

Legal Updates & News

Bulletins

Communications Law Bulletin, June 2008

July 2008

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The Month in Brief

June was a busy month at the Federal Communications Commission ("FCC" or "Commission"), with intense enforcement activity, a rule change that makes Do-Not-Call list registrations perpetual, new broadband reporting requirements, and other initiatives. We cover these and other developments, including activity in the states, in this issue of our Bulletin. We also include our usual list of deadlines for your calendar.

FCC Adjusts Maximum Forfeiture Amounts

The FCC has adjusted its maximum forfeiture amounts to reflect changes in the Consumer Price Index. The new forfeiture caps are as follows:

- Common carriers: \$150,000 per violation per day, with a maximum of \$1.5 million for a continuing violation
- Cable TV operators and broadcast station licensees: \$37,500 per violation per day, with a maximum of \$375,000 for a continuing violation
- Other violators: \$16,000 per violation per day, with a maximum of \$112,500 for a continuing violation

FCC Adopts New Broadband Reporting Obligations

In a Report and Order (“R&O”) and Further Notice of Proposed Rulemaking (“FNPRM”) released on June 12, 2008, the FCC adopted some expanded and more granular data reporting requirements for broadband providers. This data is collected on Form 477, which is filed each March 1 (for year-end data from the previous calendar year) and September 1 (for mid-year data). The newly required data will have to be provided in a standardized database format, the details of which will be provided in a later release. The new requirements are intended to take effect with the March 2009 filing that provides year-end 2008 data.

The R&O expanded the current reporting requirements in several respects:

- Wired, terrestrial fixed wireless and satellite broadband providers will now be required to report numbers of subscriber accounts at the **Census Tract level** (rather than the ZIP code level), broken down by type of technology.
- Terrestrial mobile wireless broadband providers will also move from ZIP code reporting to Census Tract reporting.
- All broadband providers will be required to report data in **eight different speed tiers**, by both download and upload speeds, within each Census Tract. The FCC noted that the contours of these tiers could change over time based upon technology advances, but did not make such changes automatic. The FCC also stated its intent to revisit these tier thresholds every two years to assess whether technology changes warrant further refinements. The FCC declined to require reporting of actual measured speed rather than the maximum possible speed.
- Mobile wireless broadband providers also must provide a new category of data reporting the number of subscribers whose device and subscription plan provide them with Internet access to the content of their choice.
- Using its ancillary Title I jurisdiction, the FCC extended the Form 477 reporting requirements to **interconnected Voice over Internet Protocol (“VoIP”) service providers** (without yet deciding the appropriate classification of such providers). VoIP providers (like local exchange carriers) will report by ZIP codes.
- In specific cases in which entities can show that the new Census Tract reporting requirements impose “significant hardship,” the FCC may instead permit such entities to report a list of service addresses or GIS coordinates, along with the speed and technology offered at each address.

The R&O also states the FCC’s intention to collect the following additional information:

- The FCC intends to design and implement a voluntary system permitting households to report broadband availability and speed at their premises.
- The FCC will recommend to the Census Bureau that a broadband availability question be added to the Community Survey (which fills the gaps between each official 10-year census).

The FNPRM seeks comment on the following issues:

- Whether to require local exchange carriers and interconnected VoIP providers to report at the ZIP code

or Census Tract level.

- Whether the FCC should adopt a ***national broadband mapping program***, tentatively based upon the information providers use to determine service coverage at particular customer addresses. This issue is set for an expedited comment cycle, and the FCC stated that it intends to issue an order on this question within four months.
- How the FCC might require service providers to ***report actual delivered broadband speeds*** rather than theoretical maximum speeds.
- Whether the FCC should require ***reporting of monthly prices*** for stand-alone broadband service in each speed tier, and how the FCC should use any reported pricing information.
- How the FCC can preserve ***confidentiality*** of Form 477 information and any information collected through the voluntary registry or other sources (although the FCC notes that it does not intend to make the raw data publicly available).
- Whether the FCC should conduct ***periodic surveys of broadband customers***.

Comments on the broadband mapping issue in the FNPRM are on an expedited pleading cycle, and will be due 15 days after publication in the Federal Register, with replies due 30 days after publication in the Federal Register. Comments on all other issues in the FNPRM are due 30 days after publication in the Federal Register, with replies due 60 days after publication in the Federal Register.

HAC Service Agent Designation

Effective June 6, 2008, public mobile service providers and digital wireless handset manufacturers must designate an agent for service of informal complaints received by the FCC and for inquiries, notices, and orders concerning hearing aid compatibility.

The designation may be sent by mail to: Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, Attention: Arlene Alexander, Room 3-C408, or e-mail to: SECTION255_POC@fcc.gov. The name, business address, telephone and facsimile numbers, and e-mail address should be included in the designation notice. Also, the FCC is required to make this information available to the public.

State Developments: California Debates Broadband Reporting Requirements and Privacy Legislation While New York Considers Amending Merger Review Authority

The California Public Utilities Commission (“CA PUC”) is considering imposing new requirements on state video franchise holders. Specifically, the CA PUC seeks information regarding broadband availability, speed tiers, and subscribership, which franchisees already file with the FCC. AT&T opposes the proposal on the grounds that the mandatory reporting requirement is preempted by federal law, although it would be willing to voluntarily provide the CA PUC with a copy of its FCC report. In contrast, Verizon supports the reporting requirement. In addition to AT&T and Verizon, the CA PUC has issued state franchises to Cox Communications.

A bill that would have extended certain privacy protections from wireline telephone call records to wireless call records (AB-3011) was defeated by the California Assembly by a vote of 36 to 22. California currently requires customer consent before a wireline carrier can release a customer’s call records to a third party. Opponents of the bill had argued that the legislation was unnecessary because customers’ confidential information already is protected under the FCC’s privacy rules and the legislation could prevent carriers from lawfully outsourcing customer service centers and supplying information to affiliates.

Under a bill passed by the New York Assembly (AB-10043), the state Public Service Commission (“NY PSC”) would more closely scrutinize major mergers involving New York telecommunications companies. The bill now will be considered by the state Senate. The legislation only pertains to transactions in which one of the

companies has more than \$200 million of gross annual revenues. The bill requires the NY PSC to affirmatively conclude that the transaction: would have short-term and long-term customer benefits and provide general economic benefits to the state; would not have an adverse impact on service quality or competition; would not result in excessive debt for the merged company; would be fair to employees; and would promote the public interest. The NY PSC would need to consult with the state attorney general regarding the competitive effects of the merger.

Wireless Developments

FCC Releases Contentious FNPRM on Service Rules for Additional Advanced Wireless Service Spectrum

The FCC released a Further Notice of Proposed Rulemaking (“FNPRM”) seeking comment on proposed service rules for advanced wireless service (“AWS”) spectrum in the 1.9 and 2.1 GHz bands, including rules that would require the licensee to provide free public access to a nationwide high-speed wireless broadband Internet network. The FNPRM specifically seeks comment on proposed rules for the AWS spectrum in the 1915-1920 MHz, 1995-2000 MHz, and 2155-2180 MHz bands.

Although the text of the FNPRM is quite short, it includes a 29-page appendix detailing the proposed AWS technical rules. FCC Chairman Kevin Martin initially circulated a final order that would have adopted the rules at the FCC’s June open meeting, but several wireless carriers urged the Commission to delay voting on the item, and Commissioners Michael Copps, Jonathan Adelstein, and Robert McDowell were adamant that the rules be put out for public comment. Against the advice of the FCC’s Office of General Counsel, Chairman Martin has established an expedited pleading cycle for the FNPRM – comments and replies are due July 9 and 16, respectively. A vote on final rules could occur as early as August.

The FNPRM proposes creating a 25 MHz block of spectrum from 2155-2180 MHz that would be allocated to one licensee. Alternatively, the FNPRM proposes a 20 MHz spectrum block from 2155-2175 MHz. The 25 MHz block would be subject to stricter out-of-band emission limits than the 20 MHz block to prevent interference with adjacent licensees. In addition, the FNPRM proposes requiring the 25 MHz block licensee to use up to 25% of its network capacity to provide free, two-way broadband Internet services. The free Internet broadband network would be required to have filtering mechanisms for indecent content and allow for the use of open devices. Under the proposed build-out requirements, the licensee would have to provide signal coverage and offer service to at least 50% of the total U.S. population within four years and to at least 95% of the U.S. population by the end of the 10-year license term.

In addition, the FNPRM proposes service rules for the AWS spectrum in the 1915-1920 MHz and 1995-2000 MHz bands (also known as the “H Block”). Under the proposed rules, the H Block would be licensed on a Basic Trading Area basis for 10-year license terms, and would require licensees to provide signal coverage and offer service to at least 35% of the population in each licensed area within four years and at least 70% of the population in each licensed area by the end of the license term.

Commissioners Continue to Debate Skype “Carterfone” Petition

FCC Chairman Kevin Martin pulled from the FCC’s monthly open meeting agenda an order that would have denied the petition of Skype Communications, seeking to apply the FCC’s “Carterfone” open access rules to wireless services. Chairman Martin said he pulled the item because he did not have two votes fully supporting the order. Reportedly, Commissioner Deborah Tate voted with Martin, Commissioner Robert McDowell concurred, Commissioner Michael Copps dissented, and Commissioner Jonathan Adelstein had not yet voted.

The dispute apparently concerns an issue that first arose last year regarding the open access rules applied to the 700 MHz C Block license. Commissioner McDowell, who opposed applying the Carterfone open access requirements to the C Block, reportedly has similar issues with the Skype petition. According to Chairman Martin, “some of the Commissioners who were concerned about the rules we had adopted in the C block want to re-debate that here in the context of the Skype petition. Other Commissioners who supported what we did in the C block don’t necessarily think we should be dismissing the Skype petition. So I think that the Skype petition actually brings back up some of the tensions among the Commissioners.”

FCC May Consider Item on Early Termination Fees as Early as July

Following an FCC hearing on early termination fees (“ETFs”), FCC Chairman Kevin Martin stated that he hoped the FCC would consider an ETF item at the FCC’s July or August open meetings. According to Chairman Martin, a recent California jury verdict in favor of Sprint Nextel emphasized the need for quick FCC action to resolve whether state regulation of wireless ETFs is preempted by the FCC. Although ETF complaints have arisen primarily in the context of wireless services, Chairman Martin noted that he would like any FCC action to more broadly address ETFs charged by other types of carriers as well.

The hearing consisted of two panels, the first of consumer advocates and state regulators, and the second of representatives from the wireless, wireline, cable, and satellite industries. The industry representatives generally advocated a national policy on ETFs and consumer protection that would preempt a patchwork of state regulations. They also noted that carriers continued to expand “consumer-friendly” policies. State regulators and consumer advocates, however, urged the FCC not to preempt state regulation even in the event the FCC does adopt rules regarding ETFs. At the hearing the Commissioners expressed concerns about whether ETFs prevented consumers from switching providers, whether carriers adequately inform customers of any applicable ETFs, and whether ETFs are necessary to subsidize handsets. Chairman Martin identified two principles that should be considered: (1) ETFs should be reasonably related to the cost of end user equipment; and (2) ETFs should be prorated over a contract’s lifetime.

With regard to the recently concluded lawsuit, an Alameda County Superior Court jury concluded that the amount of ETFs charged by Sprint Nextel is justified and that the carrier need not refund the ETFs to former customers. The jury found that the costs that Sprint Nextel incurred as a result of the class member customers who breached their contracts exceeded the amount the class members paid in ETFs.

Sprint Nextel Provided Some 800 MHz Rebanding Relief

The FCC’s Public Safety and Homeland Security Bureau (“Bureau”), on delegated authority, granted a request by Sprint Nextel that allows the carrier to continue operating temporarily on Channels 1-120 in the 806-809/851-854 MHz segment of the 800 MHz band. Under the 800 MHz rebanding plan previously adopted by the FCC, Sprint Nextel was required to vacate Channels 1-120 by June 26, 2008. However, Sprint Nextel has been unable to move to its new spectrum because of delays associated with relocating public safety licensees from that spectrum. The Bureau’s decision was conditioned on Sprint Nextel: (1) relinquishing any of the channels within 60 days if they are needed by relocating public safety entities; (2) vacating the channels if the spectrum to which the carrier is relocating becomes free; and (3) protecting public safety operators from interference caused by the carrier’s continued operations on Channels 1-120.

In a separate order, the Bureau waived for 30 days the June 26 deadline by which Sprint Nextel was supposed to vacate the 800 MHz interleaved, expansion, and guard bands (the “interleaved channels”). The Bureau concluded that the short extension would provide it with sufficient time to address a pending Sprint Nextel request to continue operating temporarily on the interleaved channels while the 800 MHz rebanding process continues.

Net Neutrality Issues Remain in Spotlight in Various Countries

Commissioner Copps recently gave a speech in which he urged the creation of a specific process for addressing net neutrality complaints. Commissioner Copps stated that the FCC cannot at this time list what forms of network management are unreasonable, but that a specific procedural mechanism for individual complaints will create a body of precedent that will assist in distinguishing reasonable from unreasonable practices.

Also in the U.S., three additional class action lawsuits have been filed against Comcast, alleging that its traffic management practices and alleged interference with peer-to-peer file transfers violate consumer protection statutes. The new suits were filed in California, Illinois, and New Jersey (joining an earlier-filed suit in the District of Columbia).

Last month we reported on a new net neutrality bill in Canada and an investigation of alleged traffic “throttling” by Bell Canada. The Chairman of the Canadian Radio-television and Telecommunications Commission (“CRTC”) has stated that that agency may hold a public consultation to study permissible network management. He called net neutrality “one of the polarizing issues of the day,” and stated that the CRTC expects to rule on the Bell Canada case by the end of the year.

Meanwhile, the Information Society and Media Commissioner of the European Commission recently gave a speech to the Organization for Economic Cooperation and Development (“OECD”) in which she called for net neutrality to be debated at a global level, urging user input rather than purely technical decisions by regulators.

FCC Enforcement Activity Continues at an Intense Pace

The FCC’s enforcement of its “junk fax,” hearing aid compatibility, universal service contribution, “do-not-call,” and “analog-only” TV Consumer Alert rules continued throughout June, along with various broadcasting-related enforcement actions. Among the more noteworthy releases were several Notices of Apparent Liability for Forfeiture (“NALs”), including one for \$695,000 against repeat offender Hot Lead LLC (see [July-August 2007](#) and [January](#) and [March 2008](#) Bulletins), for sending junk faxes – unsolicited advertisements to consumers’

telephone facsimile machines. The FCC also released a junk fax Forfeiture Order against Extreme Leads, Inc. for \$1,377,000 arising from an NAL issued in July 2007 (also reported in the July-August 2007 Bulletin). The Enforcement Bureau (“EB”) issued a number of NALs against wireless service providers for failure to include in their offerings at least two digital wireless handset models meeting the FCC’s hearing aid compatibility requirements.

On the broadcasting side, two NALs were issued against television station licensees for exceeding the prescribed limits on commercial advertising during children’s programming, and another licensee entered into a consent decree terminating an investigation into the licensee’s apparent broadcast of underwriting acknowledgements over noncommercial educational radio stations. The Media Bureau issued an NAL for a licensee’s failure to file a timely license renewal application and its operation of its noncommercial educational station for more than eleven months after its authorization had expired. Nevertheless, the licensee’s untimely renewal application, filed more than a year out of time, was granted. Finally, the EB issued an NAL against a licensee broadcasting a recorded telephone conversation without notice to the other party to the conversation.

The FCC stepped up its remedial efforts in securing compliance with its labeling requirements for television receiving equipment containing “analog-only” broadcast television tuners, i.e., TVs unable to receive over-the-air digital broadcasts. At least one firm was issued a citation for its apparent failure to comply with the FCC’s analog-only Consumer Alert requirement – i.e., the rule that analog-only television receiving equipment must display a prominent notice that such equipment will require a digital-to-analog converter box to receive over-the-air broadcasts after the digital television transition on February 17, 2009. Five general merchandise retail chains signed consent decrees terminating investigations of their compliance with the analog-only Consumer Alert labeling requirement. Four of the five agreed to educate the public about the digital transition in their advertising and by other means. The fifth, Rent-A-Center, Inc., agreed to much stricter terms requiring it to offer free converter boxes to customers who bought or rented analog-only television receivers between May 29, 2007, and August 7, 2007, and to honor requests by customers renting analog-only television receivers to switch to a comparable digital product.

Two of the chains, BJ’s Wholesale Club, Inc. and Conn’s Inc., also agreed to participate in the converter box coupon program administered by the National Telecommunications and Information Administration (“NTIA”) by selling converter boxes eligible for reimbursement through \$40 coupons distributed by NTIA. Three of the chains, Big Lots Stores, Inc., Variety Wholesalers, Inc., and Conn’s, agreed to stop selling analog-only television receivers – by September 1, 2008, in the case of Big Lots and by December 31, 2008, for the other two. Notwithstanding the December 31 deadline, Variety Wholesalers and Conn’s also must pay a \$1,500 fine every month, starting on September 1, that they continue to sell analog-only equipment.

According to press reports, most consumer electronic chains, such as Circuit City, have resisted signing similar consent orders because they do not want to concede that the FCC has jurisdiction to regulate retail labeling. Circuit City and other chains raised the issue of FCC jurisdiction in their responses to the NALs reported in the April Bulletin. Questions have also been raised concerning the FCC’s authority to compel retailers to participate in the NTIA converter box program, given that the enabling statute gave only NTIA the authority to run the program, and that NTIA rules make retail participation voluntary. These issues demonstrate the FCC’s tendency to expand its reach by means of “voluntary” conditions placed in consent decrees and other types of negotiated orders.

Senate Passes Bill Opening 911 Systems to VoIP Providers

In mid-June, the Senate approved unanimously a bill that will afford VoIP providers the same interconnection rights to E911 services as other voice service providers. VoIP providers will have to register with the FCC in order to identify a 911 point of contact for public safety and government officials. If enacted, the law will also, among other things, give VoIP providers and public safety answering points (“PSAPs”) shields from liability for 911 calls which are similar to those that wireline and wireless providers already have. The law affirms state authority to collect E911 fees from VoIP and wireless providers and authorizes use of such funds for migrating emergency call systems to Internet Protocol platforms.

The Senate and the House of Representatives compromised on an informal basis to prepare this single piece of legislation because each had passed different versions of similar legislation in recent months. A significant part of the compromise was the elimination of language strongly opposed by large telephone companies that would have restricted how telecommunications carriers could use 911 customer database information, including a prohibition on use in competition proceedings before the FCC.

The House passed the bill on June 23. The legislation now goes to the President for signature.

FCC Extends Do-Not-Call Registry Indefinitely

On June 17, the FCC amended its rules to require telemarketers to honor registrations with the National Do-Not-Call Registry ("Registry") indefinitely. Prior to the rule changes, Do-Not-Call list registrations expired after five years without further consumer action, meaning roughly 10 million registrations would have expired each month going forward. In the five years since the Registry's inception, more than 157 million people have registered.

According to the FCC, its action is consistent with Congress's mandate in the Do-Not-Call Improvement Act of 2007, which prohibits the removal of numbers from the Registry unless the consumer cancels the registration or the number has been disconnected and reassigned. In a news release, the Commission called on telephone companies to timely share telephone number disconnection and reassignment data with the Federal Trade Commission ("FTC"), the administrator of the Registry. The FTC already had amended its own rules to maintain numbers on the list indefinitely.

Communications Practice Group Attorney Publishes New Privacy Law Book

Charles Kennedy, an attorney with the Communications Law Practice Group in Morrison & Foerster's Washington, D.C. office, has written a new book on the law of privacy in the United States. *The Business Privacy Law Handbook*, available from Artech House, examines the law of privacy as it applies to communications service providers, financial institutions, healthcare and healthcare insurance providers, and other types of American business. The book also includes an appendix that lists the principal privacy laws of all 50 states.

Besides practicing with the Communications Law Practice Group, Mr. Kennedy teaches communications law at the Columbus School of Law, Catholic University of America.

Video Competition Developments: Louisiana Pursues Video Franchise Reform

On June 23, Louisiana's governor signed into law a bill to shift video franchising from municipalities to the Louisiana Secretary of State. In mid-June, the Louisiana House passed a Senate-amended version of the bill, including revisions to allow the Secretary more time to review filings, extending the time frame for companies to pay quarterly franchise fees, and mandating at least one public access channel in each franchisee's basic-tier service.

The law permits incumbent cable companies to opt out of existing municipal franchises for any reason and pursue a state franchise. The opt-out will not, however, enable franchisees to break subscriber contracts or cancel debts owed to local franchising entities.

State franchise terms are limited to 15 years, with the option to renew, and include no buildout requirements. The Secretary of State has 45 days to assess the completeness of a franchise application. State authority over franchising will not be in force for the Orleans or Jefferson parishes due to state constitutional protection of home rule charters in those parishes.

Private Equity Firms Agree to Flip Alltel to Verizon Wireless

In November of last year, near the height of the leveraged-buyout boom, Alltel Corp. ("Alltel"), the wireless phone company based in Little Rock, Arkansas, was acquired by a group of private equity investors led by TPG Capital and a private equity unit of Goldman Sachs. That deal, valued at \$27.5 billion, \$4.6 billion of which was equity, was the largest leveraged buyout in the history of the telecommunications industry. Now, just seven months later, Alltel is being sold to Verizon Wireless for \$28.1 billion, comprising \$5.9 billion in equity and the assumption of \$22.2 billion in debt. This sale will yield a profit of \$1.3 billion, or a return of 28% of the initial investment, for the private equity investors.

Private equity firms usually hold an asset for three to five years while they work to improve operations and wait for a hot market. In this case, with the economy weakened by the credit crunch and telecom companies losing market value, it appears the investors wanted to limit their risk by exiting their position in a company that accounted for a large percentage of their portfolios. It appears that when Verizon Wireless approached Alltel about a deal, the investors could not pass up the opportunity to sell, at a profit, to a firm that many analysts say is a natural buyer for Alltel.

The banks, which advanced the money to finance the leveraged buyout, are selling the loans at a discount from face value. But because in many cases the banks appear already to have written down the loan values to amounts below the current sales price, the deal will actually allow them to book new profits.

Justice Department Imposes Conditions on Verizon-RCC Merger

On June 10, 2008, a consent decree filed in Washington, D.C. brought Verizon Wireless's purchase of Rural Cellular Corp. ("RCC") one step nearer to completion. In the decree, the Department of Justice conditioned its acceptance of the transaction on complete divestiture of RCC's business in six markets in New York, Vermont, and Washington. The divestitures are intended to resolve concerns that the merger would reduce consumer choice in those markets.

The FCC's public-interest review of the purchase is pending.

Chairman Martin Endorses XM-Sirius Merger with Voluntary Conditions

FCC Chairman Martin has announced that he will approve the merger of XM Satellite Radio Holdings Inc. ("XM") and Sirius Satellite Radio Inc. ("Sirius") on the strength of voluntary commitments the companies had made in a letter dated June 13, 2008.

The companies' commitments include:

A la Carte Programming

The combined company will offer a number of programming options, including "best of both" options (best of XM and Sirius), mostly music or news, sports and talk programming, and discounted family-friendly programming packages.

Public Interest and Qualified Entity Channels

The combined company "will set aside four percent of the full-time audio channels on the Sirius platform and on the XM platform, respectively . . . for noncommercial, educational and informational programming . . ." In addition, "within four months of the consummation of the merger, the combined company will enter into long-term leases or other agreements to provide a Qualified Entity or Entities rights to four percent of the full-time audio channels on the Sirius platform and the XM platform, respectively . . ." (A Qualified Entity includes any entity that is majority-owned by persons who are African-American, not of Hispanic origin; Asian or Pacific Islanders; American Indians or Alaskan Natives; or Hispanics.)

Service to Puerto Rico

Within three months of the consummation of the merger, the merged company will apply to provide Sirius satellite radio service to Puerto Rico.

Interoperable Receivers

Within one year after the merger is consummated, the merged company will offer an aftermarket, interoperable receiver for sale.

Rates

XM and Sirius pledge that the combined company will not raise its basic subscription rate, or the a la carte programming rates described in the commitment letter, for 36 months after consummation of the merger. The companies reserve the right, after one year, to pass on certain cost increases to their customers.

Other FCC commissioners will not necessarily be persuaded by the voluntary commitments and Chairman Martin's approval. Commissioner Copps, in particular, has expressed continued skepticism about the deal.

Universal Service Reform Developments

Industry Sharply Divided on FCC Universal Service Reform Proposals

Incumbents and competitive service providers went on the offensive in their respective reply comments filed on June 2, 2008, in the trio of universal service fund ("USF") reform rulemaking proceedings pending before the FCC. The most contentious issue was the FCC's proposal to eliminate the "identical support" rule, under which competitive eligible telecommunications carriers ("CETCs") are provided the same level of high-cost USF support per line as incumbent carriers. Wireless providers argued that elimination of the rule, thereby forcing CETCs to demonstrate their own costs as a basis for high-cost support, would violate the requirements of portability of high-cost support and competitive neutrality and that the FCC does not have a sufficient record to support a finding that such elimination is required to safeguard the USF from the threat of increasingly burdensome disbursements to CETCs. Rural wireless carriers indicated that elimination of the rule could be subject to legal challenge. Incumbents countered that the competitive landscape is not neutral because they bear obligations not imposed on CETCs, such as the obligation to build out networks in high-cost areas, and

that different levels of support per line thus would not violate competitive neutrality.

Rural carriers continued to oppose the FCC's proposal to distribute high-cost support by means of "reverse auctions," in which support is allocated to carriers agreeing to accept the lowest levels of support in each auction. Rural incumbents fear that if they lose such an auction, they would lose crucial high-cost support until the next auction. Most wireless providers support reverse auctions as a way to allocate support to more efficient providers, thereby reducing support for legacy wireline costs, and to avoid the problem of calculating CETC costs. CTIA argued that, at the very least, incumbents should lose support when they lose customer lines, just as CETCs do.

VoIP providers and Indian tribes strongly supported the FCC's proposal to establish a separate high-cost support fund for broadband deployment and services, arguing that targeted broadband support is needed to bring high-speed services to underserved areas. Some incumbents argued that a separate broadband fund would draw funding away from voice networks that need ongoing support.

On June 11, the FCC announced that the proposed USF "contribution factor" – the proportion of long distance end user revenue that carriers must contribute to the USF – for the third quarter of 2008 would be 11.4%, a slight increase from the factor of 11.3% in the second quarter.

House Telecommunications Subcommittee Holds Hearing on Universal Service Policy Goals and Reform Issues

On June 24, the Subcommittee on Telecommunications and the Internet of the House Committee on Energy and Commerce held a hearing on issues relating to USF reform, chaired by Subcommittee Chairman Edward J. Markey (D-MA). Over a dozen Subcommittee members attended and heard testimony from five witnesses. With some exceptions, the members' statements and questions reflected bipartisan support for expanding the USF to cover broadband services, with various differences on how to revamp the program. House Commerce Committee Chairman John Dingell (D-MI) asserted that "Congress, not the FCC, is better suited to make the tough political choices on how best to reform the system." Members from urban areas, such as Subcommittee Vice Chair Mike Doyle (D-PA), who stated that the universal service program should be "blown up," complained about the continuing cost burden of the USF, particularly given that access to telephone service in rural areas appears to have "topped out," while rural members stressed the continuing need for high-cost universal service support in their districts and the potential benefits of expanding the program to cover broadband deployment.

Most of the witnesses advocated greater support for broadband access, particularly in schools and libraries and for low-income users. In response to questioning by Chairman Markey as to how broadband access might be increased, George Lucas, appearing as the Chairman of a foundation focusing on increasing the utilization of technology in the classroom, suggested that companies receiving rights to use public spectrum should be required to provide free broadband access to schools as a condition of such use.

Randolph J. May, President of The Free State Foundation, on the other hand, presented a free market position somewhat hostile to the USF program. He argued that "market forces, rather than subsidies, should be relied on to the greatest extent possible to achieve the identified objective." He also stated that to the extent subsidies are necessary, "they should be targeted narrowly and financed broadly," while the current system is the reverse – raising funds from only one kind of communications service while providing excess subsidies "to areas and persons who don't need them." May argued that with 94% of households having voice telephone service, the high-cost fund should be permanently capped. He also endorsed the bill introduced by Rep. Joe Barton (R-TX), which would cap universal service funds to limit the growth of the program, implement reverse auctions, and provide for a telephone number-based USF contribution approach.

Rep. Charles W. "Chip" Pickering (R-MS) expressed concern that moving to a reverse auction system might cause rural telecommunications services to re-monopolize, eliminating consumer choice in those regions. Pickering stated that to increase efficiency, instead of moving to a reverse auction system, Congress should continue to subsidize multiple providers in each market but focus on wireless and broadband technologies, which are likely to be the most efficient telecommunications platforms from a technological standpoint. Mr. May responded that the reverse auction mechanism would only exist in areas that by definition would not otherwise have service, and noted his reservations about the government's picking the winning technology.

Another hearing is expected in the fall to examine specific problems with the USF program, although passage of legislation is unlikely in the 110th Congress. According to the trade press, proposed legislation and further hearings are building a record for action in the next Congress, where an anticipated expanded Democratic majority likely will drive the momentum for making broadband deployment a national priority.

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.

July 7, 2008	Reply comments due on 700 MHz FNPRM .
July 9, 2008	Comments due on AWS NPRM .
July 14, 2008	Effective date of rules prohibiting exclusive telecom services in residential multiple tenant environments (“MTEs”) .
July 14, 2008	Reply comments due on DTV consumer education initiative NPRM .
July 16, 2008	Reply comments due on AWS NPRM .
July 17, 2008	Upfront payments due in Auction No. 78 (AWS-1 and broadband PCS) .
July 29, 2008	Reply comments due on NOI on fraudulent 911 calls from non-service initialized (“NSI”) handsets .
July 30, 2008	Comments due on diversification of broadcast ownership .
July 31, 2008	Annual traffic and revenue reports due for all international carriers.
August 1, 2008	Form 499Q (Telecommunications Reporting Worksheet) due .
August 1, 2008	Form 502 (Numbering Resource Utilization/Forecast Report) due .
August 11, 2008	Auction No. 78 (AWS-1 and broadband PCS) mock auction.
August 13, 2008	Auction No. 78 (AWS-1 and broadband PCS) begins.
August 28, 2008	Comments due on hearing aid compatibility rules (multi-mode and multi-band handsets and <i>de minimis</i> exception).
August 29, 2008	Reply comments due on diversification of broadcast ownership .