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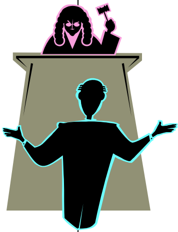
Current Issues in Telecommunications Law and Regulation August 2008



Court to FCC: Won't get fooled again

Court Conks Commission In Core Case

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In a ruling that was supremely satisfying to observers who watch the FCC avoid making decisions year after year, an exasperated U.S. Circuit Court of Appeals for the D.C. Circuit recently told the Commission enough is enough. Core Communications, a CLEC, had been battling the FCC for years over the issue of whether the caps imposed by the Commission in 2000 on termination charges for ISP-bound traffic were lawful. Twice before, the issue had gone to the same appeals court, and each time the court ruled that the FCC had not justified the lawfulness of the cap. The court nevertheless left the cap rules in place on the assumption that the FCC would promptly articulate a lawful basis for the rules. When the FCC failed to do so by 2004, Core filed a petition for a writ of mandamus with the court – an extraordinary and rarely successful method of compelling an administrative agency to do something. The FCC promised at that time that it would resolve the matter soon and the court declined to grant the writ. Three years later, when the FCC had still done nothing, Core renewed its mandamus petition and this time it struck pay dirt.

To justify a writ of mandamus, a petitioner must show that the agency has been guilty of "egregious delay." The courts have traditionally construed this term liberally since they are reluctant to interfere with an agency's administration of its own agenda. Here, however, the FCC's inaction was almost contemptuous since it had the effect of indefinitely leaving in place rules which the court had determined to be unjustified. This was punching the court itself in the gut, and the court was not pleased.

The FCC took its usual tack in these circumstances of promising that it would look into the matter soon, that

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Comcast not stirred

FCC Shakes Finger At Comcast For Internet Interference

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The FCC has determined that Comcast deliberately interfered with its customers' Internet usage by selectively blocking peer-to-peer (P2P) applications, particularly BitTorrent. "In essence," said the FCC, "Comcast opens its customers' mail because it wants to deliver mail not based on the address on the envelope but on the type of letter contained therein." The FCC noted a possible anticompetitive motive – BitTorrent and other P2P applications can let users watch high-quality video they might otherwise have to pay for on cable TV systems, such as Comcast's.

The FCC rejected Comcast's argument that its actions were necessary to manage traffic on the network, because Comcast:

- interfered with even low-volume P2P users;
- blocked traffic at times of the day when congestion was not a problem;
- targeted neighborhoods not experiencing congestion; and
- tolerated very high bandwidth customers who did not use a disfavored application.

Moreover, Comcast repeatedly lied about its practices, according to the FCC. First, it denied any responsibility for its customers' connection problems, then admitted targeting P2P traffic – but only during peak congestion, it said – and finally admitted that it blocked P2P at all times of day and regardless of congestion levels.

And yet, in the end, the FCC did little more than issue a warning. Comcast is required to do three things:

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Commission flips Bureau decision, further appeals expected

Verizon Retention Marketing Practices Prohibited

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In our last issue, we alerted you to the FCC's Enforcement Bureau's "Recommended Decision" concern Verizon's retention marketing practices. The Bureau recommended that the Commission deny in part a formal complaint filed by a number of cable operators against Verizon. According to the complaint, Verizon was acting improperly when it used for marketing retention purposes information obtained from notices to port a phone number to one of the cable operators. While the initial trade press seemed to characterize the Bureau's decision as a victory for Verizon, we were not so sure. After all, the reasoning in the Bureau's decision was very questionable, and the whole thing would eventually have to be considered by the Commission itself.

Predictably, in its recently released Order, the full Commission has overturned the Bureau: the Commission has prohibited Verizon's specific practices of using retention marketing to try to keep a customer after receiving a local service request (LSR) from a competitor to port that customer's number, but before service has been commenced by the competing carrier. Verizon has already sought a stay of the Order from the FCC, in anticipation of an appeal to a federal court to overturn the FCC's decision.

Unfortunately, the Commission's most recent Order does not create a clean or clear result. In our last issue, we noted that the legal status of retention marketing under Section 222 of the Communications Act is a mess, and that the Bureau's Recommended Decision was a mess on top of a mess. The most recent Order adds another level of mess on top of that, and there is a real chance that the Order could be reversed by an appellate court. Until that time, however, carriers would be wise not to engage in the retention marketing practices that Verizon performed.

The core issue in the case involves the question of whether, under Section 222, it is the carrier submitting customer change information, or the carrier receiving that information, that must perform a telecommunications service with the information. Contrary to the Bureau's conclusion, the full Commission has now decided that the Section 222 prohibition applies when proprietary information is given so that the *submitting* carrier (here the affiliates of cable companies) can perform a telecom service. The Commission also observed that even if Section 222(b) applies only when the *receiving* carrier uses the information for the purpose of providing its own telecommunications service, then Verizon's retention marketing practices violate the statute because Verizon's provision of local number portability (LNP) constitutes a telecommunications service. While recognizing that LNP does not involve transmission and is not provided for a fee, the Commission makes an analogy to other findings that services "adjunct" to basic transmission services are themselves telecommunications services, such as collocation and billing and collection.

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157,000,000 consumers can't be wrong!

"Do Not Call" Registry Lives On

By Peter Tannenwald
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The national Do-Not-Call Registry (Registry) was opened in June, 2003, pursuant to the Telephone Consumer Protection Act of 1991. Commercial telemarketing calls are forbidden to residential numbers entered into the Registry by consumers. The initial regulations required telemarketers not to call any number in the Registry for five years after that number was registered. That meant that each number would have to be re-registered every five years, some as early as June, 2008, to avoid resumption of telemarketing calls.

With over 157 million numbers registered, Congress anticipated the public discontent that would arise from the chore of re-registering or the onslaught of telemarketing calls after failure to re-register. Congress thus enacted the Do-Not-Call Improvement Act of 2007, which became law in February, 2008, prohibiting the automatic removal of registered numbers. The FCC has now responded with implementing regulations, extending the life of registrations indefinitely. Numbers that have been registered will remain on the list until they are cancelled by the consumer or removed by the database administrator because they have been disconnected or reassigned to a new customer.

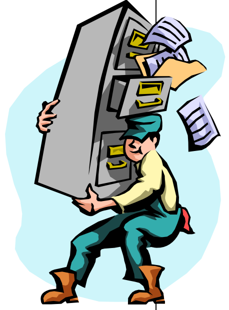
The 2008 law requires the Federal Trade Commission to check telephone numbers on the Registry periodically against national or other appropriate databases and to remove numbers that have been disconnected or reassigned. Local Exchange Carriers are encouraged to report disconnections and reassignments to the FTC on a timely and accurate basis. The database administrator currently compares the Registry to national number databases monthly. A customer to whom a number is reassigned may, of course, re-enter that number in the Registry.

The do-not-call obligation does not apply to surveys, market research, and political and religious speech calls. It also does not apply to: calls on behalf of tax-

(Continued on page 6)

Once more, with filing

Don't Just Sit There – File A Report!



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Concerned that the United States ranks a woeful Number 15 among the world's nations in access to broadband internet, the FCC has aggressively ordered broadband providers to submit more detailed reports regarding the services they provide. This bold and dramatic action will, of course, do nothing whatsoever to actually increase broadband access but will, perhaps, identify a few previously unreported service recipients so that the nation's numbers will look better vis-à-vis the rest of the civilized world.

There has been much hand-wringing of late at the FCC and on Capitol Hill about the lack of broadband access in this country. This pervasive angst is puzzling since the FCC's own reports show that 99% of all ZIP codes in the U.S. have some sort of broadband connection – a figure that actually rivals or exceeds the availability of telephones and indoor plumbing. Nevertheless, the Commission's mandate is to make it look like it's doing something about a problem – even when it's not clear that a problem exists. There are a limited number of weapons in an administrative agency's arsenal, and the easiest one to brandish is always making the industry file a report. That is the weapon of choice here.

Several years ago the FCC created Form 477 as a way of gathering some fairly basic information about broadband service and also mobile subscribership. Now the Commission has decided that it must have more detailed data about broadband service – greater "granularity" is the favored buzz term these days – so the Form 477 is being revamped to require the following additional information:

- Fixed broadband providers must now report their actual numbers of broadband subscribers on a census tract by census tract basis instead of simply identifying ZIP codes where they had

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Cross the bridge, pay the t(r)oll

Audio Bridging = Telecommunications

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The FCC has upheld a ruling by the Universal Service Administrative Company (USAC) that (a) audio bridging services are the equivalent of toll teleconferencing and (b) providers of those services must therefore contribute to the Universal Service Fund (USF). However, the FCC reversed USAC's attempt to collect USF contributions retroactively and held that the payment obligation will be prospective only.

The service provider in this case was InterCall, Inc., which provides an audio bridging service that allows customers to dial into a bridge and be connected to one another. InterCall argued that it provides an "information service" rather than a "telecommunications service," because its service includes: validation; collect billing; participant information; recording, erasing, and playback; mute and unmute; and access to operator assistance. Information service providers do not have to pay into the USF fund. The FCC held that all these features are separable from the basic service of routing ordinary voice telephone calls to connect participants, and bridging can be provided without any of the other features. Since the basic service of transmitting a phone call was included in the package, the service was deemed to be "telecommunications" rather than "information."

The Commission distinguished this situation from that of "chat-line" providers who also provide a kind of call bridging service by randomly pairing callers with each other. These chat-lines had previously been held *not* to be telecommunications services because chat-line callers do not choose with whom they will be connected, while audio bridging customers do make that choice. In other words, a chat-line includes the service of choosing participants in a conversation, while audio bridging involves only routing calls to the destination chosen by callers.

The FCC did not resolve the question of whether bridging is a common carrier or a private carrier service, as both constitute telecommunications provided for a fee, which brings them within the class of entities subject to the USF contribution obligation. InterCall's claim to be exempt from USF obligations because it is an "end user" of telecommunications service rather than a telecommunications service provider was rejected on the ground that the fact that an entity may be an end user purchaser of services from another carrier does not preclude that entity from itself providing telecommunications services to the public.

We doubt that we have heard the last of this dispute, as audio bridging providers are not likely to take kindly to their new contribution obligation.

We doubt that we have heard the last of this dispute, as audio bridging providers have previously escaped most FCC regulation and are not likely to take kindly to their new contribution obligation.

The FCC also specifically declined to address whether carriers which provide services to audio bridging providers may assess access charges or insist on other types of intercarrier compensation. Further disputes are likely when these issues come to the forefront. In the meantime, carriers providing underlying transmission services to audio bridging providers should treat those providers as resellers and consider whether revenues from the transmission services should be deemed wholesale revenues rather than end user revenues for their own reporting purposes.

In view of its decision, the FCC directed USAC to undertake outreach efforts within 30 days to inform all audio bridging or teleconferencing providers, whether stand-alone or integrated, that they must now obtain FCC Filer IDs, file quarterly Forms 499Q and 499A, and make USF contributions based on their end user revenues after June 30, 2008.

*

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The FCC has invited comments on proposals to amend its Telecommunications Relay Service (TRS) rules with respect to speech-to-speech (STS) services, including: whether Communications Assistants (CAs) should have to remain on the line longer; how abbreviated dialing "711" access can be assured; how STS services should be compensated; which entities should be authorized to provide STS; and ensuring access to Internet STS users by conventional telephone subscribers.

TRS enables persons with hearing and/or speech impairment to communicate with other persons with the assistance of a CA, who interprets the conversation in each direction according to the capabilities of the parties to the call. The earliest form of TRS allowed one party to type on a specialized terminal, and later on a computer, with the CA voicing the words in one direction and typing words in the other direction. Later, Video Relay Service (VRS) was introduced, where the CA uses visual sign language with one party to a call and voice with the other party. A further enhancement is STS, where a skilled CA can understand the impaired speech of one party and repeats the words to the other party who could not otherwise understand impaired speech, eliminating any need for keyboard use.

TRS enables persons with hearing and/or speech impairment to communicate with other persons.

While TRS was originally provided over conventional telephone circuits, many users now communicate through their computers or specialized terminals over broadband circuits (IP TRS), allowing faster communication overall and higher resolution images when sign language is used. Dial-up service is still available, and "711" has been adopted as the nationwide abbreviated dialing code to reach TRS services. State government agencies oversee the provision of TRS and select entities to provide TRS services within their jurisdiction. Telephone service providers are required to provide access to TRS and normally do so by handing off TRS calls to specialized TRS service providers.

The FCC has now invited comment on several issues relating to TRS. One is how long a single CA must stay with a call before handing the call off to another CA. The minimum time between CA changes is now 15 minutes; but because it takes time for one CA to acclimate to the speech pattern of an individual speech-impaired caller, the FCC asks whether the time should be extended to 20 minutes to reduce the frequency of interruption of a long call while a new CA acclimates. The FCC also asks whether the 20-minute minimum should be extended or should be deemed not to start until the CA understands the impaired caller's speech well enough to start a two-way conversation with the other party to the call.

Another issue is how STS users can be assured access to an STS-skilled CA when accessing TRS by 711 dialing. The first response to a 711 call is normally not an STS-capable CA. STS may even be provided by a separate service provider, and some calls have apparently been disconnected while being transferred to an STS CA. The FCC suggests that the opening menu for an incoming 711 call include an easy and reliable transfer to an STS CA.

The FCC tentatively concludes that STS provided via the Internet is a form of TRS compensable from the interstate TRS fund when the service is provided in compliance with FCC rules. IP STS providers will be eligible for certification by the FCC, but a separate certification will be required, and those certified to provide different types of TRS will not automatically qualify to be STS providers. The FCC also anticipates exempting STS providers from requirements applicable to other TRS providers, including keyboard skills, call release (where the CA drops off after setting up a call), hearing and voice carry over (which allow a caller with a disability to use voice in one direction and keyboard in the other), equal access to interexchange carriers, access to 900 calling, and 711 dialed access.

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(* For readers not fluent in American Sign Language: "TRS Grows Up")

Improving the VoIP/E-911 connection

Bringing 911 Into the 21st Century

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H.R. 3403, called the "New and Emerging Technologies 911 Improvement Act of 2008" or the "NET 911 Improvement Act of 2008", is a compromise version of legislation intended to update the nation's 911 laws for Internet phone services. It was presented to President Bush for signature on July 15, 2008 and he signed it into law on July 23, 2008. While the FCC already has rules requiring Voice over Internet Protocol (VoIP) providers to offer E-911 service to their customers, the law clarifies the FCC's authority to require VoIP providers to provide E-911 service and also makes it easier for those VoIP- providers to offer E-911 service to their customers.

The bill, which was first introduced more than three years ago, gives VoIP providers access to the country's 911 infrastructure at the same rates, terms and conditions as telecommunications carriers, and provides them the same liability protections enjoyed by those carriers. It authorizes VoIP service providers to provide customer location information to public safety answering points in an emergency by giving the public safety personnel and interconnected VoIP providers the same liability protections when handling 911 calls from VoIP users as from mobile or wired telephone service users. The law precludes the FCC from creating a technology-specific 911 and E-911 mandate. Looking to the future, the law encourages modernization of the country's 911 system by requiring the National 911 Coordination Office to establish a national plan to migrate the country's 911 system to an IP-based emergency response network and allowing 911 PSAP grants to be used for IP-based equipment.

Passage of the law was supported by numerous telecommunications and public safety groups, including the National Emergency Numbering Association, the National Cable and Telecommunications Association and the Coalition of Organizations for Accessible Technology. Under the new law, the FCC has 90 days from the date of enactment to issue implementing regulations.

*(**Do-Not-Call** - Continued from page 3)*

exempt nonprofit organizations; calls to persons with whom a seller or telemarketer has an established business relationship or where the person called has made an inquiry about a product or service; and calls to persons with whom a marketer has a personal relationship. The calling restriction is also limited to registered residential numbers. Calls are forbidden to all wireless numbers without any need to register. Calls to business lines are not restricted. Some wireless and business numbers have been entered into the Registry. The FCC declined to require such numbers to be removed, indicating that inclusion of a wireless number is harmless, and calls to business numbers are permitted even if those numbers are in the Registry.

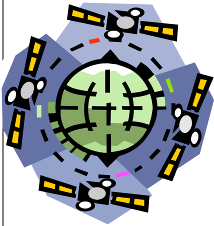
The FCC is currently considering the relationship between federal and state telemarketing rules and whether to modify a separate rule that forbids any specific entity from making telemarketing calls to a number after the telephone subscriber explicitly requests that calls stop. Those issues will be addressed in separate future orders. So at least for now, your home and cellphone numbers are safe, but your business number remains open for target practice.

*(**TRS Grows Up** - Continued from page 5)*

Comments are requested on what emergency call handling requirements should be imposed on STS providers, including the possibility of requiring IP STS providers to obtain conventional 10-digit telephone numbers so that traditional telephone users may reach their hearing and speech impaired customers.

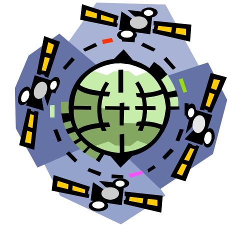
Comments are also requested on whether states should be required to increase TRS compensation rates to cover the additional costs of STS and whether the STS compensation rate should include an element to fund educational outreach. Finally, the FCC asks whether STS use will be so light that it will be uneconomical for service providers to be certified for each state, so the FCC should certify one national STS provider.

Comments will be due 60 days after publication of the proposals in the Federal Register.



Ku there, Ku with the stars in your eyes

CII ISO 14.0-14.5 GHz For FSS



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On May 6, 2008, Utilities Telecom Council (UTC) and Winchester Cator, LLC, filed a Petition for Rulemaking (RM-11429) requesting that the FCC commence a rulemaking proceeding to establish rules that would permit secondary terrestrial use of the 14.0-14.5 GHz fixed satellite service (FSS) band, which is the transmit or uplink portion of the Ku-band. UTC is the international trade association for the telecommunications and information technology interests of electric, gas and water utilities, pipeline companies and other critical infrastructure industries (CII).

UTC asserts that utilities are experiencing a rapidly increasing need for spectrum-based services to ensure the reliability of their services to the public. In order to meet this growing demand, UTC proposes that the FCC authorize fixed point-to-point and point-to-multipoint services for fixed and temporary-fixed stations in the 14.0-14.5 GHz band on a secondary basis. UTC asks the FCC to authorize a single nationwide CII licensee to coordinate and manage all new FS services in the band. The single licensee would be responsible for ensuring that the proposed FS services do not interfere with incumbent operations in the band. The CII licensee would work with CII entities and facilitate their access to the spectrum.

The FCC put UTC's Petition for Rulemaking on Public Notice and sought comments in support and opposition to the proposal. Comments were due June 26, 2008. UTC sought and was granted an extension of the reply comment deadline, moving that deadline to August 11, 2008.

Ku-band FSS satellite operators and users filed comments in opposition to UTC's proposal. The satellite interests claim that the proposed CII terrestrial use of the band would not protect present and future FSS operators from harmful interference. The UTC proposal was also opposed because the ITU radio regulations and table of frequency allocations will make it impossible for a second FS service to be offered in the United States in the 14.0-14.5 GHz band. There is not currently an FS allocation in the band in ITU Region 2, which includes the United States. While the United States could conceivably revise its Table of Frequency Allocations, any such revision would cause serious problems with non-U.S. satellites operating over the Americas in the Ku-band. Such satellites are entitled to full protection from interference from U.S. terrestrial FS stations with no ITU allocation status.

If you are interested in filing reply comments in this proceeding, please let us know.

***(Court Conks FCC** - Continued from page 1)*

progress was being made, blah, blah, blah. It even took the unusual step of representing on the record that Chairman Kevin Martin "fully intends to respond to the [remand order] within six months." This kind of carefully weasel-worded representation usually suffices to avoid a mandamus writ, but not here. In a strongly worded opinion, the court basically said: we don't believe you any more. "We have heard this refrain before….At some point promises are not enough and we must end this game of 'administrative keep-away'... Having repeatedly, and mistakenly, put our faith in the Commission, we will not do so again."

The court then proceeded to hold the FCC Chairman to his word. The FCC was given exactly six months from the date in May when it said that action would be forthcoming in six months. No extensions of time will be granted. If the FCC does not act by that date, the FCC's interim intercarrier compensation rules will be automatically vacated. Case closed.

There is nothing more frustrating than inaction by an administrative agency. We have known clients to say they'd rather get an adverse decision than no decision at all because then they'd at least know where they stand. This ruling by the court with primary responsibility for reviewing FCC decisions may serve to kindle a small but unpleasant flame under regulatory seats.

(**Retention Marketing Ruling** - *Continued from page 2*)

There were other contested issues in this case. Verizon suggested that the LSR did not contain proprietary information, but the Commission noted that it had already ruled in 1999 that carrier change information was proprietary under Section 222. The FCC also rejected Verizon's arguments that even if the information is proprietary, the information belongs to the customer and the competitor is merely acting as an agent when it conveys the information.

The Commission's logic, however, produces the following dilemma: if the customer had called Verizon directly to cancel service, Verizon *could* engage in retention marketing, but if the customer chose instead to use a competitor to relay that information, Verizon *could* ***not*** engage in retention marketing. The Commission addresses this dilemma by asserting that when the competitor sends an LSR, the competitor is not only relaying the customer's information, but also acting to promote its own commercial interests, which requires conveying its own proprietary information. That is, the customer's choice of new carrier is proprietary information owned by the competitor.

The Commission's Order is less messy than the Bureau's Recommended Decision, and unlike the Bureau's Decision, the Order has a real legal effect.

By the way, by rejecting Verizon's assertion that the competitor is merely the customer's agent, the FCC may be showing its hand as to how it may rule on another pending matter. Verizon has asked the Commission to rule that cable operators must recognize carriers as "agents" of customers when the carrier contacts the cable operator to deliver a request to cancel cable service. The Commission's treatment of the retention marketing question may signal how the Commission will ultimately resolve the related question which Verizon has posed.

One other interesting and potentially significant legal issue arises in this Order. Verizon argued that Section 222 is not triggered in this case since the complaining entities were affiliates of cable operators, and each provided (wholesale) service only to their single affiliates. Thus, according to Verizon, the complainants were not "telecommunications carriers" under Section 222 of the Act.

The issue of defining a "telecommunications carrier" or a "common carrier" has, of course, been litigated a number of times over the last 30 years in different contexts. While some decisions have found that "holding oneself out as offering service to the public" is one of the indicia of a common carrier, there have been exceptions to this. In response to Verizon's argument, the Order observed that: the complainants have received certificates of public convenience and necessity from their respective PUCs; they have submitted certifications to the FCC that they operate as common carriers and would serve similarly situated customers; and while the complainants have no tariffs, none are needed for this service. Thus, the Commission held that the complainants *are* telecommunications carriers for the purposes of Section 222 of the Act; however, the Commission stated that it is *not* ruling on whether complainants are telecommunications carriers for any other provision of the Act. While this sort of distinction is not unheard of, it will be ripe for attack if Verizon chooses to appeal.

This Order was unusual in that the Chairman is the lone (and unusually strident) dissenter. This may raise a problem for the Commission if Verizon files an appeal: typically the Chairman controls legal strategy for the FCC in an appeal. That would be difficult here.

In sum, the Commission's Order is less messy than the Bureau's Decision, and unlike the Bureau's Decision, the Order has a real legal effect. As noted above, Verizon appears to be in the process of appealing the Commission's Order. It is hard to predict at this time what their likelihood of success will be. However, given some unclarity in the language of Section 222, a court may feel an obligation to defer to the Commission's read of the statute. In the meantime, we will keep you up to date as this matter progresses.

(***Broadband Reporting Requirements*** *- Continued from page 3)*

a subscriber.

- The type of customer must be identified as either residential (not having a corporate, business or organizational address) or business.

- Mobile broadband providers must still report their numbers on a state-wide basis but must now tell the FCC which census tracts make up their service areas within the state.

- *Within each census tract*, fixed providers must break down their service categories into eight tiers ranked by upload and download speeds of the broadband service.

- Mobile broadband providers must indicate the number of subscribers who have unfettered access to lawful Internet content.

- Interconnected VoIP providers must provide this information although they are not actually telecommunications carriers. This is consistent with the FCC's recent practice of treating VoIP in virtually every respect as if it is telecommunications carriage while at the same time avoiding placing this service under full Title II common carrier regulation.

The FCC feels that the burdens of this new reporting regimen are far outweighed by the anticipated benefits – that's easy for them to say.

The FCC feels that the burdens which this new reporting regimen will entail – and they are considerable – are far outweighed by the increased understanding the FCC will have of broadband penetration. That's easy for them to say.

On the good side, the new report forms will probably not be approved by OMB for a few months, so the first report requiring the new information will be due in March, 2009. But on the bad side, the FCC also sought comment on whether in the future it should: (a) collect more information so that broadband availability can be mapped on an address-by-address basis (can room-by-room mapping be far behind?); (b) require reports of actual delivered speed of internet connections rather than nominal speeds; (c) collect broadband pricing information; and (d) take steps to preserve the privacy of people whose data is being gathered. None of this bodes well for the streamlining of Form 477 in the years to come. Interested parties may submit comments.

(***Comcast Ruling*** *- Continued from page 1)*

(1) give the FCC details of its discriminatory practices; (2) explain how it will stop those practices; and (3) tell its customers and the FCC about any new practices it will use instead.

The FCC took the occasion to announce it would oversee "federal Internet policy" in resolving any other claims of discriminatory network practices. After seeing the penalties imposed on Comcast (*i.e.*, none), we doubt that other network operators are losing much sleep.

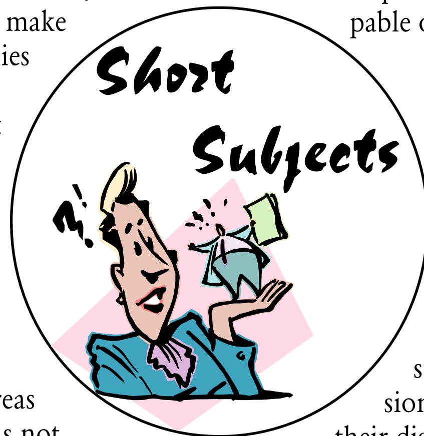
In fairness, though, the decision does plant a flag on the beach. Since the 1970s, in the pre-Internet days when people began sending large amounts of data over telephone lines, the FCC has consistently forborne from regulating any aspect of transmitted content. A series of decisions over the past few years explicitly extended that policy to cable, DSL, wireless, and broadband-over-power-line, exempting the providers of each from the traditional forms of regulation that would have blocked Comcast's methods. Network operators might have thought themselves free to run their systems as they wished. With its decision in the Comcast matter, though, the FCC put an important limit on that freedom: operators may not discriminate against categories of content. The full text of the Order is not out yet; when released, it may shed more light on the Commission's current thinking.

But another question, equally important, remains unanswered: can an operator discriminate ***in favor of*** certain users? That is the issue that launched the "network neutrality" debate – whether an Internet service provider can move some sites to customers faster than others, in exchange for money. Considering that the FCC's decision went on a 3-2 vote, and that composition of the Commission may well change after the election, we are not making any predictions.

8th Circuit Upholds Gross Receipts Taxes for Cell Phones

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

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



Testing, Testing

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

CMAS Testing Regime - All CMRS providers electing to participate in the new alert system will be subject to a mandatory testing regime akin to that imposed on broadcasters for the Emergency Alert System. In this Second Report & Order in the CMAS proceeding, the Commission adopted not particularly controversial rules to require all participating CMRS providers to engage in monthly testing, as well as additional, periodic testing of the interface between the Federal Alert Gateway and each CMRS provider's gateway. Taking refuge in the fact that the CMAS is still under development, the FCC refrained from adopting specific testing implementation details, declining to specify any content, parameters or even the day/time for the monthly tests, and refusing to be pinned down on periodic testing plans. But, the Commission did make a convoluted attempt at a compliance deadline, noting that participating "CMRS providers must comply with these testing requirements no later than the date of deployment of the CMAS, which is the date CMAS development is complete and the CMAS is functional and capable of providing alerts to the public." In other words, you have to be able to test it only once it gets running, and no one is clear when that will be.

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

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

(Continued on page 11)

And last but not least, another

Report from Planet FCC

(Our latest dispatch from that sometimes wacky planet orbiting along the Potomac River)

Next stop: Wonderland. As we saw in the articles on Verizon's customer retention plan (page 2, above) and audio bridging (page 4, above), the FCC often has to determine whether the firms involved were providing "information services" or delivering "telecommunications." In making the Verizon decision, the FCC candidly observed: "our decision holding the Competitive Carriers to be 'telecommunications carriers' for purposes of Section 222(b) does not mean that they are necessarily 'telecommunications carriers' for purposes of all other provisions of the Act…While the Act does provide a definition of the term 'telecommunications carrier,' the presence of a definition does not necessarily make the meaning clear.'" Wondering if there was any precedent to support this perplexing proposition, we looked immediately to see if the FCC had cited Lewis Carroll's treatise on the law, *Through the Looking Glass*, which happens to be directly on point: "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean – neither more nor less." Disappointingly, while the Commission clearly subscribes to the Humpty Dumpty theory of statutory construction, it did not give Mr. Dumpty his due.

The FCC steadfastly avoids defining two of the most basic terms of the industry it regulates – "telecommunications carrier" and "information service provider" – instead careening from case to case assigning whatever meaning to those terms fits the outcome it wants at that moment, but leaving the carriers and providers utterly unable to predict from circumstance to circumstance what they may be deemed to be. If Lewis Carroll were around today, he might well have placed a curiously costumed character in Alice's Wonderland named Mr. AirQuote, a gentleman who walks around putting air quotes around all the "terms" that he "uses" when he engages in "dialogue." "A 'definition,'" he would tell Alice, "does not actually clarify the 'meaning' of a word. It simply complicates our ability to give the word a whole new 'meaning' whenever it serves our 'purpose.'" Mr. AirQuote would, of course, work at the FCC.

***(Short Subjects** - Continued from page 10)*

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

Update to the CMAS First Report & Order (which we first reported on in our May issue) - On July 15, 2008, the Commission issued, on its own motion, an *Order on Reconsideration and Erratum* (FCC 08-166) in which it: (1) clarified the implementation of the CMAS deployment timeline; and (2) corrected the effective date of rules to note that information collection requirements will not go into effect until OMB approval. The timeline clarification changed the compliance deadline for participating CMS providers from ten months after the announcement of the Alert Aggregator to ten months after the Alert Aggregator makes the Government Interface Design specifications available.

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First Class

Late Breaking News???

If you're looking for information and insight about late-breaking developments, check out our commentary on the Fletcher Heald blog at **www.CommLawBlog.com**. (See the screen grab at right for a sample view.) We cover the gamut of communications issues – plus, if you feel so moved, you can submit your own views for posting.

We've had more than 120,000 visits to our site already – you can come to the party, too!!!