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Bulletins

Communications Law Bulletin, June 2009

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The Month in Brief

As this edition of our Bulletin goes to press, the new Federal Communications Commission ("FCC" or "Commission") is steadily taking shape. Notably, the Senate has confirmed the nominations of Julius Genachowski and Robert McDowell as FCC commissioners, and the President has nominated Meredith Baker, former acting head of the National Telecommunications and Information Administration ("NTIA"), to replace Chairman Kevin Martin, and Mignon Clyburn, a commissioner on the South Carolina Public Service Commission, to replace Commissioner Deborah Tate. Also in June, the Senate confirmed Larry Strickling as administrator of the NTIA.

June also brought a number of other developments at the FCC, Capitol Hill, and elsewhere. Those stories are covered here, along with our usual list of deadlines for your calendar.

FCC Imposes "Whipsawing" Sanctions Against Tongan Carrier

The FCC's International Bureau issued an order directing all facilities-based U.S. carriers to suspend payments to Tonga Communications Corporation ("TCC") for termination of traffic. The order, responding to a petition filed by AT&T Inc., concluded that TCC acted anti-competitively by blocking traffic from AT&T and Verizon when the U.S. carriers refused to pay higher termination rates, a practice often referred to as "whipsawing." Many services between the United States and Tonga will likely remain affected until TCC restores AT&T's and Verizon's circuits.

Despite negotiating termination rates of less than $0.10 per minute, at the direction of Tonga's Communications Minister, TCC raised termination rates to $0.30 per minute. When AT&T and Verizon refused to pay the increased rates, TCC began to block traffic on the U.S. carriers' circuits. The FCC rejected TCC's defense that it was merely complying with a government directive, concluding that TCC's actions were "coercive" and "anticompetitive" regardless of the Tongan government's actions and that there was "nothing in the record to suggest that the Communications Minister required TCC to block U.S. carrier circuits."

Despite the adopted sanctions, the Bureau also supported a diplomatic solution, noting that the United States and Tonga should "consult and work toward an ultimate resolution of this matter." The Tongan government, however, has not provided "complete responses" to two letters from the U.S. Trade Representative that requested information about the rate increase.

The Bureau, concerned that U.S. carriers may be paying Digicel Tonga Limited ("Digicel"), which provides wireless services in Tonga, the $0.30 per minute rate, asked for comments on whether a similar stop-payment order should apply to Digicel. Comments and replies are due July 8 and July 23, respectively.

Telecom Mergers and Acquisitions Proceed

June saw one telecommunications industry merger approved by the FCC, another held on the FCC's docket, and a third announced.

The approved merger was that of Embarq Corporation ("Embarq") and CenturyTel, Inc. ("CenturyTel"), which together provided local exchange service to roughly 8 million subscribers, along with high-speed Internet access and other services. The FCC's approval, contained in a Memorandum Opinion and Order released on June 25, 2009, was conditioned upon the merged entity's compliance with a long list of voluntary commitments, including maintenance of Embarq's pre-merger service levels for wholesale operations, devotion of additional resources to number portability requests, improvements in CenturyTel's processing of wholesale orders, negotiation of multiple, simultaneous interconnection contracts in a state, and offering of retail broadband Internet access to 100% of the merged entity's eligible access lines within three years of the closing date of the transaction.

The FCC also is considering AT&T's proposed acquisition of regional wireless provider Centennial Communications Corp., which has roughly 1.1 million wireless subscribers and holds 850 MHz spectrum in several states. The 180-day "shot clock" for FCC action on that deal ran out in mid-June, but the 180-day goal for merger approvals is self-imposed and often exceeded.

Finally, on June 9, 2009, Atlantic Tele-Network ("ATN") announced that it will acquire wireless assets from Verizon Wireless in six states. The assets, which include wireless spectrum and properties serving about 800,000 subscribers, are among those to be divested by Verizon Wireless in connection with its purchase of Alltel. Assuming that the FCC and the Department of Justice approve the transaction, ATN expects the deal to close in the third or fourth quarter of this year.

All-Time High Contribution Factor Renews Calls for USF Reform

The Universal Service Fund ("USF") contribution factor for the third quarter of 2009 will increase by 1.6 percent to 12.9 percent, making it the highest contribution rate in the history of the USF. The dramatic increase in the contribution factor has prompted several parties to renew their criticism of the USF support mechanism. AT&T, stating that the USF mechanism is "in a death spiral," urged the FCC to implement comprehensive USF reform, including the basis for USF contributions. Similarly, CTIA – The Wireless Association and the Organization for the Promotion & Advancement of Small Telecommunications Carriers noted that the increased contribution factor is another signal that USF reform must be made a high priority by the FCC. The National Association of State Utility Consumer Advocates ("NASUCA") urged the FCC to maintain the existing 11.3 percent contribution factor and look to other sources of revenue, such as $1 billion in unused funds from the Schools & Libraries or "E-Rate" program and $5.7 billion in assets the USF administrator held as of the end of 2007.

Leading lawmakers also are questioning the fluctuating contribution factor. Representatives Joe Barton (R. Tex.) and Cliff Stearns (R. Fla.) asked acting FCC Chairman Michael Copps to release additional details about future contribution factors. Representatives Barton and Stearns called the current contribution system unsustainable and asked the FCC to report quarterly: (1) whether revenue sources other than monies contributed by telecommunications companies – such as unused E-Rate funds – affected the contribution factor; (2) why the contribution factor changed from the prior quarter; and (3) why projected industry revenues changed from the prior quarter.

Broadcast Developments: Completion of Long-Awaited DTV Transition

The long-awaited transition of 971 full-power broadcast stations from analog to digital television ("DTV") began on Friday, June 12, and was completed over that weekend with no major glitches.

This historic switch to digital television prompted hundreds of thousands of consumers to call for assistance but caused no widespread disruption of free, over-the-air television broadcasts. On the first day, the Commission had trouble keeping up with the 317,450 calls it received. However, the number of calls dropped by 80% in two days. Of those callers, the Commission reported, about 28% sought help setting up their converter boxes, 26% had difficulty getting a particular station, and 23% reported broader reception issues.

"The FCC is in the midst – not the end – of the DTV transition," said FCC Acting Chairman Michael Copps. "It appears to have worked well for the majority of over-the-air viewers, but for those who are experiencing a less-satisfactory outcome, we are committed to staying on the job to help," Copps added.

FCC officials also stressed that more than 200 agency personnel would remain in the field and contractors will continue in-home installations at least until the end of the month. Bill Lake, the FCC's DTV transition coordinator, said that more than 20,000 installations have been completed so far and another 10,000 are pending. Walk-in centers will remain open until at least the end of June.

While the FCC and local broadcasters are working to resolve any remaining issues with the transition, consumers having difficulty receiving certain television channels should try installing new antennas to get all digital channels in their market or rescanning their digital converter boxes for better reception.

The FCC will hear presentations on the DTV transition at its July 2 meeting.

Telecom Tax Legislative Developments

House Introduces Bill to Repeal Federal Excise Tax on Communications Services
Reps. John Lewis (D. Ga.), Dean Heller (R. Nev.), and Gerry Connolly (D. Va.) introduced a bill (HR-3011) that would repeal the federal excise tax on local phone service. USTelecom applauded the bill, saying the outdated tax

hurts lower-income and elderly consumers the most.

Senate Introduces Mobile Wireless Tax Fairness Act

In early June, Sens. Ron Wyden (D. Ore.) and Olympia Snowe (R. Maine) introduced the Mobile Wireless Tax Fairness Act (S-1192) to prohibit state or local governments for five years from imposing taxes on wireless services or products that are not applied to other products or services.

According to wireless industry figures, while the average tax rate for goods and services is 7.07%, the average wireless consumer pays 15.9% in federal, state, and local taxes. Furthermore, the effective tax rate on wireless services increased four times faster than the rate on other goods between 2003 and 2007.

“We can’t allow the cell phone to be the next bare necessity that simply becomes too expensive to own,” Sen. Wyden said. “By banning these burdensome taxes, this legislation will equalize the taxation of the wireless industry with that of other goods and services and protect the wireless consumer from the weight of fees, surcharges, and general business taxes,” Sen. Snowe added.

House Split on Bill to Ban State Taxes on Cell Phones

Similar to the Mobile Wireless Tax Fairness Act, a bill that bans state taxes on the cell phone industry (HR-5121) was introduced in the House by Rep. Zoe Lofgren (D. Calif.) in March. Rep. Lofgren said that this legislation is essential to the deployment of broadband, which needs to be spread despite state and local governments’ resistance to federal restriction of their taxing power.

However, the Democrats are split over this bill.

Those who support the bill banning state taxes on cell phones stated their concerns at the June 9 House Judiciary Administrative Law Subcommittee hearing. Robert Atkinson, the president of the Information Technology and Innovation Foundation, said that taxes on wireless services burden “one of the major engines of U.S. innovation and economic growth.” State Rep. Mara Reardon (D. Ind.) said the bill offers a “measured approach” to tax policy; and State Rep. Joseph Gibbons (D. Fl.) said that “taxing wireless services at the same estimated 20 percent rate as the so-called sin taxes . . . makes absolutely no sense” and punishes disproportionately those who can least afford it.

Those who do not support the bill also stated their views. Don Stapley, speaking on behalf of the National Association of Counties, U.S. Conference of Mayors, and National League of Cities, said that the bill preempts state and local tax authority and creates a bad precedent that could lead other industries to seek similar special federal protection. Finally, the Federation of Tax Administrators said that the bill would “unreasonably circumscribe the authority of the states to enforce their tax laws as to wireless communications providers.”

A markup of the bill is likely, subcommittee members said, but there is nothing on the schedule yet.

Wireless Legislative Developments

House Introduces Spectrum Relocation Improvement Act

On June 24, Reps. Jay Inslee (D. Wash.), Rick Boucher (D. Va.), who is the chairman of the telecom subcommittee, and Fred Upton (R. Mich.), who is a senior member of the subcommittee, introduced a bill (HR-3019) to speed up the transfer of spectrum from the government to commercial users.

Prompted in part by the difficulty carriers and other buyers have had with clearing the AWS-1 spectrum, the Spectrum Relocation Improvement Act is designed to improve the relocation process for all parties involved so that they can use the AWS-1 spectrum in their networks, Inslee said. This bill increases the “amount and quality” of information that would be available to potential bidders before the FCC auctions other bands now occupied by government users. It also “expedites the flow of auction proceeds” to the federal agencies that have to move to keep the relocation process on track.

“I am convinced that more complete information about the affected federal agencies’ systems, their relocation cost estimates, and schedules reduces risks for potential bidders and ensures that commercial users’ bids in future spectrum auctions more fully reflect the market value of the spectrum at auction,” Inslee said.

Tax on Personal Use of Work Cell Phones
The Obama Administration said on June 16 that it will back repeal of a 1989 law that requires companies seeking to deduct worker cell phones as an expense to track personal use with painstaking documentation of minutes.

"The passage of time, advances in technology, and the nature of communication in the modern workplace have rendered this law obsolete," said Douglas Shulman, the Internal Revenue Service Commissioner. "[T]here will be no tax consequence to employers or employees for personal use of work-related . . . cell phones provided by employers," he said.

This announcement was good news to the business community, the phone makers and service providers, as well as the users.

Senate Judiciary Committee Hearing on Text Messaging Rates
On June 16, the Senate Judiciary Committee's antitrust, competition policy, and consumer rights subcommittee held a hearing on wireless text messaging rate increases and the state of competition in the wireless market.

Sen. Kohl (D. Wis.), chair of the Senate Judiciary Committee's antitrust subcommittee, was concerned about the doubling of text message rates from 10 cents in 2006 to 20 cents in 2008. "These sharp price increases raise concerns. Are these price increases the result of a lack of competition in a highly concentrated market?" he asked.

Wireless carriers Verizon Communications and AT&T denied that they colluded in setting prices for text messages. Price increases affected only a small percentage of customers who chose a pay-per-use pricing option for text messaging services, they said. For the vast majority of customers who bought volume plans, text messaging prices had actually fallen.

Verizon and AT&T also denied that they colluded on pricing. "The market evidence shows fierce competition across the wireless market," they said.

Senators Ask FCC to Examine Handset Exclusivity Deals
On June 15, four members of the Senate Commerce, Science, and Transportation Committee asked the FCC to review handset exclusivity agreements. A handset exclusivity agreement is one in which a wireless carrier and a handset manufacturer agree to make exclusive certain models of that manufacturer's handsets to that carrier's customers only during a contracted period. These arrangements have reportedly become more prevalent in recent years.

Sens. John F. Kerry (D. Mass.), Roger F. Wicker (R. Miss.), Byron L. Dorgan (D. N.D.), and Amy Klobuchar (D. Minn.) wrote a letter to acting Chairman Michael J. Copps asking the FCC to examine these handset exclusivity agreements. In particular, they asked the FCC to consider whether the agreements: (1) "are becoming increasingly prevalent between dominant wireless carriers and handset manufacturers", (2) "are restricting consumer choice with respect to which handsets are available depending on a consumer's geographic region, particularly for consumers living in rural America", (3) "place limitations on a consumer's ability to take full advantage of handset technologies, such as the ability to send multimedia messages or the ability to 'tether' a device to a computer for internet use", (4) "are manipulating the competitive marketplace between commercial wireless carriers"; and (5) "play a role in encouraging or discouraging innovation within the handset marketplace."

"[W]e ask that you examine this issue carefully," wrote the four senators, "and act expeditiously should you find that exclusivity agreements unfairly restrict consumer choice or adversely impact competition in the commercial wireless marketplace."

On June 18, the committee held a Senate Judiciary Committee hearing to explore exclusivity arrangements between wireless carriers and handset makers. There, Chairman Jay Rockefeller (D. W.Va.) said that exclusive arrangements will be a continuing focus of the Senate Commerce Committee.

On the same day, Michael J. Copps, FCC Acting Chairman, said at Broadband Policy Summit V that he agrees the FCC should open a proceeding to closely examine wireless handset exclusivity arrangements. "I have instructed the Bureau to begin crafting such an item," he said. "The Commission as the expert agency should determine whether some of these arrangements adversely restrict consumer choice or harm the development of innovative devices, and it should take appropriate action if it finds harm."

Broadband Legislative Developments

Broadband Conduit Bill
Sens. Amy Klobuchar (D. Minn.) and Mark Warner (D. Va.) have introduced a bill requiring simultaneous installation of underground broadband conduits as part of federally funded transportation projects.

The Federal Highway Administration estimates that 90% of the cost of deploying fiber for broadband service is the expense of digging up and repairing the road, the Senators noted. As such, said Sen. Klobuchar, installing underground broadband conduits at the same time as new highways or new lanes and shoulders to existing highways are constructed would eliminate the need to dig up a road a second time to install underground communication cables, thereby saving taxpayers' patience and money. This would also allow the U.S. to start "baking broadband" into our nationwide infrastructure investments, said Benjamin Lennett, policy analyst for the New America Foundation's Open Technology Initiative and Wireless Future Program.

This requirement to install broadband conduit simultaneously could be waived if the Department of Transportation and the FCC determine conduit is not necessary.

Rep. Anna Eshoo (D. Calif.) has introduced a similar bill in the House (H-2428).

Broadband Internet Fairness Act / Broadband Pricing Bill
Rep. Eric Massa (D. N.Y.) introduced a bill to require Internet Service Providers ("ISPs") to file pricing plans based on usage or the amount of data downloaded with the Federal Trade Commission ("FTC") for review (HR-2902).

This legislation, called the Broadband Internet Fairness Act, seeks to get public input and regulatory approval through the FTC before an ISP can implement a usage-based pricing plan. Under this bill, the FTC would, with help from the FCC, analyze whether the service plans are fair to customers. If not, a provider could be fined up to $1 million.

Massa told reporters that he chose to funnel the process through the FTC rather than the FCC because the FTC has experience dealing with competitive issues.

While groups like Free Press support the bill, others believe it would be "a radical and unprecedented government mandate." Despite billions of dollars in infrastructure investment, network congestion is increasingly a problem for broadband providers, said an AT&T spokesman. The "fairest way" to deal with congestion "may be to have the small number of users who generate massive amounts of traffic pay more than those who don't use as much," he said.

Broadband Developments: U.S. and U.K. Initiatives Planned to Bring Universal Broadband Access

Parties File Initial Comments on the National Broadband Plan
Comments were due June 9 on the National Broadband Plan to be developed by the FCC pursuant to the American Recovery and Reinvestment Act of 2009. The April 8 Notice of Inquiry ("NOI") sought input from consumers, industry, large and small businesses, nonprofits, the disabilities community, governments at the federal, state, local, and tribal levels, and all other interested parties. The NOI sought comment on the most effective and efficient ways to ensure broadband access for all Americans, strategies for achieving affordability and maximum utilization of broadband infrastructure and services, evaluation of the status of broadband deployment, and how to use broadband to advance consumer welfare, civic participation, public safety, job creation, and economic growth. *See* April 2009 Communications Law Bulletin.

Although the comments covered a wide variety of topics, consistent with the NOI's very broad scope, most parties at least offered input on how broadband should be defined, how the FCC should identify "unserved" and "underserved" areas, and the proper role of government regulation in accomplishing nationwide broadband availability. Views diverged widely on whether broadband subsidies would stimulate private investment or discourage it, and to what extent weak demand and the cost of service for broadband play a role in adoption rates.

Incumbent carriers and large companies like AT&T and Verizon touted vigorous competition in the broadband marketplace, and warned the Commission against imposing any regulatory rules like Net Neutrality or interconnection rights that would distort incentives for investment and innovation. Competitive carriers and wireless carriers, among others, called for a renewal of some federal regulations, such as those ensuring reasonable and nondiscriminatory availability of special access services and Universal Service Fund reforms, that will forestall broadband market concentration and promote consumer choice and value.

Several parties urged the Commission to focus significant resources on developing mobile broadband service as a complement to, or even a replacement for, fixed services, and voiced support for an inventory of all radio spectrum to identify new blocks that could be reallocated for commercial use. Views diverged widely on whether the Plan should adopt a new fifth nondiscrimination principle to add to the FCC's 2005 *Broadband Policy Statement*, or whether existing policies are sufficient to maintain the Internet's traditional low entry barriers for new content and applications.

The deadline for reply comments on the National Broadband Plan was extended, and replies are now due July 21. The Commission will continue work on the Plan throughout the year, and must submit it to Congress by February 17, 2010.

FCC Releases Rural Broadband Report

On May 27, the FCC submitted to Congress its Rural Broadband Report entitled "Bringing Broadband to Rural America: Report on a Rural Broadband Strategy" ("Report"), as required under the 2008 Farm Bill. The Report is "the starting point for the development of policies to deliver broadband to rural areas and restore economic growth and opportunity for Americans residing and working in those areas."

Acting Chairman Copps composed the Report in the first person, because approval by the full Commission was not required. The Report discusses challenges impeding rural broadband deployment, particularly inadequate technical facilities and high costs to provide service. Chairman Copps suggested a number of reforms, including comprehensive Universal Service Fund changes, Net Neutrality rules, and a spectrum audit. The Report also advocates a more significant role for the federal government in rural broadband deployment. The Report urges increased coordination among federal agencies and state and local authorities as a way to further rural broadband goals. Federal agencies should streamline existing broadband programs, and review non-broadband programs to see what opportunities exist to promote deployment. Copps also discusses the need for more granular data on broadband availability and demand to better target rural broadband initiatives.

The policy changes suggested in the Report could be rolled into the National Broadband Plan currently being drafted.

New UK Broadband Fee

Similar to ongoing efforts in the U.S., the United Kingdom has set a goal of universal broadband service to the country by 2012. As reported in the "Digital Britain" report released June 16, a monthly fee of 50 pence will be assessed on all copper lines in order to fund buildout of advanced networks to serve the approximately one third of unserved homes and small businesses. The Digital Britain report also recommends that U.K. regulators extend current spectrum licenses for 3G services for an indefinite period to maximize incentives for network investment and expansion.

Video Competition Developments: U.S. Supreme Court Denies Cert in "Shot Clock" Video Franchising Case

On June 15, the U.S. Supreme Court denied a petition for writ of certiorari in *Alliance for Community Media et al. v. FCC et al.*, which sought review of the Sixth Circuit's decision upholding the FCC's imposition of a "shot clock" requiring action by local authorities within specific timeframes on competitive video franchise applications. As a result, the FCC's existing 2006 competitive franchising order remains in effect. That order imposed a 90-day shot clock for action on video franchise applications for providers that already have access to rights-of-way, and a six-month shot clock for competitive providers without such existing rights. Local authorities' ability to impose additional requirements, such as construction milestones, is also limited by the order. Incumbent video providers have sought to vacate the 2006 order in the separate case at the Sixth Circuit, *Dayton Access Television v. FCC*, which currently has been put on hold until the FCC acts on certain related petitions for reconsideration.

Recent Enforcement Activity Focuses on Section 214 Authority and USF Obligations

Teleplus NAL

On June 4, the Enforcement Bureau ("Bureau") released a Notice of Apparent Liability for Forfeiture ("NAL") against Teleplus, LLC, for failing to obtain an international authorization under Section 214 of the Communications Act before providing international telecommunications service. In February 2006, Teleplus applied for international

Section 214 authority, which was granted in June 2008. On March 30, 2009, the Bureau issued a letter of inquiry ("LOI") regarding Teleplus's possible noncompliance with Section 214. In response to the LOI, Teleplus stated that it has provided international service since May 2005.

The NAL alleges that Teleplus apparently willfully violated Section 214 and implementing regulations by providing international service without authorization from May 2005 to June 2008 and that this violation was aggravated by its failure to apply for special temporary authority while its Section 214 application was pending. The Communications Act allows the FCC to impose a forfeiture of up to $130,000 for each violation or each day of a continuing violation, up to a maximum of $1,325,000 for a single act or failure to act within the past year. The NAL states that, in light of the FCC's clear Section 214 requirements and the important international Section 214 public interest considerations involving national security, foreign policy, and trade policy, Teleplus's failure to obtain Section 214 authority prior to its provision of international service was "egregious." In order to provide an adequate deterrent effect on companies with Teleplus's revenues, the NAL concludes that the nature, circumstances, extent, and gravity of the violation and the degree of Teleplus's culpability, in light of prior precedent in similar cases, warrant a proposed forfeiture of $100,000.

Hiawatha Broadband Consent Decree
On June 10, the Bureau's Investigations and Hearings Division released an order adopting a consent decree with Hiawatha Broadband Communications, Inc., terminating an investigation of possible violations of Section 214 relating to an unauthorized assignment of assets and related Commission licenses and authorizations to Hiawatha. In November 2007, Hiawatha and TDS Metrocom, LLC, filed an application for approval of the assignment to Hiawatha of assets and customer accounts relating to TDS's telecommunications operations and TDS's Section 214 authorizations. The applicants admitted that they consummated the transaction in 2003 but inadvertently did not seek prior FCC consent. The FCC granted the application in January 2008 but referred the issue of Hiawatha's possible violation of Section 214 to the Bureau. Hiawatha also sought and was granted special temporary authority during the pendency of the Section 214 assignment application.

Under the consent decree, Hiawatha agrees to create a two-year compliance plan regarding possible future assignments or transfers of control of Section 214 authorizations. Hiawatha will conduct an education program for its personnel responsible for transactions involving telecommunications assets or carriers regarding the FCC's requirements governing assignments and transfers of control under Section 214. Hiawatha also commits to seek federal regulatory counsel regarding potential FCC approvals required for such transactions and agrees to file annual compliance reports with the FCC during the plan. Hiawatha also agrees to make a voluntary contribution to the U.S. Treasury of $13,000.

Global Crossing Consent Decree
On June 25, the FCC released an order adopting a consent decree with Global Crossing North America, Inc. and its U.S. operating subsidiaries terminating an investigation and NAL against Global Crossing for apparent violations of its USF and telecommunications relay service ("TRS") contribution obligations. Starting in July 2006, the Universal Service Administrative Company ("USAC") referred Global Crossing's subsidiaries to the Bureau for investigation regarding their alleged failures to fully and timely contribute to the USF. As a result of the Bureau's investigation, the FCC issued an NAL against Global Crossing for over $10.5 million for failing to contribute to the USF and the TRS fund. As of the date of the NAL, Global Crossing owed over $18 million to the USF. After the NAL, Global Crossing paid the entire balance of outstanding USF payments not subject to a pending appeal and disputed various allegations in the NAL.

Under the consent decree, Global Crossing agrees to create a three-year compliance plan to ensure the timely payment of all required contributions to the USF, the TRS fund, and other functions and regulatory fees. Global Crossing will designate two individuals, who will receive specialized training, with responsibility for the payment of all contribution obligations and regulatory fees. Those individuals will report to a senior-level oversight team with supervisory responsibility for the timely payment of all regulatory obligations. The oversight team will also oversee the development and dissemination of training materials regarding federal regulatory payments. Global Crossing will also establish and maintain a compliance manual regarding all regulatory payment obligations and a training program for all employees responsible for processing regulatory payments and the preparation of all related forms, including appropriate disciplinary procedures for non-complying personnel. Global Crossing will also file compliance reports 90 days after the effective date of the consent order and on each anniversary of the order until the termination of the plan. Global Crossing also agrees to make a voluntary contribution to the U.S. Treasury of $2,800,000 in two installments within seven months after the release of the consent order.

Ninth Circuit Holds That States May Not Enforce Access or Pricing Obligations Under Section 271 of the

Communications Act

On June 8, the U.S. Court of Appeals for the Ninth Circuit issued a decision in *Qwest Corp. v. Arizona Corp. Comm'n* affirming a district court decision in favor of Qwest Corporation's challenge to an Arizona Corporation Commission ("ACC") arbitration order. The ACC had imposed certain obligations on Qwest under Section 271 of the Communications Act in a proceeding brought by Covad Communications Company to arbitrate disputes regarding its interconnection negotiations with Qwest under Sections 251 and 252 of the Act. Both the district court and the Ninth Circuit held that state regulators lack authority to set rates or to impose interconnection or unbundling requirements under Section 271, which governs the conditions under which Regional Bell Operating Companies ("RBOCs") may provide long distance services in their local service areas.

In determining the scope of the ACC's authority, the court had to construe the relationship of two sets of requirements imposed by the Telecommunications Act of 1996. One set of rules is found in Sections 251 and 252 of the Act, which establish a regime under which incumbent local exchange carriers ("ILECs"), including RBOCs such as Qwest, may be required to provide unspecified unbundled network elements ("UNEs") to competitive local exchange carriers ("CLECs"), such as Covad, to facilitate local service competition. The FCC determined that, under Sections 251 and 252, UNE rates must be based on total element long run incremental cost ("TELRIC"). The other regime is set forth in Section 271(c)(2)(B) of the Act, which requires an RBOC to meet a competitive checklist, including compliance with unbundling requirements similar to those imposed by Sections 251 and 252, as a condition of authority to enter the long distance market. The elements required to be unbundled are specified in Section 271(c)(2)(B).

Initially, the FCC imposed unbundling requirements under Sections 251 and 252 that overlapped substantially with the unbundling requirements spelled out in Section 271(c)(2)(B). Later, however, the FCC "delisted" those UNEs from the Section 251/252 unbundling requirements. The FCC also held that the network facilities provided under Section 271 and delisted from Section 251/252 requirements would not have to be offered at TELRIC prices.

In Covad's arbitration proceeding against Qwest, the ACC required Qwest to provide certain network elements under Section 271, and at TELRIC prices. The ACC also held that it had jurisdiction to impose unbundling requirements under state law that the FCC had delisted. Qwest sued to enjoin these requirements in federal district court, which held that the ACC had no authority to impose Section 271 unbundling or pricing obligations and that its imposition of TELRIC pricing under Arizona law was preempted by the FCC's contrary policy.

On appeal, the Ninth Circuit joined the First, Seventh, Eighth, and Eleventh Circuits, as well as numerous federal district courts, in holding that state commissions are not authorized to implement Section 271 terms and rates in interconnection agreements. Unlike the authority granted to the states by Sections 251 and 252, authority under Section 271 is granted exclusively to the FCC. States have only a limited consultative role under Section 271. The court also concluded that conflict preemption bars the states from imposing, under state law, the unbundling and TELRIC pricing that the FCC abolished under Sections 251 and 252. The FCC has held that market rates, not TELRIC rates, apply to Section 271 elements. The court held that Section 251(d)(3)'s savings clause does not protect the ACC's decision from preemption because the ACC's requirements are inconsistent with the FCC's application of Section 251. The court accordingly affirmed the lower court's summary judgment for Qwest.

New Electronic Form for Hearing Aid Compatibility Status Reports

The FCC's Wireless Bureau announced that the OMB has approved the new electronic FCC Form 655 (hearing aid compatibility status report). This new electronic form is now mandatory and the only means by which filing parties can submit the report. These reports are due annually – handset manufacturers must file by July 15, 2009, and by July 15 of each subsequent year. Service providers must file by January 15, 2010, and by January 15 of each subsequent year.

FCC Adopts Procedural Rules for Forbearance Petitions

Thirteen years after the Section 10 forbearance provision was added to the Communications Act and more than one hundred twenty (120) forbearance petitions later, the FCC has acted on a petition for rulemaking and has adopted procedural rules to govern the conduct of such proceedings. Up to now, the only procedural rule governing these petitions required that they be filed as a separate pleading and identified in the caption as a petition for forbearance.

First, the FCC adopted a rule requiring that petitions for forbearance must be "complete as filed." Specifically, petitioners must: (1) state explicitly the scope of relief requested, including identification of each statutory provision or rule from which forbearance is sought, each carrier or group of carriers for which forbearance is sought, each service for which forbearance is sought, and the geographic location in which forbearance is sought; (2) address each prong of the statutory forbearance test for each regulation or statutory provision from which relief is sought; (3) identify any other pending proceedings on the same issue; and (4) comply with certain format requirements (including searchable data, a summary statement of the relief sought and a full statement of the petitioner's *prima facie* case). The FCC emphasized that this new rule will not prevent petitioners from seeking additional data from third parties (so long as petitioners identify such data, along with the parties who possess it and how it relates to the petition), submitting new data at the request of the FCC or in response to oppositions, or updating data. The FCC rejected calls to restart the clock whenever any new data is filed; rather, the FCC will determine when and if such data materially alters the original position. The FCC also clarified that the burden of proof – both the burden of production and the burden of persuasion – is on the petitioner at the outset and throughout the course of the proceeding.

Second, the FCC adopted certain procedures to ensure that forbearance proceedings are transparent and actively managed. The FCC will post on its web site a timeline for petitions that will contain docket numbers and contact information, although these timelines are just internal goals. Forbearance petitions must be e-mailed to forbearance@fcc.gov, and the FCC encourages petitioners to contact the relevant Bureau prior to filing. Filing starts the statutory clock, and petitions that appear to be complete on their face will be placed on public notice. The pleading cycle will typically allow 30 days for comments and 15 days for replies, with longer pleading cycles for more complex petitions. Following the close of the comment cycle, there will be an "intermediate period" – generally from months 3 through 10 – during which the FCC will actively review and develop the record and hold internal discussions. Then there will be a "final period" consisting roughly of months 11 and 12 (or months 14 and 15 if the FCC has extended the statutory deadline). The relevant Bureau will circulate a draft order no later than 28 days prior to the statutory deadline (unless all Commissioners agree to a shorter period), and there will be a two-week "quiet period" before the statutory deadline (announced by public notice) during which no *ex parte* communications will be permitted.

Third, the FCC addressed concerns about the last-minute withdrawal of petitions, the burden that this can place on the FCC itself as well as on commenters, and the distortions of FCC jurisprudence that can result. The FCC accordingly adopted a rule that a petitioner may not withdraw (or significantly narrow) a petition after the date that is 10 business days after reply comments are due, unless the FCC authorizes such a withdrawal.

With respect to the applicability of these new rules to pending petitions, the FCC stated that the "complete as filed" rule will not apply to petitions filed before the effective date of the new rules. The other new requirements (for example, those involving withdrawal limitations, the "quiet period," etc.) will apply to pending petitions. The new rules will take effect 30 days after the FCC's order is published in the Federal Register.

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 13, 2009	Reply comments due on **CMRS market competition**.
July 14, 2009	Reply comments due on **satellite market competition**.

July 15, 2009	**Form 655** (Hearing Aid Compatibility Status Report) due from handset manufacturers.
July 21, 2009	Reply comments due on **National Broadband Plan NOI**.
July 31, 2009	Annual **traffic and revenue report** due for international carriers.
July 31, 2009	Reply comments due on **NOI regarding Arbitron's use of portable people meters**.
August 1, 2009	**Form 499Q** (Telecommunications Reporting Worksheet) due.
August 1, 2009	**Form 502** (Numbering Resource Utilization/Forecast) due.
August 5, 2009	**Auction No. 86 (BRS)** seminar.
August 5, 2009	Filing window opens for applications for **Auction No. 86 (BRS).**
August 18, 2009	Short-form applications due for **Auction No. 86 (BRS).**
