BloostonLaw Telecom Update

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IMPORTANT DEADLINES

JUNE 30: CALEA "J-STANDARD," "PUNCH LIST" CAPABILITY EXTENSIONS FOR 2004-2006 PERIOD EXPIRE. *Clients still not compliant with Communications Assistance for Law Enforcement Act (CALEA) "J-Standard" and "Punch List" capability requirements for their circuit-switched facilities will need to request an additional extension for up to two years (i.e., until June 30, 2008). However, the FBI is not going to extend its Flexible Deployment Program beyond June 30. But the FCC is still subject to the Section 107(c) extension procedures, it may not be granting many of such extensions.* ***Please call us to discuss your particular circumstances and to determine your options.*** *BloostonLaw contacts: Ben Dickens and Gerry Duffy.*

JUNE 30: ANNUAL ICLS USE CERTIFICATION. *Rate of return carriers must file a self-certification with the FCC and the Universal Service Administrative Company (USAC) stating that all Interstate Common Line Support (ICLS) will be used only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. In other words, carriers are required to certify that their ICLS support is being used consistent with Section 254(e) of the Communications Act.* ***Failure to file this self-certification will preclude the carrier from receiving universal service support. We, therefore, strongly recommend that clients have BloostonLaw submit this filing and obtain an FCC proof-of-filing receipt for client records.*** *BloostonLaw contacts: Ben Dickens and Gerry Duffy.*

JULY 31: REPORT OF EXTENSION OF CREDIT TO FEDERAL CANDIDATES: *This report (in letter format) must be filed by January 30 and July 31 of each year, but ONLY if the carrier extended unsecured credit to a candidate for a Federal elected office during the reporting period. BloostonLaw contacts: Bob Jackson and Richard Rubino.*

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VoIP Providers To Pay Into USF; Wireless Safe Harbor Increases To 37.1 Percent

At its open meeting today, the FCC adopted a long-awaited order on assessments and contributions to the federal Universal Service Fund (USF). Specifically, the Commission adopted two major modifications. First, it increased the existing wireless "safe harbor" percentage used to estimate interstate revenue from 28.5 percent to 37.1 percent of total end-user telecommunications revenue. This interim wireless safe harbor was last updated in 2002. Wireless carriers continue to retain the option to base contributions on their actual revenues or on traffic studies that estimate their actual interstate revenues.

Second, the Commission expanded the base of USF contributions by extending universal service contribution obligations to providers of interconnected voice over Internet Protocol (VoIP) service. For interconnected VoIP providers, the Commission establishes a safe harbor percentage of interstate revenue at 64.9 percent of total VoIP service revenue. Interconnected VoIP providers also may calculate their interstate revenues based on their actual revenues or by using traffic studies.

The Commission also adopted a Notice of Proposed Rulemaking (NPRM) seeking comment on interim contribution obligations imposed in the Order.

Commissioner Michael Copps was concerned that the exemption of digital subscriber line (DSL) from USF obligations might come back to haunt the Commission. He said, "I think the jury may still be out on whether today's action actually puts enough additional funds into the universal service fund as DSL's non-participation takes out. By some accounts DSL providers contribute $350 million a year to the fund, perhaps more. Recall that last summer, when the Commission announced its broadband recusal approach, we pledged to "take ***whatever action is necessary*** to preserve existing funding levels" (emphasis added) before releasing providers from their contribution obligations. I don't see with slam-dunk certainty that contributions from interconnected VoIP (which is, for all its impressive growth, still a relatively nascent industry) and from wireless carriers (whose possibly increased use of traffic studies could lead to unforeseen consequences) offset the funds lost by DSL's non-participation. Surely it would be an intolerable result to end up with the fund having less revenue, not more, for the foreseeable future. Last summer we pledged this result would not happen. Nine months later we seem to accept the possibility of a diminished fund."

Similarly, **Commissioner Jonathan Adelstein** expressed long-term concerns with the decision: "I fully support the efforts to expand the contribution base in today's Order but, as we edge toward the close of the Commission's interim contribution plan, there remain important unanswered questions. Despite the best efforts of our talented staff, it is difficult to forecast the precise impact of the measures we adopt today on overall contributions. Indeed, this Order makes no definitive findings about what level of contributions will be recovered through these changes. This Order also does not attempt to analyze the extent of the Commission's decision last August on the overall revenues available for universal service purposes. It is clear, however, that exempting broadband Internet access revenues would remove a sizable and rapidly-growing segment of the telecommunications sector from the contribution base. That Congress contemplated that our universal service mechanisms would evolve as technology evolves is certainly evidenced in the broad permissive authority it gave the Commission to expand the contribution base. As I said at the time of the reclassification, I would have preferred to exercise our permissive contribution authority to address this potential decline in the contribution base permanently. For these same reasons, I concur in part to this item, which preserves a status quo with respect to universal service that strikes me as inconsistent with the intent of Congress and an evolving level of universal service."

FCC Chairman Kevin Martin, Commissioner Deborah Tate, and **Commissioner Robert McDowell** (attending his first meeting) all offered brief statements supporting the item. Martin, however, added an explanation for why the Commission selected the 64.9 percent safe harbor figure for VoIP providers: "Like wireless services, consumers are increasingly using interconnected VoIP services as a substitute for traditional wireline service. And, many of these VoIP providers claim that their services are 'inherently interstate.' Thus, we could require these providers to pay based on 100 percent of their revenues. Instead, we only require them to contribute based on a safe harbor of 64.9 percent—the percentage of interstate revenues reported by wireline toll providers. Similar to the options available to wireless providers, interconnected VoIP providers may choose instead to contribute based on their actual interstate revenues or use a traffic study as proxy for these revenues."

At our deadline, the text of the order and NPRM was not available.

BloostonLaw contacts: Ben Dickens and Gerry Duffy.

FCC Sets Comment Cycle For 2nd FNPRM On DE Rules

The FCC has established a comment cycle for the *Second Further Notice of Proposed Rulemaking (FNPRM)* accompanying the *Second Report & Order (R&O)* strengthening its unjust enrichment and spectrum leasing rules for designated entities (DEs) that it released April 25. **Comments on the WT Docket No. 05-211 *Second FNPRM* are due August 21, and replies are due September 19.** The *Second R&O* has been the center of controversy, and has prompted petitions for reconsideration from several parties, including BloostonLaw. And, on its own motion, the Commission issued an Interim Order partially addressing some of the issues raised in those filings before the record on reconsideration had closed (BloostonLaw Telecom Update, June 7).

In the *Second FNPRM,* the Commission seeks comment on whether it should implement additional safeguards beyond those it adopted in the *Second R&O,* and whether it should further modify its competitive bidding rules governing benefits reserved for designed entities. The Commission also seeks comment to obtain additional evidence regarding how and under what circumstances an entity's size might affect its relationships and agreements with DE applicants and licensees. The Commission seeks further comment on whether it should adopt additional rule changes that would restrict the award of DE benefits under certain circumstances and in connection with relationships with certain entities.

The Commission acknowledges that voice, data, and video services are converging and are being offered as bundled service packages. These bundled service offerings may include wireline, wireless, cable, and/or direct broadcast satellite (DBS) services, along with the required equipment such as handsets and receivers. In light of the continuing dynamic technological developments and convergence occurring in the communications marketplace, the Commission seeks comment on the appropriate class of entity, if any, that should trigger any additional restriction the Commission may adopt regarding relationships with designated entities. For instance, would the Commission be better positioned to achieve its statutory mandates if it defined such an entity to include one that is subject to the Commission's jurisdiction under Titles I, II, III, or VI of the Communications Act, including any of the entity's controlling interests or affiliates as those terms are defined in Sec. 1.2110 of the Commission's rules. The Commission seeks comment on whether adopting a definition of a class of entities with which a designated entity's agreements might trigger additional restrictions for designated entity benefits will better ensure that the Commission can continue to award such benefits to entities that Congress intended.

The Commission also seeks comment on the financial threshold, if any, that it should consider in defining the appropriate class of entity that might trigger any additional eligibility restrictions it adopts. It seeks further comment on the proposed financial benchmarks raised by commenters. Should the Commission consider a financial threshold of $5 billion in annual gross revenues as advocated by various parties or lower thresholds such as $1 billion or $125 million as suggested by other commenters? The Commission also seeks comment on whether an entity's size is relevant to its incentive and/or ability to influence a designated entity with respect to the type and scope of the service it might provide as well as relevant economic analysis to support such arguments.

Similarly, the Commission seeks comment on whether it should define a class of entities based on its particular spectrum interests, for instance those that have licenses for commercial mobile radio services (CMRS) spectrum. If the Commission were to define a class in this manner, should it define CMRS spectrum to include any spectrum for which the service specific rules permit the provision of commercial mobile radio services as that term is defined in Sec. 20.9 of the Commission's rules? If the Commission determines to base any additional safeguards upon an entity's particular spectrum interests, should it consider including spectrum other than CMRS spectrum for the purposes of such restrictions? If so, what spectrum and why is it more or less relevant than other types of spectrum?

The Commission seeks further comment on whether it should adopt an in-region component to defining relationships with any particular class or type of entity that could trigger any additional eligibility restrictions it might adopt. The Commission also seeks comment on whether all entities with in-region spectrum interests have the same ability and incentive to leverage an inappropriate level of influence over a designated entity with which it has financial and/or operational arrangements. Additionally, the Commission seeks comment on how the in-region component might protect the designated entity program from being subject to potential abuse from those entities that might seek to craft relationships with designated entity applicants in a manner intended to serve their self-interests.

Assuming the Commission does adopt an in-region component to any additional eligibility restrictions, the Commission seeks comment as to whether it should find that a geographic overlap that triggers the in-region restriction occurs when there is any overlap between the licensed service areas of the entity that has in-region spectrum, with whom the designated entity applicant has a material relationship, or any affiliate of the entity that has in-region spectrum as defined in Sec. 1.2110 of the Commission's rules, and the licensed service area to be acquired by the designated entity applicant. Further, the Commission seeks comment on whether the adoption of an in-region component to any additional eligibility restrictions would be burdensome to implement. Thus, the Commission seeks comment as to whether any class of entities on which any additional eligibility restriction is based should be allowed to divest its interest in the subject service area to allow a designated entity applicant to maintain eligibility for benefits. The Commission also seeks comment as to whether the Commission should adopt divestiture provisions similar to those found in the eliminated spectrum aggregation limit rules.

The Commission seeks comment on whether divestiture should be permitted. Specifically, the Commission seeks comment as to how such divestitures should be implemented. The Commission seeks comment on the time period for divestiture and whether the restricted entity should be allowed to market the spectrum or whether such marketing should be done by a trustee. The Commission seeks comment as to whether the award of designated entity licenses should be withheld until the restricted entity files the applications to divest or until the transaction to sell the divestiture spectrum has been consummated. The Commission also seeks comment as to whether the Commission should receive reports detailing the progress made in identifying a buyer for the divestiture spectrum and how often such reports should be filed.

The Commission also asks commenters to discuss what should occur if the restricted entity that has in-region spectrum fails to divest. The Commission seeks comment on whether the designated entity must purchase

the license without the benefit of the bidding credit and be subject to the Commission's default rules. The Commission also seeks comment on whether the requirement for a designated entity to purchase the license without the bidding credit maintains auction integrity and ensures that entities with in-region CMRS spectrum are not able to game the auction process.

Material Relationships: Following on its rule revisions adopted in the *Second R&O*, the Commission seeks comment on whether there is a need to even further modify its part 1 designated entity eligibility rules to include other types of agreements in its definitions of ``impermissible material relationships'' or ``attributable material relationships.'' In particular, the Commission seeks comment on the specific types of additional agreements, if any, that should fall within its definitions of impermissible material relationships and attributable material relationships. The Commission also seeks comment on whether its concern regarding relationships between designated entity applicants or licensees and other entities should differ depending upon the type of entity at issue and the circumstances surrounding the relationship. Should the Commission reconsider adopting a minimum equity requirement for designated entity applicants or define material relationship in a way that would prohibit a designated entity applicant from securing all of its capitalization from outside sources? The Commission also seeks comment on commenters' suggestions to include additional operational agreements in its definitions of material relationship and asks whether doing so creates technological and practical restrictions that could hinder a designated entity licensee's ability to become a provider of spectrum based services, as intended by Congress.

The Commission is concerned that additional types of relationships could have the potential to confer significant influence over the actions of a designated entity licensee, thereby allowing an ineligible entity the ability to gain undue advantages in the communications marketplace through the benefits offered to a designated entity applicant. The Commission therefore seeks comment on the specific types of additional agreements that should fall within its definitions of ``impermissible material relationships'' and ``attributable material relationships'' so that it may be better able to prevent the potential for abuse of the designated entity program, thereby ensuring the award of our designated entity benefits only to legitimate small businesses.

The Commission said it generally does not have the same concerns regarding relationships between designated entity applicants and those who do not have interests in spectrum capacity or the provision of service, such as financial institutions or venture capital firms, provided that such entities do not have a controlling interest relationship with the applicant. The Commission presumes that for those entities, the overarching goal and primary incentive for partnering with a designated entity is to seek a return on investment rather than to provide service themselves using the designated entity's spectrum licenses. The Commission seeks comment on its presumption. Likewise, the Commission presumes that where an entity is not already providing communications services, there is no opportunity for it to bundle existing communications services with a strategic wireless partner, and there is less potential for those entities to exert undue influence over a designated entity licensee's decision making regarding its service provision or the use of its licensed spectrum. The Commission also seeks comment on this presumption. Assuming that its presumptions are valid, the Commission anticipates that such relationships will not require the additional safeguards the Commission may apply to relationships with other entities that have differing incentives and motivations. For instance, if the Commission includes financial relationships in its definition of either impermissible material relationships or attributable material relationship it might specifically exclude relationships with financial institutions from such a definition. The Commission seeks comment on whether it should specifically do so.

With regard to financial relationships, Commission asks whether it should conclude that the greater the financial stake an entity has in a designated entity the more incentive it has to significantly influence the designated entity licensee's decisions regarding its provision of service. The Commission also seeks comment on whether it should expand its definitions of impermissible material relationship or attributable material relationship to include any financial relationship(s) (including any combination of equity, debt, loan or credit agreements, as well as future interests for such financial arrangements) between a designated entity applicant or licensee and another entity that represents more than a certain percentage of the designated entity's total financing. If so, it asks what is the appropriate percentage? The Commission seeks comment on how the percentage of an entity's financial interest in a designated entity applicant or licensee should be considered in its definitions of impermissible material relationship or attributable material relationship. In this regard the Commission is concerned that it does not want to create a situation in which additional safeguards regarding financial interests render a designated entity without any avenues for access to much needed capital.

Additionally, the Commission asks whether there are circumstances in which it should define material relationships to include, without limitation, management agreements, trademark license agreements, joint marketing agreements, future interest agreements (such as puts, calls, options, and warrants), and long-term de facto and spectrum manager leasing arrangements? If so, should such relationships be considered to be impermissible material relationships or attributable material relation-

ships? Likewise, the Commission seeks comment regarding the circumstances under which the existence of any agreement between a designated entity applicant or licensee and another entity will have the strong potential to convey influence over the operations of the designated entity and the deployment of its spectrum in a manner contrary to that intended by Congress.

The Commission also seeks comment upon whether it should adopt even tighter safeguards to prevent the development of relationships that might deter designated entities from evolving into independent facilities-based competitors. For example, are circumstances in which the Commission should define ``material relationship'' to include any relationship, financial and/or operational, between a designated entity applicant or licensee and another entity? For instance, does the likelihood that certain relationships will influence a designated entity's provision of service increase when agreements are entered into with an entity that has existing self-interests in the same spectrum?

The Commission seeks comment on whether, if it includes all agreements, both financial and operational, as either impermissible material relationships or attributable material relationships between designated entities and entities that have existing spectrum interests in the same geographic areas, it can reduce the reliance of designated entities on those that might provide funding or operational support in a manner designed to complement their own services rather than for facilitating the emergence of new technologies and new facilities-based competitors.

The Commission also seeks comment on any and all of the agreements it should consider including in its definitions of impermissible material relationships or attributable material relationships and whether it should take into consideration whether such agreements are made with certain types of entities with certain geographic interests. Moreover, the Commission seeks comment on whether it should include personal net worth in determining designated entity eligibility and if so, whether it should adopt the proposal to prohibit individuals with a net worth of $3 million or more (excluding the value of a primary residence) from having a controlling interest in a designated entity or whether it should place other net-worth-based restrictions on designated entity eligibility.

BloostonLaw contacts: Hal Mordkofsky, John Prendergast, Gerry Duffy, and Cary Mitchell.

D.C. Circuit Finally Upholds FCC's "Unbundling" Rules

The U.S. Court of Appeals for the District of Columbia Circuit last week denied several petitions for review of the FCC's *Remand Order,* and finally upheld the Commission's "unbundling" rules. In *Covad v. FCC,* the D.C. Circuit said upfront in its opinion that the Commission has thrice attempted unsuccessfully to implement the "unbundling" provisions of the Telecommunications Act of 1996. "This case involves a series of petitions for review of the FCC's fourth attempt. Because we conclude the Commission's fourth try is a charm, we deny all of the petitions for review."

Under the Act, the FCC may require incumbent local exchange carriers (ILECs) to offer pieces of their networks as unbundled building blocks, which competitive local exchange carriers (CLECs) can lease, repackage, and use to compete against the ILECs. Congress left to the FCC the choice of elements to be "unbundled," specifying that it must consider, at a minimum, whether the failure to provide access to such network elements would impair the ability of the carrier seeking access to provide the services that it seeks to offer.

Relying upon its discretion to interpret the meaning of "impairment," the FCC in this case amended its unbundling determinations for three types of unbundled network elements (UNEs): "switches" (devices that direct calls to their destinations in the same way switchboard operators once did), "transport trunks" (wires that carry calls between switches), and "local loops" (wires that run from switches over the "last mile" to consumers' telephones).

The Commission concluded that UNE prices must be based on each element's Total Element Long-Run Incremental Cost (TELRIC). TELRIC rates are akin to wholesale prices because CLECs are supposed to be economically able to rent UNEs and then use them to sell telecom services to their retail customers. The ILECs unsurprisingly dislike seeing their own networks wielded as competitive weapons by CLECs--especially when the CLECs enjoy access to UNEs at TELRIC rates. The ILECs therefore champion the use of substitute products that allow CLECs to compete without demanding access to the ILECs' individual network elements.

For the purposes of this case, the court said, the only relevant substitute product is the tariffed special access service (TSAS). Basically, Covad can purchase TSASs from Verizon (at prices above the TELRIC rates associated with UNEs), and the TSASs allow Covad to complete point-to-point calls over dedicated lines. Thus, instead of purchasing or renting a loop, switch, space in a central office, and a transport trunk to complete a call, a CLEC might simply pay the higher TSAS rate for a dedicated line (which does not require separate switching or transport). Given the lower cost of UNEs, the CLECs favor widespread unbundling, while ILECs favor fewer UNEs and the greater availability of higher-priced TSASs. This tug-of-war—between CLECs advocating

more unbundling and ILECs advocating less—has been the nub of an ongoing, decade-long dispute between incumbents and their prospective competitors.

FCC's previous attempts: In its first attempt to interpret the Act's "impairment" standard, the Commission concluded that a CLEC was entitled to a given UNE "if the quality of the service the entrant can offer, absent access to the requested element, declines and/or the cost of providing the service rises." The Supreme Court found this interpretation of "impair" unreasonable in two respects. First, the Commission had erroneously refused to consider whether a CLEC could self provision or acquire the requested element from a third party. Second, the Commission had considered any increase in cost or decrease in quality, no matter how small, sufficient to establish impairment--a result the Court concluded could not be squared with the "ordinary and fair meaning" of the word "impair." The Court admonished the FCC that in assessing which cost differentials would "impair" a new entrant's
competition within the meaning of the statute, it must "apply some limiting standard, rationally related to the goals of the Act" (*AT&T v. Iowa Utilities Board*).

On remand, the Commission ruled that a would-be entrant is "impaired" if, "taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer." The D.C. Circuit held the Commission's "impairment" standard was unlawful because it did not differentiate between those cost disparities that a new entrant in any market would be likely to face and those that arise from market characteristics "linked (in some degree) to natural monopoly . . . that would make genuinely competitive provision of an element's function wasteful." (*U.S. Telecom Association v. FCC* or *USTA I*). *USTA I* concluded that the Commission's broad concept of impairment failed to "balance" the costs and benefits of unbundling.

On remand from *USTA I*, the Commission determined that a CLEC would be impaired when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic. The court concluded that the Commission's "touchstone" of impairment--"uneconomic" entry--was excessively vague. Moreover, *USTA II* held the FCC could not lawfully implement a more "nuanced" (or "granular") impairment standard by adopting a blanket finding of impairment and then delegating power to state regulatory commissions to make non-impairment exceptions to the FCC's nationwide rule. Instead, the FCC must establish unbundling criteria that take into account "relevant market characteristics," which capture "significant variation," sensibly define the relevant markets, connect those markets to the FCC's impairment findings, and consider whether the "element in question" is "significantly deployed on a competitive basis."

FCC's Remand Order: On remand from *USTA II*, the Commission issued an interim order and Notice of Proposed Rulemaking (NPRM). The FCC sought "comment on how to respond to the D.C. Circuit's *USTA II* decision in establishing sustainable new unbundling rules under sections 251(c) and 251(d)(2) of the Act." After receiving and considering comments, the FCC issued a four-part order, which is the subject of this case.

First, the Commission altered its unbundling framework. The FCC clarified that it would find "impairment" where it would be "uneconomic" for a "reasonably efficient" CLEC to compete without UNEs. Because the Commission concluded that UNEs are vital to the continued development of competition in the local exchange market, it retained its unbundling requirements, regardless of whether CLECs are currently using TSASs to provide local service.

Second, the Commission amended its impairment findings for dedicated interoffice transport. "Dedicated transport facilities" refer to facilities that are dedicated to a particular carrier used for transmission between or among ILEC wire centers. If the ILEC seeks to challenge the propriety of unbundling the trunk, it must first provide the UNE and then raise a challenge through the dispute resolution procedures prescribed by the applicable interconnection agreements (i.e., contracts between ILECs and CLECs).

Third, the Commission amended its impairment findings for DS1 and DS3 loops. The Commission noted it is often not economical for a CLEC to deploy its own DS1 loops, given their capacity limitations. However, the FCC explained that to offer DS1 or DS3 service, CLECs "install high-capacity fiber-optic cables [including DS3 loops and "optical carrier level n," or "OCn," facilities] and then use electronics to light the fiber at specific capacity levels, often 'channelizing' these higher-capacity offerings into multiple lower--capacity streams." Thus, the FCC concluded, CLECs are not impaired without DS1/DS3 UNEs in markets where CLECs have deployed--or could economically deploy--higher-capacity facilities that can be "channelized" to provide service at lower levels. If CLECs self-certify that a DS1/DS3 loop meets the impairment thresholds, ILECs must offer immediate unbundled access and then litigate the issue before the state commissions.

Fourth and finally, the Commission concluded that ILECs no longer need to provide CLECs with unbundled access to mass market local circuit switching (MMLS). The FCC

adopted transitional rules to wean CLECs off the local circuit switching UNEs that are currently in use. Specifically, the Commission afforded CLECs 12 months to eliminate their reliance on unbundled MMLS, and it increased the rates at which ILECs are compensated for unbundled local switching during the transitional period.

Petitions for Review: The D.C. Circuit noted that numerous parties had filed petitions for review, and that the court's review was governed by the classic two-step framework from *Chevron USA v. Natural Resources Defense Council* and *National Cable Telecommunications Association v. Brand X Internet Services,* which ultimately require the court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.

The ILECs challenged the Commission's adherence to its policy of allowing CLECs to convert TSASs to UNEs in markets where other CLECs have access to UNEs. But the court said that given that an agency's policy decisions are entitled to deference so long as they are reasonably explained, and given the FCC's reasoned explanation of the administrability problems that a bar on conversions would cause, it denied this petition for review as to this issue. The Commission's analysis is reasonable. In contrast to the wireless and long-distance markets, "carriers generally make only limited use of special access offerings to provide service in the local exchange services market." Moreover, in accordance with the court's instructions from *USTA II,* the FCC tempered its consideration of TSAS-based competition by "tak[ing] into account such factors as administrability, risk of ILEC abuse, and the like." Thus, the Commission "consider[ed]" the import of TSASs in its impairment inquiry, and it provided a reasoned explanation for its decision not to eliminate unbundling solely on the basis of limited TSAS-based competition. *Chevron's* second step requires nothing more, the court said.

The ILECs' challenge to the Commission's unbundling of high-capacity loops is equally unavailing, the court said. Again, the FCC chose to assess loop impairment at the wire-center level because wire centers provide the best evidence of "not only actual competition within a given market, but also potential competition within that market." Again, the ILECs complain that the FCC "removed high-capacity loop unbundling obligations only in a tiny subset of wire centers where there is evidence of extreme competition and again, we disagree. After surveying the economic realities surrounding loop deployment, the Commission decided to apply its loop thresholds "in conjunction with one another" (that is, there is no impairment if a wire center meets both the business line and the collocation metrics). The FCC concluded that a conjunctive application of the loop-impairment thresholds would "best minimize and balance any under-inclusiveness and over-inclusiveness" in its unbundling inquiry. Congress gave the Commission--not the petitioners or this Court--discretion in regulatory line-drawing. The mere fact that the Commission's exercise of its discretion resulted in a line that the ILECs would have drawn differently is not sufficient to make it unlawful.

While the ILECs want less unbundling of high-capacity loops and transport trunks, the CLECs want more. To that end, the CLECs raise three arguments. First, the CLECs argue that they are universally impaired without unbundled access to DS1 loops, DS3 loops, and DS1 transport. Second, the CLECs argue that they are universally impaired without unbundled access to mass market local switching. Third, the CLECs argue that the Commission's transitional rules for implementing the Order are arbitrary and capricious. The court rejected all three claims. Although the court addressed each of the arguments in detail, the bottom line is that the court believed the FCC reasonably determined that CLECs are not impaired without unbundled access to MMLS, and that competition is possible without unbundled switches.

Finally, the D.C. Circuit rejected the New Jersey Division of Ratepayer Advocate's (NJDRA's) challenge to the Commission's ruling on MMLS. The Ratepayer Advocate argued that the Commission's "analytical construct for assessing mass market impairment"--namely, the "reasonably efficient competitor" standard--was not a "logical outgrowth" of the NPRM. Without explaining how, the court said, NJDRA simply asserts that the Order "is a substantial and significant departure from the NPRM." NJDRA's argument is meritless. An agency's final rule need only be a "logical outgrowth" of its notice. "Given that the NPRM put interested parties on notice that the FCC wanted to answer our questions, and given that the Order answered our questions, the latter was easily a logical outgrowth of the former," the court said. "Therefore, we deny NJDRA's petition for review."

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LAW & REGULATION

FCC SEEKS PROPOSALS FROM ENTITIES WHO WISH TO ACT AS 2.1 GHz CLEARINGHOUSE: The FCC's Wireless Telecommunications Bureau (WTB) is soliciting proposals from entities who wish to act as a neutral, not-for-profit clearinghouse responsible for facilitating cost sharing among entrants benefiting from the relocation of incumbent licensees in the 2.1 GHz bands. The WTB will accept proposals until **July 17, 2006**, and will make the proposals available for public inspection. Comments on the specific proposals or on other issues related to the Bureau's selection of a clearinghouse must be filed by **July 31, 2006**, and replies to comments on specific proposals must be filed by August 14, 2006. In

the *AWS Relocation and Cost Sharing Report and Order*, the Commission delegated authority to the Bureau to select one or more entities for the creation and management of a neutral, not-for-profit clearinghouse that would facilitate cost sharing among Advanced Wireless Services (AWS) and Mobile Satellite Service (MSS) entrants benefiting from the relocation of Fixed Microwave Service (FS) incumbents in the 2110-2150 MHz and 2160-2200 MHz bands. MSS operators are required to participate in the clearinghouse for Ancillary Terrestrial Component (ATC) base stations, and may elect to submit claims for reimbursement to the AWS clearinghouse for FS links relocated due to interference from the MSS space-to-Earth operations. The Commission also delegated authority to the Bureau to select one or more entities for the creation and management of a neutral, not-for-profit clearinghouse to facilitate cost sharing among AWS entrants benefiting from the relocation of **Broadband Radio Service (BRS)** incumbents in the 2150-2160/62 MHz band. The Commission stated that selection would be based on criteria established by the Bureau, and that the Bureau would publicly announce the criteria and solicit proposals from qualified parties. The Commission also instructed the Bureau to solicit public comment on proposals that are submitted and, after selecting the clearinghouse administrator(s), to announce the effective date of the clearinghouse filing requirements. BloostonLaw contacts: Hal Mordkofsky and John Prendergast.

FCC RELAXES 10-MINUTE IN-CALL RULE FOR VRS: The FCC has adopted an *Order* addressing two issues concerning the provision of Video Relay Service (VRS), raised in the Further Notice of Proposed Rulemaking in the *2004 TRS Report and Order & FNPRM*. The FCC clarified that if the calling party or the VRS communications assistant (CA) find that they are not communicating effectively given the nature of the call, the 10-minute in-call replacement rule does not apply and the VRS provider may have another CA handle the call. It also clarified that the VRS CA may ask the VRS user questions during call set-up when necessary to assist the CA in properly handling the call. The purpose of the rule is to prevent disruptions to a call and make the call more functionally equivalent to a voice telephone call. In this regard, the rule is principally intended for the benefit of the TRS user. At the same time, there may be VRS calls during which the party using sign language, the CA, or both, find that they are unable to communicate effectively because of regional dialect differences, lack of knowledge about a particular subject matter (*e.g.*, a technical or complex subject matter), or other reason. In these circumstances, when effective communication is not occurring, the FCC concluded that the 10-minute in-call replacement rule is not violated if the VRS provider has another CA take over the call. BloostonLaw contacts: Ben Dickens and Gerry Duffy.

FCC ANNOUNCES INTERIM DE REPORTING FORMS: In order to permit designated entity (DE) licensees to seek advance FCC approval for reportable eligibility events and to file annual reports, on an interim basis, the Commission will submit a temporary FCC Form 609-T (Wireless Telecommunications Bureau Application to Report Eligibility Event) and a temporary FCC Form 611-T (Wireless Telecommunications Bureau Annual Report Related to Eligibility for Designated Entity Benefits) to the Office of Management and Budget (OMB) for approval. The Commission will also seek OMB approval to modify the FCC Form 602 instructions to implement the section 1.919(b)(5) requirement to file or update FCC Form 602 when an applicant or licensee submits FCC Form 609 (or, in the interim, FCC Form 609-T), reporting an eligibility event as defined in section 1.2114. Once OMB approves the interim information collections, the Bureau will release a public notice announcing the availability of the interim forms, as well as the steps necessary to submit applications and reports during the interim period. **Accordingly, until the Commission announces the effective date of the interim filing process for reportable eligibility event applications and annual reports, designated entity licensees will not be required to file to obtain advance Commission approval of reportable eligibility events or file annual reports.** BloostonLaw contacts: Hal Mordkofsky, John Prendergast, and Cary Mitchell.

SENATOR INOUYE REJECTS STEVENS' NET NEUTRALITY COMPROMISE: Senator Daniel K. Inouye (D-Hawaii) has rejected a compromise provision that Commerce Committee Chairman Ted Stevens (R-Alaska) added to his revised draft of the Communications, Consumer's Choice and Broadband Deployment Act of 2006 (S 2686). Stevens added a new section aimed at preserving consumers' ability to surf anywhere on the public Internet and use any Web-based application. However, it does not include a ban on pricing content companies have demanded. Earlier versions of the bill only called for the FCC to report on Internet access. Stevens' compromise would also create a complaint process through the FCC if consumers believe their access rights were violated and the agency would be authorized to adjudicate complaints with penalties. However, the FCC would be barred from issuing any regulations under the new law that would add to the obligations on Internet service providers. The compromise is somewhat similar to legislation that passed the House. However, there are other differences between the House and Senate that would have to be resolved. But Inouye was not satisfied with the compromise. "In the absence of meaningful consumer protections, network operators will have the unfettered capacity to discriminate against unaffiliated online content, degrade their quality of service, or impose steep charges for prioritized traffic," he said. He also had problems with provisions that he said would prevent states from protecting consumers from bad billing and market-

ing practices by wireless telephone carriers, and Internet telephone services would also not have to comply with certain state laws. "For a bill of this importance and impact, consumers deserve far better," he said. The committee is scheduled to consider amendments and vote on the measure this Thursday. BloostonLaw contacts: Ben Dickens and Gerry Duffy.

INDUSTRY

NECA RELEASES OUTLINE OF THIRD RURAL BROADBAND STUDY: The National Exchange Carrier Association (NECA) has released an outline of its third and latest rural broadband study, *The Packet Train Needs To Stop At Every Door.* The first two studies focused on the "last mile" and the "middle mile," respectively. The "Packet Train" study provides the latest data on the broadband revolution in rural America, network upgrade and triple-play multimedia package cost estimates and availability issues, and the implication of the packet revolution on universal service and intercarrier compensation reform. The study finds that maintaining and evolving rural network infrastructure remains critical to meeting the future needs of rural consumers and their communities, including the provision of new Internet Protocol (IP)-based services like Voice over Internet Protocol (VoIP). However, this cannot be achieved based solely on competitive model assumptions applied to urban areas; rural America still requires a carrier of last resort due to the lower density, higher cost characteristics of rural service areas. The study also finds that as excess network capacities diminish and demand for voice, video, and data multimedia packages increase, all carriers including companies serving rural consumers will require significant additional investment in their broadband networks. For rural carriers, this requires stable cost recovery mechanisms including adequate intercarrier compensation and sustainable universal service funding. The "Packet Train" study assumes that demand for multimedia service packages will define the capacity requirements for broadband networks. Based on this, the report estimates that a complete network upgrade for 5.9 million lines to deliver these services to rural consumers will require an investment of $11.9 billion based on current technology prices. The study also looks at the incremental revenues and costs for delivering a basic multimedia service to rural customers and concludes that costs exceed basic package revenues absent significant additional revenues from advertising and premium services. The study further observes that rural carriers face issues regarding access to Internet backbone networks and video content on reasonable terms and prices. Contact NECA (www.neca.org) for more information.

ITAA REPORT FINDS SECURITY PROBLEMS WITH APPLYING CALEA TO VOIP: A new Information Technology Association of America (ITAA) report claims applying federal wiretap laws to voice over IP (VoIP) services will either limit the current flexibility of those services or introduce serious security risks to domestic IP networks. The report was co-authored by a number of major technologists including Vin Cerf of Google, Whitfield Diffie of Sun Microsystems and Clinton Brooks, now retired from the National Security Administration. It comes on the heels of the recent U.S. Court of Appeals for the District of Columbia Circuit ruling upholding the FCC's decision that VoIP providers must comply with the Communications Assistance for Law Enforcement Act (CALEA) rules that require service providers to enable law enforcement to do routine wire-tapping (BloostonLaw Telecom Update, June 14). Such requirements overlook the fact that VoIP calls are very different from traditional public switched telephone network (PSTN) calls, the report said. While some VoIP calls can be easily traced--those made from fixed locations using fixed IP addresses tied directly to an Internet Service Provider's (ISP's) access router--most calls involve dynamic assignment of IP addresses and enable the participating parties to be mobile, using different communications devices and even rapid changes of identity. By not acknowledging the differences between the PSTN and the Internet, U.S. law enforcement officials may actually force creation of a complex security infrastructure that introduces new potential risks including man-in-the-middle attacks and capture of identity and password information. The PSTN uses a direct connection between individual phones and local switches and direct dedicated connections between two parties on a call. VoIP calls are data streams broken down into packets that travel multiple paths through the Internet, to be reassembled at the destination site, making wire-tapping much more difficult. VoIP users access the network from any computer or digitally connected device, so their calls enter the network from unpredictable locations. As such, almost all VoIP systems have an associated rendezvous service, whose purpose is to take a familiar identifier, a telephone number, a screen name, or an e-mail address, and transform it into the specific IP address of the computer where the designated user can currently be reached, the report explains. In addition, the report points out, VoIP providers are separate entities from the ISPs or broadband service providers that operate the networks over which VoIP rides. So even relatively direct requests to wiretap at IP access routers is complicated by the complexity of service provider relationships and the fact that VoIP providers can be located at arbitrary points on the Internet, including foreign sites. As a result of all these complications, building a comprehensive, unavoidable, VoIP intercept capability into the Internet would appear to require the cooperation of a very large portion of the routing infrastructure, the report states. That creates potential unintended consequences. "There is a danger that intercept design features adopted for the benefit of legitimate law enforcement agencies could be used by others, rendering the entire Internet's application space more vul-

nerable than it already is," the report says. "This is very dangerous (and has more than privacy implications)." That danger is the primary reason the Internet Engineering Task Force declined to develop wiretapping as part of its standards process, the report said. Establishing a physical security presence in the Internet world is also complicated, since there are more than 1300 ISPs in the U.S. alone, many of whom are too small to provide the kind of security presence that big telephone companies provide today for their CO switches. Implementing CALEA would also likely drive up the cost of VoIP and other Internet applications and stifle innovation in the process, the report said. "The fundamental difficulty of applying CALEA to VoIP lies in law-enforcement's desire to achieve 100% compliance with an authorized wiretap order," it said. "If law enforcement were to adopt the practice of the intelligence agencies and settle for the best intelligence at a reasonable cost, it might do quite well." BloostonLaw contacts: Ben Dickens and Gerry Duffy.

FCC LAUNCHES MEDIA OWNERSHIP PROCEEDING: The FCC, at today's open meeting, adopted a *Further Notice of Proposed Rulemaking* that seeks comment on how to address the issues raised by the 3rd U.S. Circuit Court of Appeals in *Prometheus v. FCC,* which two years ago stayed and remanded several media ownership rules that the Commission had adopted in its *2002 Biennial Review Order*. The *Further Notice* also opens a comprehensive quadrennial review of all of the media ownership rules, as required by statute. BloostonLaw contacts: Ben Dickens and Gerry Duffy.

DEADLINES

JULY 31: FCC FORM 507, ICLS QUARTERLY LINE COUNT UPDATE. *All wireline and wireless eligible telecommunications carriers (ETCs), with competitors (CETCs) operating in their study areas, must file quarterly line count updates with the Universal Service Administrative Company (USAC) to receive Interstate Common Line Support (ICLS). This data is used to calculate an ETC's per-line universal service support. CETCs are also required to file quarterly line count updates. However, an ETC without competition is not required to file Form 507, but may do so on a voluntary basis. BloostonLaw contacts: Ben Dickens and Gerry Duffy.*

AUGUST 1: FCC FORM 499-Q, USF TELECOMMUNICATIONS REPORTING WORKSHEET. *All telecommunications common carriers that expect to contribute more than $10,000 to federal Universal Service Fund (USF) support mechanisms must file this quarterly form. The form contains revenue information from the prior quarter plus projections for the next quarter. Form 499-Q relates only to USF contributions. It does not relate to the cost recovery mechanisms for the Telecommunications Relay Service (TRS) Fund, the North American Numbering Plan Administration (NANPA), and the shared costs of local number portability (LNP), which are covered in the annual form (Form 499-A) that was due April 1. BloostonLaw contacts: Ben Dickens and Gerry Duffy.*

AUGUST 1: FCC FORM 502, NUMBER UTILIZATION REPORT. *Any wireless or wireline carrier that has been assigned an NXX code (10,000 numbers) or one or more 1,000 number blocks; and any wireless or wireline carrier that has received from the North American Numbering Plan Administrator (NANPA) or from another carrier one or more 1,000 number blocks must file Form 502. Such carriers should apply for an Operating Company Number (OCN) from NANPA if they do not already have one. Make sure you send your data to* ***Gerry Duffy*** *at BloostonLaw.*

SEPTEMBER 1: COPYRIGHT STATEMENT OF ACCOUNTS. *The Copyright Statement of Accounts form plus royalty payment for the first half of calendar year 2003 is due to be filed September 1 at the Library of Congress' Copyright Office by cable TV service providers. BloostonLaw contact: Gerry Duffy.*

SEPTEMBER 1: FCC FORM 477, LOCAL COMPETITION & BROADBAND REPORTING FORM: ***All*** *facilities-based providers of broadband connections to end-user locations, including* ***all*** *local exchange carriers and* ***all*** *mobile service carriers that provide broadband must file this form twice a year—on March 1 and September 1. Specifically, a small entity is required to file Form 477 semi-annually if it is (1) a* ***facilities-based broadband provider*** *with at least one broadband connection in service to an end-user location, (2) an incumbent or competitive* ***local exchange carrier*** *(ILEC or CLEC) with at least one voice telephone service line, or (3) a* ***facilities-based provider of mobile telephony service*** *to at least one subscriber. Examples of small entities that may be facilities-based broadband providers include* ***cable TV systems, CLECs****,* ***ILECs,*** *and* ***satellite carriers****. Additional examples include* ***municipalities*** *or other governmental entities that deploy broadband connections to homes and/or businesses; investor-owned or* ***public utilities that provide, on commercial basis, "Access BPL"*** *(i.e., the use of electric power lines to provide Internet connectivity to a home or business premises from an outside source); and* ***wireless Internet service providers or "WISPs" that equip or provision broadband connections to end-user locations by using their own equipment and spectrum on an unlicensed basis.*** *Broadband connections are lines (or wireless channels) that terminate at an end-user location and enable the end user to receive information from and/or send information to the Internet at information transfer rates* ***exceeding 200 kilobits per second (kbps) in at least one direction. BloostonLaw is available to assist clients with preparing and completing the new form,***

as well as obtaining a proof of filing receipt. *BloostonLaw contacts: Hal Mordkofsky, Ben Dickens, Gerry Duffy, and John Prendergast.*

FCC Meetings and Deadlines

***June 21* – FCC open meeting.**

June 22 – Deadline for comments on Michigan Pay Telephone Association request for declaratory ruling that PSC failed to apply new services test to AT&T's payphone usage rates (CC Docket No. 96-128).

June 23 – Deadline for petitions to reject or suspend annual access tariff revisions filed on 15 days' notice (WCB/Pricing File No. 06-15).

June 23 – Deadline for reply comments on WCS Coalition request for waiver of WCS construction rule (WT Docket No. 06-102).

June 25 – Date when CLEC Coalition forbearance petition regarding certain unbundling rules will be deemed granted, if FCC does not act (WC Docket No. 05-170).

June 26 – Deadline for non-subset 3 carriers to file annual access tariff revisions on seven days' notice, if proposing to decrease all rates (WCB/Pricing File No. 06-15).

June 26 – Deadline for reply comments on Core Communications petition to forbear from certain rate regulation rules (WC Docket No. 06-100).

June 28 – Deadline for petitions to reject or suspend annual access tariff revisions on seven days' notice (WCB/Pricing File No. 06-15).

June 29 – Deadline for replies to petitions to reject or suspend annual access tariff revisions filed on 15 days' notice (WCB/Pricing File No. 06-15).

June 29 – Deadline for replies to petitions to reject or suspend annual access tariff revisions on seven days' notice (WCB/Pricing File No. 06-15).

June 30 – Deadline for reply comments on NPRM to reexamine M-LMS spectrum (WT Docket No. 06-49).

July 1 – Effective date for annual access tariffs filed on 15 days' notice.

July 3 – Effective date for annual access tariffs filed on seven days' notice.

July 3 – Deadline for comments on FNPRM regarding Internet-based TRS (CG Docket No. 03-123).

July 3 – Deadline for comments on Iowa Telecom's petitions for forbearance, waiver to be eligible for non-rural high cost USF support (WC Docket No. 05-337).

July 6 – Deadline for reply comments on proposals to accommodate broadband operations on current wideband spectrum (12 MHz) of the current 700 MHz public safety spectrum allocation (WT Docket No. 96-86).

July 6 – Deadline for reply comments on Michigan Pay Telephone Association request for declaratory ruling that PSC failed to apply new services test to AT&T's payphone usage rates (CC Docket No. 96-128).

July 13 – Deadline for reply comments on Iowa Telecom's petitions for forbearance, waiver to be eligible for non-rural high cost USF support (WC Docket No. 05-337).

***July 17* – Upfront payments due for AWS-1 auction (Auction No. 66).**

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