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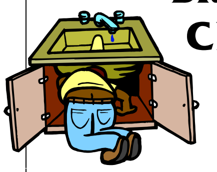
Current Issues in Telecommunications Law and Regulation May 2006

FCC cleans up and tightens up rules



BRS/EBS One Step Closer to Reality

By Donald Evans
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In a much anticipated Order, the FCC corrected, clarified and revised most of the miscues which had marred its 2004 decision re-vamping the MDS/ITFS band to make it more commercially viable. The 2500 – 2690 MHz band had been mired for decades in a mélange of channels interleaved for educational service (now EBS) and commercial multipoint distribution service (now BRS). At the same time, legacy rules and procedures strangled the ability of operators to assemble viable bandwidth.

Although the FCC commissioners proudly proclaimed in June, 2004 that they had finally "gotten it right," it quickly became apparent that the plan for transitioning to the new band plan was wholly unworkable. Under the new band plan, the channels assigned to licensees would be shuffled around to create a small core of high power 6 MHz mid-band channels useable for wide-area video transmissions, and two bands of low power 5.5 MHz channels suitable for cellular type operations. Replacement spectrum for old MDS Channels 1 and 2 and largely unused MDS return channels were also thrown into the mix to create a large swath of prime spectrum in the 2496-2690 MHz band ideally suited for fixed and portable 3G applications.

The problem was that the FCC ordained that the transition from the old band plan to the new one would be initiated and orchestrated in each market by individual licensees or spectrum lessees. The markets were defined as MEA's – Major Economic Areas – which were so vast in size that no one was willing to undertake the financial burden of transitioning a market. Not a single market had actually been transitioned in the 19 months since the

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Bidding rules tweaked on eve of auction

AWS Auction Update

By Lee Petro
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The last time we came to you, the Commission was knee-deep in the process of establishing the auction procedures for the much-heralded AWS Auction in June 2006. We had advised you that the Commission was considering proposals to modify the bidding structure of the auction to make individual bidders "anonymous" during the auction, and was considering revisions to the designated entity standards.

First, the Commission decided that it will not disclose the identity of bidders during the auction if the subject market is not "competitive". The Commission will determine competitiveness by looking to see if there are at least three bidders that are qualified to bid in the auction for that particular market. Only if there are three or more bidders will the Commission disclose their identity.

Second, the Commission modified the standards for entities to qualify for bidding credit as a designated entity. Rather than focus on the investment levels of otherwise non-eligible entities, the Commission will now concentrate on whether the applicant has entered into lease or resale arrangements with other entities which would effectively cede control of some of the acquired spectrum to those entities. Depending on the quantum of spectrum leased, the applicant could either be attributed with additional revenues of the lessee or lose eligibility for DE status altogether. *See* the related article on p 6. Also, the Commission yet again declined to adopt rules that would have permitted "package" bidding. Instead, it determined that the "reserve price" established by Congress to compensate the government incumbents for moving off their portion of the auctioned spectrum creates too much uncertainty, and that the package bidding may result in the undervaluing of the spectrum, thus resulting in

(Continued on page 5)

Deft regulatory footwork or jack-booted toe-stepping?

The CALEA Waltz Goes On

One Step Forward, Slide A Bit, Then One Step Back

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Faithful readers will recall that last year the FCC adopted rules imposing CALEA requirements on facilities-based broadband internet service providers. This action was taken in response to complaints by law enforcement that it could not properly intercept messages, both VoIP and text, which were being sent over the internet. (CALEA requires communications providers to meet certain technical requirements which facilitate the intelligible interception of transmissions.) The FCC, over the objections of both privacy rights advocates and institutional internet users, agreed to impose CALEA obligations on this category of information service provider, although its legal footing was a bit shaky. In early May, two somewhat conflicting developments occurred.

First, the FCC acted on petitions for reconsideration of its original 2005 action. It affirmed its decision in all key respects, and also made it clear that the compliance deadline – May 14, 2007 – applied to all facilities-based broadband internet providers without exception. Affected providers will have to file interim compliance reports with the Commission prior to the deadline and must also adopt "System Security" policies like common carriers. These policies identify contact persons within the ISP for law enforcement action and also attempt to focus responsibility for CALEA compliance within a company. The FCC confirmed that affected providers could use "Trusted Third Parties" to meet their CALEA obligations, just as many common carriers do. Finally, the FCC appeared to sharply undercut the ability of carriers to get either compliance extensions or government funding to support their CALEA expenditures. Thus, the FCC plunged ahead aggressively with its campaign to broaden the scope of CALEA obligations.

Almost simultaneously, though, the U.S. Court of Appeals for the D.C. Circuit was considering appeals of the original 2005 Order. Though the Court has not yet issued a decision, at least two of the three judges on the panel seemed very skeptical at oral argument that Congress could possibly have given the words "information services" diametrically opposed meanings in two laws enacted within a couple years of each other. The panel did appear to accept the FCC's reasoning that VoIP is a substitute for local exchange service, but to extend that reasoning to all broadband internet communications was too much to swallow. While oral arguments are impossible to assess, there does seem to be a good likelihood that at least part of the FCC's CALEA rules will either be thrown out or face further scrutiny by the Supreme Court.

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FCC Grants Forbearance of Verizon Broadband Services

Breadth of Grant is Unclear, Action is Appealed

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Recently, the FCC granted a petition filed by Verizon requesting forbearance from Title II regulation as applied to certain broadband services offered by Verizon. However, due to the procedure used to grant Verizon's petition, significant questions remain as to the services affected. This article attempts to shed some light on the answers to those questions.

Under Section 10 of the Communications Act, if the FCC does not act on a petition for forbearance within 15 months of filing, the petition is deemed to be automatically granted. That is what occurred in this case – there was no substantive order, just a news release and press releases from various Commissioners, discussing their views on the automatic grant. The confusion regarding the recent grant of forbearance to Verizon arises because Verizon's original Petition for Forbearance was pretty vague as to what services it wished to be covered.

> *Verizon sought, and appears to have received, relief from Title II tariff filing, cost support and pricing requirements (and ONA and CEI requirements) for the provision of certain specific retail and wholesale broadband services.*

So, what services are covered by the grant of forbearance? A bit of historical analysis is probably necessary to answer that question.

Verizon's Petition was filed in December of 2004. At that time, the FCC had already released its Notice of Proposed Rulemaking in the Wireline Broadband proceeding, but had not yet issued its Order in that proceeding. The Verizon Petition spent almost no space describing the services for which it sought forbearance, which it denoted merely as "any broadband services offered by Verizon." In September of 2005, the FCC issued its *Wireline Broadband Order*, which held that wireline Internet access is properly considered to be an information service subject to Title I, and that the underlying broadband transmission services used to provide Internet access may be offered either as private carriage under Title I or common carriage under Title II. The *Order* did not appear to make any distinction between mass market and enterprise services, in terms of what was being deregulated.

In a February 7, 2006 letter, Verizon attempts to explain the services for which forbearance was sought, and the relationship between that relief and the relief granted by the Commission in the *Wireline Broadband Order*. In the letter, Verizon specifically *excludes* "TDM-based services" from those for which relief is sought. Rather, Verizon states that it was seeking forbearance relief for "two principal categories of service":

- ***Packet-Switched broadband services***, which include *Frame Relay, ATM, IP-VPN, and Ethernet* services; and

- ***"Non-TDM-based optical networking, optical hubbing and optical transmission services"*** provided at "OC'n speeds" but specifically *excluding* "services at DS1 and DS3 speeds." According to Verizon, these are services provided over SONET networks, as well as over Wave Division Multiplex and Dense Wave Division Multiplex networks.

The February 7th Letter states that both categories of service are "sold primarily to enterprise custom-

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More than a day late, CMRS provider now more than a dollar short

Importance of Implementation of Emergency Service Emphasized

FCC Issues $750K Fine for Late Delivery of E911

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Although Voice-Over-IP providers have been taking heat over the deployment of 911 services to VOIP users, a recent decision from the FCC makes it clear that the FCC continues to police the delivery of Enhanced 911 ("E911") services by wireless carriers with equal vigor. In a Notice of Apparent Liability for Forfeiture (or "NAL") released in mid-April, the Commission proposed a $750,000 penalty on two subsidiaries of wireless provider Dobson Communications Corp. for failing to provide E911 services within the time limits provided in the Commission's rules.

> *The FCC based the size of the fine, in part, on the size of the company involved. While smaller companies should not expect a break on account of their size, larger companies can expect to be hit with larger fines.*

The FCC's rules provide that wireless carriers must provide E911 "Phase I" service to a particular area within six months of a valid request by the relevant local governmental authority known as the Public Safety Answer Point (or "PSAP"). "Phase I" services require wireless carriers to provide the designated PSAP with both the telephone number of the mobile handset that originated the 911 call and the location of the base station or cell site that received the 911 call. The FCC's rules further provide that wireless carriers must provide E911 "Phase II" service to a particular area within six months of a valid request by the relevant PSAP. "Phase II" service requires wireless carriers to provide the designated PSAP with the location of wireless 911 callers by longitude and latitude.

A complaint by several Michigan PSAPs, led by the 911 State Administrator for the Michigan State Police, triggered a formal inquiry into Dobson's compliance with the E911 rules. The facts disclosed in response to that inquiry prompted the FCC to conclude that Dobson had failed to timely provide E911 Phase I services in nine instances and failed to timely provide E911 Phase II services in 41 instances. Some of the PSAP requests, the FCC noted, had been pending for as long as two or three years.

While not denying any of the FCC's essential findings, Dobson noted that it faced significant unanticipated challenges in rolling out the requested E911 services. These challenges included the integration of several noncompliant systems, failures by equipment vendors, technical difficulties in actually deploying E911 services, and miscommunications between its E911 Project Manager and the PSAP representatives as to the progress of the roll out. The FCC recognized these difficulties but ultimately concluded that Dobson had not shown that it exercised the level of diligence expected of carriers in addressing the deployment of E911. The FCC further criticized Dobson for not devoting sufficient attention, resources, or oversight to the process of complying with the E911 requirements.

Wireless carriers should take note of a couple of points in this case. First, as with the fines we discussed last month, the FCC based the size of the fine, in part, on the size of the company involved. While smaller companies should not expect a break on account of their size, larger companies can expect to be hit with larger fines. Perhaps more significantly, the FCC considered Dobson's violations "egregious" because they involved E911 services, which the FCC characterized as "extremely serious, given the critical function these requirements serve in promoting and safeguarding life and property." Given this re-affirmation of the importance of E911 compliance, wireless carriers would be well advised to re-evaluate their current procedures for implementing E911. Any questions regarding E911 requirements should be directed to communications counsel.

Who knew????

Carrier Relies on Ineptitude Defense; Fails

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Fines levied by the FCC in the high six figures always get our attention, but the recent $715,031 fine imposed on Globcom, Inc. served to teach several important lessons.

The FCC discovered in 2003 that Globcom, a provider of interstate and international resale services, had failed to pay its Universal Service Fund contributions in 2001 and 2002. The amount in arrears was almost $700,000. The FCC therefore proposed that Globcom pay the arrearage plus additional penalties adding up to over $800,000. After initially ignoring the FCC's inquiry, the carrier responded by admitting that "frankly, [it] has no explanation for the discrepancy [in its revenue reporting] other than to say that the confusion surrounding the Worksheet was significant." Its mistake, it argued, was merely due to its own negligence and ignorance of the reporting obligations, not intentional misconduct. The carrier also argued that it had actually overstated its revenues out of negligence.

However, its attempt to correct the erroneous reports was rejected because it was beyond the time period when reports were allowed to be revised. The FCC then, however, opened a window in which late-filed revisions to reports would be accepted on a one-time basis. This would have permitted Globcom to rectify its erroneous overstatement of its revenues. The FCC staff thoughtfully called Globcom to alert it that this window to correct its earlier filing had been opened, but Globcom did not take advantage of the opportunity. The FCC noted testily that Globcom's inexplicable failure to seize this gift horse cost it about $274,318 in downward adjustments.

Not surprisingly, the FCC rejected Globcom's reliance on its own incompetence as an excuse for failing to file the reports and pay the fees. Globcom's method of researching its USF obligations – checking around with industry contacts – was deemed "wholly unpersuasive." The Commission also found that negligence, inadvertence and ignorance were not acceptable excuses for Globcom's various rule violations, which were found to be willful and repeated. The FCC emphasized that it was time for it to implement substantially greater forfeiture amounts because its earlier lower fines had not sufficiently incented carriers to make the necessary contributions and file the required reports. It therefore awarded Globcom a bonus forfeiture of an amount equal to half of the unpaid debt.

> *Globcom's method of researching its USF obligations – checking around with industry contacts – was deemed "wholly unpersuasive." The FCC also found that negligence, inadvertence and ignorance were not acceptable excuses.*

Clearly, the FCC is adopting a get tough approach with companies who fail to comply with the USF and related reporting and contributing requirements. When negligence, inadvertence, incompetence, and ignorance are removed as excuses for violations of the law, we are, unfortunately, left with compliance as a last resort.

*(**AWS Auction** - Continued from page 1)*

the possible cancellation of the auction.

Several parties, including past designated entities, have filed petitions with the Commission to delay the June 29th auction. The deadline for submitting short form applications was May 10th, and to date, there have been no actions that would lead us to believe that the auction will be delayed.

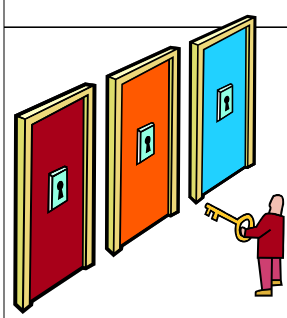
We will continue to monitor the situation closely, and let you know if the Commission alters the auction schedule. In the meantime, if you have any questions, please contact the attorney with whom you normally work, or Lee G. Petro.

In Brief

What if you held an auction and nobody came? The FCC recently had to announce the cancellation of its scheduled auction of a few 400 MHz air-ground licenses. The potential bidder pool was restricted to companies who had filed mutually exclusive applications for these frequencies many years ago. When it came time to file short forms indicating interest in bidding on the licenses, nobody bothered to show up. Interestingly, if only one potential bidder had filed a short form, he would have gotten the licenses for free.

The government works in mysterious ways. The FCC issued a Public Notice explaining how potential users of the AWS band to be auctioned in June can determine who in the federal government is using the spectrum. Heretofore, it had been difficult to figure out what use was being made of the spectrum allocated to the federal government, information which is necessary to plan band-clearing timetables and resolve potential problems. The PN provides a website where interested parties can find location, frequency, service type, relocation timetable, and contact information which will be very useful in assessing whether government users occupy the band you're thinking about buying and when they are likely to vacate. The information can be found at http://www.ntia.doc.gov/osmhome/reports/specrelo/index.htm.

Channel 1 and Channel 2, where are you? In a companion to the BRS/EBS Order (*see* article on page 1), the FCC clarified the relocation obligations of AWS licensees who acquire spectrum now assigned to MDS channel 1 and 2 licensees as well as fixed microwave licensees in the adjacent bands. The plan calls for a clearinghouse similar to that established for the PCS relocation process. The initial AWS licensee who clears the band must provide comparable facilities to the operating licensees who must vacate, and it must maintain a record of the costs it incurs in doing so. Later entering AWS licensees who use the same spectrum must then reimburse the original clearer for their share of the costs.



Designated entity? It all depends . . .

FCC Ties "Designated Entity" Status to Bidder's Spectrum Use Plans

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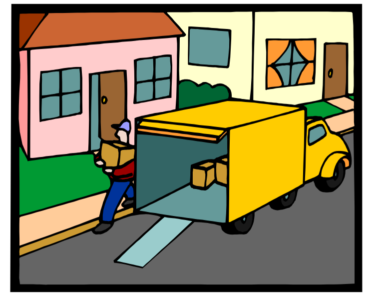
In anticipation of the upcoming AWS auction and in response to a widely publicized Justice Department case against the backer of numerous designated entities, the FCC has tightened the rules by which a designated entity may operate. The latest FCC restrictions apply to how a licensee uses its spectrum.

Material Relationship – The FCC has created a "material relationship" standard based on the use of the spectrum at issue. A licensee's lease or resale of spectrum to another entity is now referred to as a material relationship.

The FCC will treat a material relationship in one of three ways. If the lease or resale is 25 percent or less of a license's spectrum capacity, the FCC requires nothing further from the licensee. If a licensee leases or resells more than 25% of the spectrum capacity of license to any individual entity, the relationship is "attributable" and the revenues of such entity are included in calculating a licensee's bidding credit eligibility. If a licensee leases or resells more than 50% of spectrum capacity – regardless of to whom or how many – the relationship is "impermissible" for bidding credit purposes and the applicant with such an arrangement will not qualify for a credit. If such an arrangement were entered into *after* the auction, any bidding credits used during the auction would need to be repaid with interest. The rule is curious in that it strips a prospective Designated

(Continued on page 7)

New tenants moving into lower 700 MHz before old ones move out



Qualcomm MediaFLO Application for Chicago Area Approved

But jury is still out on OET-69 applicability

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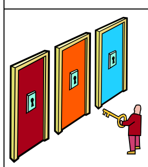
Qualcomm recently had its application approved to provide its "MediaFLO" service on TV Channel 55 in the Chicago, Illinois area. Qualcomm's application incorporated broadcaster consent to accept higher levels of interference than the Commission's rules otherwise permit.

Qualcomm has acquired licenses in Block D of the lower 700 MHz band to provide its "MediaFLO" service on TV Channel 55 throughout the United States. Qualcomm intends to deploy a "mediacast" service to deliver many channels of multimedia content to third generation wireless phones, using "forward link only" or "FLO" technology developed by Qualcomm. Initially, the "Media FLO" service will provide up to 15 live streaming video program channels, numerous video "clip cast" channels from which subscribers can choose video clips for reviewing on-demand, and numerous audio channels. Qualcomm intends that its service will carry local programming, including breaking news, weather, and public affairs. Its network will also be capable of disseminating emergency alert information. Qualcomm intends that "MediaFLO" will be affordable and readily available as early as the second half of 2006.

In markets where no television stations are operating on Channels 54, 55 or 56, Qualcomm can launch its service immediately. In markets where there are adjacent and co-channel television operations, Qualcomm may negotiate agreements with the incumbent broadcasters to accept higher levels of interference, as it did with its Chicago area application.

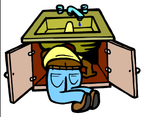
Qualcomm previously filed a petition with the FCC seeking its approval to use the FCC's OET Bulletin No. 69 ("OET 69") methodology for analyzing the interference its "MediaFLO" operations would cause to incumbent television broadcasters. Qualcomm's petition has been opposed by MSTV. MSTV has argued that OET 69 was only developed to measure interference among television stations and fails to account for transmitters within a television station's service area or the aggregate effect of interference from multiple "MediaFLO" transmitters. MSTV has proposed that a new methodology be developed that calculates desired signals relative to each individual undesired signal. Qualcomm has expressed concern that the development of such a new methodology could delay the rollout of "MediaFLO". The FCC has been somewhat reluctant to "bless" a standardized methodology for measuring interference in this context, but eventually some method will have to be approved as more and more 700 MHz stations seek operational status.



***(Designated Entities** - continued from page 6)*

Entity of its credit even if the prospective lessee of the spectrum is itself a DE. This seems to make no sense since leasing spectrum to another DE would be fully consistent with the underlying objective of the Commission's rule. Notably, the FCC has not proposed to take away any licenses involved in "attributable" or "impermissible" material relationships. Instead, these new decisions affect bidding credits in most cases.

Longer Holding Periods – The FCC is also doubling the amount of time that a licensee needs to hold a license in order to keep bidding credits. If a licensee attempts to assign or transfer control of a license to an applicant with a lower or no credit, it will have to pay back the credits on a declining basis. During the first five years, the entire credit will need to be repaid. A sliding scale is applied during years six to ten. Again, the penalty does not involve losing a licenses but simply repaying the bidding credit.



*(**BRS/EBS** - Continued from page 1)*

re-structuring was adopted. Plus, the original transition rules left many unanswered questions about who was to pay for what and when.

The latest Order adopts the industry's near unanimous recommendation that transitions occur on a BTA-by-BTA basis which will be much more manageable for all concerned. In addition, the Order clarified the following key points:

- The procedures applicable to initiating and implementing a market transition were detailed. Parties have 30 months from the effective date of the new rules to initiate a transition, and the transition must them be completed within 18 months.

- A transition "proponent" may demand reimbursement from the other commercial licensees, commercial lessees of both EBS and BRS spectrum in the market, and (somewhat surprisingly) from non-commercial EBS licensees who use their spectrum for commercial services. The latter provision is curious since the rules had previously been structured to exempt non-commercial entities from having to bear any of the cost of transitioning.

- Reimbursement of the proponent is due as soon as the transition is complete. However, the FCC established no mechanism for enforcing the payment obligation.

- Perhaps the most contested issue was whether leases by educators for commercial purposes should be limited in their length. Some educators had expressed concern that educators would be pressured into what amounted to lifetime leases so there needed to be a term limit on leases to protect them from themselves. After much soul-searching, the FCC agreed to a maximum 30-year term, subject to license renewals during the lease term and subject also to the educator being able to re-evaluate its educational needs for the service every five years after the 15th year. So much for prioritizing education.

- Build-out requirements were clarified to provide "safe harbors" of service provision levels which will assure renewal if attained. The service levels were somewhat higher than the levels established by the Commission in other comparable services (*e.g.*, 30% of the population must be covered if you provide fixed or mobile service). If these build-out and service levels are not reached by May 1, 2011, the licensee will have to be adjudged on a case-by-case basis – the last thing a licensee wants to go through.

- Although there was considerable comment in the Docket about the implementation of an auction to clear the band and assign vacant spectrum, the FCC tabled any decisions about this until the transition process is closer to completion. That unfortunately means that vacant ITFS spectrum which has lain fallow since 1995 must remain fallow for at least three more years.

- Regulatory fees were made more sensible. Now the fees will be assessed on the basis of market size (in three graduated tiers) and the amount of spectrum assigned rather than on a call sign by call sign basis.

- The FCC confirmed its belief that unlicensed low power operations, a handful of legacy point-to-point links, and certain MSS operations can coexist in the same band as BRS/EBS without interference.

While the new Order is itself far from perfect in many respects, it does seem to make it realistically possible for operators to proceed with the transition process. Low power cellularization will permit the intense re-usage of the spectrum necessary to maximize the number of simultaneous users. Perhaps this time they did get it right.

*(**Verizon Forbearance** - Continued from page 3)*

ers" (on a "retail basis") and to "other carriers on a wholesale basis." In regards to those two categories of customers, the Letter states that it seeks relief "regardless of the nature of the customer to whom the service is offered."

In subsequent *ex parte* letters, Verizon addressed CLEC filings opposing its request, and in doing so, adds a bit more detail to what it is seeking. Thus in addressing COMPTEL complaints that Verizon should not receive forbearance on *wholesale special access*, Verizon states on March 2nd that its request *excludes* "traditional TDM-based special access services," and that such services "will continue to be available as wholesale common carrier services." Thus, competing carriers can continue to purchase TDM-based special access services "to offer their own packetized services, such as ATM and Frame Relay." In a March 13th Letter, Verizon included *DS1 and DS3* wholesale special access services in the category of services for which relief was *not* sought. Thus, in regards to special access services, it appears that only *non*-TDM-based wholesale (and perhaps retail) services are subject to relief.

With regard to the nature of the regulation from which Verizon sought relief, the Petition and the February 7th Letter stated that it sought forbearance from Title II regulation, so that it has the flexibility to offer these services on either a common-carriage or private carriage basis. It specifically sought relief from tariff filing, cost support and pricing requirements. It also sought relief from *Computer Inquiry* requirements regarding CEI (comparably efficient interconnection) and ONA (open network architecture). In its February 7th Letter, Verizon stated that to the extent the affected services are subject to USF contribution requirements, Verizon was *not* seeking relief from making contributions, pending resolution of the USF rulemaking.

So, in sum, Verizon sought, and appears to have received, relief from Title II tariff filing, cost support and pricing requirements (and ONA and CEI requirements) for the provision of certain specific retail and wholesale broadband services. This relief addresses many more services than the relief granted to all carriers in the *Wireline Broadband Order*, which applied to retail and wholesale DSL/Internet access service, and the underlying broadband transmission services used to provide Internet access/DSL. We believe that the Commission may be drafting an Order on a related matter – the USF consequences of the Verizon forbearance – so that Order may contain more explanation.

It will come as no shock that COMPTEL has already filed an appeal of the Verizon forbearance action with the D.C. Circuit. What is unusual is that there is no actual order to challenge.

It will come as no shock that COMPTEL has already filed an appeal of the Verizon forbearance action with the D.C. Circuit. This case has some unusual facts, and thus it will be difficult to predict the outcome. What is unusual is that there is no actual order to challenge, since the forbearance went into effect by default. It will be hard for COMPTEL to say that the FCC *did* anything that violated the Communications Act – since they did nothing. The best that COMPTEL can do is to say that the FCC *should have* acted to affirmatively deny the Petition, but since there is no FCC analysis of the statutory forbearance factors, COMPTEL will have to convince the court to make its own analysis, which it may not be comfortable doing. Even if the Court is willing to make its own analysis, it is hard to say at this time how it would come out. COMPTEL's strongest arguments might be that it is unclear what the *breadth* of the forbearance is, since the FCC did not specify it, and that the forbearance is *procedurally defective*, since Verizon did not specify what it wanted until late in the process. If the court agreed with either of these two arguments, it would likely remand to the FCC.

We will keep you up to date on this unusual but potentially far-reaching proceeding.

Megabits - And now for something completely different . . .

Let Us Not To The Meeting Of Two Minds Admit Impediments

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It was love at first draft.

She was a senior associate in the commercial finance department of Venerable & Gray, he a junior partner in construction contracts at Thrush and Perry, PLLC. One of the firm's banking clients asked Cornelia to review a construction contract drafted by Jerry for a deal in which the bank would be supplying the financing.

Cornelia was impressed. The contract was punctilious, well-organized and aggressive. It addressed and minimized every conceivable angle which could spell potential liability to Jerry's client. Written in plain English rather than legalese, the text was lucid and consummately thorough. The glossary of capitalized terms (which, of course, included a definition of Capitalized Terms) ran to seven pages. In every paragraph where Jerry's client had to actually commit to do something, the commitment was qualified and hedged, and the liquidated damages and indemnity clauses effectively eliminated whatever liability was left. She especially appreciated the touch of specifying Arkansas as the forum for choice of law issues. No one involved in the contract had any connection with Arkansas whatsoever, but the *cognoscenti* knew that courts in Arkansas had evolved a body of case law very favorable to construction companies. As Cornelia read the document, she began to feel excitement, even desire, stirring in her loins.

Since law school, Cornelia's only love had been contracts – drafting them, negotiating them, finding loopholes for her clients when they breached them. To her there was something sublime and utterly beautiful about two parties sitting down together and ordering their relationship by voluntary agreement, openly arrived at, negotiated in good faith, and rationally thought out, all with the input of legal counsel. Contractual relationships were so different from the disorganized mess that characterized most human relationships: always having to guess at what others meant, unspoken assumptions being relied on, terms not properly defined, major contingencies left unaccounted for. Cornelia's parents had bumbled their way into marriage and then divorce without any clear sense of who was responsible for what or what their respective obligations were. As Cornelia put it, when her parents got married there was offer and acceptance, but not a whole lot of consideration. To Cornelia it was astounding that more marriages did not end up in divorce given the imprecision and ambiguity of the whole enterprise.

Contracts, by contrast, were tidy.

Because they represented parties on the same side of the negotiating table, their exchanges regarding the contract were amiable. Jerry began to insert little jokes meant just for her in the e-mailed correspondence relating to the deal. The longer the process went on, the steamier their exchanges became. Cornelia had a way of saying "I take your point" that somehow made Jerry breathe heavily, and she wielded her mastery of the Uniform Commercial Code like a dominatrix with a whip. "I love it when you talk UCC to me," he confessed one afternoon. When he put together a full copy of the voluminous schedules for her and had it couriered to her office, she was as impressed as a female sapsucker who is offered a tender grub by a male suitor. For her part, Cornelia would listen to Jerry holding forth on a conference call about environmental hazards (to his client, of course, not to the earth -- *e.g.*, the potential liabilities associated with the Resource Conservation and Recovery Act of 1976, the Clean Air Act, the Clean Water Act, and the Toxic Substance Control Act, as amended from time to time), and her knees would get weak.

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(**Megabits** - continued from page 10)

After one such session, they arranged to meet for a drink, and within six months they were living together. Soon it was time for The Talk.

"Darling," said Cornelia one evening after the dinner dishes had been cleared, "I want to suggest something." She led him back to the dinner table, sat him down on one side, and then took his hands in hers from the other side. "We've spent six months now doing due diligence and I think we're both satisfied with the results. Don't you think it's time we moved on to the definitive agreement?"

Jerry removed his hands from hers and pressed his fingertips together. "I can see how that might be mutually beneficial, my sweet," he allowed. "It *has* occurred to me that by pooling our assets we could achieve some real economies of scale and develop synergies which we could never exploit singly. Did you have a particular structure in mind?"

"Well, an LLC would normally be my structure of choice, offering both the tax advantages of a partnership and the liability limitations of a corporation. But under the circumstances, the marital state might actually be indicated. We'd have no plans to admit additional partners, so new equity offerings are not an issue. There are dramatic estate planning advantages, our joint assets would be secure from individual creditors, we'd enjoy certain evidentiary immunities, and, of course, the rights and obligations of both parties with respect to any resulting offspring would be established in advance."

"All quite true. But what about the marriage tax penalty? That would be a bitter pill to swallow at our income levels."

"I don't see any way around it, though my sources on Capitol Hill assure me that the marriage penalty will be abolished in the next term or two. I'd be willing to trade off that short-term hit for what I really believe to be the long-term benefits. What do you think?"

"I imagine you'd want me to act as the managing estate holder, given my –

Cornelia cut him off. "Jerry, you're not Stanley Kowalski, I'm not Stella, and we don't operate under the Napoleonic Code. I'm talking a 50/50 split of profits and losses with equal co-management responsibilities. And there'd have to be some strict reps and warranties on certain matters. Your track record with previous girlfriends has not gone unnoticed."

"Hey, don't get me wrong, I think the deal you're pitching is a great one. But there can't be any guaranties in a deal like this, baby, express or implied. I come strictly AS IS, WHERE IS – all caps. And I generally oppose sole source arrangements. Up until I met you, I always opted for multiple suppliers – the competitive incentives seemed to benefit all concerned."

"Sorry, sweetie – exclusivity is a dealbreaker for me. I need an airtight 'forsaking all others' clause or I walk. And I should also note that this arrangement applies to both 'sickness and health' as contingencies."

"No problem – our insurance policies should provide perfectly adequate coverage for the sickness eventuality. The risk of 'poorer' rather than 'richer' is harder to protect against. What about the term of the deal? Quite frankly, 'till death do us part' is somewhat beyond my predictability horizon. Wouldn't you feel more comfortable with, say, a ten-year term, renewable for successive ten-year terms at the option of either party?"

"Jerry!"

"OK, OK. But I do have to insist on naming rights."

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*(**Megabits** - Continued from page 11)*
"Sorry, I'm keeping my name, but if it's that important you can have the rights to the kids' last name."

"Done. Do you have a proposed effective date? It might take nine to twelve months to get the necessary clearances from our parents, locate a non-denominational officiator, settle on a closing location, and make the other pre-merger arrangements."

"Not to make too fine a point about this, Jerry, but the closing needs to occur in less than nine months. Six months might be a safer drop-dead date."

Jerry went slightly pale before a smile spread over his face. "Honey, you've got yourself a deal!" He walked around to the other side of the table and took Cornelia in his arms. She rested her head on his shoulder for a long moment and sighed. "Don't you think we should have a pre-nup?" he whispered.