

THE  **LOKT** NEWSLETTER

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MAY 2005

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# The Federal Pages

## News and Updates in Federal Telecommunications Law



FCC Headquarters in  
Washington, D. C.

### FCC ISSUES ORDER ON ILEC UNE-P REQUIREMENT

On March 25, the FCC issued an Order finding that a state commission may not require a LEC to provide DSL service to an end user customer over the same UNE loop facility that a com-

petitive LEC uses to provide voice services to that end user. Many states had previously required LECs like BellSouth, who spear-headed this effort before the FCC and many state commis-

sions, to share the UNE loop with competitive carriers such as independent ISPs. BellSouth is now seeking implementation of this ruling in Kentucky, Louisiana and Georgia.

### LEVEL 3 WITHDRAWS VOIP ACCESS CHARGE WAIVER PETITION AT FCC

In December 2003, Level 3 filed a petition at the FCC asking for formal exemption from access charges on traffic that originates as Internet protocol (ex. via an analog telephone adapter) and terminates on the PSTN. Lacking any consensus on the issue, the FCC failed to act on the petition until the last week before, by law, the petition would have been deemed granted. On the final day, March 21, 2005, Level 3 abruptly withdrew the petition. Apparently, with the departure of pro-petition Chairman Powell a few days earlier, the remaining FCC commissioners had gained enough votes to rule against the petition. Initially, there had been support for the petition despite massive lobbying efforts by the incumbent local exchange carriers, particularly the rural ILECs. Support waned after the FCC began its IP Enabled Services docket and issued another notice of proposed rulemaking on intercarrier compensation. The commissioners were then reluctant to grant Level 3 such a special deal in the midst of these proceedings. Sensing this turn, Level 3 decided to drop the petition and allow the FCC to finish its pending dockets and wait for new rules to be applied to the entire VoIP industry. It also bears mentioning that Level 3 is in the midst of filing amendments to its interconnection agreements with SBC and Verizon wherein the IP carrier agrees to pay a termination rate at a few points lower than reciprocal compensation, around \$.0005 per minute. With these negotiated rates in place and the FCC leaning against them, Level 3 chose to simply drop the petition altogether.

### PREPAID CALLING CARD: AT&T v. FCC

AT&T has filed a motion for stay pending their appeal of the FCC's Feb. 23rd Order finding that AT&T unlawfully avoided paying universal service and access fees on its prepaid

calling cards. The FCC rejected AT&T's argument that, because its calls traversed AT&T's IP network, they were exempt from access charges. AT&T is seeking the stay until May 15,

so that it may secure a letter of credit to cover these charges. A copy of the 2/23 Order can be found at: [http://braunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-256921A1.pdf](http://braunfoss.fcc.gov/edocs_public/attachmatch/DOC-256921A1.pdf).

### NEW FCC LEADERSHIP CONTINUES TO TAKE SHAPE

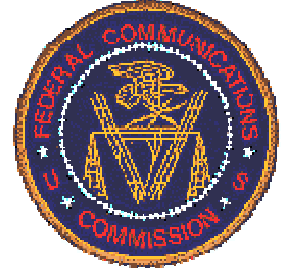
Earl Comstock has withdrawn his name from consideration for the post of FCC Commissioner. Comstock was Senate Commerce Committee Chairman Ted Stevens' (R-AK) pick to

take over the seat left vacant when Kevin Martin took over for former Chairman Michael Powell. It is believed that the withdrawal relates to whether Comstock had properly

handled financial arrangements with a household employee. Senator Stevens' next choice for the vacancy is Christine Kurth, his current chief of staff.

## INTERCARRIER COMPENSATION DEBATE GRINDS ON AT FCC

The FCC has struggled with the issue of intercarrier compensation since the dismantling of the old Bell system. A rulemaking has been pending at the FCC for the previous five years with no action. In the meantime, dramatic technological changes including email, VoIP, and the shift to greater cellphone use, has put enormous pressure on the access charge regime. The FCC recently resuracted that docket and is seeking input from parties based on six different industry proposals. Rumors suggest that the FCC is in favor of a system that would gradually move to a full bill and keep system over five years, with port charges replacing traditional per minute access charges. These port charges could vary depending on the type of carrier; i.e. a rural carrier's rates could be higher than an urban carrier's. Because rural incumbent carriers rely so heavily on access charges for revenue, they are adamantly opposed to bill and keep and warn of much higher phone bills for rural customers if such a system is adopted. Most competitive carriers are urging some form of bill and keep which would certainly simplify life for CLECs. Comments are due in this docket on May 23 and reply comments are due June 22.



## FCC OPENS 3.65 GHZ FOR UNLICENSED USE, WITH A TWIST

For all the problems the FCC causes for CLECs and ISPs, the commission continues to help wireless ISPs. The commission opened additional spectrum in the 3.65 GHz range and offered a creative solution to spectrum management. Rather than place this spectrum under the Rules of Part 15 (the rules that ambiguously require

WISPs not to cause interference, but also to accept all interference), the commission chose a modified licensing system under Part 90. WISPs will need to apply for a license to use this spectrum. The fee has not been set yet, but will presumably be high enough to assure that real WISPs are using the spectrum, rather than hobbyists or rogue operators.

Licenses will be non-exclusive and licensees will have a specific duty to work with each other to minimize interference. The FCC has also opened an additional slice of spectrum in the 5.4 GHz band adding 255 MHz of space formerly reserved for the Department of Defense.

## ADDITIONAL FCC ACTIVITY AFFECTING WISPs

Three other issues are of relevance to WISPs. First, the FCC ruled on its cognitive radio proceeding facilitating the use of "smart radios." This should encourage vendors to create radios that take spectrum hopping to the extreme. Second, the commission has developed rules to allow leasing of licensed spectrum. This will be particularly attractive to WISPs looking for solid wireless backhaul links to replace expensive T-1s. And finally, in what would be a dramatic boon to WISPs, the FCC is also considering allowing unlicensed wireless use of the spectrum in unused television bands, a.k.a. the "TV Whitespace Docket." The FCC appears inclined to allow such use. Strong opposition has erupted, however, from powerful interests such as the broadcasters' trade association, and public television supporters.

## WIRELESS BROADBAND TASK FORCE REPORT ISSUED

In an additional and more broad effort to assist WISPs, the FCC created a “Wireless Broadband Task Force” for the initial purpose of creating a report on ways the FCC could assist wireless broadband deployment. Initial reaction to the report from WISPs has been favorable. Opening comments were due on April 22, but reply comments can be filed and are due on May 22. The Report found that the FCC should:

- Promote voluntary frequency coordination efforts by private industry for license-exempt spectrum – such as those already successfully underway in some of the more congested parts of the country – to mitigate potential interference among users.
- Promote voluntary industry “best practices” among unlicensed users to maximize the potential opportunities for spectrum use.
- Facilitate reporting of violations of technical rules for license-exempt spectrum (e.g., improper power boosting and jamming) to ensure level playing field and minimize impermissible interference.
- Expedite the transition of the digital television (DTV) spectrum for advanced wireless services and public safety, given that the spectrum in the 700 MHz band is ideal for mobile broadband applications. In the meantime, the Task Force also recommends that the Commission consider additional mechanisms for allowing 700 MHz channels to be used for wireless broadband services before the completion of the DTV transition.
- Ensure that FCC rules are flexible enough to allow providers to pair spectrum asymmetrically to account for the unbalanced nature of broadband services, which typically requires a large amount of bandwidth for downstream communications, and less bandwidth for upload links. For mobile services, the Commission has traditionally paired two licenses of equal size, one for upstream and one for downstream communications.
- Apply a pro-competitive, innovative national framework for wireless broadband services – one that imposes the fewest regulatory barriers at both the federal and state level – to wireless broadband services. Such an approach would enable the greatest innovations, in terms of technologies and types of services, and would maximize consumer benefits. The Task Force recommended that the Commission consider several options for achieving this goal, including classifying wireless broadband either as an “information service” or an “interstate” service, or clarifying the scope of the deregulatory principles applied to Commercial Mobile Radio Services (CMRS) – which enabled the rapid success of mobile voice and data services over the last decade.
- Continue to take a pro-active, forward looking approach to regulation as wireless broadband networks begin to be used in combination with other broadband service networks and services (e.g., regularly evaluate whether it is time to remove outdated rules, and accord an increasingly flexible regulatory environment for service providers to facilitate convergence).
- Build upon and improve specific existing FCC outreach efforts (e.g., relationships with federal agencies and state & local governmental organizations).

## FEDERAL COURT DENIES SBC UNE INJUNCTION REQUEST

An Illinois federal court denied SBC's request for an injunction that sought to delay enforcement of an Illinois law requiring SBC to provide unbundled switching and other unbundled network elements ("UNE(s)"). SBC has argued that state requirements to provide UNE platform ("UNE-P") and other UNE combinations were preempted by the FCC's original Triennial Review Order ("TRO") and later Triennial Review Remand Order ("TRRO"). This battle goes back to 2002, when SBC first went to the U.S. District Court in Chicago. The Court's ruling was based largely on public interest grounds. The Court held that the status quo, as long as the Illinois Commerce Commission moves forward at an "efficient pace" to resolve UNE issues, needs to be maintained.

## OPASTCO CALLS FOR UNITY AMONG RURAL TELECOM ADVOCATES

The Organization for the Promotion and Advancement of Small Telecommunication Companies ("OPASTCO") Board President John Rose says wants to send a strong message to the telecommunications industry: that rural telecommunications advocates, whether they are associations or individual companies, need to

come to agreement quickly on overarching intercarrier compensation and universal service principles. "I urge any organization with an interest in protecting rural telecommunications consumers, and the companies that serve them, to adopt the Rural Alliance's principles," said Rose. This in light of a recent FCC staff report

that made it clear that the FCC still favors the bill-and-keep scenario. Interestingly, the staff report was omitted from the comment manifest when the FCC issued the formal notice of proposed rulemaking (Docket No. 04-36).

## CONGRESS LOOKS AT FUTURE OF TELECOM AND VOIP

On March 16, the House Subcommittee on Telecommunications and the Internet held a hearing to explore the effect IP-enabled services, specifically VoIP, are changing the way telecommunications should be regulated. Joe



Sen. Joe Barton  
(R-TX)

Barton (R-TX), Chairman of the House Commerce Committee, said that Congress should ensure that facilities based competition in the VoIP marketplace is allowed to flourish - free from government management - for the benefit of the consumers. Just a few days later, Telecom Subcommittee Chairman Fred Upton (R-MI) said several telecom reform bills would be introduced in the coming months, including bids to rewrite telecom laws, accelerate DTV and

modify the Universal Service Fund's E-rate program. Upton said a reform Bill may be up for debate as early as mid-May. Barton seems to be on the same page, as he has called for a top-to-bottom overhaul of telecommunications law, saying that Internet technology and broadband distribution require an entirely new regulatory model. "I believe that the best thing to do is just start from scratch," Barton said. "The broadband age is such that it doesn't really fit easily into any of the existing categories and, so, we probably ought to just start over."

## CONGRESS SEEKS TO PERMANENTLY END INTERNET TAX ANAMALY

Back in 1998, Senators Ron Wyden (D-OR) and Christopher Cox (R-CA) authored the Internet Tax Freedom Act. George Allen (R-VA) joined the effort to extend the Act in 2003. The three Congressmen have now launched legislation that would make the provisions of the Act permanent. Right now, the law is set to expire in November 2007. The new legislation would permanently extend the ban on taxes on Internet access, double taxation (i.e., by two or more states) of a product or service bought over the Internet and discriminatory taxes that treat Internet purchases differently from other types of sales.

## SUPREME COURT HEARS ARGUMENTS IN BRAND X

On March 29, the U.S. Supreme Court heard oral arguments in the important and long-awaited Brand X case. The questions by the justices indicated that they may be a bit skeptical of claims that cable companies should not have to open their broadband lines to rival Internet service providers. The case, named for the Santa Monica-based ISP that was denied access to cable's high-speed data lines, got to the Supreme Court after the Ninth Circuit Court of Appeals decided in October of 2003 to overturn the FCC's classification of cable modems as an unregulated "information service." The goal of the case now is to decide how broadband will be defined under the Communications Act.



The U.S. Supreme Court Building

## The State Pages

### News and Updates in State Telecommunications Law

#### CALIFORNIA AND OHIO REVIEW SBC MERGER

Despite SBC's contention that their proposed merger with AT&T was exempt from state review, two SBC states will conduct merger reviews. The California PUC has opened a docket (Case A05-02-027) assigned to Administrative Law Judge Thomas Pulsifer and supervised by commission President Michael Peevey. The issue of whether or not the PUC has jurisdiction will be the first major grounds for battle, although the procedural schedule has not yet been set. In Mid-March the Ohio PUC opened Case 05-269-TP-ACO, a full merger review, after the Office of Consumer Counsel petitioned the Commission to do so, because of the significant effect the merger could have on competition. Despite being outside of SBC's region, states such as Minnesota, New York, Utah, West Virginia as well as Washington, DC are considering a review of the merger due to AT&T's substantial CLEC and long distance operations in those jurisdictions.

#### CALIFORNIA PUC ADJUSTS ACCESS CHARGE RULES

The California PUC adopted a new "principle", allowing ILECs to impose surcharges or increases to other rates when the Commission orders substantial intrastate access charge reductions. The PUC announced this principle in conjunction with Case R03-08-018, which opened this summer in response to an AT&T Petition for reductions to access charges. The Commission also said the access charges of all California local telecommunications providers, including smaller CLECs, should be reviewed to ensure they are just and reasonable.



#### CALIFORNIA PUC EXPLORES 310 AREA CODE EXHAUSTION

Telephone subscribers in the 310 Southern California area code will get a chance to discuss a telecom industry proposal for contingency code relief at public meetings before the California Public Utilities Commission on April 26 and 27. California's

major landline and wireless carriers have proposed a "triggered" overlay in place of a geographic split as the solution for the inevitable 310 area code exhaustion. This split would have given subscribers in the northern half of the region a new area code, how-

ever, the triggered scheme would create an all-service overlay when the supply of available phone numbers drops below a specified threshold. These carriers contend that this would provide relief with the least disruption to phone subscribers.

#### NEBRASKA RULE REQUIRES VOIP PROVIDERS TO PAY TO STATE USF

In Nebraska, VoIP providers are now subject to state universal service fund assessments on the intrastate portion of their services. Although providers claim it is impossible to ascertain where a VoIP

call is terminated, the PSC said the ultimate termination point based on call usage data establishes jurisdiction for the purposes of the assessment. The PSC (Case NUSF-40/PI-86) gave VoIP providers a choice: Either pick a juris-

on a reasonable sampling of actual call data, or the PSC will assess the provider based on the FCC's default 71.5% intrastate and 28.5% interstate rate. VoIP providers have begun various efforts to reverse this ruling.

#### GEORGIA FINES AT&T FOR CHARGING NON-CUSTOMERS

On April 5th, The Georgia Public Service Commission fined AT&T \$100,000 for improperly charging a minimum monthly long-distance service charge. AT&T had been charging over 40,000 customers — 35,000 of whom were not current AT&T subscribers — a \$3.95 monthly fee. The refunds must be given within 60 days of a consent agreement, which was filed in mid-April.

## CALIFORNIA SENATE PUSHES FOR TELECOM BILL OF RIGHTS

The infamous Telecom Consumer Bill of Rights that was suspended this past January has been reincarnated by the California Senate Energy, Utilities & Communications Subcommittee. The new Bill seeks mainly to address wireless carriers' implementation problems. The Bill (SB-1068) advanced although it was (not surprisingly) strongly opposed by wireless carriers. The measure is now in the hands of the Senate Appropriations Committee, which plans hearings this month. The bill addresses false and deceptive service marketing, rates and terms, early termination fees, and other hot-button wireless issues. Commissioner Susan Kennedy also introduced new provisions to the Bill of Rights granting consumers the right to naked DSL and freedom from restrictions on content. "These changes make this a Bill of Rights for the future, instead of a throw-back to the past," Commissioner Kennedy said. Specifically, the bill would grant consumers:

- The right to purchase broadband services without being forced to buy local calling service from the broadband provider (naked DSL)
- The right to access lawful content over the Internet without interference from a broadband provider

## ARKANSAS LEGISLATURE SEEKS TO TAX VOIP PROVIDERS

The Arkansas House Revenue & Taxation Committee has advanced a bill that would define VoIP as a telecommunications service for tax purposes, and thus make

VoIP and other nontraditional telecom services subject the state's telecom gross receipts tax. The House unanimously advanced HB-2728 which would redefine telecom-

munications as "the one-way or two-way transmission of messages, voice messages, images or other real-time or essentially real-time communications whether accomplished by

any means including wire, cable, fiber optics, laser, microwave, radio, satellite, Internet, voice-over-Internet protocol, or similar facilities," for the purposes of the tax.

## TEXAS HOUSE SEEKS DEREGULATION

The Tex. House approved an amended version of a telecom deregulation bill (HB-789), which would also ban most new municipal wireless services. The vote followed a bitter struggle between ILECs, opposing government networks, consumer groups and economists favoring the investments. The municipal wireless prohibition would grandfather existing and planned municipal projects and would direct the PUC to "conduct further study" and make recommendations for the 2007 legislative session. The Bill would give cities until Sept. 1, 2006 to set up services, or until June 15, 2006 to inform the PUC of plans to do so, after which they would be barred from offering wireless access, for free or pay.



## KANSAS GIVES LECs MORE LEEWAY TO OFFER PROMOTIONS; OTHER STATES MOVE TO DEREGULATE

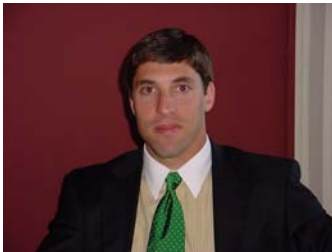
Kansas Governor Kathleen Sebelius signed HB- 2042. Previously, LECs were required to extend any promotions to all customers in the geographic area the offer covers, in a non-discriminatory manner. The new bill will instead give the Kansas Corporation Commission the authority to ban promotions that are, "unjust, un-

reasonably discriminatory or unduly preferential." In other states, the deregulation trend continues. Idaho, for example, has enacted a bill to deregulate Qwest basic exchange service. Deregulation bills also advanced in Oregon and Alabama.

## LoKT Firm News

### What's New at LoKT

#### ANDREW GANZ JOINS FIRM AS NEW ATTORNEY



Andrew Ganz, Esq.

LoKT is proud to announce that Andrew Ganz has joined the firm as an associate. Andrew is a graduate of the George Mason University School of Law in Arlington, VA, and received his undergraduate degrees in philosophy and journalism from the George Washington University in Washington, DC.

While in Washington, he served as a White House Intern, interned for a Superior Court Judge, clerked for a telecommunications law firm, the U.S. Department of Agriculture, and the U.S. Social Security Administration. Since moving to the Bay Area, Andrew has interned for the San Francisco District

Attorney, and passed and become a member of the California Bar. Andrew grew up in the town of Lakewood, NJ, and now lives in San Francisco, where he is the head coach of a little-league baseball team. You can reach Andrew at LoKT's San Leandro office, or by email: [Andrew@lokt.net](mailto:Andrew@lokt.net).

#### KRIS TWOMEY TO LEAD PANEL AND SPEAK AT INDUSTRY CONFERENCES

Kris Twomey will be leading a panel discussion entitled: "The 10 Biggest Policy Issues Facing Your Business and What to Do About Them Now" at the upcoming ISPCON in Baltimore, MD on Wednesday May 25 at 8:45 AM. The panel will include telecom attorneys Mark O'Connor (outside counsel for Earthlink), Harvey Reiter (attorney for Brand X) and William Wilhelm (outside counsel for Vonage). The Spring 2005 ISPCON will be held at the Baltimore Convention Center from May 24-26. Kris will also be speaking at the Wireless Network Operators Group, otherwise known as

Wi-Nog, public-private broadband conference in Park City Utah. Talks will include "Regulatory & Legal Issues for Independent Service Providers" and "Legal Issues: Getting Sued by Private Competition" on Tuesday August 16th at 10:30am. The Wi-Nog event will take place at the Prospector Square Lodge and Conference Center in Park City August 15-17. For more information on ISPCON Spring 2005, visit <http://www.ispcon.com/spring2005/>, and for more information on Wi-Nog, go to [http://www.winog.com/park-city\\_2005/](http://www.winog.com/park-city_2005/).



## MAY 2005 State/Federal Filing Deadlines

### THIS MONTH'S FILINGS (WITH LINKS TO FORMS)

Sun	Mon	Tue	Wed	Thu	Fri	Sat
1 CO/ MN/WA Annual Report	2	3	4	5	6	7
8	9	10 WI Annual Report	11	12	13	14
15 NV Annual Report	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

- FCC form 499A: [499A](#)  
(Was due April 1)
- Colorado Department of Revenue Annual Report (form DR525): [DR525](#)
- Minnesota Annual Report: [MN Annual Report](#)
- Nevada Annual Report
- Washington Annual Report: For Class A CLECs (more than 80K lines): [Class A](#) For Class B CLECs (less than 80K lines): [Class B](#)
- Wisconsin Annual Report: (statutorily 4/1, but extended to 5/10 for 2005)

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