

BMJ&D Telecom Update

Published by the Law Offices of Blooston, Mordkofsky, Jackson & Dickens

Vol. 3, No. 49

December 13, 2000

Commission Considers Access Charge Break for Rural CLECs

Benchmark for Urban CLEC Tariffs May Not Be Appropriate for Carriers Operating in 'Sparsely Populated Areas,' FCC Says

Competitive local exchange carriers (CLECs) operating in rural areas could be at liberty to set higher tariffs for local switched service to interexchange carriers (IXCs) under a proposal last week by the FCC. In its continuing struggle to set equitable rules for CLEC access charge regulation, the Commission is currently considering setting a benchmark level below which CLEC rates would be presumed to be "just and reasonable." However, in a public notice released last week, the Commission stated its concern that a one-size-fits-all benchmark might not be feasible. It proposes a "rural exemption" from the benchmark for certain CLECs.

For various reasons, CLEC access charges tend to be significantly higher than regulated charges that incumbent LECs pay IXCs. CLECs often have smaller subscriber bases over small geographic areas and are burdened by high expenses connected to building out their facilities. A number of conflicts between CLECs and IXCs in recent years have cropped up, sometimes with the threat that IXCs will discontinue service to CLEC customers. In a recent example, a group of Minnesota CLECs petitioned the FCC for emergency relief to halt AT&T from withholding service to their customers (BMJ&D Telecom Update, May 17).

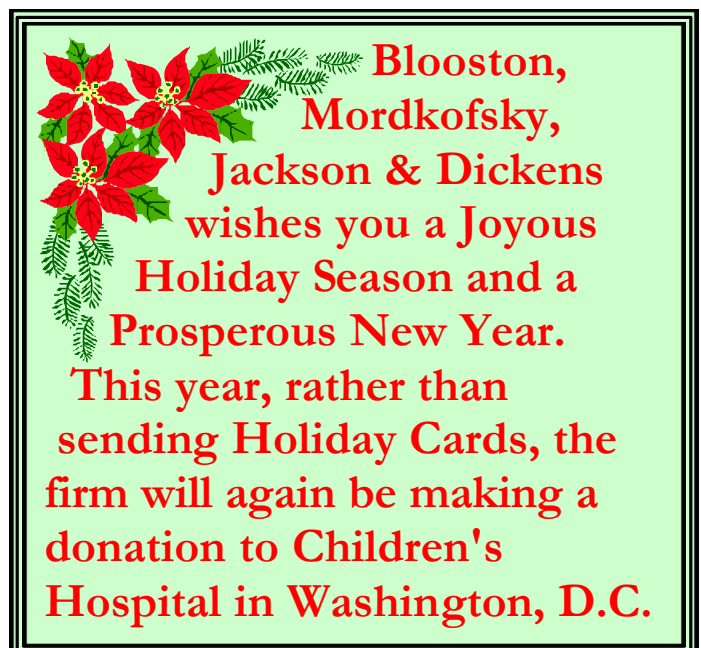
The FCC since 1997, when it adopted permissive detariffing of CLEC access charges, has been examining the prospect of mandatory detariffing rules. At the same time, the Commission often has expressed a concern that high CLEC access charges "may impose unfair burdens on IXC customers that pay rates reflecting these CLEC costs." It adopted a rulemaking in September 1999 with the goal of determining the specific instances when IXCs could lawfully refuse to purchase CLECs' tariffed switched access services. Last week's public notice expands on the issues from that rulemaking.

CLECs in rural areas, the FCC reasons, may be at a greater risk of conflict with IXCs. ILECs in rural areas, which participate in the National Exchange Carriers As-

sociation (NECA) pools, already tariff rates higher than larger price cap LECs due to the higher cost of serving small populations spread over wide geographic areas. Rural CLECs face similar challenges along with the additional expenses for building out their facilities. An exemption from any national CLEC tariff benchmark would allow those CLECs to continue setting access charges at the level needed to recover costs, while heading off the possibility that IXCs might withhold service.

Implementation of such an exemption requires solving a number of administrative problems, such as determining the definition of a "rural telephone company" for purposes of rural access tariffs. The FCC suggests that it could simply include all CLECs operating outside of a metropolitan statistical area (MSA). It also is considering the development of a formula based on the population density of a CLEC's service area or the density of customers in a given rural CLEC's service area. In some cases, a CLEC could be serving both densely and sparsely populated areas. "Is it feasible for a CLEC to charge different access rates within a single service area depending on the population density surrounding particular end users?" the FCC asks.

The Commission also is considering limiting eligibility for the exemption to certain types of CLECs that serve certain types of customers. Some CLECs serve a few high-volume customers in a small geographic area within a



small town or city, which would tend to lower the carriers' expenses and increase profitability. The Commission could decide to limit the benchmark exemption to CLECs serving primarily residential customers over a wider area. The FCC also asks whether the exemption should be limited to CLECs that qualify for high-cost or rural universal service support.

The comment deadline on the rural exemption proposal, published yesterday (Dec. 12) in the Federal Register, is **Dec. 27** (CC Docket No. 96-262). Reply comments are due **Jan. 11, 2001**.

BMJ&D contacts: Ben Dickens and Gerry Duffy.

LAW & REGULATION

FCC Sets 60% Number Utilization Threshold

Threshold to Increase Gradually to 75% as More Area Codes Are Exhausted; Commission Begins Search for 1,000-Block Pool Administrator

The FCC has adopted a 60 percent "utilization threshold" for telecommunications carriers requesting new telephone numbers. In the future, carriers must demonstrate that they have used up at least 60 percent of the numbers assigned to them for given geographic areas before the North American Numbering Plan Administrator (NANPA) will assign them additional numbers. The threshold will rise gradually in 5 percent increments as additional area codes are exhausted until reaching a 75 percent cap, according to a Second Report (R&O) and Order and Further Notice of Proposed Rulemaking (FNPRM) (CC Docket Nos. 99-200/96-86) adopted by the Commission last week.

The utilization threshold and other new features adopted in the order are follow-up provisions to an R&O adopted earlier this year with the overall goal of conserving the rapidly dwindling supply of telephone numbers in the North American Numbering Plan (BMJ&D Telecom Update, March 22). Some studies estimate that at the current rate of utilization, all available area codes could soon be exhausted due to increased popularity of cellular/PCS phones, fax machines and other telecommunications devices. "In March, the Commission decided in principle to go forward with [1,000-block] pooling on a national basis in areas where you have the underlying architecture, which is local number portability," said one of the FCC's leading expert on numbering issues. The Second R&O "really completes the work that had been done before and gives further definition," he said.

Other provisions of last week's order include a plan to give state commissions authority to audit carrier compliance with the FCC's numbering rules and a decision to begin seeking a Pooling Administrator to implement the 1,000-block pooling plan. The FCC will take competing applications for the administrator, which should be named within a few months. The eventual Pooling Administrator is expected to draw up an implementation timetable and recommend it to the full FCC sometime next year. The administrator will have a five-year term.

Chairman William Kennard, during last week's regular monthly FCC meeting, strongly emphasized that the Commission is not requiring nationwide 10-digit dialing. The FCC received a number of calls after a Dec. 6 article in the Los Angeles Times mistakenly reported that the FCC was planning to adopt such a provision in the Second R&O. Carriers already have implemented 10-digit dialing in a number of heavily populated areas and in areas where area code overlays are in place. However, most regions of the United States do not require 10-digit dialing. "Since we're not persuaded that the benefits of 10-digit dialing outweigh the burdens on consumers, we're not taking that step and I just wanted to make sure everybody understands that," Kennard said.

The order also does not include any provision for auctioning phone numbers or taking other steps to create a numbering marketplace, to the disappointment of at least two commissioners, Harold Furchtgott-Roth and Gloria Tristani. Furchtgott-Roth said he believes that the current shortages of numbers are due to the fact that they are free and too easily attainable by carriers. By requiring payment for numbers, carriers would automatically take steps on their own to conserve numbers and federal regulations would be less necessary, he said. Furchtgott-Roth repeated an earlier proposal to apply revenues from numbering assignments to universal service support.

However, Furchtgott-Roth admitted that a numbering marketplace likely would be a temporary phenomenon as telephony moves from circuit-switched to packet-based systems. In 10 to 20 years, when people phone each other using Internet protocol addresses, they will consider the old fashioned practice of dialing numbers as "quaint," he predicted.

Questions on a possible numbering marketplace could be included in the FNPRM. At press time, the text and comment deadlines were not available. Other FNPRM topics could include proposed changes in area code overlay rules and an examination of how the current rate center structure policies may accelerate number usage.

BMJ&D contacts: Ben Dickens, Gerry Duffy and Michael Adams.

Phase-Out of Interim Hold-Harmless for Non-Rural Carriers Begins Jan. 1

FCC Accepts Joint Board Recommendation to Delay Phasing Out Support for Non-Rural Exchanges Transferred to Rural Carriers

The FCC has adopted the Federal-State Joint Board's recommendation to phase out "interim hold-harmless" universal service support for non-rural carriers. Beginning Jan. 1, 2001, the FCC is reducing the average monthly per-line support for non-rural carriers receiving hold-harmless payments by \$1, and will continue \$1 reductions every year until the payments are eliminated. The process is expected to last three years.

The FCC established the hold-harmless payments in 1999 after adopting a new forward-looking support mechanism for non-rural carriers. Because the forward-looking mechanism results in reduction or elimination of support in several states, the FCC adopted a plan to continue funding at the former levels in each state to ensure that consumers served by non-rural carriers did not receive sudden increases in their monthly bills.

An order adopted by the Commission last week also accepts the Joint Board's recommendation to delay phase out of interim hold-harmless support for non-rural exchanges that have been acquired by rural carriers (BMJ&D Telecom Update, July 5). The Joint Board's Rural Task Force (RTF) has recommended that the FCC retain Section 54.305 of the Commission rules, which, as the FCC describes it, requires the buyer of a telephone exchange "to step into the seller's shoes for universal service support." Because non-rural exchanges generally receive less high-cost support than rural exchanges, RTF also recommended a "safety valve" mechanism to provide additional funding to rural carriers operating non-rural exchanges, which eventually could replace revenue losses through elimination of interim hold-harmless support.

In a further notice of proposed rulemaking, the FCC is considering elimination of the Section 54.305 requirement for exchange transfers between non-rural carriers. The provision will no longer be necessary, the FCC says, after the phase-out of hold-harmless because all non-rural carriers' support would be based on the forward-looking mechanism only. "We believe this rule change is necessary regardless of the outcome of the current Joint Board examination," the FCC said. Requiring a non-rural buyer to step into a non-seller's shoes could disrupt calculations of transferred exchange costs "on an ongoing, quarterly basis" when using the FCC's forward-looking cost model, the Commission said. Comment dates on the further notice have not yet been published in the

Federal Register. Initial comments will be due 30 days after publication and reply comments will be due after 45 days.

BMJ&D contacts: Ben Dickens and Gerry Duffy.

Law & Regulation in Brief

AUCTION 35 OPENS: The FCC's auction of C/F-block personal communications service (PCS) licenses began on schedule yesterday morning (Dec. 12). The auction, which is expected ultimately to draw several billion dollars in bids, began with about \$404 million in total net bids in the first round. **By press time today, the auction had completed four rounds for a total of \$666.7 million in net bids.** The leader was Alaska Native Wireless, an AT&T Wireless partner, which made an aggressive move in the fourth round to become high bidder on 353 of the 422 available licenses for a total of \$434 million in net bids. Alaska Native held the high bid on 11 of the fifteen 10 MHz licenses available in the top six Basic Trading Areas (BTAs) ranked by population, including New York, Los Angeles, San Francisco, Washington, Philadelphia and Dallas. Competition in many of the lower population BTAs also increased during the fourth round. Twenty-three small markets had not yet received opening bids after the third round, but every BTA had at least one bid after the fourth. BMJ&D contacts: Hal Mordkofsky, John Prendergast, Gerry Duffy and Cary Mitchell.

ALI CHOICE: AT&T Wireless has informed the FCC that **it intends to deploy enhanced observed time difference of arrival (E-OTD) technology** to comply with the FCC's requirement to provide automatic location identification (ALI) in Phase II of its Enhanced "911" (E911) rules. AT&T was unable to name an ALI technology in its earlier E911 compliance report as required by the Commission (BMJ&D Telecom Update, Nov. 15). At the time, AT&T provided extensive details of ALI system field tests, but could not determine which system it planned to use. In the wake of last week's announcement that Japan's NTT DoCoMo is investing nearly \$10 billion in AT&T Wireless (BMJ&D Telecom Update, Dec. 6), **the carrier announced that it will install an overlay global system for mobile communications (GSM) airlink network to replace its current time division multiple access (TDMA) technology.** The GSM overlay will be an interim step toward AT&T/NTT technical compatibility in an eventual third generation wireless service. E-OTD is a hybrid network/handset-based ALI technology specifically designed for GSM networks. VoiceStream Communications, another GSM service provider, also has indicated it will deploy E-OTD. AT&T is left, however, with the problem of providing ALI service over its legacy TDMA facilities, which will remain in service in a number of markets in coming years. It says it is looking

at the possibility of adapting E-OTD to TDMA. "Based on preliminary analysis, E-OTD appears to be a promising solution in this circumstance," AT&T said in a filing to the FCC. BMJ&D contacts: Hal Mordkofsky, John Prendergast and Cary Mitchell.

MORE FINES: A \$1,107,500 notice of apparent liability (NOA) for sending unsolicited "junk fax" advertisements leads a long list of recent FCC actions in its ongoing crackdown on violations of its rules through its

year-old Enforcement Bureau. 21st Century Faxes Ltd., a company specializing in broadcast faxes, violated the junk fax rule a total of 152 times, including 77 instances where consumers specifically requested the company to cease sending the advertisements, according to the FCC. The Commission also **imposed a \$750,000 fine on Coleman Enterprises, a Minneapolis long distance company, for 14 slamming violations** based on complaints from consumers in five states. America's TeleNetwork Corp., an Atlanta long distance company, re-

FCC Meetings and Deadlines

Dec. 14 – Deadline for comments on Nextel Communications petition to clarify rules requiring incumbent up to 200 channel SMR licensees to participate in "good faith" relocation negotiations. Reply comments due Dec. 21 (PR Docket No. 93-144).

Dec. 18 – Deadline for comments on proposal to establish fixed high-speed wireless data service on 3650-3700 MHz and 4940-4990 MHz bands. Reply comments due Jan. 16, 2001 (ET Docket No. 98-237 and WT Docket No. 00-32).

Dec. 19 – Deadline for comments on NECA's proposed changes to TRS/VRS reimbursement rates. Reply comments due Dec. 26 (CC Docket No. 90-571).

Dec. 21 – Deadline for comments on Kansas independent telcos' petition to declare that fixed local services provided by Western Wireless in the state are not CMRS. Reply comments due Jan. 8, 2001 (WT Docket No. 00-239).

Dec. 21 – Deadline for comments on proposed Phase 2 reforms of FCC accounting reporting rules as part of the Commission's 2000 Biennial Review. Reply comments due Jan. 30, 2001 (CC Docket No. 00-199). Initial comments on proposed Phase 3 reforms are also due Jan. 30, and reply comments on Feb. 28.

Dec. 21 – Deadline for comments on FCC's list of LECs that qualify for waiver of CALEA capability requirements through March 31, 2001. Reply comments due Jan. 4, 2001 (CC Docket No. 97-213 and File No. NSD-L-00-234).

Dec. 27 – Deadline for comments on a proposed rural exemption on benchmarked interexchange tariffs for rural CLECs. Reply comments due Jan. 11, 2001 (CC Docket No. 96-262).

Jan. 5, 2001 – Deadline for comments on proposed automatic roaming rules and sunset of manual roaming rules for CMRS carriers. Reply comments due Feb. 5 (WT Docket No. 00-193).

Jan. 5, 2001 – Deadline for comments on requests by Nextel Communications and Hawaiian Wireless Inc. for waivers of the FCC's Phase II E911 implementation deadlines. Reply comments due Jan. 22 (CC Docket No. 94-102).

Jan. 5, 2001 – Deadline for comments on proposed new methodologies for estimating cost recovery amounts for TRS/VRS services. Reply comments due Jan. 19 (CC Docket No. 98-67).

Jan. 8, 2001 – Deadline for comments on proposed creation of "CSAT" satellite-based rural Internet access service. Reply comments due Feb. 9 (IB Docket No. 00-203).

Jan. 8, 2001 – Deadline for reply comments on petition to reopen consideration of lifting hearing aid compatibility exemption for broadband PCS handsets (RM 8658).

Jan. 8, 2001 – Deadline for oppositions and responses petitions to deny the proposed merger of Deutsche Telekom, VoiceStream Wireless and Powertel Inc. (IB Docket No. 00-187).

Jan. 10, 2001 – Deadline for reply comments on Notice of Inquiry into open access to cable modem facilities for ISPs not affiliated with the cable TV industry (GN Docket No. 00-185). In the same docket, the FCC seeks comments on petition for declaratory ruling that cable operators offering telephone service are required to contribute to universal service.

ceived a **\$154,000 fine for failing to make universal service contributions over a two-year period.** The FCC increased the total fines for two violations by 50 percent to reach the \$154,000 mark, due to what it called the "egregious and intentional nature of the violations." BMJ&D contacts: Ben Dickens and Gerry Duffy.

WIRELESS FINES: The list of FCC enforcement actions also includes **NOAs to three paging carriers and a specialized mobile radio (SMR) operator for operating their facilities without authorization.** The paging carriers are each apparently liable for \$5,000 fines, but will have the opportunity to argue that the fines should be rescinded or reduced. In all three cases, the FCC found that the carriers filed applications to renew their paging licenses several months after they had expired. According to the FCC, Ohio Bell Telephone operated a paging station in Dayton, Ohio, without a license for approximately three months in late 1999; Page-Comm operated facilities in Leavenworth, Texas, without a license during approximately nine months ending in January 2000, and Star Communications operated four stations without a license in Cape Girardeau, Mo., for eight months ending in December 1999. The SMR operator, Commercial Radio Services Corp., was fined \$6,000 for operating 11 stations with expired licenses in Virginia and North Carolina from October 1999 to March 2000. BMJ&D contacts: Hal Mordkofsky, John Prendergast and Richard Rubino.

OK/KS QUALMS: The Department of Justice (DoJ) has advised the FCC to closely review SBC Communications' wholesale pricing for local lines in Oklahoma and Kansas before approving SBC's Section 271 application to provide in-region long distance service in those states. In a letter to the FCC, DoJ claimed that pricing for unbundled network elements in Kansas and Oklahoma are significantly higher than in Texas, where the FCC granted SBC's Section 271 application earlier this year. DoJ also suggested that the wholesale pricing in those states is not cost-based, as required by FCC rules. BMJ&D contacts: Ben Dickens and Gerry Duffy.

TRS COMMENTS: The FCC is seeking comments on the **National Exchange Carriers Association's (NECA's) proposed increases in the reimbursement rates for telecommunications relay service (TRS) and the video relay service (VRS).** NECA proposes raising the TRS rate from \$1.282 to \$1.328 per interstate connections from Jan. 1 through June 30, 2001. It proposes raising the VRS rate from \$5.143 per minute to \$5.539 retroactive from October 2000 and effective until June 30, 2001. NECA does not recommend increasing the carrier contribution rates for TRS/VRS because the changes in the funding requirement are not anticipated to result in the need for additional funding. Comments are due **Dec. 19** (CC Docket No. 90-571), and reply comments on **Dec. 26.** In a separate proceeding, the FCC seeks comment on a report by the Interstate Tele-

communications Relay Service Fund Advisory Council to make changes in the current TRS/VRS cost recovery mechanisms. The FCC requested the report earlier this year after expanding the TRS service to include video relay and other expanded services (BMJ&D Telecom Update, March 8). The Council recommends retaining the current TRS cost recovery model and applying it to the new services, "but capturing minutes of use and costs separately and establishing separate reimbursement rates," according to a public notice Comments are due **Jan. 5, 2001** (CC Docket No. 98-67). Reply comments are due **Jan. 19.** BMJ&D contacts: Ben Dickens and Gerry Duffy.

TOLL-FREE TANGLE: At the request of several interested organizations, the FCC has delayed the implementation of the "855" toll-free code, which was to have been released on **Nov. 18.** Industry associations involved in the reservation and distribution of toll-free numbers claimed that the current automated method for reserving toll-free numbers through "mechanized generic interface" systems puts organizations using graphic user interface and dial-up methods at a disadvantage. According to the petitioners, there is no imminent danger of exhausting toll-free numbers. The current "800," "888," "877," and "866" codes are not expected to be exhausted until 2002. Comments on the proposal to defer "855" release are due **Dec. 13** (CC Docket No. 95-155/File No. NSD-L-00-249). Reply comments are due **Dec. 20.** BMJ&D contacts: Ben Dickens and Gerry Duffy.

USF CONTRIBUTION FACTOR: The FCC has proposed a factor of **0.066827 for universal service contributions in the first quarter of 2001.** The proposed factor would be a substantial increase from the fourth quarter 2000 figure of 0.056688. BMJ&D contacts: Ben Dickens and Gerry Duffy.

NEW COMMITTEE: Consumer affairs and access to telecommunications services by the disabled have been two pet projects of the FCC's under Chairman William Kennard. Last week, Kennard announced the formation of an advisory committee to study both areas. **The commission is now accepting applications for those willing to serve on the Consumer/Disability Telecommunications Advisory Committee (CDTAC).** The advisory committee is asked to study and recommend changes in consumer protection policy, such as truth in billing rules, cramming and slamming policy, and privacy issues. The committee also is to examine and recommend changes related to the telecommunications relay service, closed captioning, video description and other telecommunications access programs for the disabled. The third area of study will be the extent to which new and emerging technologies, such as broadband telecommunications services, low power FM, digital TV and other impact both consumer and disability policy. The Commission is encouraging consumer advocates,

equipment manufacturers, state regulators and telecommunications service providers to participate during a two-year term. Those interested in participating should submit an application to the FCC's Consumer Information Bureau by **Jan. 15, 2001**.

INDUSTRY TRENDS

FCC Seeks to Define Software Defined Radios

Key Questions of Interference and Equipment Certification Could Control Timing of SDR Rollout

It is likely to take several years, but the FCC has begun taking the steps necessary to introduce software defined radios (SDRs) for wireless consumers. Along with recent efforts to establish a secondary market for wireless spectrum leasing (BMJ&D Telecom Update, Nov. 15), SDRs are part of an overall FCC strategy to reform its spectrum management policies. However, the Commission is concerned that standards to control SDR usage must be developed in order to avoid increasing the potential for radio interference.

"We seek to ensure that our regulatory requirements keep pace with technology development," the FCC said in a Notice of Proposed Rulemaking (NPRM) adopted last week (ET Docket No. 00-47). SDRs are devices that replace many of the fixed parameters of current radio transmitters with software-based components. There currently is no internationally recognized definition of SDRs. Therefore, the NPRM proposes a possible definition: "A radio that includes a transmitter in which the operating parameters of the transmitter, including the frequency range, modulation type or maximum radiated or conducted output power can be altered by making a change in software without any hardware changes."

The commercial possibilities and spectrum saving potential of such devices is significant, especially when considered in combination with a future secondary wireless market. For example, a consumer with an SDR-based wireless phone could choose a different carrier on a call by call basis. After checking the current leasing rates for a particular carrier, the consumer could choose one and the radio would automatically change frequency to match the chosen carrier's signal. If a carrier's facilities are overloaded in a given area, the caller could switch to a different carrier within seconds.

But the FCC anticipates that these and other applications will not be available in the near future. There could be more regulatory barriers to SDR deployment than technological problems. SDRs could be programmed to operate on nearly any frequency and at various power out-

put levels, including those that do not comply with FCC regulations. The NPRM confines its proposals to equipment authorization issues aimed at avoiding those problems. The Commission proposes the establishment of a new "Class III" equipment designation for SDRs which would be restricted to certain "permissive changes" in its parameters. The FCC would perform its own technical review of SDR devices to ensure that they are not programmed to interfere with services where they are not approved to operate.

What happens if an unscrupulous person reprograms the SDR to operate outside of its authority? The FCC declines to propose specific software authentication standards designed to block such SDR modification. The NPRM notes that the European Telecommunications Standards Institute is developing such a standard and that the FCC likely will return to the issue after that development is complete. However, some entities that participated in an earlier Notice of Inquiry on SDRs, including Lucent Technologies, oppose authentication standards, claiming that they are unnecessary and that they will delay SDR product introductions.

The FCC had not released comment deadlines at our press time. Initial comments will be due 75 days after publication in the Federal Register and reply comments will be due 135 days after publication.

BMJ&D contacts: Hal Mordkofsky and John Prendergast.

LAW OFFICES BLOOSTON, MORDKOFSKY, JACKSON & DICKENS

2120 L St. NW, Suite 300
Washington, D.C. 20037
(202) 659-0830
(202) 828-5568 (fax)

Harold Mordkofsky, 828-5520, halmor@bmjd.com
Robert M. Jackson, 828-5515, rmj@bmjd.com
Benjamin H. Dickens, Jr., 828-5510, bhd@bmjd.com
John A. Prendergast, 828-5540, jap@bmjd.com
Gerard J. Duffy, 828-5528, gjd@bmjd.com
Richard D. Rubino, 828-5519, rdr@bmjd.com
Mary J. Sisak, 828-5554, mjs@bmjd.com
D. Cary Mitchell, 828-5538, cma@bmjd.com
Michael B. Adams, Jr., 828-5562, mba@bmjd.com
Douglas W. Everette, 828-5529, dwe@bmjd.com

Randy Sukow, editor, 828-5566, rms@bmjd.com

If you would like to receive an e-mail version of the newsletter, contact Althea Pierce at 828-5521 or abp@bmjd.com and indicate your format preference: MS Word 97, Adobe Acrobat (.pdf) or plain text.

This newsletter is not intended to provide legal advice. Those interested in more information should contact the firm.