutrality Front” in the July-August 2008 issue of this Bulletin.](#)) Because the appeals were filed in different courts, there was a lottery, and the D.C. Circuit was randomly selected to hear the appeal. Comcast has stated that its appeal intends to challenge the basis on which the FCC found it to violate federal policy “in the absence of any preexisting legally enforceable standards or rules.”

In the meantime, in compliance with the FCC’s order, Comcast has filed a plan with the FCC outlining the new traffic management practices it intends to implement by the end of the year. Comcast’s plan states that it will identify particular subscribers responsible for high volumes of traffic and will temporarily give those subscribers lower priority, but only during times of congestion. Comcast stated that it still expects to implement its new traffic management plan by the end of December, although it is continuing to refine the details of the plan. Comcast promised to make supplemental filings to inform the FCC of any material changes in the plan. Critics of Comcast have expressed concern regarding Comcast’s statement that it can change its policies without notice in 2009 after the implementation of the initial plan.

The FCC has increased application processing fees. Please consult the various fee filing guides prior to submitting your applications. The fee filing guides are available at: <http://www.fcc.gov/fees/appfees.html>.

Industry Feverishly Lobbies Proposed Reforms of Intercarrier Compensation and Universal Service Reform

The communications industry continues to lobby the FCC regarding comprehensive reform of the intercarrier compensation ("ICC") regime and the USF mechanism in light of an upcoming November 5 deadline set by the United State Court of Appeals for the District of Columbia Circuit. The court intends to vacate the FCC's rules regarding intercarrier compensation for traffic bound for Internet service providers ("ISPs") unless the FCC explains the legal basis for its rules. FCC Chairman Martin, however, has stated that he hopes for a more comprehensive solution for ICC and USF reform by the deadline, prompting industry members to step up efforts to promote their positions.

The ICC regime and the USF mechanism have been under significant scrutiny and subject to on-going rulemakings for almost a decade. It is widely agreed that the existing systems do not accurately take into consideration new technologies and services, creating opportunities for players to game the system. Most segments of the communications industry agree that the FCC cannot continue to maintain the status quo.

The industry, however, continues to debate how reform should be accomplished. A coalition of wireless and large wireline carriers recently supported adoption of a uniform \$0.0007 terminating access rate for all traffic, but rural carriers argue that the rate is unrealistic and not based on true carrier costs. In addition, carriers continue to disagree as to how carriers can make up any revenue shortfall created by the adoption of a uniform terminating access rate (e.g., increasing subscriber line charges and drawing money from the USF), as well as carriers' interconnection rights and obligations. Also on the negotiating table is the issue of revamping the USF contribution and distribution mechanisms. Several companies recently have urged the FCC to assess contributions based upon the number of telephone numbers associated with a carrier.

It is unclear at this time whether any particular approach has sufficient support at the FCC. What is clear is that any changes to the ICC and USF systems could have far significant implications for all segments of the communications industry. Accordingly, we can expect lobbying efforts to continue and likely increase as November approaches.

Legislative Developments

Congress Passes Broadband Data Collection Act; President Expected to Sign

On September 28, 2008, the House passed the Broadband Data Improvement Act, a bill to enhance and expand federal and state collection of data on the deployment and adoption of broadband service. The bill also promotes Internet safety for children. The Senate approved the bill on September 30, 2008. Congress has sent the legislation to President Bush, who is expected to sign it.

Recognizing the importance of broadband to the United States, the bill seeks to identify underserved or unserved areas and facilitate expansion of advanced telecommunications services to those areas. The bill requires several different federal agencies to collect and evaluate broadband data.

The bill amends Section 706 of the Telecommunications Act of 1996 to require the FCC to conduct an inquiry about advanced services annually, rather than "regularly" as previously provided. As part of its inquiry, the FCC must compile a list of areas that do not receive advanced services, make international comparisons regarding broadband service capability, and survey consumers about their broadband capability.

The bill requires the Census Bureau to determine whether residences have computers, Internet access, and use dial-up or broadband. Within one year of passage, the Comptroller General must recommend metrics or standards about the cost and capability of broadband connections. The bill requires the Small Business Administration's Office of Advocacy to analyze how the price and availability of broadband offerings affect small businesses.

Moreover, the bill directs the Commerce Department to establish a grant program to promote broadband deployment on a state-by-state basis, with eligible entities required to match up to 20% of the federal grant amount. Among other things, grant recipients must survey broadband speeds in their states, map broadband deployment on a state-by-state basis, and suggest strategies for expanding use of technology in underserved areas. Although earlier versions of the bill would have appropriated \$300 million in grants to states to finance broadband mapping, that provision was dropped and such grants will have to be funded through a future appropriations bill.

The bill also contains a section promoting safe use of the Internet by children. The bill requires the Federal Trade Commission ("FTC") to conduct a public awareness campaign about safe use of the Internet by

children. The bill further requires the Commerce Department to convene an Online Safety and Technology Working Group to review and report to Congress regarding the status of online safety.

Congress Seeks Prepaid Calling Card Reform

On September 10, 2008, the Senate Commerce Committee held a hearing with consumer advocates and FTC Chairman William Kovacic as part of efforts to reform the prepaid calling card industry. Committee member Senator Nelson (D-Fla.) was widely quoted in trade press for demanding an end to “skullduggery” in the industry, including selling cards that provide fewer minutes or charging higher rates than advertised. Chairman Kovacic’s testimony cited low income consumers as particularly susceptible to the unfair and misleading pricing and advertisement practices rampant among calling card providers.

Senator Nelson has introduced S-2998, a bill that would direct the FTC to enact new rules requiring prepaid calling card providers and distributors to disclose rates and fees at the point of sale. The bill grants jurisdiction to federal courts over suits brought by the FTC and state officials against bad actors, while keeping intact preexisting state consumer protection rules applicable to calling card providers. Kovacic raised concerns about the bill’s current version, which contains a provision to hold distributors liable for selling fraudulent cards, because of the high evidentiary burden in proving such cases. He also noted that the bill’s exemption from enforcement for cards associated with service on consumer-purchased handsets would cause bad actors to switch their fraudulent businesses to the handset market.

Similar legislation is making its way through the House. Under HR-3402 (the “Calling Card Consumer Protection Act”), which was passed by the House by voice vote on September 25, prepaid calling card providers would be required to disclose terms and conditions to customers. Like the Senate bill, the House bill authorizes the FTC and state officials to sue companies who violate the rules. Unlike the Senate bill, however, HR-3402 creates a limited carve-out for FTC enforcement measures that otherwise would lie within the FCC’s exclusive power over common carriers to prosecute calling card fraud. Opponents of the House bill argue that granting FTC this power duplicates state and local law enforcement.

FCC Reporting Requirements – FCC Grants ARMIS Forbearance

In an unusual Saturday release, the FCC on September 6, 2008 issued an order granting an AT&T forbearance petition that included granting of accounting rules relief to Verizon and Qwest. AT&T in its petition asked for relief from Automated Reporting Management Information System (“ARMIS”) rules, which track service quality, customer satisfaction, infrastructure, and operating data. The order provides for a two-year phase-out period during which AT&T (and all other price cap carriers) may cease filing such reports. The order also includes a more controversial provision extending to Qwest and Verizon the cost-assignment rules relief won by AT&T in April 2008. The trade press reports that the cost assignment rule change was added to the AT&T order late on Friday September 5 by Chairman Martin with the support of fellow Republicans Tate and McDowell. The change was strongly opposed by Democrats Copps and Adelstein, who fought granting cost assignment relief to AT&T back in April of this year.

Competitive local exchange carriers also opposed granting the large Bells relief from cost assignment and allocation rules because many feel that AT&T, Verizon, and Qwest continue to hold market power in their service territories. In the view of competitors, excusing the Bells from record-keeping duties means the FCC will have less information with which to detect abuses of market power. The FCC also was criticized for confining this relief only to AT&T, Qwest, and Verizon and not including others that requested similar relief, including Embarq, Frontier, and Windstream. The National Association of State Utility Consumer Advocates (“NASUCA”) stated publicly that it is considering filing a lawsuit to challenge the ARMIS order.

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 frequently subject to 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 10, 2008 | Deadline for 700 MHz licensees to file DTV consumer education report for 3Q 2008 . |
| October 14, 2008 | Effective date of new commercial mobile alert system rules (regarding requirement for non-commercial educational and public broadcast television station licensees to install equipment to enable alerts to participating Commercial Mobile Service providers). |
| October 14, 2008 | Reply comments due on CTIA petition for declaratory ruling regarding |

timely review of wireless facility siting applications and preemption of certain state and local zoning laws.

October 14, 2008

Reply comments due regarding **E911 Phase II location accuracy requirements.**

October 22, 2008

Reply comments due on **BRS/EBS FNPRM.**

October 22, 2008

Reply comments due on **sponsorship identification and embedded advertising NPRM.**

October 27, 2008

Reply comments due on **FNPRM regarding assessment and collection of regulatory fees.**

November 1, 2008

Deadline for filing **Form 499-Q (Telecommunications Reporting Worksheet).**

November 17, 2008

Hearing aid compatibility report due.