
SELECTED FCC DOCKET SUMMARIES, 2005

BROADBAND

In re Communications Assistance for Law Enforcement Act and Broadband Access and Services, First Report and Order and Further Notice of Proposed Rulemaking, 20 F.C.C.R. 14,989 (Aug. 5, 2005)

This report was the result of increasing concerns that emerging technologies were making it difficult for the law enforcement community to conduct surveillance. Congress enacted the Communications Assistance for Law Enforcement Act of 1994, Pub. L. No. 103-414, 108 Stat. 4274 (“CALEA”), to compel the technology sector to modify and design their equipment so that the law enforcement community could effectuate authorized surveillance of wireless and digital conversations. Petitioners, including the Drug Enforcement Agency, the Federal Bureau of Investigation, and the Department of Justice, asked the Federal Communications Commission (“FCC” or “Commission”) to include broadband Internet access providers and Voice over Internet Protocol (“VoIP”) under the services covered by CALEA. The agencies argued that although the two technologies were not listed specifically in CALEA, the FCC has the authority to determine that they are included under § 102(8)(B)(ii), the Substantial Replacement Provision (“SRP”).

The FCC determined that Congress vested it with the power to determine other developing technologies that were to be covered under CALEA. The Commission ultimately agreed that broadband Internet access providers and VoIP were to be included under CALEA. The date for full compliance was set to be eighteen months from the Order effectuation date.

The Commission compared the conflicting definitions of “telecommunications carrier” under the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, to the definition under CALEA. The CALEA definition was broader and designed to include not only transmission or transport capabilities, but also packet-based equipment and functionalities. The FCC determined that CALEA embodies a three-pronged analysis to determine if a new technology was to be included under its provisions. The criteria are as follows: (1) the technology must function using switching or transmission; (2) the functionality is a replacement for a substantial portion of the local telephone exchange service, specifically the portion used for dial-up internet access; and (3) the public interest must favor inclusion of the new technology in CALEA.

The Commission determined that facilities-based broadband Internet providers and VoIP utilize a switching or transmission technology. Legislative history indicates satisfaction of the second prong is not limited to making and receiving calls but includes “the transmission facilities that provide access to other services.” Applying this to both facilities-based broadband Internet access providers and VoIP, the Commission reasoned that each technology satisfied the second prong. VoIP was limited to “interconnected VoIP services” only, focusing exclusively on the switching and transmission function of its service, and not to other functions such as email storage. Finally, the FCC balanced the competing needs of the technology sector against law enforcement needs and deemed it was in the public’s interest of national safety and security to include facilities-based broadband Internet access providers and VoIP under CALEA.

The ultimate goal of the Commission’s report was to encourage law enforcement agencies and the industry to work together to “develop capability solutions that providers are reasonably able to achieve, and that are responsive to law enforcement’s needs.”

Summarized by Nicole Behar

In re IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers, First Report and Order and Notice of Proposed Rulemaking, 20 F.C.C.R. 10,245 (May 19, 2005)

In this First Report and Order and Notice of Proposed Rulemaking, the Federal Communications Commission (“FCC” or “Commission”) adopted rules requiring providers of interconnected Voice over Internet Protocol (“VoIP”) service to provide enhanced 911 (“E911”) capabilities as a standard feature of the service. Specifically, VoIP providers must transmit to the appropriate statewide answering point all 911 calls placed over the network, a call back number, and the caller’s “registered location” where the emergency operator is capable of receiving the information. Interconnected VoIP providers may also satisfy the requirements of this Order by using a third-party service to collect and transmit the necessary information. Subscribers to VoIP services must be notified within 120 days of the effective date of this Order of the addition of E911 to the standard service offering. Because of the importance of providing reliable avenues of emergency assistance, subscribers will not be permitted to opt-out of the service.

The Order further requires that E911 capabilities must be available from wherever the subscriber uses the service, whether at home or through a wireless connection. While at this time the VoIP user may have to report his location when placing an E911 call, the Commission anticipates the future adop-

tion of rules requiring that E911 services develop the technological ability to determine a user's location without user self-reporting. The location reporting capabilities and requirements for wireless VoIP E911 calls will be dealt with more thoroughly in subsequent orders if necessary.

The FCC views the decision to impose E911 standardization requirements on VoIP providers as a balancing act that seeks to accommodate the expectations of consumers and the needs of service providers while fulfilling its commitment to facilitating the country's ability to respond to national emergencies through wireline and wireless 911 services. As anticipated by the 2004 Vonage Order, these rules were adopted in response to an urgent need to address public safety issues presented by the increasingly widespread usage of VoIP as a primary means of summoning emergency assistance. *See In re Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, Memorandum and Opinion Order*, 19 F.C.C.R. 22,404 (Nov. 9, 2004). Requiring VoIP service providers to supply E911 capabilities as a standard feature also works to fulfill the FCC's goal of supporting the deployment of new communications without interfering with the ability of state and local governments to effectively administer emergency 911 services.

Because of the challenges posed by implementation of E911 capabilities into VoIP services, especially in the wireless context, the Commission emphasizes that it is prepared to expand the rules articulated in this Order, and seeks comment on whether further rulemaking may be necessary regarding technical options and possible timelines for implementation. In the Notice of Proposed Rulemaking, the Commission also seeks comment on any further steps that should be taken to ensure providers of VoIP are able to provide dependable E911 service, including the capabilities of persons with disabilities to use E911 and other services over interconnected VoIP and the need for consumer privacy protections. These concerns and the regulatory obligations to be imposed on VoIP providers will be addressed in the pending IP-Enabled Services proceeding.

Summarized by Casey J. Simpson

INTERNATIONAL

In re Implementation of § 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 to Amend § 338 of the Communications Act, Report and Order, 20 F.C.C.R. 14,242 (Aug. 22, 2005)

In December 2004, the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA") amended § 338 of the Communications

Act of 1934 (“Act”), which governs the carriage of local television broadcast stations by satellite carriers. 47 U.S.C. § 338 (2000). SHVERA establishes new and special requirements for satellite carriage of local stations in states outside the contiguous United States.

SHVERA requires satellite carriers with more than 5,000,000 subscribers to carry the analog and digital signals of television broadcast stations in local markets in non-contiguous U.S. states by December 8, 2005 for analog signals and by June 8, 2007 for digital signals.

The Commission determined the amendment intended to only refer to Alaska and Hawaii and not to the broader Communications Act definition including territories and possessions. The Commission considered the technical difficulties of serving the territories and possessions, and the fact that the affected satellite carriers have never before served any subscribers in much of those areas.

The statute requires carriage of “signals originating as analog signals” and “signals originating as digital signals.” There was no reference to “primary video” or other term in the statute that expressly limits or describes the nature, format, or content of the broadcast signal that satellite operators must carry in the affected states. The Commission concluded § 338(a)(4) requires carriage of multicast and high-definition signals. They found that the use of the plural term “signals” in requiring carriage of “signals originating as digital signals” to mean carriage of the entire free over-the-air digital broadcast, without limitation, being transmitted by a broadcaster.

Another resolved issue concerned the availability of signals. Section 338(a)(4) provides that satellite retransmissions of local stations in Alaska and Hawaii “shall be made available to substantially all of the satellite carrier’s subscribers in each station’s local market;” however, the provision did not define “substantially all.” The Commission held that satellite carriers are not required to provide service to every subscriber in a designated market area. Recognizing the existing physical limitations on satellite service in the noncontiguous states, the Commission stated that “substantially all” should mean those that could be served by a satellite providing primary services within the engineering constraints of the primary or spot beams.

Finally, the Commission considered whether to require satellite carriers to provide special notifications to local stations regarding the new carriage requirements. The Commission held that no such requirement was necessary for the election for analog signals because of the imminence of the analog carriage election deadline. The Commission did adopt a notification requirement to ensure that local stations in Alaska and Hawaii will be reminded of their digital carriage rights. Satellite carriers will be required to notify all television broadcast stations located in local markets in Alaska and Hawaii that they are enti-

tled to carriage as of June 8, 2007 and that they must elect mandatory carriage or retransmission consent by April 1, 2007.

Summarized by Michael Amash

In re Technical Standards for Determining Eligibility for Satellite-Delivered Network Signals Pursuant to the Satellite Home Viewer Extension and Reauthorization Act, Notice of Inquiry, 20 F.C.C.R. 9349 (Apr. 29, 2005)

The Federal Communications Commission (“FCC” or “Commission”) released a Notice of Inquiry (“NOI”) on April 29, 2005, seeking comments and information as to whether the current standards and procedures for determining digital television signal strength in identifying households that are not served by local television broadcast signals for purposes of determining eligibility for distant signals from satellite communications providers should be revised. The Commission issued this NOI in preparation for its December 2005 report to Congress as required under the Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, § 207, 118 Stat. 2809, 3393 (to be codified at 47 U.S.C. § 325) (“SHVERA”).

SHVERA was enacted to extend to digital broadcast signals the requirements placed on analog broadcast television signals by prior legislation. The Satellite Home Viewer Act (“SHVA”) was enacted by Congress in 1988 to protect broadcasters’ interests while permitting satellite video providers to provide broadcast television to subscribers unable to receive over-the-air broadcast television due to distance. The Commission implemented this legislation by defining the signal intensity necessary to determine eligibility for broadcast television over satellite. In response to the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”), the Commission developed and adopted a predictive model for determining whether a household is not served by local analog broadcast signals. SHVERA, adopted in 2004, requires that the Commission complete an inquiry as to whether the digital strength standard in § 73.622(e) of the FCC’s rules or the testing practices under § 73.686(d) of those rules should be revised and that the Commission is to submit its findings to Congress.

In this NOI, the Commission seeks comments and information regarding: (1) whether antenna placement and orientation should be considered in determining whether a household is not served; (2) whether measurement procedures for DTV signal strength should be revised; (3) whether a standard reliant on other factors than signal strength should be adopted; (4) whether a new predictive model for determining household eligibility for DTV signals should be developed; (5) whether DTV receiver price variation should be factored into

the standard for determining whether a household is not served; and (6) whether external interference from other analog and digital signals as well as from foliage and man-made clutter should be factored into the determination standard.

Summarized by Davina Sashkin

MEDIA

In re Closed Captioning of Video Programming: Telecommunications for the Deaf, Inc., Petition for Rulemaking, Notice of Proposed Rulemaking, 20 F.C.C.R. 13,211 (July 14, 2005)

In its July 14, 2005, Notice of Proposed Rulemaking (“NPRM”), the Federal Communications Commission (“FCC”) examined the status of closed captioning rules and determined whether revisions should be made to ensure that video programming remains fully accessible to Americans with hearing disabilities. This proceeding has been proposed in response to compliance and quality issues raised in a Petition for Rulemaking filed by Telecommunications for the Deaf, Inc. Telecommunications for the Deaf Inc. et al., *Petition for Rulemaking*, RM-11065 (July 23, 2004) (“TDI Petition”).

The TDI Petition requested that the FCC initiate a rulemaking to ensure the established closed captioning rules are better implemented using additional enforcement mechanisms, with an overall outcome of high quality and reliable closed captioning. In response to the petition, the NPRM’s main objective was to seek comment on whether the current closed captioning rules are the most effective and efficient way of ensuring Americans with hearing disabilities are provided substantially equivalent information to listeners without disabilities.

The FCC requested comment on proposing changes to a variety of issues in the NPRM. The FCC had previously declined to set standards for non-technical quality aspects of closed captioning, instead relying on the establishment of standards through industry contracts, which the FCC expected would normalize quality standards. In response to arguments that market incentives have been insufficient in achieving this standardization, the FCC sought comment on whether standards should be established or whether sufficient reasons can be provided to maintain the status quo. Additionally, observations were called for on a potential need for additional technical quality standards, aside from the established “pass through” rule, with the anticipation of preventing and remedying technical problems.

The FCC also sought comment on whether video programming distributors should be held responsible for monitoring and maintaining their equipment and signal transmissions, as no specific rules or steps were previously required by

the FCC. The Commission hoped to address specific concerns that the captioning is not routinely checked, which affects the delivery of intact captioning by distributors to consumers. The FCC further requested comments on whether the rules should be amended to allow consumers to complain directly to video programming distributors through various modes of communication. How this contact information should be provided to those with hearing disabilities was a specific issue in the complaint process.

Comment on various other issues relating to closed captioning was also requested. These include the question of whether specific limitations apply to electronic newsroom techniques by markets other than the major designated market areas, and whether imposing a quality standard would have an impact on the limited number of available captioning services who supply real-time and pre-recorded captioning in light of a rising demand. Comments on the necessity of compliance reports, suggested mandates of electronic filing for exemption requests, maintaining and reformatting closed caption programs regularly, and the authorization of benchmark compliance audits are also requested. Additionally, the FCC sought comment on whether reporting requirements should be implemented in the compliance process to ensure distributors keep accurate and informative records that may be easily disseminated to the public.

Finally, the FCC noted that, effective January 1, 2006, all non-exempt new English language programming must be captioned, and requested a reassessment of the complaint procedures due to this newly imposed requirement. The rules had previously required closed captioning complaints be directed initially to video programming distributors within a specified period before filing directly with the Commission. The rationale was to give video programming distributors further time to respond to consumer complaints, but problems have been raised regarding the protracted process and response times. The FCC anticipates a full review of the record on the above matters before determining what closed captioning rules should be modified or retained to ensure the accessibility and effectiveness of video programming is satisfied.

Summarized by Kaethe M. Carl

WIRELESS

In re Service Rules for Advanced Wireless Services In the 1.7 GHz and 2.1 GHz Bands, Order on Reconsideration, 20 F.C.C.R. 14,058 (Aug. 5, 2005)

On August 5, 2005, the Federal Communications Commission ("FCC" or "Commission") resolved petitions for reconsideration of the Report and Order adopting service rules for Advanced Wireless Services ("AWS") in the 1710

MHz–1755 and 2110 MHz–2155 MHz bands. Growth in the demand for mobile wireless services, in addition to the rise of Internet and broadband availability, have increased the need for additional spectrum and advanced technologies capable of providing AWS. In order to facilitate the rapid deployment of broadband technologies, the FCC set forth a band plan and licensing procedures in 2003. *In re Service Rules for Advanced Wireless Services In the 1.7 GHz and 2.1 GHz Bands, Report and Order*, 18 F.C.C.R. 25,162 (Oct. 16, 2003) (“AWS-1 Order”). The AWS-1 Order also established rules governing competitive bidding for the licenses. In this Order on Reconsideration, the Commission examines whether the AWS-1 Order provides adequate opportunities for small and rural wireless carriers and promotes the policy goal of disseminating licenses fairly among a variety of applicants. The Commission made minor modifications to the band plan and the service rules in the AWS-1 Order, thereby increasing flexibility for potential licensees.

The Commission took into consideration RCA and T-Mobile’s petition that more spectrum should be licensed on an RSA/MSA basis to meet the need of rural carriers, that a 30 MHz REAG block should be broken into smaller components that could be aggregated. In the AWS-1 Order, the Commission sought to provide geographic license sizes and a band plan that would meet the various needs of potential entrants, as well as incumbents seeking additional spectrum. However, after considering the RCA and T-Mobile petition the Commission decided to modify the AWS-1 Order to provide smaller spectrum licenses and blocks which will provide bidders with greater flexibility to implement their business plans. In addition, the smaller licenses and blocks will be more beneficial to carriers of various sizes, which will bring the benefits of AWS to rural areas.

The second petition that the Commission addressed was a proposal by Council Tree for a set-aside spectrum in the 1710 MHz–1755 MHz and 2110 MHz–2155 MHz bands for designated entities or other categories of bidders. In the alternative, Council Tree requested that the FCC establish a third small business size standard and offer a 35% bidding credit to AWS auction applicants whose average gross revenues for the preceding three years did not exceed \$3 million. In rejecting the set-aside proposal, the Commission reasoned that there are a large number of licenses available. In addition, the effectiveness of bidding credits and other provisions allowing small business participation eliminate the need for spectrum set asides. The Commission also found the adoption of a third small business size standard and a 35% bidding credit unnecessary because the current licensing scheme provides a broad spectrum to regional and small market areas across multiple spectrum blocks which should result in the equal dissemination of licenses.

Lastly, the Commission addressed the petition by Powerwave proposing a

harmonization of the transmitter output power of AWS and PCS stations. The Commission in the AWS-1 Order intended to adopt the same transmitter output power limitations for AWS and PCS stations. Therefore the Commission decided to amend § 27.50(d)(1) of the AWS-1 Order to provide the same technical criteria for AWS equipment as currently exist for broadband PCS.

Summarized by D. Margeaux Witherspoon

In re Applications of Nextel Communications, Inc. and Sprint Corporation; For Consent to Transfer Control of Licenses and Authorizations, Memorandum Opinion and Order, 20 F.C.C.R. 13,967 (Aug. 3, 2005)

Here, the Federal Communications Commission (“FCC” or “Commission”) considered applications by Nextel Communications, Inc. (“Nextel”) and Sprint Corporation (“Sprint”) to transfer control of all licenses and authorizations held by Nextel to Sprint. This merger, one of the largest in communications history, would result in a reduction of large nationwide carriers of wireless and broadband services from five to four. The FCC analyzed the consequences of combining two large companies which offer overlapping products, services and geographic coverage, as well as whether the proposed transfers would serve the public interest, convenience, and necessity. The Commission concluded that this merger would not substantially lessen competition in the wireless industry nor harm the public interest, and approved the applications for transfer.

Nextel is the fifth-largest provider of mobile-telephony service in the United States, with 16.2 million subscribers and revenues of \$13.4 billion in 2004. Nextel offers digital wireless voice and data communications using Integrated Digital Enhanced Network technology. Nextel also offers a popular bundled service called Direct Connect, which uses Push-to-Talk (“PTT”) technology, allowing a customer instant, two-way, real-time conferencing, much like a walkie-talkie. Sprint, the third-largest provider of mobile telephone voice and related data service, has 24.7 million customers and reported revenues of \$14.6 billion in 2004. Sprint also offers digital wireless voice communications on its broadband Personal Communications Service network, as well as wireline long-distance and local telecommunications services.

The \$70 billion merger of Sprint and Nextel would combine the licenses held by these two companies, resulting in overlap in most geographic areas in the United States and its territories. Despite this overlap and the possible reduction in competition, Sprint and Nextel contend that this transaction is in the public interest for the following reasons: (1) increased availability and variety of products, services and features; (2) technical benefits and increased efficiency; (3) improved quality of service and coverage; and (4) accelerated re-

lease of improved wireless products.

The Commission analyzed whether the horizontal nature of the merger would significantly increase concentration in the market and result in competitive harms. It found there would not be a significant change in the market share controlled by the resulting company because the services offered by each company were diversified enough from each other.

Mobile data services are offered to a lesser extent by Nextel than by Sprint. Nextel, however, is a market leader in PTT technology, a service that Sprint does not currently offer as a stand-alone service. The Commission found that there is enough variation in market shares and presence in local geographic markets, as well as incompatibility of wireless standards to permit the merger. Additionally, the combined Sprint-Nextel entity, in most geographic markets, would not be one of two leading carriers available; therefore, there would be no resulting increase in subscriber share.

The Commission also determined the products offered by the Sprint-Nextel entity are substitutable for products carried by other nationwide carriers, such as Cingular and Verizon Wireless. The availability of alternate wireless carriers reduces the risk of harmful unilateral effects of the merger. The PTT technology that Nextel offers as a stand-alone service is the only service that is not easily substitutable among all the wireless carriers, but the Commission noted that this technology may be phased out in the future, costing Nextel its advantage and bringing balance back to the wireless marketplace.

Finally, the Commission found the public interest benefits from the merger outweighed any potential harms. The combined Sprint-Nextel entity would offer improved customer service and coverage for both Sprint and Nextel customers.

Although the Commission has allowed the merger of these two nationwide wireless carriers, it notes strongly that there will come a point where further consolidation would not be in the public's best interest, a sentiment also echoed in the 2004 FCC decision approving the transfer of licenses from AT&T Wireless Services, Inc. to Cingular Wireless Corporation. *In re Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation; For Consent to Transfer Control of Licenses and Authorizations, Memorandum Opinion and Order*, 19 F.C.C.R. 21,522 (Oct. 26, 2004). One may well wonder when that point will be reached, as there are now only four major wireless providers that offer nationwide coverage, and there is not much more to reduce. The next proposal to merge wireless providers may reach that limit, but at present, the Sprint-Nextel merger claims to bring the wireless market into a new era.

Summarized by Elizabeth F. Getman

In re Applications of Western Wireless Corporation and ALLTEL Corporation; For Consent to Transfer Control of Licenses and Authorizations, Memorandum Opinion and Order, 20 F.C.C.R. 13,053 (July 11, 2005)

Western Wireless Corporation (“WWC”), together with ALLTEL Corporation (“ALLTEL”), filed an application seeking to transfer control of all licenses and authorizations owned by WWC and its subsidiaries to ALLTEL. The joint application is a result of the pending merger between WWC and Wigeon Acquisition LLC (“Wigeon”), a limited liability company wholly owned by ALLTEL.

ALLTEL is a publicly traded corporation specializing in wireless and wire-line telephone services to more than 13,000,000 customers spread throughout the Southeast, Southwest, Northeast, and upper Midwest regions of the United States. Other areas of expertise include local telephone, high-speed data, and Internet services.

WWC primarily operates wireless phone systems throughout Central and Western portions of the United States. Its wireless services are provided for approximately 1.4 million customers under two brand names, Western Wireless and Cellular One. The Cellular One name is owned by WWC who, in turn, licenses the name out to other carriers.

Pursuant to § 7 of the Clayton Act, the Antitrust Division of the Department of Justice (“DOJ”) reviewed the proposed merger to ensure the unlikelihood of a substantial decrease in market competition should the merger go forward. The DOJ found several areas where future competition would be significantly harmed and permitted the merger on the condition that ALLTEL divest its interests in each of the sixteen districts.

According to §§ 214(a) and 310(d) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, it is the duty of the Federal Communications Commission (“Commission”) to investigate and decide if the acquisition of WWC by ALLTEL will serve the public interest, convenience, and necessity.

After analyzing the potential for future competitors in the same geographical market, as well as several issues concerning roaming charges and security issues, the Commission concluded that the proposal would result in effective future competition in most areas. The merger, however, would result in unfair competition in sixteen specific areas identified by the Commission and the DOJ. Authority for ALLTEL and WWC to proceed, therefore, was granted only with ALLTEL’s divestiture of WWC operating units in these areas.

Overall, the Commission believes the merger between ALLTEL and WWC will provide a number of public benefits and significantly increase effective competition. Furthermore, by divesting WWC of its operating units in the six-

teen problem markets ALLTEL can decrease the likelihood of potential harm and satisfy the proper interest, convenience, and necessity required of the Commission.

Summarized by Jeffrey A. Piposar

Consumers May Experience Interference to Their Garage Door Opener Controls Near Military Bases, *Public Notice*, 20 F.C.C.R. 3614 (Feb. 15, 2005)

This public notice explains the cause of the recent interference to garage door opener controls of consumers situated near certain military installations. The malfunctions include a reduction in the operating distance of the device or the device ceases to function entirely. However, the interference should not affect wall-mounted push buttons located inside the garage.

Garage door openers operate on frequencies reserved for the federal government but were allowed limited use for many years. However, due to the increased needs of Homeland Security, these frequencies are now employed by the Department of Defense (“DOD”) in order to deploy new mobile radio systems on and around certain military bases. The DOD, the National Telecommunications and Information Administration, and the FCC are working with the garage door opener industry to limit the impact this may cause to consumers. The variety of technical characteristics of garage door controls and configuration of the mobile radio systems makes it impossible to provide advance notice regarding which users or locations may experience interference. For security reasons, the DOD cannot make information regarding deployment of new mobile radio systems widely known.

Garage door opener manufacturers have a variety of tools to aid consumers in resolving interference to their systems. Therefore, consumers experiencing difficulty with their garage door openers should contact the manufacturers or their local installers.

Summarized by Alisa Chunephisal

WIRELINER

***In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings; Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone**

Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises; Consumer Protection in the Broadband Era, *Report and Order and Notice of Proposed Rulemaking*, 20 F.C.C.R. 14,853 (Aug. 5, 2005)

In the Report and Order, the Federal Communications Commission (“Commission”) established a regulatory framework for broadband Internet access services offered by facilities-based wireline providers. The Commission’s decision was based on its acknowledgement that wireline services must be classified as either a communications service or an information service.

The regulatory framework the Commission adopted establishes minimal regulatory obligations for facilities-based wireline broadband Internet access providers. The Commission found that previous regulations were “outdated” because of market conditions and technological advances. Specifically, the Commission stated that the record illustrated the “broadband Internet access market is . . . characterized by several emerging platforms and providers, both intermodal and intramodal, in most areas of the country.” In response to its finding, the Commission adopted a framework that is “eligible for a lighter regulatory touch.”

The Commission, consistent with the Supreme Court’s decision in *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005), concluded that a facilities-based wireline broadband Internet access service is an information service. Furthermore, the Commission found that “neither the statute nor relevant precedent” requires broadband transmission to be classified as a “telecommunications service” when provided to an Internet service provider.

The Commission announced that facilities-based wireline broadband Internet access service providers are no longer required to separate and offer transmission components of wireline broadband Internet access services as a stand-alone telecommunications service under Title II. The decision will be subject to a transition period that the Commission will implement. The Commission also announced that Bell Operating Companies are relieved of all obligations established in the line of cases referred to as the *Computer Inquiries*¹ with re-

¹ See Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, *Final Decision and Order*, 28 F.C.C.2d 267 (1971), *aff’d in part sub nom.*, GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973), *decision on remand*, 40 F.C.C.2d 293 (1973), commonly referred to as Computer I, and subsequent similar cases Computer II and Computer III. This line of cases has been collectively referred to as the *Computer Inquiries*.

spect to wireline broadband Internet access services. Furthermore, it announced that facilities-based wireline carriers may choose to offer broadband Internet access transmission arrangements for Internet access services either on a common carrier basis or a non-common carrier basis. In the Order the Commission stated that facilities-based wireline Internet access service providers must continue to offer current wireline broadband Internet access transmission services, “on a grandfathered basis, to unaffiliated ISPs for a one-year transition period.”

The Commission also implemented transition period for universal service, announcing that the program will remain “status quo” until the Commission resolves the USF Contribution Methodology proceeding which should occur within a 270-day period. The Commission reaffirmed its commitment to ensure that Voice over Internet Protocol providers using wireline broadband Internet access facilities comply with E911 obligations. The Commission also assured providers that the Order does not alter the rights of telecommunications carriers to access unbundled network elements (“UNEs”) under § 251.

Additionally, the Commission issued a Notice of Proposed Rulemaking seeking comment on the need for any new regulatory obligations that the Commission should implement to ensure that consumer protection needs are met by all broadband Internet access service providers, irrespective of the underlying transmission technology.

Summarized by Stefanie Zalewski

In re Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Information; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Provision of Directory Listing Information under the Communications Act of 1934, as amended, Order on Reconsideration, 20 F.C.C.R. 9334 (Apr. 29, 2005)

In its April 29, 2005, Order on Reconsideration, the Commission upheld and clarified provisions governing the obligations of local exchange carriers (“LECs”) in providing competitive providers access to directory assistance (“DA”) data. In a joint petition, BellSouth Corp. (“BellSouth”) and SBC Communications, Inc. (“SBC”), sought reconsideration and clarification of rules prohibiting LECs from imposing restrictions on the ways in which competing DA providers use the DA information obtained from LECs. The Commission denied the petition determining that because § 251(b)(3) of the Communications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (“Act”), requires

LECs to provide competing providers nondiscriminatory access to directory information, LECs may not impose contractual restrictions on the uses of these data, but rather must offer the same access as they provide themselves.

The Commission clarified that while there is no express limitation under § 251(b)(3) of the Act regarding competing DA providers' uses of DA information, competing DA providers are bound by the same restrictions governing uses of DA data by the LECs. Competing DA providers, therefore, are subject to all federal and state laws and regulations regarding the uses of these data. Competitors must also comply with the privacy requests of LEC customers and may not gain access from a LEC any numbers which have been unlisted at the customer's request. Finally, the Commission agreed with petitioners that use of DA data for directory publishing is governed under § 222(e) of the Act.

The Commission rejected the petitioners' request for reconsideration of the rule requiring that LECs provide nondiscriminatory access to local DA data acquired from third parties. BellSouth and SBC argued that LECs should not be required to provide access to data that were obtained from third parties because competing DA providers could access that information directly from the third parties themselves. The Commission disagreed and determined that nondiscriminatory access to local DA data applied without regard to the source of the data.

Summarized by Davina Sashkin

