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Short Subjects

8TH CIRCUIT UPHOLDS GROSS RECEIPTS TAXES FOR CELL PHONES

On July 3, 2008, the U.S. Court of Appeals for the 8th Circuit upheld the application of telephone gross receipts taxes on cellphone companies (*Cities of Jefferson City and Springfield, Missouri vs. Cingular Wireless et al.*, Case No. 7-2884). The cellphone companies claimed that they were providing “Commercial Mobile Radio Services”, and that that term does not appear in ordinances imposing a tax on “telephone” and “telephonic” services.

After dodging numerous procedural obstacles, the Court said that cellphones are used to make telephone calls, the cellphone companies market them for use in making telephone calls, and most users think that their cellphones are intended to be used to make telephone calls. In other words, it if looks like a telephone, walks like a telephone, and quacks like a telephone, it must be a telephone. The fact that CMRS services may be treated differently from wireline services in other regulatory areas does not mean that cellphone service is not subject to taxes on telephone services.

TESTING, TESTING

In the latest step toward implementing the Commercial Mobile Alert System (CMAS), the FCC has adopted rules: (1) specifying testing requirements for commercial mobile radio service (CMRS) providers who elect to transmit emergency alerts; and (2) requiring NCE television stations to install equipment on their digital transmitters within the next two years.

CMAS Testing Regime - All CMRS providers electing to participate in the new alert system will be subject to a mandatory testing regime akin to that imposed on broadcasters for the Emergency Alert System. In this Second Report & Order in the CMAS proceeding, the Commission adopted not particularly controversial rules to require all participating CMRS providers to engage in monthly testing, as well as additional, periodic testing of the interface between the Federal Alert Gateway and each CMRS provider’s gateway. Taking refuge in the fact that the CMAS is still under

development, the FCC refrained from adopting specific testing implementation details, declining to specify any content, parameters or even the day/time for the monthly tests, and refusing to be pinned down on periodic testing plans. But, the Commission did make a convoluted attempt at a compliance deadline, noting that participating “CMRS providers must comply with these testing requirements no later than the date of deployment of the CMAS, which is the date CMAS development is complete and the CMAS is functional and capable of providing alerts to the public.” In other words, you have to be able to test it only once it gets running, and no one is clear when that will be.

NCE Broadcast TV Station Equipment Requirement - The FCC also clarified that noncommercial educational (NCE) broadcast television stations, but not NCE radio stations, must comply with the Congressional mandate to install equipment on their digital transmitters to enable geographic targeting of mobile phone emergency alerts. The FCC concluded the language in Section 602(c) of the WARN Act, which specifically points to “broadcast television digital signal transmitters,” clearly reflected Congress’s intent to limit the obligation to television and, therefore, to exempt radio.

In keeping with its “technological neutrality” posture, the Commission has not specified particular equipment or technologies which must be utilized, **but** the Commission has nevertheless highlighted APTS’s recommendations of the types of equipment that will be needed – the obvious implication being that APTS’s recommendations should be the obvious first choice for anyone looking to assure compliance. (APTS is the Association of Public Television Stations.) The FCC further presumes, but does not expressly require, that the Public Broadcasting System will take on the role of providing the interface feed between stations and the CMAS.

NCE TV operators need not worry about incurring costs in acquiring and installing the newly-mandated gear: all NCE stations subject to the requirement will be compensated for reasonable costs of compliance by the Assistant Secretary of Commerce for Communications and Information (that would be our friends at NTIA, dipping into the same fund being depleted by DTV converter box coupons – these are your tax dollars at work). As it is expected that many stations will need to request funding in advance in order to complete the installation, the equipment installation deadline is the latter of the following dates: 18 months from the receipt of this funding, or 18 months from the effective date of the order, September 22, 2008.

Update to the CMAS First Report & Order (which we first reported on in our May issue) - On July 15, 2008, the Commission issued, on its own motion, an *Order on Reconsideration and Erratum* (FCC 08-166) in which it: (1) clarified the implementation of the CMAS deployment timeline; and (2) corrected the effective date of rules to note

that information collection requirements will not go into effect until OMB approval. The timeline clarification changed the compliance deadline for participating CMS providers from ten months after the announcement of the Alert Aggregator to ten months after the Alert Aggregator makes the Government Interface Design specifications available.