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Legal Updates & News

Bulletins

Communications Law Bulletin -- March, 2007

April 2007

Communications Law Bulletin -- March, 2007

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The Month in Brief

Among other developments in the month of March, members of the House Energy and Commerce Committee held rescheduled oversight hearings of the Federal Communications Commission (the “FCC” or the “Commission”). This was the first time in four years that the full panel of FCC commissioners had appeared before Committee members, and Democratic members had harsh words for the Commission generally and Chairman Martin in particular.

Committee Chairman Dingell (D–MI) set the tone when he criticized the FCC for usurping Congress’s legislative authority. Dingell was especially unhappy with last December’s FCC action on streamlining of the video franchising rules, and suggested more generally that the Commission might benefit from “an oversight hearing every month to keep the business of the Commission on track.”

Other concerns were expressed by Rep. Edward Markey (D-MA), who noted that broadband deployment in the United States lags well behind other developed nations, and suggested that the Commission improve its collection of deployment information and “explore ways to create incentives for investment in new technologies.” Markey also questioned Chairman Martin about the National Security Agency’s collection of individual telephone records and the sale of customer records to pretexters. Another Democrat, Anna Eshoo

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of California, complained about the lack of oversight hearings in recent years and questioned both Chairman Martin and Commissioner Tate on their handling of the AT&T-BellSouth merger and the possibility that conditions placed on the merger will be selectively enforced. The AT&T-BellSouth merger conditions also drew fire from the Republican side, with Representative Barton (R-TX) suggesting that the imposition of Net neutrality provisions was contrary to the will of Congress, which has so far declined to pass legislation that mandates Net neutrality.

Besides the oversight hearings, March also saw the judicial approval of the SBC-AT&T and Verizon-MCI mergers and major victories for Voice Over Internet Protocol ("VOIP") services. These and other developments are covered in this issue of our Bulletin, along with our usual list of deadlines for your calendar.

Wireless Broadband Classified as Information Service; FCC Plans to Terminate Two Rulemakings Because of Incumbent Interference Concerns

Consistent with the FCC's prior treatment of other forms of broadband services (such as DSL and cable modem), the FCC at its March open meeting adopted on its own motion a declaratory ruling classifying wireless broadband Internet access as an "information service" under the Communications Act of 1934, as amended (the "Act"). Accordingly, wireless broadband services are not subject to the Act's Title II common carrier regulations. The FCC's action brings regulatory parity to Internet broadband services provided over wireless, cable, wireline, and power line facilities. According to the FCC, its decision will bring regulatory certainty and promote competition among all broadband services.

Under the FCC's ruling, wireless broadband Internet access service utilizes spectrum wireless facilities and wireless technologies to provide high-speed Internet access. Furthermore, the information service classification applies to mobile, portable, or fixed technologies that transmit data over short, medium, or long ranges. Similar to its treatment of other broadband services, the FCC concluded that the transmission component underlying wireless broadband service is "telecommunications" that is part of a functionally integrated wireless Internet access service. Further, the FCC stated that a wireless broadband Internet access service that uses mobile technology is not a "commercial mobile radio service" under the Act or FCC rules.

The FCC voted unanimously to declare wireless broadband Internet access service as an information service, but Commissioners Copps and Adelstein issued concurring statements. Commissioners Copps and Adelstein expressed concern that the item failed to address certain consumer issues, such as customer privacy and access by those with disabilities. Commissioner Copps also stated that he had hoped the FCC would start a rulemaking to address how the FCC's 2005 Internet access policy statement applies to wireless broadband services, including the applicability of its "Carterfone" rules, which was raised recently in a petition for rulemaking by Skype Technologies. Chairman Martin, however, noted that parties can comment on the Carterfone issue in the Skype proceeding or in response to the notice of inquiry regarding Net neutrality that the FCC also adopted at the open meeting. *See also* "FCC Tees Up Lively Debate with Net Neutrality NOI, While Maryland Backtracks and Maine Jumps into the Fray," below.

In the FCC's decision regarding the classification of wireless broadband services, Chairman Martin also stated that his office is circulating separate orders that would terminate a proceeding regarding the use of cellular telephones aboard airplanes and another proceeding regarding the use of "interference temperature" in certain spectrum bands to improve spectrum management and utilization. Chairman Martin noted that both proceedings, which drew tremendous criticism from incumbent wireless providers, were being terminated because of incumbent interference concerns.

In addition, there have been several developments regarding truth-in-billing and whether states have authority over wireless carriers' line item billing practices or other consumer issues. These developments are discussed in "States Continue to Address Wireless Consumer Protection Issues," below.

Judge Approves SBC-AT&T and Verizon–MCI Mergers

On March 30, 2007, Judge Emmet Sullivan of the United States District Court for the District of Columbia approved the agreement between the parties and the Justice Department in the SBC–AT&T and Verizon–MCI mergers. Although the mergers were approved by the Justice Department and the FCC more than a year ago, Judge Sullivan was tasked under the Tunney Act with determining whether the deals are in the public interest.

At hearings held last year, Judge Sullivan criticized the Justice Department for presenting an inadequate record and suggested that he might hold evidentiary proceedings to assist in his decision. In his decision of March 30, Judge Sullivan pointed out that his public interest finding under the Tunney Act does not establish that "these mergers . . . are altogether in the public interest, nor whether they should be approved by other

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branches of government."

In another merger-related story, Qwest Communications International ("Qwest") withdrew the writ of mandamus it had filed with the U.S. Court of Appeals for the D.C. Circuit, demanding that the FCC be directed to suspend certain provisions of a special access tariff that AT&T proposed one day before the FCC approved the merger between AT&T and BellSouth. (See related article in February, 2007 issue of this Bulletin.) Late on March 26, the FCC had revised the special access condition based upon a proposal by AT&T.

VOIP Providers Score Major Victories at the FCC and in Court

Interconnection Rights for VOIP Providers

On March 1, the Wireline Competition Bureau granted a petition for declaratory relief filed by Time Warner Cable ("TWC") regarding interconnection rights for its VOIP services. The Bureau released an order declaring that wholesale telecommunications carriers are entitled to interconnect and exchange traffic with incumbent local exchange carriers ("ILECs") pursuant to Sections 251(a) and (b) of the Communications Act when providing services to VOIP and other service providers. The order also concluded that state commission decisions denying telecommunications carriers the right to interconnect with ILECs are inconsistent with the Act and FCC precedent and would frustrate the development of competition and broadband deployment.

TWC began to deploy its facilities-based VOIP service in 2003, using wholesale telecommunications services from MCI WorldCom Network Services Inc. ("MCI"), Sprint Communications Co., LP ("Sprint"), and other carriers to connect TWC's VOIP service customers with the public switched telephone network ("PSTN"). MCI and Sprint provide transport for the origination and termination of TWC's VOIP traffic on the public switched telephone network through their interconnection agreements with ILECs. In its petition for declaratory relief, TWC claimed that MCI has been unable to provide such wholesale service to TWC in certain areas in South Carolina and that Sprint has been unable to provide wholesale service to TWC in certain areas in Nebraska due to decisions by the South Carolina and Nebraska Public Service Commissions limiting their interconnection rights. These commissions determined that rural ILECs are not obligated to enter into interconnection agreements with competitive service providers (like MCI and Sprint) to the extent that such competitors operate as wholesale service providers. They held that, because MCI and Sprint sought interconnection for services provided to TWC customers, rather than their own end users, they are not telecommunications carriers entitled to interconnection under Section 251.

In granting declaratory relief, the Bureau held that Section 251 makes no distinction between wholesale and retail services and that carriers are entitled to interconnect and exchange traffic with ILECs pursuant to Sections 251(a) and (b) for the purpose of providing wholesale services. The Bureau concluded that the regulatory classification of the end user service is not dispositive of the wholesale carrier's rights under Section 251. The Bureau found that a contrary decision would impede the development of wholesale telecommunications and facilities-based VOIP competition, as well as broadband deployment. The Bureau also noted that, although it found any contrary state decision to be inconsistent with the Act, it was not making any determination as to whether to preempt any state commission decision.

The Bureau stressed that it was not determining or prejudging the regulatory classification of VOIP services or any retail service provider's entitlement to serve end users through the type of wholesale arrangement at issue. It also emphasized that its ruling is limited to carriers seeking interconnection in their own right for the purpose of providing wholesale service, and conditioned the interconnection rights recognized in the order on the wholesale carrier's assumption of responsibility for compensating the ILEC for the termination of traffic under a Section 251 arrangement.

Cable providers praised the order as limiting states' and competitors' ability to inhibit cable VOIP competition. One industry analyst characterized the order as a significant victory for the cable industry and predicted that it may hurt rural ILECs that previously faced less competition because of the lack of interconnection rights in some states. Daniel Mitchell, Vice President, Legal & Industry Division of the National Telecommunications Cooperative Association ("NTCA"), stated that the ruling gives VOIP providers a competitive advantage by allowing them to impose costs on ILEC networks without paying for those costs. NTCA will meet with rural ILECs concerning the order, and they likely will ask the full Commission to review it. He also claimed that the order is premature and should not have been decided in advance of the pending intercarrier compensation, IP-enabled services, and universal service reform proceedings.

State Regulation of VOIP Services

On March 21, the U.S. Court of Appeals for the Eighth Circuit affirmed the FCC's 2004 order preempting state regulation of Vonage Holdings Corporation's VOIP service. Vonage had sought preemption of an order of the Minnesota Public Utilities Commission ("MPUC") directing Vonage to comply with the MPUC's telephone service regulations in the provision of its DigitalVoice "nomadic" service, which enables Vonage customers to

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initiate a call from any location through a broadband Internet connection. Vonage requested that the FCC find that DigitalVoice is an information service and thus exempt from state regulation; or, in the alternative, preempt state regulation under the "impossibility exception" to the dual jurisdictional regime established in the Communications Act. Vonage also sought relief from the MPUC's order in federal district court, which granted a permanent injunction against the order on the grounds that DigitalVoice is an information service not subject to MPUC regulation.

In its 2004 preemption order (discussed in the November 2004 Bulletin), the FCC preempted the MPUC order on the grounds that the intrastate and interstate components of Vonage's DigitalVoice service cannot be separated and that state regulation of the service would impede federal authority over interstate communications and conflict with the FCC's deregulatory policies. The FCC explained that allowing traditional intrastate entry and exit common carrier regulation of a service like DigitalVoice would conflict with the FCC's policies, and allowing DigitalVoice to be subject to 50 different regimes could impede the development and deployment of such services, to the detriment of consumers.

The FCC explained that this regulatory conflict would arise irrespective of the proper regulatory classification of DigitalVoice. If the FCC were to classify DigitalVoice as a telecommunications service, it would be treated as a nondominant, competitive service for which the FCC has eliminated tariffing and entry and exit regulation. If DigitalVoice were an information service, it would be entirely deregulated. In either case, the MPUC's regulation of DigitalVoice would conflict with the FCC's approach. Moreover, it is virtually impossible to know the geographic location of all of the end-points of a nomadic VOIP service like DigitalVoice, making any jurisdictional distinctions highly impractical, if not impossible.

The FCC emphasized that its decision addressed only the jurisdictional issue raised by Vonage, ruling that Vonage's DigitalVoice service is not subject to the MPUC's certification, intrastate tariffing, and 911 requirements, and did not resolve the ongoing debate over the proper regulatory classification of VOIP. The FCC did note, however, that "we would preempt state regulation to an extent comparable to what we have done in this Order" as to any other service "having the same capabilities as DigitalVoice." Shortly thereafter, the Eighth Circuit affirmed the lower court's permanent injunction based on the preclusive effect of the FCC's preemption decision. Multiple state regulatory commissions appealed the FCC's preemption order, and those appeals were consolidated in the Eighth Circuit.

In affirming the FCC, the court rejected a variety of claims that the FCC's preemption decision was arbitrary and capricious. The court found that it was not arbitrary or capricious for the FCC to preempt state regulation while deferring the regulatory classification of VOIP services. Because the impossibility exception is dispositive as to the FCC's authority to preempt, "[i]t was therefore sensible for the FCC to address that question first without" determining VOIP's classification. The court also found that it was not arbitrary or capricious to conclude that the impossibility exception applies to VOIP services. It was proper for the FCC to consider the economic burden of identifying the end points of VOIP communications in determining whether it is impractical or impossible to separate the service into its interstate and intrastate components. The court noted that the preemption order was not inconsistent with the FCC's subsequent VOIP 911 order because both orders acknowledge the difficulties in determining the location of nomadic VOIP customers. The court also pointed out that the FCC subsequently indicated that a VOIP provider that was able to track the actual locations of its users would no longer qualify for preemption.

The court similarly found that it was not arbitrary or capricious for the FCC to conclude that state regulation of VOIP service would interfere with valid federal rules or policies. The court cited the FCC's explanation that conflicts with state regulation would result whether the FCC classified DigitalVoice as a telecommunications or information service. The court also concluded that the FCC's preemption of the MPUC's 911 requirements was not arbitrary or capricious. Vonage could not have complied with those requirements because it cannot identify the locations of DigitalVoice callers and thus could not be certificated as a service provider in Minnesota. Vonage's compliance with the FCC's VOIP 911 order does not guarantee that it could have met the MPUC's state 911 requirements.

Finally, the court found that an issue raised by the New York Public Service Commission ("NYPSC") – whether the FCC's apparent preemption of state regulation of all VOIP services, including "fixed" services, exceeds its jurisdiction – was not ripe for review. The FCC's preemption order only suggests that the FCC might preempt fixed VOIP services, but does not purport to do so. As a "mere prediction," that statement is not final agency action. Observers stressed that the court's finding of unripeness as to NYPSC's claim leaves the regulatory status of cable VOIP and other fixed VOIP services uncertain. To the extent that fixed VOIP users' locations can be identified, the impossibility exception would not apply. Any FCC assertion of jurisdiction over such services thus must be based on another rationale. For providers of nomadic VOIP services, however, the decision is a clear victory and removes potential regulatory obstacles.

Dramatic Increase in Contribution Factor Renews Concerns Regarding USF Reform

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The second quarter 2007 contribution factor for the Universal Service Fund ("USF") has increased dramatically from 9.7 percent to 11.7 percent. The higher contribution factor is the result of an increase in monies allocated to USF subsidies and a simultaneous decrease in the USF revenue base that supports those subsidies. Specifically, the estimated total USF subsidies for the second quarter of 2007 rose $13 million from the first quarter of 2007. The high-cost USF subsidy increased approximately $20 million alone, while the other USF subsidies stayed constant or dropped. In contrast, the USF revenue base dropped from $18.5 billion in the first quarter to $18 billion in the second quarter.

The increased contribution factor renewed concerns regarding the urgent need to reform the USF. Wireline carriers continue to argue that the designation of wireless carriers as eligible telecommunications carriers or "ETCs," thus making them eligible for high-cost and other USF subsidies, is putting too much pressure on the USF. The designation of a satellite reseller, DialToneServices, as an ETC by the Texas regulatory agency has widened the debate to whether satellite companies whose only facilities are handsets should receive USF subsidies.

The sufficiency of the USF also has been the subject of several recent Congressional hearings. There appears to be broad consensus that the USF must be maintained, but reformed. A number of senators urged the FCC to expand the USF to support broadband deployment in rural areas. In fact, Senators Smith (R-OR) and Dorgan (D-ND) introduced a bill that would require the FCC to establish rules for an annual $500 million fund dedicated to rural broadband. In response to questioning at a House oversight hearing, Chairman Martin reiterated his support for a numbers-based USF contribution system and for allocating high-cost USF subsidies using "reverse auctions."

Important Reminders Regarding USF Carrier Contributions

The FCC recently released a series of orders that provide carriers with certain important reminders regarding their obligations to contribute to the USF –

- Carriers can submit revised forms within the 45-day correction period. Even if the errors are significant and result in substantial increases in USF payments temporarily, if the carrier misses the revision deadline, it must wait to "true up" its reported revenues on its next Form 499A annual report.
- Resellers have an independent obligation to report revenues on their Form 499s and contribute to the USF, regardless of whether a third party agrees to contribute to the USF on their behalf. For example, even if a reseller pays USF fees to its wholesale supplier based upon the assurances of the wholesaler that it will then remit those payments to the USF, the reseller is still independently responsible for reporting revenue and making contributions.
- Requests for USF credits based upon a "double-payment" argument generally will be rejected because the administrator of the USF does not have the ability to determine with certainty whether a double payment has in fact occurred and/or been remitted to the USF. For example, resellers that pay into the USF indirectly (by making payments to their underlying suppliers) and are then found to be required to contribute directly will not be credited for potential double payments. The FCC has made it clear that the reseller might have a legal claim in court against the wholesale supplier for a refund of the fees, but will not receive a credit from the USF administrator.

Accordingly, it is important that carriers report their Form 499 revenues accurately and correctly the first time. If you have any questions regarding your Form 499 contribution obligations, do not hesitate to contact any of the attorneys in Morrison & Foerster's Communications Group.

FCC Denies Junk Fax, CAN-SPAM Petitions

On the electronic marketing front, the FCC in March rejected two petitions for reconsideration or amendment of

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existing rules. One petition, brought by Starkle Ventures, LLC, asked the Commission to commence a rulemaking proceeding to rescind the established business relationship ("EBR") exception for facsimile advertisements. The other, brought by Cingular Wireless, LLC, asked the Commission to reconsider its decision to include mobile telephone companies' mobile service commercial messages ("MSCMs") to subscribers in the CAN–SPAM Act's restrictions on sending MSCMs to wireless devices.

The first petition, that of Starkle Ventures, had been brought in September of 2005. This was after Congress passed the Junk Fax Prevention Act, which effectively required the FCC to restore the EBR exception that the Commission had rescinded in 2003. After Starkle's petition was brought, on April 6, 2006, the Commission amended its Junk Fax rules to conform to the Junk Fax Prevention Act, thereby restoring the EBR exception. Noting that "Starkle has not presented grounds for the Commission to revisit its facsimile advertising rules," the Commission on March 14, 2007, denied the petition.

The Cingular petition sought reconsideration of an FCC order that "requires CMRS providers such as Cingular to obtain express prior authorization from their subscribers before sending the MSCMs." In its petition, Cingular relied principally on language in the CAN-SPAM Act that permits the Commission to exempt Commercial Mobile Radio Service ("CMRS") providers after analyzing the relationship between CMRS providers and their customers. In Cingular's view, the FCC's failure to exempt CMRS providers from restrictions on MSCMs violated Congressional intent and violated Cingular's free speech rights under the First Amendment.

The Commission rejected all of Cingular's arguments, pointing out that the CAN-SPAM Act permitted, but did not require, the Commission to exempt CMRS providers from wireless spam prohibitions. In the Commission's view, Congress's primary goal in the CAN-SPAM Act was to limit spam, and the relationship between CMRS providers and their customers did not outweigh that concern. The Commission also rejected Cingular's First Amendment argument and declined to reconsider its previous decision.

House of Representatives Approves CFIUS Reform

On February 28, 2007, the House of Representatives unanimously passed the National Security FIRST Act ("H.R. 556"), a bill intended to strengthen the oversight role of the Committee on Foreign Investment in the United States ("CFIUS") in reviewing foreign acquisitions of domestic assets for possible national security threats. Although it is unclear whether a Senate version of the CFIUS reform legislation will be introduced in the near future, it is likely that any CFIUS reform will result in the application of a higher level of regulatory scrutiny on foreign acquisitions of U.S. companies with any potential implications for U.S. national security interests.

The Exon-Florio Amendment to the Defense Production Act of 1950 ("Exon-Florio") permits the President of the United States to prevent any acquisition, merger, or takeover of a U.S. company or U.S. assets by foreign-owned or controlled entities if the President determines that the transaction threatens the national security of the United States. CFIUS, a 12-member interagency committee composed of various representatives of the executive branch of the U.S. Government and chaired by the Secretary of the Treasury, administers the Exon-Florio presidential notification process and is charged with reviewing transactions for potential national security concerns.

Last year, CFIUS came under heavy scrutiny after Congress decried its approved sale of U.S. port management businesses to a Dubai-based company as potentially compromising domestic port security. Lawmakers criticized the review process for its secretive nature and for giving CFIUS too much discretion in its ability to choose which transactions it investigates without the proper oversight. Congress also expressed concerns that the deadlines placed on CFIUS to complete reviews and investigations did not provide adequate time for the Committee to complete its reviews and investigations in some instances, and that the existing CFIUS procedures are no longer adequate for today's national security concerns.

The key changes established by H.R. 556 to the CFIUS review process include:

- Appointing the Secretary of Homeland Security and Secretary of Commerce to serve as Vice Chairpersons of CFIUS and requiring that the Director of National Intelligence conduct reviews of any investment that poses a threat to national security.
- Increasing the role of Congressional oversight by mandating greater reporting by CFIUS either during or after it completes reviews and providing Congress with a greater amount of detailed information about its operations.
- Mandating that CFIUS conduct extended investigations of any transaction wherein the acquiring entity is owned or controlled by a foreign government.

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- Requiring that the Secretaries of the Treasury, Homeland Security, and Commerce (or the Deputy Secretary of each agency) sign off on CFIUS approvals in order to ensure that all principal members of CFIUS are aware that all reviews and investigations have been completed.

Both the U.S. business community and the White House have been receptive to H.R. 556, believing the bill to be a moderate and balanced compromise between the dual goals of promoting foreign direct investment in the U.S. and protecting national security interests.

Broadcast Developments

In early March, Clear Channel Communications, CBS Radio, Entercom Communications, and Citadel Broadcasting reportedly reached a settlement with the FCC under which they collectively will pay a total of $12.5 million to resolve claims that they engaged in payola practices. Though long-standing FCC regulations have prohibited broadcasters from accepting payment to play specific songs on the radio, this settlement would represent the FCC's largest fine to date to combat payola.

On March 27, the FCC voted to approve the transfer of control of Univision Communications Inc. ("Univision") to Broadcasting Media Partners, Inc. The FCC and Univision also entered into a consent decree under which Univision would pay $24 million to resolve allegations made by the Commission that it failed to comply with children's programming requirements under the Children's Television Act of 1990.

Representatives Inslee (D-WA) and Deal (R-GA) introduced legislation that would require the FCC to complete its broadcast "white spaces" proceeding and issue a final order before October 1, 2007, or 180 days after enactment, and would require that the spectrum be opened for unlicensed uses by February 18, 2009. The Congressmen explained that the spectrum provides a potentially valuable platform for technological innovation without affecting incumbent users. A companion bill was introduced in the Senate. For more information, see the separate "Legislative Developments" article in this issue.

Network2 filed a petition asking the FCC to declare that "Internet video" is not subject to cable or broadcast TV regulations under either Title III or Title VI of the Communications Act. The petition also asks the Commission to declare that it does not intend to impose any additional regulations on Internet video, services, or applications going forward.

Tip: Responding Individually to Informal Complaints

On March 2 the FCC's Consumer and Governmental Affairs Bureau ("CGA") released a public notice reminding carriers of their responsibility to respond to informal complaints. When consumers file complaints against a common carrier, the Commission sends the carrier a "Notice of Informal Complaint." Failure to respond to an informal complaint on an individual case-by-case basis within a 30-day period is a violation of the Communications Act and the Commission's rules. The CGA stated that it will not accept a consolidated list of complaints as an indicator that those complaints have been resolved; rather, each complaint must be addressed individually.

Video Franchise Developments

In early March, the FCC released the text of its federal video franchise order adopted in December 2006. (See related articles in the December, 2006 and January, 2007 issues of this Bulletin.) The franchise order was criticized by many groups, including municipalities and cable companies, who were concerned that the order usurps local authority and gives an unfair advantage to Bell companies.

On March 22, the FCC adopted a Notice of Proposed Rulemaking ("NPRM") seeking comment on a number of issues relating to the use of exclusive contracts for the provision of video services to multiple dwelling units ("MDUs"). The NPRM seeks comment on the current conditions facing providers attempting to gain access to

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MDUs or other real estate developments, the impact of exclusive contracts on consumer choice and video competition, and what steps the Commission should take to ensure that exclusive contracts do not unreasonably impede competitive video entry. The NRPM also tentatively concludes that the FCC has authority to regulate in this area to the extent it finds that such contracts may impede competition and impair deployment of video services. In his separate statement, Chairman Martin explained that the NPRM was released in part out of concern about rising cable prices in recent years.

Video franchise reform bills designed to shift franchising authority from municipalities to the state level have made progress in several states:

- A new Ohio Senate bill, SB-117, would shift video franchising from municipalities to the state's Commerce Department. The department would have 30 days to review franchise filings, with inaction causing automatic approval.
- The Missouri legislature passed a video franchise reform bill, which the governor signed, that will shift franchising from municipalities to the state public service commission. The commission will have 30 days to act on statewide video franchise applications.
- Iowa's legislature has taken initial steps towards a bill to shift video franchising from municipalities to the Iowa Utilities Board. The bill, revised to include new buildout requirements and public access obligations, could reach the senate floor for debate in late March.
- Florida's House of Representatives passed a bill shifting video franchising from municipalities to the Secretary of State. The state Senate has a similar bill in committee, but that bill includes more stringent buildout requirements and greater restrictions on the types of technological platforms that new landline video entrants may use.
- Wisconsin's legislature introduced parallel video franchise reform bills that would require all entrants to obtain a statewide video service franchise. However, the bill would allow municipalities to keep their existing authority over rights-of-way and public, educational, and government channels.
- Tennessee's legislature introduced a video franchise bill, which was set for House committee hearings on March 27. The bill would shift video franchising authority from municipalities to the Secretary of State. The bill does not impose buildout requirements on new entrants, but it allows incumbents to opt out of existing municipal-level franchises when a state-franchised competitor enters the market.

Meanwhile, statewide franchise measures were dealt setbacks in Utah and Idaho, where bills were defeated or withdrawn.

FCC Tees Up Lively Debate with Net Neutrality NOI, While Maryland Backtracks and Maine Jumps into the Fray

March saw the issue of network neutrality ("Net neutrality") return full throttle as a federal issue. In a bit of a surprise, the FCC placed a notice of inquiry ("NOI") on broadband industry practices (a/k/a Net neutrality) on the agenda for the March open meeting. This NOI, which was initially proposed by Chairman Martin in the fall as a compromise to the Democrats in the AT&T/BellSouth merger debate, was pulled when the commissioners reached an impasse on Net neutrality conditions on the merger and delayed the merger vote. When Net neutrality conditions ultimately were placed on the merger, many assumed the NOI was no longer being considered.

The NOI seeks information on the behavior of participants in the broadband market, and specifically raises the following questions:

- How broadband providers are managing Internet traffic on their networks;
- Whether providers charge different prices for different speeds or capacities of service;
- Whether FCC policies should distinguish between content providers that charge end users for access to content and those that do not;
- How consumers are affected by network management practices; and
- Whether a fifth principle of "non-discrimination" should be added to the Internet Policy Statement and how it would be defined and drafted.

Commissioners Copps and Adelstein concurred in the initiation of the NOI, but criticized the FCC for not instead taking stronger action by voting to initiate a rulemaking proceeding. Both Copps and Adelstein also strongly asserted that the FCC should use this proceeding to add a fifth principle – that of non-discrimination – to its 2005 Internet Policy Statement. Chairman Martin and Commissioner McDowell, however, noted the absence of documented problems or complaints. Given the high level of interest in this issue in the industry and at the Federal Trade Commission's recent public workshop (see related article in February, 2007 issue of this Bulletin), and the renewed interest in this issue in the new Democratic Congress, the NOI will undoubtedly result in a lively debate at the FCC. Because of the lack of consensus among the FCC commissioners on this

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issue, participants in this proceeding should view it as a potentially open field. Commissioner McDowell even encouraged parties to raise issues not specifically cited in the NOI.

The text of the NOI is expected to be released in early April, which will initiate a 60-day comment cycle and additional 30-day reply cycle.

Meanwhile, at the state level, we reported in our last issue of this Bulletin that Maryland had introduced broadband legislation that contained a Net neutrality provision. In early March, however, the Maryland Attorney General advised the legislators that this provision created a significant risk of federal preemption. Following this advice, the bill was formally withdrawn.

In Maine, however, a stand-alone network neutrality bill was introduced that was not part of another larger telecommunications bill. The bill would bar Internet Service Providers ("ISPs") from offering service that could block, impair, degrade, or interfere with any customer's ability to use or connect to any content, service, or application on the Internet. Under the bill, ISPs could offer tiered service if it is based only on connection bandwidth and/or options such as spam blocking. Supporters have not yet explicitly addressed the issue of conflict with federal law or preemption.

State Legislatures Address VOIP Emergency Services and USF Contributions

A number of state legislatures are considering bills that would subject providers of interconnected VOIP services to the same E911 support obligations as are imposed on other telecommunications carriers. In 2005, the FCC required providers of interconnection VOIP services, those VOIP services that originate or terminate on the public switched networks, to provide their customers with access to E911 service. The pending state bills would expand the definition of "telecommunications service provider" to include interconnected VOIP, thereby making the service subject to the same fees and taxes used to support emergency services as are paid by other telecommunications carriers. While the FCC does require interconnected VOIP providers to make E911 available, it remains to be seen whether any provider will challenge the funding obligations that these states are considering in light of the Eighth Circuit's affirmation of FCC preemption of state regulation for certain VOIP services. (This decision is discussed in more detail in the related article, "VOIP Providers Score Major Victories at the FCC and in Court," above.)

In Idaho, both the House and the Senate have passed HB-123, and the Arizona Senate has passed SB-1265. Both bills add a new definition of "interconnected VOIP" and include the service with those subject to the states' E911 fees, up to $1 per month in Idaho and 20 cents per phone number in Arizona. In Kansas, SB−49 would require interconnected VOIP providers to contribute to the state's Universal Service Fund. SB-49 is the result of requests to the legislature by Embarq, whose representative testified that the sustainability of the Kansas Universal Service Fund is in question because of a decline in revenues due, in part, to customers migrating to VOIP service. Including VOIP in the services that must pay into the Universal Service Fund will ensure future viability of the fund. In Maryland, the state Senate is considering SB-864, which would deregulate retail interconnected VOIP services but retain PSC jurisdiction over E911, Lifeline services, and intercarrier compensation. In Utah, Governor Jon Huntsman signed HB-119, expanding the E911 surcharge to interconnected VOIP and any other new technology that interconnects with the public switched network. The new Utah statute also reduces the cap on surcharges that fund E911 services.

States Continue to Address Wireless Consumer Protection Issues

As reported in prior Bulletins, a number of state legislatures are considering consumer protection measures for wireless services and restrictions on the use of mobile phones and devices while driving. Illinois and California join the growing list of states with pending cellphone safety bills. In California, SB-1613 would bar drivers with learner's permits, provisional licenses, or student licenses from using any type of mobile device, including hands-free devices, while driving. This would expand the current California law that prohibits the use of hand-held devices for all drivers, scheduled to take effect on July 1, 2008, to restrict both hand-held and hands-free use for those drivers without a permanent license. In Illinois, SB-140 would ban all mobile phone use, both hands-free and hand-held, by drivers under the age of 19 on learner's permits or other limited licenses, except in the case of emergencies.

Earlier in March, the Connecticut Department of Public Utility Control ("DPUC") issued a report summarizing wireless complaints it had received over the prior year. The report, required by a 2005 state law requiring the DPUC to establish a toll-free number for wireless complaints, included a request that the DPUC be permitted to enforce wireless consumer rights and service quality. The DPUC lamented that, while the complaint line received 19,000 calls from consumers, only 504 callers registered their complaint, most of the callers aborting the process upon learning that the DPUC has little ability to resolve their complaints. The report recommended

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that wireless carriers fully and clearly explain contract terms to their customers and conduct quarterly reviews of the complaints received by the DPUC. The wireless carriers disagreed with these recommendations, stating that the competitive market, combined with state and federal consumer laws and FCC regulations, provides sufficient consumer protection.

AT&T Settles Cingular Dispute with the California PUC

On March 14, AT&T, which acquired Cingular in late 2004, filed with the California Public Utilities Commission ("CPUC") an all-party settlement of Cingular's long-running dispute regarding its marketing practices and collection of early termination charges. The settlement between the CPUC's Consumer Protection and Safety Division and Utility Consumer Action Network ("UCAN"), a consumer group, was approved by the CPUC during its March 15 public agenda meeting. In 2002, the CPUC opened an investigation into Cingular's practice of imposing early termination charges on those customers who terminated service because of poor service coverage. In September of 2004 the Commission found that Cingular's no-refund policy constituted an unfair business practice and fined the company $12.14 million. The CPUC's decision was upheld by the California District Court of Appeals, and the California Supreme Court denied AT&T's petition for appeal. On March 9, AT&T filed a petition for writ of certiorari with the United States Supreme Court, which AT&T withdrew upon submission of the all-party settlement. Under the settlement the $12.14 million fine will be released from escrow and paid to the California General Fund. In addition, AT&T will pay approximately $18.5 million in refunds to those customers who entered into contracts with AT&T or its agents between January 1, 2000, and April 30, 2002, and who paid early termination fees.

California Bill to Limit Special Deals Between Video and Broadband Providers and Landlords

AB-1164, currently pending in the California Assembly, would prohibit agreements between video service and broadband service providers and landlords that would interfere with their tenants' ability to subscribe to the video or broadband provider of their choice. The bill also would prevent landlords from discriminating, in rents or otherwise, between their tenants based on the video or broadband carrier to which the tenant subscribes. The bill was introduced on February 23.

Legislative Developments

Senate Commerce Committee Chairman Daniel Inouye (D-HI) is working with members of his committee on a bipartisan measure to reform the federal USF. As part of that effort, he is expected to conduct an in-depth briefing on the potential and limitations of broadband Internet and wireless services. The measure reportedly is not intended to be part of a larger telecommunications reform bill. Obtaining a broad-based consensus on the substance of the measure, however, may prove challenging, given the differing views among lawmakers on how to improve the universal service program. For example, Sen. Ted Stevens (R-AK), the top Republican on the Senate Commerce Committee, opposes reverse auctions, which are intended to limit the number of carriers eligible for USF subsidies and to reduce the size of USF. Some state commission representatives, however, have raised concerns regarding the expanding size of USF and questioned the existing system under which both wireline and wireless carriers providing service to the same areas are eligible to receive subsidies.

On a separate issue, Reps. Inslee (D-WA) and Deal (R-GA) in March introduced a bill requiring the FCC to open broadcast "white space" spectrum for unlicensed use by February 18, 2009. Sens. Kerry (D-MA) and Smith (R-OR) introduced a similar bill in the Senate earlier in January. The measure is supported by the White Spaces Coalition, which includes Microsoft, Google, Intel, Dell, and Hewlett Packard. To demonstrate the feasibility of unlicensed operations in the white spaces, the Coalition has submitted for FCC testing a prototype device that operates in the spectrum without causing harmful interference to existing licensed operations.

Federal Court Rules Against Vonage in Verizon Patent Dispute

A jury ruled on March 8 that Vonage Holdings Corporation ("Vonage"), the Internet phone provider, is infringing three patents held by Verizon Communications Inc. ("Verizon") that enable voice calls to be placed over the Internet. The Federal District Court for the Eastern District of Virginia ordered Vonage to pay Verizon $58 million for infringing the patents and a royalty of 5.5% of its future revenue for any continuing infringement. The amount was significantly less than the $197 million that Verizon requested, meaning the jury found that the infringement was not willful, and Verizon could not collect triple damages. After the ruling, Vonage shares hit a 52-week low, declining almost 4%.

On March 23, the federal judge in the case announced that he would issue a permanent injunction barring Vonage from using the technology infringing the three Verizon patents. Vonage denies that it is infringing Verizon's patents and has requested a stay of the injunction pending an appeal. The presiding judge will

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refrain from signing the order for the permanent injunction for two weeks while he considers Vonage's request. Trading in Vonage stock was halted while Vonage issued a statement regarding the injunction, and Vonage shares eventually fell 26%, to close at $3 per share.

The ruling will not immediately impact Vonage subscribers. Although Vonage claims that its technology is not infringing the Verizon patents and vowed to appeal the ruling, Vonage announced that it is working on developing new technology so that it can avoid using the technology at issue in the case.

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 5, 2007	Reply comments due on **aviation radio NPRM**.
April 6, 2007	Comments due on **ORBIT Act Report to Congress**.
April 9, 2007	Deadline to register for pre-auction seminar for **Auction No. 72 (Phase II 220 MHz)**.
April 11, 2007	Pre-auction seminar for **Auction No. 72 (Phase II 220 MHz)**.
April 11, 2007	Short-form filing window opens for **Auction No. 72 (Phase II 220 MHz)**.
April 11, 2007	Final payments due in **Auction No. 69 (1.4 GHz)**.
April 12, 2007	Reply comments due on **Missoula Plan amendments to address "early adopter" issues.**
April 13, 2007	Reply comments due on **ORBIT Act Report to Congress**.
April 16, 2007	**TV license post-filing announcements due** for New York and New Jersey.
April 16, 2007	**TV license post-filing announcements due** for Delaware and Pennsylvania.
April 16, 2007	Reply comments due on NPRM regarding **diversity in video programming**.
April 20, 2007	Short-form application deadline for **Auction No. 72 (Phase II 220 MHz)**.
April 20, 2007	Comments due on **NPRM in local video franchise order**, including whether preemption of certain local video franchise processes should be extended to incumbent cable operators.
April 20, 2007	**Broadband PCS spectrum (Auction No. 71)** up-front payments due.
April 23, 2007	Comments due on **migratory birds NPRM**.
April 30, 2007	Oppositions/comments due on **Skype petition for rulemaking regarding application of *Carterfone* rules to wireless networks**.
May 1, 2007	**TV license post-filing announcements due** for Delaware and Pennsylvania.
May 1, 2007	**Quarterly Telecommunications Reporting Worksheet (Form 499Q) due**.
May 1, 2007	Deadline for **annual certification of compliance with rate averaging/rate integration requirements**.
May 7, 2007	Reply comments due on **NPRM in local video franchise order**, including whether preemption of certain local video franchise processes should be extended to incumbent cable operators.
May 7, 2007	**Rural health care pilot program applications** due.
May 14, 2007	**Auction No. 71 (broadband PCS) mock auction**.
May 14, 2007	Deadline for **broadband Internet access and VOIP providers to comply with CALEA requirements**.
May 15, 2007	Replies to oppositions/comments due on **Skype petition for rulemaking regarding application of *Carterfone* rules to wireless networks**.
May 16, 2007	**TV license post-filing announcements due** for Delaware and Pennsylvania.
May 16, 2007	**Auction No. 71 (broadband PCS) begins**.
May 16, 2007	**Prepaid calling card reports to transport service providers** due.
May 21, 2007	Upfront payments due for **Auction No. 72 (Phase II 220 MHz)**.
May 23, 2007	Reply comments due on **migratory birds NPRM**.

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