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# FHH Telecom Law

*Current Issues in Telecommunications Law and Regulation* July 2006


*On-line carriers on the hook*

## FCC 2 VoIP: U O USF

### First FCC Filings are Due August 1st

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Facing declining contributions from traditional wireline carriers and increasing demands on the federal Universal Service Fund (USF), the FCC recently adopted a Report and Order which will require providers of interconnected Voice-over-Internet-Protocol (VoIP) to make contributions to USF. While some VoIP providers had previously made such contributions voluntarily, this action may significantly impact the economics of the VoIP industry, and it is another step in regulating VoIP providers in a manner similar to regulation of traditional wireline carriers. ***VoIP providers will have to make their first USF filing on August 1, 2006***, and will have to take several regulatory steps prior to the August 1st filing. VoIP providers should review the steps described below, and prepare to act immediately.

Under the current system, the federal USF is funded by contributions from a wide variety of providers of telecommunications, though the bulk of contributions comes from traditional wireline and wireless (cellular/PCS) carriers. Contributions are fulfilled by the assessment of a certain percentage of each provider's ***interstate and international*** revenues. The percentage is established by the FCC based on its estimate of both the funding requirements and the anticipated gross revenues. The FCC has been under strong pressure to increase both the pool of contributors to USF and the amount of contributions, but an on-going proceeding to revise the federal USF system has been stuck due to lack of consensus among industry segments and regulators over how to replace the current system. Lacking a consensus for a permanent revision to the rules, the FCC's recent Order enacts what it calls "interim" measures.

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*The Never-Ending Story, Part II?*

## Re-Defining Designated Entities . . . Again

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Occasionally one wakes up in the middle of the night thinking "Who am I, really? What am I all about? Why am I here?" These questions have no doubt been disturbing the sleep of many a Designated Entity (DE) these nights as the FCC has repeatedly attempted in recent months to define what it means to be a DE.

In the run-up to the Advanced Wireless Services auction now scheduled to begin in August, the FCC has been struggling to tighten its DE definitions so as to prevent the kind of sham structures which were the hallmark of earlier auctions. As we reported in April, the FCC adopted rules which would preclude DE's from having a material relationship with bigger companies. At the same time, the FCC took the unexpected steps of extending the holding period before a DE could sell its license without penalty (from five years to ten) and imposing harsh new disclosure requirements on "reportable eligibility events."

Following the inevitable howls of protest from adversely affected DE's, the FCC agreed to make the ten-year holding requirement prospective-only. Thus, DE's who obtained their licenses with discounts prior to April of this year and who have paid their five-year debt to society can still sell those licenses to non-DE's without having to pay any "unjust enrichment" penalty. DE's could breathe a sigh of relief.

But at the same time the FCC is now requiring them to (1) file an annual report detailing any arrangements they have entered into which could affect their DE status and (2) get prior approval for any new reportable eligibility events which might possibly affect their DE status. This latter requirement is an unusual one for the FCC since the Commission has rarely in the past inquired into a li-

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*FCC guess-timates on the high side*

# USF Wireless Safe Harbor Set at 37.1%

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To no one's surprise, the FCC decided at its June meeting to substantially increase the "safe harbor" percentage applicable to wireless traffic for purposes of contributions to the Universal Service Fund (USF). The safe harbor is the percentage of traffic which the FCC – in the absence of actual data – accepts as the percentage of interstate traffic carried over wireless networks. This percentage is important because carriers contribute to the USF on the basis of their interstate (and in some cases international) revenues. Because many carriers could not identify what percentage of their wireless calls were interstate and what percentage were intrastate, the FCC allowed the use of these safe harbors in order to facilitate the USF contribution calculation. The safe harbor amount had started at 15%, then risen to 28.5% in 2002. The new figure is a whopping 37.1%.

The FCC made no bones about acknowledging that the increase in the safe harbor was intended in part to increase the contribution from wireless carriers whose traffic accounts for a larger and larger percentage of telephone traffic generally. The need to increase USF contributions also factored in the Commission's decision to set 64.9% as the interstate safe harbor for VoIP providers who also have difficulty allocating their traffic between interstate and intrastate calls. [*See* related article on p. 1 regarding the new requirement that VoIP providers contribute to the USF.]

One might consider this a cynical approach to what should, after all, have been an arithmetic calculation based on estimated proportions of interstate and local traffic without regard to how those proportions would affect the USF's bottom line. To be sure, the FCC based its number on a study submitted by Tracfone, but the FCC chose to adopt the very highest percentage in the range of percentages offered by Tracfone (the interstate minutes of major carriers ranged from 11.9% to 37.1%) and then applied that figure to all carriers. An outcome with less of an eye on the bottom line might have adopted the middle of the range as the most reasonable place to situate the safe harbor.

Fortunately, traffic monitoring technology has improved to the point that many carriers who could not identify interstate calls in 2002 now can do so. The FCC will permit carriers who think the safe harbor percentage is too high to rely instead on either their own actual known interstate traffic figures or on their own traffic studies that indicate the percentage of interstate calling by customers. The FCC had always permitted the use of traffic studies, but now it will require such studies to be submitted by the carrier to the Commission and USAC so that their validity can be verified. (Apparently, bean counters at USAC and the Commission suspected that carriers were understating their interstate traffic in order to minimize their USF obligations.)

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*Red tape alert!!!!*

# FAA Proposes Changes In Tower Approval Process

## Major delays in approvals likely if changes are adopted

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The FAA has proposed major changes to the factors it considers in determining whether proposed construction of new towers or modifications to existing towers are a hazard to aircraft navigation. All applicants for FCC authorization for a new or modified communications service facility must demonstrate, prior to obtaining FCC approval, that any tower from which the service proposes to transmit its signal will comply with all FAA tower regulations.

Communications service providers currently must notify the FAA of any proposed new tower construction or modification which is 200 feet or higher or lies within certain specified airport approach paths. Initially the FAA evaluates the notification to determine whether the tower is a potential physical obstruction to aircraft and, in the case of FM radio and VHF TV facilities, whether the facility will potentially case electromagnetic interference (EMI) to aircraft navigation equipment. If the FAA determines that a proposed tower or modification will not be a hazard, the FAA issues a determination of no hazard to aircraft navigation.

***Comments are due September 11, 2006.***

If the FAA determines that a proposed tower or modification may potentially be a hazard to aircraft navigation, the FAA studies the proposal in depth to determine whether the tower construction or modification will in fact create adverse effects on aeronautical operations. If after further study the FAA determines that a proposed tower or modification will in fact adversely affect aeronautical operations, the FAA issues a determination of hazard to aircraft navigation. Issuance of a determination of hazard to aircraft navigation leads to the FCC denying any required FCC construction permit for the tower and will often result in local authorities denying required permits for construction/modification of the tower.

EMI is of concern to the FAA since the FM band (88-108 MHz) is immediately adjacent to the FAA's navigation/communications band (108-136.5 MHz) and FM stations transmit with a much greater power than the FAA's communications systems. In addition, the VHF TV bands (54-72 MHz, 76-88 MHz, and 174-216 MHz) are adjacent to the FAA communications navigation bands for marker beacons (75 MHz), government land mobile facilities (162-174 MHz), and bands used for communication with military air traffic (225-328.6 MHz).

The FAA's proposed changes to the factors it considers in determining whether a proposed tower or tower modification is a hazard to aircraft navigation will both increase the number of notifications which proponents of tower construction or modifications must file with the FAA and make it harder for those proposing tower construction or modification to obtain FAA approval. The new rules could interject very significant delays into the construction timetable of otherwise routine towers. Companies who construct towers regularly (or who rent space on their towers) will be adversely affected if these rules are adopted and may wish to consider submitting comments on the proposals to the FAA.

Among other changes, the FAA proposes:

- to require notice of ***all*** proposed new construction of any man-made structure (tower, building, etc.) which will support a radiating element used for radio frequency transmission on the following frequencies: (i) 54-108 MHz, (ii) 150-216 MHz, (iii) 406-420 MHz, (iv) 932-935/941 MHz, (v) 952-960 MHz, (vi) 1390-1400 MHz, (vii) 2500-2700 MHz, (viii) 3700-4200 MHz, (ix) 5000-5650 MHz, (x) 5925-6525 MHz, (xi) 7450-8550 MHz, (xii) 14.2-14.4 GHz, and (xiii) 21.2-23.6 GHz.

- to require prior notice of any change to a communications facility operating on any of the above frequencies, if the communications system

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*The eyes have it . . .*

# Broadband and VoIP Subject to CALEA Requirements

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In 2004, several law enforcement agencies (LEAs) petitioned the FCC to clarify the scope of the Communications Assistance for Law Enforcement Act (CALEA). Enacted in 1994, and designed to facilitate the lawful LEA interception of digital communications, CALEA requires "telecommunications carriers" to "ensure" that their networks are technologically "capable" of being accessed by LEA officials.

While CALEA's provisions explicitly apply to "telecommunications carriers," they explicitly do ***not*** apply to providers of "information services." The core problem that the LEAs sought the FCC to address was whether CALEA requirements applied to networks used to provide broadband services (DSL, cable modem) and voice-over-Internet services (VoIP). The FCC has recently issued Orders expanding the application of CALEA requirements to networks used for provision of broadband and VoIP services, and a federal appeals court has upheld the first of those Orders.

*The Court gave the FCC a pass on the moving shell game it has been playing with the definitions of "telecommunications service" and "information service".*

Prior to 2004, the FCC had held that CALEA requirements do not apply to facilities used for information services, and had separately held that DSL was an information service. Nevertheless, the world had changed in the interim, with massive growth in the use of e-mail and broadband services, and the development of VoIP. Accordingly, in September of 2005, in response to the LEA Petitions, the FCC focused on language in CALEA that classifies as telecommunications carriers entities providing service which the FCC finds to be a "substantial replacement" for telephone service, and the Commission thus for the first time found that (1) facilities-based broadband Internet access providers and (2) providers of "interconnected" VoIP, are subject to CALEA requirements.

The Commission found that these two sorts of entities provide services which are substantial replacements for telephone service, and that due to national security concerns, it would be in the public interest to subject them to CALEA requirements. The Commission established a deadline for compliance by such entities of 18 months from the effective date of the Order, and stated that a future Order would discuss the specific CALEA compliance requirements that will be imposed on such entities, as well as cost recovery.

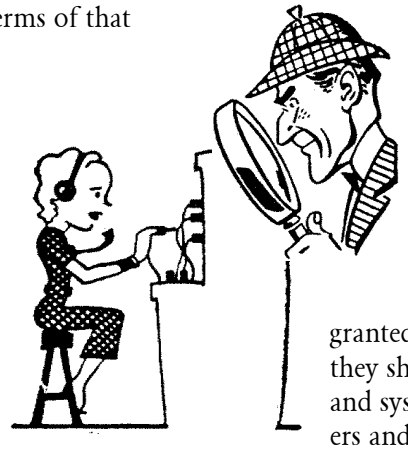
Recently, the U.S. Court of Appeals for the D.C. Circuit reviewed and upheld the FCC's 2005 findings that CALEA applies to facilities used to provide Broadband Internet Access, and to facilities used to provide VoIP. This came as a bit of a surprise, given the tough questioning of the FCC by the judges during oral argument. The petitioner American Council on Education (ACE) had argued that (a) the FCC had classified Broadband Internet Access as an "information service" in other proceedings, (b) the classification must be the same for the purpose of CALEA, (c) CALEA prohibits application of its requirements to information services, and thus (d) CALEA cannot be applied to Broadband Internet Access.

The Court rejected part "b" of this argument, noting that the definitions of "telecommunications service" and "information service" under CALEA are not the same as those under the Telecommunications Act, and thus the FCC is not required to make the same findings regarding the status of Broadband Internet Access in the context of different statutes. The

*(Continued on page 5)*

(**Broadband/VoIP/CALEA** - *continued from page 4)*
Court then concluded that the FCC's interpretation of CALEA was "reasonable," relying on the deference that precedent requires courts give to agencies. In essence, the Court gave the FCC a pass on the moving shell game it has been playing with the definitions of "telecommunications service" and "information service," in light of the FCC's decision that this is what is necessary to promote law enforcement. The Court also upheld the application of CALEA to VoIP, which was perhaps less surprising, since it is hard to argue that VoIP is not a "substantial replacement" for telephone service, and thus subject to CALEA requirements under the terms of that statute.

Moving forward, the FCC recently issued another Order which spells out some of the regulatory process and requirements associated with applying CALEA to VoIP and Broadband. Most importantly, the FCC set a deadline of ***May 14, 2007*** for providers of VoIP and Broadband to be in compliance with CALEA requirements. Among the issues addressed in the Order are the following:



- ***Definition of CALEA requirements***: In addressing the nature of the call information capability that service providers must provide to LEAs, the recent Order decides to defer to "industry standard-setting bodies." The good news is that the FCC did not make a bad substantive decision on this issue; the bad news is that no one knows when the "industry standard-setting bodies" will act, whether there will be conflicting standards set by multiple such bodies, and whether LEAs will agree with any of them. And the clock is ticking towards May 14, 2007.

- ***Compliance Based on Use of a "Trusted Third Party"***: One approach to compliance for a service provider could be use of a "trusted third party" (TTP) to access the carrier's network and remotely manage the intercept process for the carrier. The Order concludes that TTPs exist, and could offer a quick and cost-effective method of compliance; therefore, the Order holds that carriers may use TTPs to fulfill their compliance requirements. However, the carrier is still the party that is ultimately responsible for delivering information to the LEA, and for protecting customer privacy.

- ***Carrier Petitions for Relief***: The Statute provides that carriers may seek relief from CALEA compliance obligations if the Commission grants a petition for relief. Such petitions do not give the carrier an extension of time to comply, but if granted, shift the cost of compliance to the federal government if the carrier can show that compliance is not "reasonably achievable" or would impose a "significant difficulty or expense" on the carrier. However, the Order makes clear that carriers have a very high burden of proof to meet in order to get a petition granted, and petitions will be rejected unless they show that they "have engaged in sustained and systematic negotiations with manufacturers and third-party providers to design, develop and implement CALEA solutions...."

- ***Monitoring Reports***: The Order concludes that carriers should have to file monitoring reports on the progress they are making in complying with CALEA as applied to their VoIP and broadband services. The sample form must first be approved by OMB. When that happens, the FCC will release a public notice with the deadline for filing.

- ***Security Policy Requirements***: The FCC had previously enacted rules on policy and procedures for carriers in regards to employee supervision and control re CALEA searches, as well as rules on maintaining secure and accurate CALEA records. These carrier policies and procedures are supposed to be filed with the FCC. In the Order, the FCC holds that these requirements apply to providers of VoIP and broadband services, and that such providers ***must come into compliance***

*(Continued on page 6)*

*Landing on two feet*

## Less is More: FCC OKs Smaller Point-to-Point Microwave Antennas

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The FCC has granted a blanket waiver permitting FiberTower Corporation to use two-foot antennas in the 10.7-11.7 GHz microwave band, subject to modified frequency coordination rules.

FCC rules require a point-to-point microwave transmitter antenna to concentrate its outgoing radio waves into a tight beam toward the receiver. The rules of physics require a large antenna dish, relative to the radio wavelength, to produce that tight beam. At 11 GHz, where the wavelength is just over one inch, the FCC requirements demand an antenna about four feet in diameter. But a four-foot dish is large, heavy, expensive, and unsightly.

*Many towers and rooftops that cannot take the weight of a four-foot dish can easily accommodate a two-foot. Some areas have zoning rules that prohibit four-foot antennas, but allow the two-foot equivalent.*

FiberTower, which uses microwave radio for backhaul services (such as delivery of telephone signals to cellular towers), asked the FCC for permission to use two-foot antennas instead, arguing that they are one-third the cost, one-quarter the weight, and much less conspicuous. Many towers and rooftops that cannot take the weight of a four-foot dish can easily accommodate a two-foot. Some areas have zoning rules that prohibit four-foot antennas, but allow the two-foot equivalent.

Two-foot antennas have a disadvantage, however. They emit radio energy in a wider beam, thus potentially threatening interference to 11 GHz microwave users nearby, and to satellite earth stations that share the band. FiberTower proposed to avoid this problem by turning down the power, if necessary, so the interference would be no worse than from a four-foot dish. Similarly, two-foot antennas are more susceptible to incoming interference from certain directions, but FiberTower agreed not to object to interference unless a four-foot user could also object. The FCC adopted this approach.

The only challenge came from satellite licensees, which feared the waiver would encourage greater point-to-point use of the band, and thus make coordination more difficult for earth stations. The FCC brushed aside this concern.

FiberTower also has on file a Petition for Rulemaking to implement the same change in the FCC rules. After more than two years, the FCC has yet to act on it.

(**Broadband/VoIP/CALEA** - *continued from page 5)*

***with the security requirements within 90 days of the effective date of the Order*** (which has not yet been established). At that time, carriers will have to file their policies and procedures with the FCC.

The bottom line is that the FCC Order applying CALEA to broadband and VoIP services was upheld, and until further notice, numerous CALEA compliance deadlines are quickly approaching. Petitioners may make an appeal to the Supreme Court, but we may not know that for some time – and even if they do, short of getting a stay from the Supreme Court (which would be very unlikely), the earliest we could expect a decision would be Spring of 2007. So, it looks like service providers should operate as if the FCC's Order will remain in effect, and they should be mindful of the approaching compliance deadlines.

*Throwing in the towel and shouting "no mas"*

# IRS Surrenders!

## Taxpayers will get communications tax refund


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Announcing that it is "conceding," the Internal Revenue Service has decided it will stop demanding the collection of federal excise tax on long-distance telephone service and will issue refunds to taxpayers who have paid the tax for the last three years. The excise tax currently shows up on phone bills as 3% of long distance, local and certain other telephone services. The tax on local and certain other services continues; this concession is limited to long distance and bundled services.

*Not an actual photograph of IRS official formally announcing policy change*

Recently, several companies took the IRS to court over the long distance portion of the tax. When Congress wrote the law – originally more than 100 years ago, but edited since then – it described long distance service as telephone service as to which the charge varied due to time and distance. Alas, telecommunications evolved much faster than the tax law. The law that was written during the era of Teddy Roosevelt has little to do with today's economics of long distance (which is rarely charged based upon distance). Therefore, argued the companies suing the IRS, the tax cannot apply to long distance since the variable of distance for calculating the charge has vanished. Courts throughout the country uniformly agreed.

The IRS stubbornly resisted and it took almost a year before they decided to do what the courts (and taxpayers) had been telling them. In a statement from the Treasury Department, the IRS advised collectors, who are often the telephone companies, that they should stop collecting the taxes on services billed after July 31. The IRS also told taxpayers that refunds should be claimed as part of their annual income tax return filing. Organizations claiming the refund will have to maintain documentary support of their refund request. In contrast, the IRS is going to establish a "standard" amount for individuals which can be used as a default but can be itemized should an individual's taxes have been greater than the standard amount. The refund amount will be limited to the period from February 28, 2003, until August 1, 2006.

Specifically, the IRS has determined that long distance and bundled services are nontaxable. The IRS now simply defines long distance service as service to connect a person with telephones outside of a local calling area. The IRS is abandoning the collection of taxes on long distance services altogether.

The more interesting determination is that bundled services are not taxable. Bundled services are services which a provider is offering under a plan that does not separately state the charge for the local telephone service. This is almost uniformly how mobile phone services are billed as well as other flat month landline charges, prepaid cards and VoIP services. Any carriers that are offering local-only service must continue to assess the tax on those services as they remain unchanged.

Readers who perform their own billing and collection function should program or upload the latest IRS requirements. All readers, both individually and on behalf of their businesses or organizations, should be alert to the refund that will be incorporated into their 2006 income tax return.

*FCC, NTIA, Industry agree to compliance test procedures*

# Finally! -- New 5 GHz Procedures Are Ready

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The FCC's long-running effort to expand the 5.7 GHz U-NII band has at last reached a successful end.

Back in 2003, the FCC added 255 MHz to the unlicensed U-NII bands, which then consisted of three 100 MHz segments. The new spectrum, located at 5.47-5.725 GHz, was supposed to take pressure off the heavily-used Wi-Fi band at 2.4 GHz in the face of escalating demand for unlicensed spectrum.

The freshly added spectrum, however, is shared with radars operated by the federal government. The FCC's 2003 order included rules to protect those radars – in particular, a requirement that an unlicensed device in the band be able to monitor for the radars and, it if finds one, avoid the frequencies the radar is using. Separately, to help accommodate more users, the FCC required that unlicensed devices be able to automatically turn down their output power to the minimum needed for communication.

In setting up the new rules, the FCC had to specify criteria for testing whether a device satisfies the technical requirements. That proved to be much harder than expected, in part because the federal government was reluctant to disclose certain details about the radars it wanted protected. It took more than two years – until earlier this year – for the FCC, an industry group, and the federal government (via the National Telecommunications Information Administration) to agree on a compliance test procedure. Now the FCC has adopted that procedure, a dense 40 pages of technical detail.

At the same time, the FCC disposed of several requests for clarification and reconsideration left over from the original 2003 order. The FCC made clear that transmitters limited to sufficiently low power need not implement automatic power control. It declined to answer a complicated question on frequency avoidance by networks of interconnected radio devices, saying it preferred to handle such issues on a case-by-case basis. And it responded to other outstanding questions by inserting appropriate provisions in the compliance test procedure.

The new rules on frequency avoidance and automatic power control govern not only the newly allocated 255 MHz, but also a pre-existing U-NII segment at 5.25-5.35 GHz. They apply to all products for these bands whose certification applications are filed on or after July 20, 2006, or that are imported or marketed on or after July 20, 2007.

***(FAA Proposal** - continued from page 3)*
was specified in a previous FAA determination, including (i) a change in frequency, (ii) addition of a frequency, (iii) an increase in effective radiated power (ERP) equal to or greater than 3 decibels (dB), and (iv) modification of a radiating element which increases the height of the antenna mounting location 100 feet or more, changes the antenna specifications (including gain, beam-width, polarization, or pattern), or changes the antenna azimuth/bearing (point-to-point microwave).

- to require prior notice of any change in the type of antenna used by a communications facility operating on any of the above frequencies, if the antenna type was specified in a previous FAA determination.

- to require an in-depth study of all notifications of a radiating element which will transmit on any of the above frequencies.

- to require prior notice of any proposed new tower construction or modification on or near a private use airport or heliport which has at least one FAA-approved instrument approach procedure (IAP). Notice of proposed new tower construction or modification on or near a private use airport or

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*Megabits - musings hot off the press*

# What You Don't Know Won't Hurt You

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Several months ago we reported that both Congress and the FCC were up in arms to discover that unauthorized parties were gaining access to telecom customers' proprietary phone information (known as CPNI). The Telecom Act and FCC regulations theoretically protect such material from disclosure, but marketers were somehow gaining access to customer files rather easily. The FCC quickly levied some major fines, made all carriers file reports about their compliance with the rules, and proposed some new rules to signal a "get tough" policy with carriers who failed to protect the privacy rights of their customers. For its part, Congress hauled a bunch of top-level execs into public hearings and excoriated them for their insensitivity to their customers' privacy rights, threatening to enact tough new laws to ensure that these rights were protected.

The public could feel reassured that federal watchdogs were vigilantly guarding their rights.

Fast forward a few months and suddenly press reports revealed that agencies of the federal government had themselves been accessing the data of customers or engaging in surveillance of customers without court orders. Several major carriers were alleged to have permitted, and indeed, abetted these activities despite the fact that the FCC's rules explicitly prohibit such activity. The privacy rights of customers appeared to have again been systematically abused on a massive scale. Both civil libertarians and folks who expect simple consistency from their regulators awaited a swift and sure reaction from the FCC and from Congress.

Well, the reaction was sure swift. Chairman Martin quickly announced that the FCC would do nothing whatsoever to investigate the matter or enforce its rules on unlawful surveillance. Several Congressmen and Senators expressed outrage about the incident on camera, but after the initial furor died down, Sen. Arlen Spector (R-PA), the leader of the outraged pack, quietly announced that no hearings would be held after all. Neither Congress nor the FCC would do anything to investigate or punish what appeared to be both a major violation of FCC rules and a gross invasion of the privacy rights of the public. And of course the executive branch was involved in the scheme itself. The matter has thus been neatly swept under the rug. Several private class action law suits which have been brought against the phone companies who participated in the scheme are the only remaining vehicles for vindicating the rights of the people – perhaps you and us – who were illegally surveilled.

We rarely editorialize in these pages, but we can't help observing the sheer hypocrisy of regulators and legislators who loudly condemn the relatively minor invasion of privacy involved in a disclosure of proprietary data to telemarketers while turning a blind eye to unlawful surveillance by government agencies. The fight against terrorism is certainly a worthy cause, but increasingly the government at all levels is using that fight as a carte blanche to intrude more and more deeply into the private lives of all its citizens without the constraint of judicial oversight. CALEA rules actually require carriers to design their systems so as to accommodate electronic surveillance; warrantless wiretaps are being conducted under a program defended by the Attorney General. When the nation's law enforcement personnel condone and wink at violations of our right to be secure in our homes and our papers, we are in serious trouble indeed. On the other hand, Congress did pass a law increasing the fine for using dirty words on the airwaves, so we can feel safe after all.


*(**VoIP and USF** - continued from page 1)*
In imposing a contribution requirement on VoIP providers, the FCC limited that obligation to so-called "interconnected" VoIP providers, which it defines as those that provide VoIP services that: (1) enable real-time, two-way voice communications; (2) require a broadband connection from the user's location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive calls from and terminate calls to the PSTN.

Under the current contribution methodology, carriers are required to calculate their total interstate and international end user revenues, and then multiply that figure times a percentage provided by the FCC. This calculation is done on FCC Form 499-Q (filed quarterly) and FCC Form 499-A (filed annually). However, in order to minimize administrative burdens on filers, certain classes of carriers are allowed to use a "safe harbor" percentage as a substitute for calculating the specific portion of their end user revenues attributable to interstate and international traffic. In its recent Order, the FCC established ***64.9%*** as the "safe harbor" percentage for interconnected VoIP providers. While that percentage is high compared with other classes of carriers, there was substantial evidence in the record that VoIP has been largely marketed as a cheap way for consumers to make interstate and international calls, so the FCC concluded that a very large percentage of VoIP traffic falls into that category.

*The FCC has imposed significant fines in recent years on entities that failed to file and make required USF contributions.*

While the FCC has issued a Notice of Proposed Rulemaking seeking comments on that percentage, unless and until the FCC acts again, VoIP providers will have to use that percentage. Alternatively, VoIP providers may base their calculations on a traffic study that meets FCC requirements (and submit the study to the FCC), or they may calculate the specific amounts of end user revenue for each period that came from interstate and international service. The large safe harbor number may inspire some VoIP operators to develop the capability to determine caller location that many have claimed was impossible in the past; however, the Order notes that an operator developing this capability would no longer qualify for federal preemption under the previous *Vonage* case, and thus that operator would be subject to state jurisdiction and regulation for calls determined to be intrastate. This will be a real dilemma for VoIP operators.

Interconnected VoIP providers should take the following steps in order to come into compliance with the new USF requirements:

☎ If they have not already done so, VoIP providers must obtain an FCC Registration Number (FRN) from the FCC. This can be done through the FCC's web site. Having an FRN is a requirement for any company that interacts directly with the FCC.

☎ If they have not already done so, VoIP providers must make a filing designating an agent for service of process in the District of Columbia. Contact your telecommunications attorney for information on how to do this. (FHH has a Washington address which can serve as a D.C. location for clients wishing this service.)

☎ VoIP providers who have not already done so must file – ***by August 1, 2006*** – Blocks 1, 2 and 6 of FCC Form 499-A and the entire Form 499-Q (though first-time filers will not be required to complete Lines 115-118 of that form in this first filing).

Interconnected VoIP providers should begin reviewing the 499 Forms as soon as possible to evaluate their payment obligations. They may discover that they are not required to make contributions at all, if the calculation shows that their contribution would be less than $10,000 (the so-called *de minimis* exemption). VoIP providers that are inclined to ignore this process in hopes that the FCC will ignore them should be forewarned: the FCC has imposed significant fines in recent years on entities that failed to file and make required USF contributions, and the recent Order emphasized that the FCC's enforcement efforts in this area will increase.

Please call us if you have any questions about federal USF obligations, or if you would like assistance in complying.

## In Brief

***Court confounds observers***. Last month we reported that it appeared that the U.S. Court of Appeals for the D.C. Circuit was leaning strongly in the direction of overturning the FCC's latest rules applying CALEA obligations to broadband internet service providers. At oral argument, one member of the judicial panel had referred to the FCC's rationale as "gobbledy-gook" – never a good term to have applied to an administrative decision. Coming from the former chief judge of the circuit, this was especially harsh criticism. So the FCC must have been as surprised as everyone else when the Court ruled in favor of the FCC by a 2-1 vote. We always advise clients not to be misled by the tenor of the panel at the oral argument because the court sometimes comes out completely the opposite of where their questions would have led you to believe they were. This was just such a case.

***(Designated Entities** - continued from page 1)*

censee's financial and other arrangements except in the context of the issuance of a new license or the transfer of an old one.

A reportable eligibility event is an event that would lead to a DE losing its DE status. Here the FCC has yet to explain exactly what those events might be. We know they include non-controlling changes in the ownership structure of the licensee, and management, trademark, marketing and facilities agreements, but this list is not exhaustive. Basically, the hapless DE has to speculate as to whether any arrangement it plans to enter into might possibly be construed as affecting its DE status by triggering the attribution of another entity's revenues; it must then seek permission for this possible triggering event in advance.

*The FCC will be issuing clarifying guidelines about what must be deemed a reportable eligibility event, but in the meantime a major cloud hangs over the ability of DE's to secure financing, management services, and the rest of the elements that go into running a business.*

Presumably, in many instances the FCC will say that the proposed agreement is not a reportable eligibility event after all, and yet the FCC will have had to spend time reviewing it, and the licensee will have been delayed in implementing needed business arrangements. We understand that the FCC will be issuing clarifying guidelines about what must be deemed a reportable eligibility event, but in the meantime a major cloud hangs over the ability of DE's to secure financing, management services, and the rest of the elements that go into running a business. We also note that the FCC, in its haste to adopt these new rules, failed to get approval from the folks in the federal government who review the imposition of paperwork obligations by administrative agencies. So until the new disclosure rules are approved by OMB, the FCC has stayed their effective date.

Meanwhile, back at the courthouse, Council Tree Communications and several other companies – the very same companies who had originally asked the FCC to tighten the DE rules in the first place – were scrambling to have the new rules stayed or invalidated by the court. It therefore appears that the DE identity crisis – and sleepless nights – will continue indefinitely.

***(USF Safe Harbor** - continued from page 2)*

This is, of course, an "interim measure" until the entire USF contribution process can be reformed, a process which is desperately needed but just as desperately bogged down in controversy. With billions and billions of dollars flowing into and out of the USF fund these days, the carriers on the receiving end do not want to give up what has quickly become an entitlement, and the net payers want to either get a piece of the action themselves or limit the amounts that they have to pay. With these stakes, one "safe harbor" we can count on is that this interim measure will be in effect for years to come.

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First Class

*(**FAA Proposal** - continued from page 8)*
heliport is not currently required.

- to modify some of the five "airport runway imaginary surfaces" (horizontal surfaces, conical surfaces, primary surfaces, approach surfaces, and transitional surfaces) it uses to initially determine whether a proposed tower construction or modification may potentially be a hazard to aircraft navigation. This proposal will make the surfaces applicable to an increased number of proposed new tower constructions or modifications. Since an in-depth study is required for all proposed new tower constructions or modifications to which "airport runway imaginary surfaces" are applicable, this will result in the FAA conducting an in-depth study of more tower proposals.

- to consider the effect on planned or proposed airports for which the FAA has received actual notice anytime prior to issuance of an FAA determination regarding the notification, regardless of whether the "comment period" has closed. In evaluating a notification, the FAA currently considers the effect of the proposed tower construction or modification on planned or proposed airports for which the FAA has received actual notice prior to the closure of the "comment period" for the notification.

- to require notices of proposed tower construction or modification to be filed 60 days before construction begins. Currently, notices must be filed 30 days before construction begins.

- to make all determinations of no hazard to aircraft navigation effective 40 days after issued by the FAA, if no petition for review is received by the FAA within 30 days of issuance. Currently, the effective date is contained in the determination and is generally the same date the determination is issued.

- to modify its rules regarding extension of a determination of no hazard to aircraft navigation.

The FAA has solicited comments regarding its proposed changes. Comments are due September 11, 2006.