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Current Issues in Telecommunications Law and Regulation

May 2007

Common carrier? Information service?

Service Classifications: What's In A Name?

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The FCC at its March meeting adopted an order classifying wireless broadband Internet access as an "information service" rather than a telecommunications service. This may seem like "non-news," given that the Commission had already adopted a similar classification for wireline broadband Internet access, cable modem internet access and Broadband over Power Line Internet access, but it gives us an opportunity to address, as Commissioners Copps and Adelstein did in their concurring statements, the curious anomalies created by the Commission's action. A customer can be making a call over a broadband access device that looks and feels pretty much like a cell phone and can be connected in what seems to be a functionally identical way, but the regulatory regime and the rights and obligations underlying that call – both from the customer's standpoint and the service provider's – may be radically different.

Basically, an "information service" under the 1996 amendments to the Telecom Act is not a common carrier service. Because it's not common carriage, it's free from most of the rules and regulations that apply to common carriers such as rate regulation, non-discrimination obligations, reports, liability for complaints and damages under Title II, etc. This used to be universally considered a good thing because freedom from regulation is the Garden of Eden-like state that telecom companies used to most fervently long for. The FCC's decision regarding wireless broadband Internet access was a foregone conclusion given its earlier determinations – upheld by the Supreme Court – that other forms of similar Internet access should be classified as information services.

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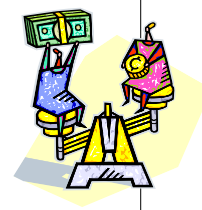
Back to the future?

FCC Weighs Net Neutrality - And Why That Matters



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The FCC has announced its belated entry into the acrimonious "network neutrality" debate, starting with a Notice of Inquiry aimed at gathering information on how broadband Internet providers charge for services. The Commission must decide whether to mandate a principle of nondiscrimination in the provision of Internet access services, and if so, how it should word the requirement.

The "network neutrality" issue has its origins in 1887, fully a century before the Internet appeared. Back then, the newly-built Western railroads operated on a monopoly basis. Ranchers, who depended on the trains for their business, complained that the railroads played favorites, giving some customers preferential treatment while imposing delays and overcharges on others. Congress responded with the Interstate Commerce Act, which required the railroads to give similar treatment to similar customers, and to charge everyone the same published rates.

Half a century later, Congress again heard the same complaints, this time about telephone service – another monopoly on which businesses had come to depend. The Communications Act of 1934 applied the same solutions. Indeed, its Title II was modeled almost section for section on the 1887 railroad provisions. The monopoly phone provider, AT&T, was barred from unreasonably discriminating among its customers, and had to charge everyone the same FCC-approved rates listed in its public tariffs. The solution worked. AT&T made a consistently good return on investment for decades, while Americans enjoyed the best telephone service in the world.

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Carterfone, with no strings attached?

Skype to FCC: Don't Let 3G Nets Bar Consumers From Tweaking Software

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A recent Petition filed with the FCC has established a whole new battleground over access to communications networks. Skype, an internet telephony division of eBay, asked the Commission to commence a rulemaking proceeding addressing whether the Commission's *Carterfone* principles should be applied to wireless systems.

In the landmark 1968 *Carterfone* case, the Commission threw out the phone companies' stranglehold on customer equipment, enabling consumers for the first time to attach devices of their own choosing to the public switched telephone network, provided only that they did not damage the network. This principle promoted innovation, competition and consumer choice in customer premises equipment. Skype argues that the same policy should be applied to wireless services, asserting that the same rationale and principles apply.

The Skype Petition alleges that wireless carriers are engaging in restrictive practices that are harming consumers. For example, Skype contends that wireless companies disable certain products and features, lock handsets to prevent their use on additional networks, prevent users from installing third-party applications, and impose terms of service limitations which make it impossible for consumers to take advantage of advanced features.

Skype argues that the principle of *Carterfone*, derived from Sections 201 and 202 of the Communications Act, is applicable to wireless technologies and should be applied as such. The Petition endorses the creation of an "industry-led forum" established by the Commission to ensure that the *Carterfone* principle is applied to 3G Internet access networks so that "no entity can enforce techniques such as blocking, locking, or certification requirements that have the intention of preventing consumers from modifying or installing software unless it is reasonably proven that such software harms the network." Not surprisingly, the requested ruling would also be of enormous benefit to Skype and other VoIP providers since it would enable them to offer their services over wireless networks without being blocked by the spectrum owners.

The Skype Petition has already aroused heated opposition from some in the wireless community. CTIA President Steve Largent has declared that the application of "monopoly-era *Carterfone* rules" to wireless technologies would stifle innovation and consumer choice. "Skype's self-interested filing contains glaring legal flaws and a complete disregard for the vast consumer benefits provided by the competitive marketplace," Largent said. FCC Commissioner Copps has expressed some sympathy for Skype's position, observing that if wireless broadband access is an information service, as the Commission recently concluded, the existing informal "guidelines" adopted by the Commission already preclude restrictions on the equipment used for such access. (Query whether the conditions

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I'll scratch your back if you scratch mine . . .

(Yet Another) Public Safety Proposal With A Private Trade-Off

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There seems to be no end of public spirited commercial enterprises who are offering to assist public safety entities in getting access to more spectrum – all they want in return is access to the spectrum themselves. After Cyren Call's failed attempt to get the FCC to set aside additional 700 MHz spectrum originally slated for auction, and M2Z's efforts to provide public safety uses in return for circumventing the auction process altogether in the 2 GHz band, a new player – Frontline Wireless – has stepped up to the plate with its own public safety-based proposal in reply to the Commission's ninth notice of proposed rulemaking on Public Safety in the 700 MHz band.

The Frontline proposal would set aside the E Block, adjacent to the public safety spectrum, for auction with certain conditions on the winning bidder's license. In return the licensee would have the exclusive right to use the excess capacity in the adjacent public safety spectrum. The conditions on the winning bidder would be that it:

- Fund the construction of an interoperable and secure nationwide broadband network;
- Allow Public Safety users priority access to the network;
- Make capacity available on a wholesale basis;
- Build the network according to "open access" principles; and
- Enable roaming.

Frontline proposes to meet these conditions with a 4G, IP-based network. The roaming and open ac-

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FCC to TelCos: Mum's the word

FCC Clamps Down On CPNI Disclosure Practices

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Driven by the crack of Congressional whips, the FCC has imposed strict new requirements on the disclosure of Customer Proprietary Network Information (CPNI). A year ago, the communications world was shocked – shocked! – to learn that unscrupulous persons were illicitly obtaining information from phone companies about their customers' phone calls with the greatest of ease. The FCC at that time handed out some exemplary fines and required all carriers to file certifications of their compliance with the CPNI protection rules which had been around since 1998. It also opened a rulemaking to consider the imposition of stricter rules to deal with the problem in the face of widespread lackadaisical compliance.

Unlike many such tempests on the Washington weather map, this one refused to peter out. More and more reports surfaced of "pretexting" as a common practice to obtain customer data, despite the non-disclosure rules, and Congress continued to express concern that the FCC was not doing enough to deal with the problem. In response, the FCC recently handed out a spate of hundred thousand dollar fines to carriers who, on spot check, had not filled out and put in a drawer their internal certification of compliance with the CPNI rules.

The Commission also adopted new procedures applicable both to common carriers and VoIP operators to protect such data. Starting in about six months, phone companies must:

- File every March 1 with the FCC a statement of compliance with the CPNI rules;
- Require a password from customers before disclosing call detail information during customer-initiated contacts and when data is ac-

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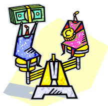


*(**Net Neutrality** -Continued from page 1)*

Broadband Deregulation

In its early days the Internet relied on those FCC-regulated voice and data lines. But not any more. Most active users have shifted to broadband delivery – largely via cable modem and DSL, soon to include broadband-over-power-line and various wireless options. Over the past few years, the FCC has systematically removed all of these broadband delivery services from Title II. The only users still receiving Title II protection are the rapidly shrinking population of dial-up subscribers.

The current regime leaves broadband Internet providers free to discriminate among users in quality of service, and to charge them different rates. The FCC believes that any tendency toward abuse will be restrained by competition. Customers who feel they are under-served or overcharged can, in principle, take their business elsewhere. In practice, though, many Americans still have access to only one broadband provider. Even among those having a choice, many are tied into long-term contracts, or receive their phone and TV services in a bundle with Internet, or are reluctant to give up the email address known to their friends and relatives.

At first, the deregulation of broadband mattered mostly to Washington policy wonks. That changed when the executives of two major providers announced they see nothing wrong with giving some customers faster service for a higher price. Those customers' sites would download faster to users. If Amazon.com, say, opted to pay for the premium service, consumers would have a quicker and easier experience browsing at Amazon.com than at its competitors. Conversely, if providers were to charge Apple's iTunes.com an extra dime for each downloaded song – as one provider has threatened to do – either Apple's profits will drop or its customers will leave. Either way, Apple loses.

Like the ranchers of the 1880s, businesses today depend on a facility that has the power to tip some to prosperity and others to failure. Like the ranchers, they have gone to Congress in hopes of getting legislation to keep their playing field level. Now the FCC has stepped in.

The Neutrality Debate

The term "network neutrality" generally refers to a regulatory regime under which Internet providers must treat similar users similarly. But there is room for disagreement as to what that means.

Opponents of network neutrality – generally, the biggest DSL and cable providers – argue that the Internet flourished without regulation, so that regulation now can only cripple it. Apart from being a non sequitur, this ignores the detail that much of the Internet's growth occurred while consumer-end transmission channels were under Title II protection. The deregulated Internet is still new. And so the opponents riposte: since there have been no actual complaints of discrimination, why try to fix a non-existent problem? But it was the providers' own statements, declaring their right to discriminate, that triggered the demands for preventive regulation.

> *Brace yourself, FCC: You are going to hear, at length, from people who feel strongly on both sides.*

Some network neutrality opponents try to confuse the issue by distorting it. They say, for example, that network neutrality would require charging the same monthly rates to all users. Amazon.com and the one-man corner bookstore would have to pay the same for Internet service. Of course, this would make no sense. Aha! say the opponents. That means network neutrality makes no sense.

The argument is silly. Anyone would agree that providers can properly charge more for heavy traffic. The question is, do the higher rates also entitle high-traffic users to preferential treatment? Today, data packets from Amazon.com pages and from the corner bookstore all line up for the same channels and switches, and are processed the same way. Network neutrality would require that treatment to continue. Network neutrality is violated when Amazon.com, paying a premium, has its packets bumped to the head of the line, so they consistently reach their destinations faster. That could seriously disadvantage the small bookstore.

Because the FCC has declared broadband Internet service providers to be offerors of "information service," rather than common carriers, the non-

(Continued on page 5)

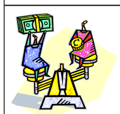
***(Frontline Proposal** -Continued from page 3)*

cess *Carterfone* elements have been seen by some as a "poison pill" that would discourage large wireless incumbents from bidding on this block. These conditions would run with the license so that any future assignee would be bound by them. While these restrictions would discourage large incumbents from participating, they would, by keeping the ultimate price paid at auction low, encourage smaller ventures to bid on the license.

The Frontline proposal comes in response to the FCC's attempts to determine the best way to build out a public safety network in the 700 MHz band that will be surrendered by broadcasters after the DTV transition. Specifically, Congress has mandated that 24 MHz of the spectrum be used for public safety purposes. The Commission accepted comments on how to best build out a broadband public safety network on 12 MHz of this block.

Frontline responded by seeking a national public-private partnership where the FCC would auction the commercial E Block (10 MHz of spectrum) adjacent to this 12 MHz of public safety spectrum on the condition that the winning bidder's build-out of the commercial network would support public safety use of the 12 MHz public safety block, subject to the conditions outlined by Frontline.

This plan averts some of the pitfalls associated with the Cyren Call or M2Z proposals by not requiring new legislation (Cyren Call) and not requiring waiver of the auction requirements found in 309(j) of the Communications Act (M2Z). However, Frontline's proposal was submitted as a late-filed *ex parte* comment – a highly unusual point in the rulemaking process at which to offer a radical new proposal. Observers anticipate that the FCC will seek some sort of further public comment on the proposal because not to do so might violate the requirements of administrative notice. However, because the FCC must begin its auction of the spectrum at issue no later than January, 2008, there is very little time for the agency to solicit comments, digest the comments, and develop a reasoned response.



***(Net Neutrality** - Continued from page 4)*

discrimination provisions of the Communications Act do not apply. These providers can therefore favor selected customers for any reason – or no reason. A more egalitarian form of discrimination would still allow faster service for a premium, but would require providers to make that option available to all. The corner bookstore could thus compete packet-for-packet with Amazon.com, if the owner is willing to pay extra.

But even this proposal outrages those who see the Internet primarily as a vehicle for disseminating and sharing ideas, as opposed to selling consumer products. Political organizations, non-profit entities, advocacy groups, crisis-support services, community networks, health-information websites . . . all of these and dozens more would drop to second-class status as commercial users ponied up for the fast lane. The providers insist they would not deliberately impair the others, but speeding up everybody else arguably amounts to the same thing. That does not matter, say the providers. We own the facilities, and we can use them as we wish.

The FCC already has a list of principles to guide its Internet policies. These assure consumers access to lawful content, their choice of applications and services, the ability to connect their own hardware, and the benefits of competition among providers. Now the FCC is assessing whether to add network neutrality to this list. Still at a very preliminary stage, its Notice of Inquiry asks:

- ? how broadband providers are managing Internet traffic on their networks today;
- ? whether providers currently charge different prices for different speeds or capacities of service;
- ? whether FCC policies should distinguish between content providers that charge end users for access to content and those that do not; and
- ? how consumers are affected by these practices.

Brace yourself, FCC: You are going to hear, at length, from people who feel strongly on both sides. Whatever your decision, many will disagree. Your best hope may be that Congress takes the decision away from you.

(**Service Classifications** - *Continued from page 1*)

The FCC's heart here is in the right place: it wants to regulate the Internet with a "light touch" as opposed to the ham-fisted regulatory scheme applicable to common carriers (which itself was a throw-back to regulation of railroads). In reaching this goal, however, the FCC has had to do some contorted statutory interpretations worthy of Gumby. These analyses seem totally result-oriented and could just as easily, if not more easily, have come out the other way. As more and more data and voice services are delivered over the Internet by common carriers as well as ISPs, the distinction between those services and traditional "telecommunications services" (*i.e.*, common carriage) begins to disappear. One begins to wonder if *anything* qualifies as common carriage anymore.

What carriers are increasingly discovering, however, is that many of the privileges and rights they used to enjoy as carriers – the ones that came with unpleasant duties and responsibilities – are endangered by the new classification. Consider the following:

Commercial mobile service providers are deemed to be common carriers, but they have been unregulated as to rates since 1992 and are exempt from much traditional common carrier regulation. The classification of wireless broadband access as non-common carriage thus affords them little added relief from the regulations that currently apply.

On the other hand, new entrants who wish to provide Internet-based services via the Internet – say, for example, Clearwire using 2.5 GHz spectrum – have no obligation to contribute 10% or more of their income to the Universal Service Fund, do not have to file annual and quarterly financial reports, can discriminate in price and services between customers, are exempt from strict protections for customer proprietary information, have reduced obligations to provide access to the disabled, and have limited CALEA and 911 obligations.

But on the third hand, these seemingly footloose and fancy free Internet access providers have no automatic right to pole attachments, are not entitled to be free from discriminatory zoning decisions, do not have an established right for their customers to roam on other providers' systems, do not have a right to non-discriminatory interconnection, may have liability exposure for the content of material transmitted over their systems, and have no absolute right to interconnection. Those are all rights that come only with being a common carrier. At the same time, an information service provider may be obligated to allow any non-harmful device to connect with its network, which may complicate service issues immeasurably.

Many hands make light work, but here many hands make a regulatory hodge-podge which is not intellectually honest and which is inherently unfair to ***all*** *of the industry participants in one way or another.*

On the fourth hand – you begin to see how difficult this juggling process is – the FCC's solution to those latter problems is to declare that as long as you are a common carrier for some purpose (such as a CMRS provider), your associated "information services" also qualify for most of the other rights of common carriers. While that approach solves the practical problem for many existing companies who merely want to supplement existing common carrier services with additional information services, it leaves pure information service providers in the cold.

The inevitable fifth hand is that the FCC recognizes that some things like E-911, CALEA, CPNI protection, and access for the disabled are too important to be left unregulated, even though the statute technically does not apply these requirements to information services. So the FCC has had to regulate these types of things under its generalized authority to regulate communications without any clear statutory mandate. The FCC's authority to impose what amounts to common carrier regulation on entities which are not common carriers rests on very thin regulatory ice, and it is only a matter of time before the courts step in to articulate at what point the FCC has gone too far.

Many hands make light work – as Confucius may have said and as 16th Century British proverbist John Heywood reportedly did say – but here many hands make a regulatory hodge-podge which is not intellectually honest and which is inherently unfair to ***all*** of

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*(**CPNI non-disclosure provisions** - Continued from page 3)*

cessed by customers on-line;

- Notify customers at their addresses of record whenever there is a change in the customer account information;

- Notify law enforcement within seven days of a breach of CPNI security;

- Require customers to "opt in" to arrangements with joint venturers or independent contractors who use the CPNI for marketing communications-related services.

The FCC did seem to acknowledge that at some point the interposition of these protections hampers the ability of carriers to address routine customer questions or concerns. Accordingly, the FCC stressed that carriers could address a question about a bill without a password if the customer provides the information about the items in question. Similarly, the carrier can send requested information to the address of record of the customer without needing a password, the theory being that in these circumstances no private information would be disclosed to imposters. And customers who present themselves at store locations can be identified by picture ID without a password. Business customers who have a dedicated account representative are exempt from the new rules on the theory that their privacy is governed by detailed contracts between them and the carrier. (NB – Contracts with business customers must deal with this issue or the exemption does not apply.) Nevertheless, there is no doubt that these new security measures will complicate customer-carrier contacts.

> *The FCC did seem to acknowledge that at some point the interposition of these protections hampers the ability of carriers to address routine customer questions or concerns.*

For one thing, customers who do not now have a password will have to have one set up, and their identity must be verified without using "readily available biographical information" such as birth date, address and possibly even that old favorite, mother's maiden name. (Customers with existing passwords do not need to set up a new one.) The password procedures (including telling the customer what his password is when he has forgotten it) are familiar to users of password-protected sites. To accommodate smaller carriers, the FCC has allowed an additional six months for them to implement password protection for their on-line databases.

Also of particular note is the FCC's new rule with respect to disclosure of breaches of security. You might imagine that the customer should be informed right away if the carrier inadvertently discloses CPNI. Instead, the FCC requires that *law enforcement* be informed right away so they can seek to apprehend the perpetrator; absent exigent circumstances, however, the customer is *not* to be informed until law enforcement says it's OK. This curious rule seems to put the cart of catching the criminals before the horse of protecting the privacy rights of the customer.

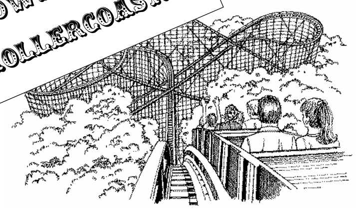
Finally, the FCC requested further comment as to whether it should require customer data to be encrypted (to prevent hackers from getting the information), whether audit trails should be required as an aid in tracking down breaches, whether password protection should be expanded to non-call detail CPNI, and whether data in carriers' computers should be systematically destroyed (or otherwise quarantined) after a certain period to reduce the risk of disclosure. Comments on those issues are due in about 30 days, replies 30 days thereafter.

*(**Service Classifications** - Continued from page 6)*

the industry participants in one way or another. The ultimate solution, of course, is to change the statute to eliminate the disparate treatment between information service providers and telecommunications carriers. This might easily be accomplished by eliminating altogether the classification of companies as information service providers, treating everybody instead as common carriers, but then layering the attendant rights and duties in accordance with the market power held by different categories of carriers and the importance of the duties to the public.

That particular solution must probably await Congressional intervention. In the meantime, the FCC continues to patch together a collage of regulatory classifications to try to achieve the level of regulation it thinks each service deserves, and it is not a pretty picture.

Up and Down on the Vonage Rollercoaster



It was the best of times . . .

Federal Appeals Court Holds Nomadic VoIP Exempt From State Regulation

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The U.S. Court of Appeals for the Eighth Circuit recently issued a decision upholding an FCC order preempting state telephone regulation of "nomadic" VoIP service, which is provided by Vonage and similar companies. This is at least a temporary victory for Vonage, as it means that nomadic VoIP is not subject to the burden of complying with differing telephone regulations of fifty different states. The Court's decision does not directly apply, however, to "fixed" VoIP, which is typically provided by cable operators and facilities-based telephone companies.

The FCC and the courts have been struggling for years with the issue of the jurisdictional classification of VoIP services. Traditional telephone services are classified as "interstate" or "intrastate", based primarily on an analysis of the origination and termination location of a call. If the area codes of both the origination and termination points of a call are in the same state, then the call is declared to be "intrastate" and is primarily subject to the telephone regulations of that state. If the area codes are from different states, then the call is declared to be "interstate" and subject primarily to FCC regulation rather than state regulation.

The problem with applying this process to VoIP is that many VoIP services are used in a nomadic mode where the subscriber has an originating area code and number, but primarily uses the number from his/her computer in various places around the country or the world. VoIP providers assert that in this situation, regardless of the location associated with the customer's assigned area code, it is nearly impossible to tell the actual location from which such a nomadic VoIP call is originated. In contrast, "fixed" VoIP service uses the same sort of IP transmission technology, but is typically provided by a cable operator or wireline telephone company to a subscriber located at a fixed residence or business location. In that case, the origination location can be easily determined, and the jurisdictional analysis is resolved simply.

The case at issue arose in 2003 when the Minnesota Public Utilities Commission issued an order requiring Vonage to cease offering service in Minnesota until it complied with that state's telephone regulations. Vonage filed a petition with the FCC seeking a declaratory order that Vonage's VoIP service was not subject to state telephone regulation because the service was an "information service" rather than a "telecommuni-cations service". Alternatively, Vonage also sought preemption of state regulation under the theory that it was impossible to separate the interstate and intrastate components of the service, and that subjecting Vonage to state regulations interfered with federal policies designed to minimize regulation of the Internet.

In a widely publicized and controversial 2004 order, the FCC refrained from ruling on the information vs. telecommunications service issue, but declared that VoIP services such as Vonage were jurisdictionally interstate, due to the impossibility of determining the actual origination location of such calls. In addition, though little-noticed at the time, the FCC's order also stated that the FCC "would" pre-empt state regulation of fixed VoIP services if a party subsequently sought such a ruling from the Commission. It appears that no one sought such a ruling from the FCC, though most parties continue to operate as if state regulation of fixed VoIP was pre-empted as well.

The appeals of the FCC's 2004 order were addressed by the Eighth Circuit in its recent decision. The court first ruled that it was not arbitrary and capricious for the FCC to decline to rule on whether VoIP is an information service or a telecommunications service. The court ruled that it was logical for the FCC to ***first*** rule on jurisdiction. Unfortunately, this holding will likely encourage the FCC to continue (as it has for over three years already) to avoid making this important choice, thus maintaining regulatory uncertainty over an important technology and set of services.

Next, the court upheld the FCC's findings that it is impossible to separate the interstate and intrastate

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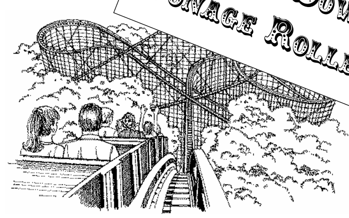
Up and Down on the Vonage Rollercoaster



It was the worst of times . . .

Federal Jury Rules Against Vonage In Patent Dispute

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A $58 million judgment and the issuance of a permanent injunction (since lifted, at least temporarily) have Wall Street doubting the future viability of Vonage, the Internet phone provider which has yet to turn a profit and has suffered staggering economic losses over the last couple of years.

A federal jury in Alexandria, Virginia found that Vonage violated three patents belonging to Verizon. In Verizon's initial lawsuit, it alleged that Vonage infringed on seven of its patents, before amending its complaint to five. The U.S. District Court found for Verizon on three of the five patent infringement claims. In addition to the $58 million judgment, Vonage must pay future royalties of 5.5 percent for the Verizon-patented technologies should Vonage be entitled to use them.

The three patents that Vonage was deemed to have violated concern the method by which it connects Internet calls to the public-switched telephone network, features such as call forwarding and voice mail, and the use of Internet phones at Wi-Fi hot spots. The two patent claims the court dismissed related to systems designed to prevent billing fraud.

A Vonage spokesperson stated that the company was "delighted" at the verdict, as Verizon's claim was for $197 million in damages. But the $58 million awarded to Verizon could have a crippling effect on the company, which has seen its losses accumulate rapidly. Vonage reported that its 2006 net loss was $286 million, an increase of nearly 10 percent from its 2005 losses. Shares of its stock have plummeted 47 percent this year, following a decrease of 59 percent in 2006. The closing price bottomed out at $3 per share in late March.

The free fall in Vonage's stock price occurred following the second dose of bad news for the New Jersey corporation. Judge Claude Hilton issued an injunction against Vonage, prohibiting it from using Verizon technology to connect new customers to phone lines, though it could continue to provide service pending further appeals. However, the U.S. Court of Appeals for the Federal Circuit promptly removed that limitation pending further developments. This was akin to restoring the life support systems that the trial judge had turned off.

Even with the injunction lifted, though,, Vonage's business could still be in serious jeopardy. Some financial analysts are predicting the demise of the company as a result of the March decisions. The company has spent hundreds of millions of dollars in marketing, but has seen its numbers of new subscribers dwindle at an alarming rate. From the second quarter to the fourth quarter of 2006, the number of new subscribers Vonage added each quarter dropped from 256,000 to 166,000. Vonage has been damaged by a rising number of players in the IP telephony business and the fact that many cable operators are bundling voice services with video packages at a rate that makes it increasingly difficult for Vonage to earn customers.

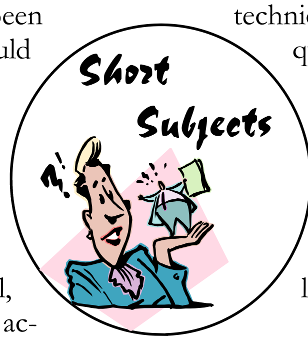
> *Some financial analysts are predicting the demise of the company as a result of the March decisions.*

But Vonage CEO Mike Snyder, in a prepared statement following the issuance of the injunction, said that his company should not be counted out. "Our fight is far from over," Snyder said. " We remain confident that Vonage has not infringed on any of Verizon's patents – a position we will continue vigorously contending in federal appeals court – and that Vonage will ultimately prevail in this case."

Do-It-Yourself & Save

***(Skpye Proposal** -Continued from page 2)*
imposed on AT&T/Bell South in connection with their merger require them to allow unfettered interconnection to their networks – Copps's reasoning would suggest they do.) Clearly, this is a high stakes battle and one which has a high profile at the Commission. Interested parties have until April 30 to file comments. Replies are due by May 15.

Life imitates joke. A few months ago we reported on the progress of a hapless BRS renewal application which had not been acted on for more than ten years because it had been filed 12 days late in 1996. The FCC accepted the application and ordered that it be processed in due course. We joshed that, if all went well, the application might actually be granted in another ten years. All too soon, the FCC discovered that because the original application had been filed in 1996, their computer program would only renew the license through 2006. They therefore declared that a new application would have to be filed for the 2006 -2016 term. However, the applicant would also have to submit a request to waive the filing deadline since that new application should have been filed in April, 2006 – a period when the FCC refused to accept such a filing because the 1996 application was still pending. A petition for reconsideration by a third party challenging the grant of the second application has now been filed. We expect the matter to be wrapped up in, well, another ten years.



Sometimes, smaller is better. The FCC has started a rulemaking on whether to allow fixed microwave operators in the 10.7-11.7 GHz band to install two-foot-diameter antennas, in place of the four-foot antennas presently required. The FCC does not regulate antenna size directly, but it does require fixed microwave units to transmit energy in a tight beam. The laws of physics, as applied to radio waves, generally call for a four-foot antenna to achieve that narrow beamwidth. The rulemaking proponent, FiberTower Corporation, argued that two-foot antennas are smaller, lighter, less expensive, and less objectionable esthetically than the four-foot versions, and so can be installed in more locations needing service. FiberTower proposed a change to the frequency coordination rules to ensure that four-foot users and the satellite earth stations that share the band can maintain the same level of interference protection that they enjoy now, despite the small dishes' broader radiation patterns.

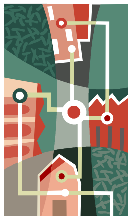
Silence is golden. The FCC has nailed the coffin on an idea whose time had clearly not yet come. A couple of years ago the FCC solicited comment on whether air travelers should be allowed to use their cell phones on commercial aircraft. The proposal struck a nerve with the traveling public, who commented in the tens of thousands on the matter – almost all in opposition. It seems that the prospect of sitting next to a self-important windbag holding forth loudly on his or her cell phone was enough to make most passengers – and even flight attendants – want to parachute out the nearest emergency exit. Although the idea had some theoretical merit if the technical concerns could be resolved, the FCC quietly folded its tent on the matter and slunk away, mumbling something about the lack of data in the record regarding possible interference. It will be interesting to see if the same response is aroused by a recent proposal to allow text messaging on aircraft – an activity much less likely to irritate seatmates.

Wait – maybe bigger is better after all. The FCC has backed away from its plans to require private land mobile licensees at 150-174 MHz and 421-512 MHz to transition to from 12.5 kHz to 6.25 kHz bandwidth transmitters. The FCC had been trying to squeeze communications in these bands into smaller and smaller channels, but the industry found it impossible to meet the new standards. Equipment submitted for certification must now meet the 6.25 kHz requirement as of January 1, 2011, newly postponed from January 1, 2005. The FCC declined to set a date when use of that equipment will be required.

***(Nomadic VoIP** -Continued from page 8)*

aspects of nomadic VoIP, and that finding VoIP to be an intrastate service would interfere with federal policy of minimal regulation of the Internet. Lastly, the court rejected an argument that the FCC improperly classified ***fixed*** VoIP as interstate: the court found that the FCC's language on fixed VoIP was purely predictive (*i.e.,* that the FCC "would" pre-empt state regulation of fixed VoIP ***if*** such a case were presented to it) and thus the appeal was not yet ripe for judicial review.

The idea that the FCC has not ruled on the jurisdictional status of fixed VoIP probably comes as a revelation to many people, and is perhaps the most important "take away" from the court's decision. Given the rapid growth of "fixed VoIP" and the impact of jurisdictional holdings on the regulation and business of VoIP, we anticipate that some party will press this issue at the FCC in the near future.



Re-affirming the value of buying in volume

Wholesale VoIP Providers Entitled to LEC Interconnection

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The FCC's Wireline Competition Bureau has granted a petition for declaratory ruling filed by Time Warner Cable (TWC) asking the Commission to declare that *wholesale* telecommunications carriers are entitled, pursuant to Sections 251(a) and (b) of the Communications Act, to interconnect and exchange traffic with local exchange carriers (LECs) when providing services to other service providers, including VoIP service providers. This ruling is a minor victory for VoIP providers and the telecommunications carriers that provide underlying services to VoIP providers. A "bone" is thrown to the incumbent LECs, though.

TWC, like other cable companies and similar carriers, purchases wholesale telecommunications services from certain telecommunications carriers, including MCI WorldCom Network Services Inc. and Sprint Communications, in order to connect TWC's VoIP service customers with the public switched telephone network (PSTN). MCI and Sprint provide transport for the origination and termination on the PSTN through their interconnection agreements with incumbent LECs. In addition, MCI and Sprint provide TWC with connectivity to the incumbent LEC's E911 network and other necessary components of a wholesale service.

TWC filed its petition essentially on behalf of MCI and Sprint, because MCI has been unable to provide wholesale telecommunications services to TWC in certain areas in South Carolina, while Sprint has been unable to provide wholesale telecommunications services to TWC in certain areas in Nebraska. Unlike certain other state commissions, the South Carolina Public Service Commission and the Nebraska Public Service Commission have determined that rural incumbent LECs are not obligated to enter into interconnection agreements with competitive service providers (like MCI and Sprint) to the extent that such competitors operate as *wholesale* service providers.

The Bureau granted TWC's request, noting that the Act does not differentiate between retail and wholesale services when defining "telecommunications carrier" or "telecommunications service." It therefore declared that telecommunications carriers are entitled to interconnect and exchange traffic with incumbent LECs pursuant to Section 251(a) and (b) of the Act for the purpose of providing *wholesale* telecommunications services. The Bureau also noted that the regulatory classification of the service provided to the ultimate end user has no bearing on the wholesale provider's rights as a telecommunications carrier to interconnect under Section 251. As such, the Bureau clarified that the statutory classification of a third-party provider's (TWC's) VoIP service as an information service or a telecommunications service is irrelevant to the issue of whether a wholesale provider of telecommunications (Sprint, MCI) may demand interconnection under Section 251(a) and (b).

To address concerns by commenters about which parties are eligible to assert these rights, the Bureau stated that the scope of its declaratory ruling is limited to wholesale carriers that are acting as telecommunications carriers for purposes of their interconnection request. In affirming the rights of wholesale carriers, they also made clear that this decision in no way diminishes the ongoing obligations of these wholesalers as telecommunications carriers, including compliance with any technical requirements imposed by this Commission or a state commission. In addition, the Bureau confirms that it is most consistent with Commission policy that where a LEC wins back a customer from a VoIP provider, the number should be ported to the LEC that wins the customer at the customer's request, and therefore the Bureau made such a requirement an explicit condition to the Section 251 rights clarified in the Order. Other concerns about porting will supposedly be addressed in the *IP-Enabled Services* proceeding that has been pending for years. In any case, the skirmishing between VoIP providers and incumbent carriers will certainly continue.

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First Class

FCC Looking Into Exclusivity Deals For Video Delivery to Multiple Dwelling Units

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At its March meeting, the FCC adopted a Notice of Proposed Rulemaking (NPRM) to elicit comment on issues relating to the impact of exclusive contracts for the provision of video services to multiple dwelling units (MDUs) and other real estate developments. The FCC seeks to foster greater competition in the delivery of multichannel video programming and also accelerate broadband deployment.

The NPRM seeks to ascertain the current environment for video service providers seeking access to MDUs and other real estate developments. It queries whether exclusive contracts unreasonably restrict consumer choice and video competition and raise barriers to competitive entry.

The FCC tentatively concludes that it has authority (under Section 628 of the Communications Act) to regulate exclusive contracts for the provision of video services to MDUs and other real estate developments where it finds that such contracts impede competition and impair deployment of those services. Approximately twelve states already regulate exclusive video contracts. The FCC concluded a similar rulemaking in 1997 without regulating exclusive contracts because it found insufficient evidence of a significant problem at that time. The real estate industry is likely to question the FCC's authority to regulate in this area.

The NPRM also seeks comment on what specific steps the FCC should take to ensure that exclusive contracts do not unreasonably impede competitive video entry. For example, the FCC asks whether it should only limit exclusive contracts where the video provider possesses market power. The FCC also seeks comment regarding the existence of "perpetual" contracts and the competitive issues they may raise.

Comments are due June 18, 2007, with Reply Comments due July 18, 2007. If you are interested in commenting, please contact this office.