

THE **LOKT** NEWSLETTER

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AUGUST 2005

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The Federal Pages

News and Updates in Federal Telecommunications Law

FCC News:

FCC MAKES WHOLESALE DSL TO ISPS A (SOON-TO-BE) THING OF THE PAST

On August 5, 2005, in its Order and Notice of Proposed Rulemaking, (FCC 05-150), the Federal Communications Commission adopted significant DSL deregulatory policies, eliminating facilities sharing requirements on facilities-based wireline broadband Internet access service providers. This puts wireline broadband Internet access service (most often delivered via DSL technology) in the same position as cable modem service. It is no coincidence that the FCC's DSL deregulation comes not more than one month after the U.S. Supreme Court placed its stamp of approval on deregulation of cable service. This approach is consistent with a recent U.S. Supreme Court decision upholding the Commission's light regulatory treatment of cable modem service. The FCC believes that consistent regulatory treatment of these competing broadband platforms will "enable potential investors in broadband network platforms to make market-based, rather than regulation-driven, investment and deployment decisions." The FCC achieved this deregulation by determining that wireline broadband Internet access services shall be defined as information services, merely integrated with a telecommunications component. In the past, the Commission required facilities-based providers to offer that wireline broadband transmission component separately from their Internet service as a stand-alone service on a common-carrier basis, and thus classified that component as a telecommunications service. This Order eliminates this transmission component sharing requirement. Unaffiliated ISPs currently getting wholesale DSL will be price-protected for one year, and then the rules will go into full-effect. This is, of course, a potentially devastating blow to independent ISPs. Please contact us if you would like to discuss this further or need additional information.

VOIP 911 ACKNOWLEDGEMENT DEADLINE EXTENDED

The FCC has decided to delay the Labor Day deadline for VoIP providers to obtain "911 acknowledgements" from their customers. VoIP providers now must get the acknowledgements (that their customers understand the limitations and problems with dialing 911 for emergency services over their VoIP connection) by Wednesday, September 28. So far, providers

have reported that many customers, nearly 100,000 across the U.S., have still not returned acknowledgements forms. Under the FCC's original Order, service could not be provided to any customer who did not acknowledge the limitations of 911 on VoIP. VoIP providers are still concerned that they will

have many unreturned acknowledgements by the new deadline. The acknowledgement represents merely the first phase of the FCC's Order. VoIP providers must scramble to implement full 911 capabilities by November 28 of this year. There is no indication that this deadline will be extended.



COMMISSION WILL ALLOW CALIFORNIA TO IMPLEMENT TECHNOLOGY-SPECIFIC OVERLAY AREA

The FCC's Wireline Competition Bureau has partially granted a California PUC Petition which asked the FCC to implement two technology-specific overlays. The PUC can now place any non-geographic-based numbers (except for wireless) in the overlay. Numbers to be placed in the overlays are those used for technologies such as On-Star, E-fax, ATMs and VoIP. One overlay will cover the northern portion of the state, while the other will cover the south.

FEDERAL LAW ENFORCEMENT AGENCIES CONVINCED FCC TO IMPOSE WIRETAP RULES ON VOIP

Responding to a petition from the FBI, Dept. of Justice and DEA, the FCC has determined that VoIP providers that offer services which permit users to place calls to the Public Switched Telephone Network must be prepared to accommodate law enforcement wiretaps.

The Commission established an 18 month deadline from the effective date of the Order, which has not been released yet, for VoIP providers to comply with all relevant Communications Assistance for Law Enforcement Act ("CALEA") requirements. By expanding the already

controversial Act to VoIP, the FCC is almost certain to hear from groups who feel that the Order further impinges on Americans' privacy. General information about CALEA can be found at the following link: <http://www.fcc.gov/calea/>.

COMMISSION APPROVES SPRINT-NEXTEL MERGER

Early this month, the Commission announced that it consents to the proposed merger of Sprint Corporation and Nextel Communications. The FCC determined that enough competition would exist after the merger, and thus did not require Sprint to divest any of its holdings. It did note, however, that in their merger application, Sprint and Nextel promised that if their transfer of control application were approved, Sprint would spin-off its local wireline business, Sprint Local Division. The Commission expressly noted that letters submitted by the CEOs of Sprint and Nextel represent commitments that the new local wireline company (LTD Holding Company) will receive an equitable debt and asset allocation at the time of its proposed spin-off, so that the company will be a financially secure, Fortune 500 company.

AS BUSH IS SET TO APPOINT NEW COMMISSIONERS; POWELL MOVES ON



Michael Powell

The National Journal has reported that White House adviser Richard Russell and Tennessee regulator Deborah Tate are headed to the FCC to fill two Republican vacancies there, congressional and industry sources said Friday. The White

House has refused to comment on possible nominees and has not indicated when it will make an announcement, but several sources suggested that the nominations of Russell

and Tate are imminent. In related news, Former FCC Chairman Michael Powell is no longer unemployed. Powell, who stepped down from his FCC post in January, will be a Senior Adviser for Providence Equity Partners. The company, based in Providence, Rhode Island, is a private equity firm that has rapidly built a healthy \$9 billion of holdings in media and telecommunications companies. Powell's salary at the firm has not been made public.

FCC OUTLINES PRINCIPLES TO EXPAND BROADBAND AND PROTECT CONSUMERS

Earlier this month, the FCC adopted a policy statement of new principles to, “preserve and promote the open and interconnected nature of the public Internet.” The four principles to encourage broadband deployment are: 1) consumers are entitled to access the lawful Internet content of their choice; 2) consumers are entitled to run applications

and services of their choice; 3) consumers are entitled to connect their choice of legal services that do not harm the network; and 4) consumers are entitled to competition among network providers, application and service providers, and content providers. The Commission intends to incorporate these new principles into its ongoing policymaking activities. Congress has already picked up the ball from the

FCC, as Representative Rick Boucher (D-VA), called for his fellow House members to codify these “net neutrality principles,” and give the FCC authority to enforce them. Representative Boucher stated that the principles were “an appropriate first step in ensuring that all persons continue to enjoy the unfettered ability to access and use the Internet in a lawful manner without being impeded by broadband network operators.”

Congressional News:

UNIVERSAL SERVICE BILL IN THE WORKS

Communications Daily reports that Senators Conrad Burns (R-MT), Jay Rockefeller (D-WV) and Olympia Snowe (R-ME) are drafting a Universal Service Fund reform bill to be introduced in September that would expand the contribution base and redistribute funding. “It will address the issue of contribution methodology, and the issue of schools and libraries [E-rate],” a

Senate source told Communications Daily. The E-rate program was given a one year exemption from Anti-Deficiency Act (ADA) requirements that funds are to be in hand before government agencies make funding commitments. The 12-month exemption ends December 31, 2005. Ac-



U.S. Capitol Building
Washington, D.C.

ording to Communications Daily, the Burns bill is likely to differ from the

Smith-Dorgan bill, which would apply USF contributions to all 2-way voice services and establish a separate fund for broadband

deployment in rural areas.

The State Pages

News and Updates in State Telecommunications Law

STATE BRIEFS:

Listed below are briefs of this month's important news from state utility commissions, legislatures, courts, and other noteworthy state news:

- California: A hearing officer at the PUC formally proposed replacing the code relief contingency plan for the Southern California 310 area code. Originally the PUC called for a geographic split of the 310 code when number conservation measures were exhausted. The PUC plans a workshop Sept. 20-23 in the first phase of its docket to develop a unified regulatory framework for CA telecom providers other than small rural incumbent telcos.
- Illinois: Governor Rod Blagojevich (D) has signed two "telecom acts". One, (HB-1071) is aimed to combat spam; it requires e-mail service providers that contract with state agencies to use software filters or other means to keep spam from state users (applies only to contracts signed after the law takes effect). The 2nd (SB- 101) requires medical and technological examination before a person can get an assistive telecom device from the state. The law also requires that assistive-device makers include express warranties and written statements of the consumer's rights and responsibilities under the warranty, and make such information available through their dealers.
- Iowa: The Utilities Board ruled (Case TF-05-216) that Iowa Telecom Services could immediately delete special access services from its regulated service tariffs, without having to file an accounting plan for keeping deregulated special access separate from its regulated services. The plan requirement had been mandatory under previous state deregulation laws, but Iowa Telecom sought a waiver. The board ruled that the new deregulation law passed this year had already waived the plan requirement. Iowa Telecom said the deregulation of special access rates will not cause withdrawal of the service from existing or new customers
- Kentucky: A federal appeals court upheld a Public Service Commission ("PSC") ruling that AT&T's move to convert a special access contract with BellSouth to an at-cost unbundled network element agreement did not represent a termination of the contract. The Appeals Court in Cincinnati was ruling on an appeal of a lower court decision upholding the PSC's ruling on a dispute between the carriers over applicability of termination penalties. AT&T had sought to convert its special access to UNE access, citing FCC, court and PSC decisions, but BellSouth wanted penalties on the grounds that AT&T prematurely terminated its contract. The PSC refused to impose penalties and was upheld by the lower federal courts. The appeals court (Case 04-5605) said the only standard for federal review is whether the PSC's decision was arbitrary and capricious, and the record didn't show that it had been. The court said the PSC's rationale for its findings against penalties has been upheld by state courts in other contract disputes involving application of penalties.
- Massachusetts: The state's Supreme Court upheld lower court rulings that had barred municipalities from fining utility pole owners who failed to promptly remove old poles after installing new ones. The court (Case SJC-09405) was ruling on an appeal by Verizon and Nstar Energy of an order by the town of Bedford that imposed a \$100 daily fine for each pole remaining after the deadline. The town ordinance said old poles had to go for safety and aesthetic reasons. The state's highest court said state law requires utilities to remove old poles within 90 days but doesn't prescribe a penalty for violations. The court said the town exceeded its authority by imposing its own penalties.
- Michigan: The PSC adopted new telephone service quality rules for regulated services of all facilities-based providers in requiring, among other things, carriers to repair outages and line troubles within 36 hours, except in disaster situations. They must also install residential and small business service within 5 business days and respond to customer complaints within 10. The PSC (Case U- 14499) also suspended hearings on retail rate increases averaging 19% sought by Sprint after the staff questioned their reasonableness. PSC staff said some of the proposed retail increases far exceeded Sprint's wholesale cost increases, and Sprint didn't provide enough data to determine whether the proposed rates are justified.
- Missouri: The MO state Court of Appeals ruled regulators cannot rewrite a price cap plan in "midstream." The court overturned a Nov. 2003 PSC Order denying SBC 8% rate rises for its verification and interrupt services for busy lines. In other news, the PSC denied an SBC petition to reconsider a May decision to adopt rules on data exchange between local carriers intended to help carriers spot billing discrepancies by improving call record accuracy and traffic measurement. SBC has sought rehearing of certain rules on classification of wireless calls and handling of transiting interexchange traffic (Case TX-2003- 0301).

Continued on next page

STATE BRIEFS (CONTINUED)

New Jersey: A federal appeals court upheld a lower court decision overturning a town Board's denial of permission to AT&T Wireless to install microcell mobile phone equipment. AT&T wanted to mount its equipment on the roof of a nonconforming office building in a residential zone, but the local board denied permission on grounds AT&T hadn't shown the building is particularly well suited for a wireless network installation. A federal district court upheld AT&T's claim that benefits to the public from the installation obviate the need to show "particular suitability." The township lost its appeal to the 3rd U.S. Court of Appeals, Philadelphia in Case 04-3221 on a ruling that the board hadn't justified its decision that AT&T's equipment -- 2 small rooftop antennas and 2 small electronics cabinets -- constituted an eyesore in this residential area.

North Carolina: Some BellSouth customers asked state regulators to look into a new BellSouth policy of allowing collection agents to charge a \$1 "processing fee." Customers who pay their bills through one of 44 BellSouth-authorized supermarkets and check-cashing stores are affected by the charge. Also, the Utilities Commission ("NCUC") opened a generic docket on establishing a dialing plan that would differentiate clearly between extended-area local calls that carry no additional charge and toll calls that do have extra charges. The N.C. Public Staff asked for the investigation because many customers had complained of being billed toll charges on calls dialed as local. The case (P-100, sub 157) asked incumbent telcos offering extended-area local service to file by Sept. 9 descriptions of their plans and tariffs. That's also the deadline for comments from all parties other than the Public Staff, which has until Sept. 30 to file comments. Finally, a federal court granted BellSouth a temporary stay of a NCUC Order requiring the carrier make available to resellers at the usual discount any gift cards, gift checks, coupons or other promotional benefits it offers for 90 days or more. The NCUC concluded that gift cards and similar premiums were part of service rates so they should be subject to resale, and 90 days made a reasonable line between temporary and permanent offers. The judge in the matter has set an Aug. 11 hearing on making the stay permanent pending BellSouth's appeal.

Rhode Island: A bill exempting prepaid wireless service from state gift-card rules became law without the governor's signature. Under the law (HB-5777), prepaid wireless is exempt from rules such as those barring maintenance fees and requiring receipts for purchasers. The law does not apply to telephone calling cards used for landline telephone service, which will remain subject to consumer protection rules on gift cards.

South Dakota: The SD PUC's 3 members will join FCC Commissioner Jonathan Adelstein Aug. 24 for a 2-day "Broadband Road Trip" across the state. The trip is intended to "highlight the importance of high-speed Internet to rural America and bring that perspective to the ongoing federal telecommunications policy debate," said S.D. PUC Comr. Bob Sahr, the organizer. Congress placed a high priority on rural concerns in the Telecommunications Act. We need to ensure that quality service at affordable rates is available to everyone in this country -- whether they live in rural or urban areas." The trip will visit businesses around the state, including a family-owned rural telco, a tribal-owned telco and a company selling livestock online, and will stop in historic Deadwood to see how the town has used the Internet to promote tourism.

Texas: Governor Rick Perry (R) recently opened a special legislative session on school finance to consider telecom deregulation and competition bills, plus statewide video franchising. Also, a federal appeals court upheld a lower court dismissal of antitrust claims filed by a TX paging company against CenturyTel of over application of toll charges on paging calls (case 04-50838; 5th Cir., New Orleans).

Utah: The UTOPIA municipal fiber infrastructure consortium told a federal court Qwest lacks evidence to underpin a raft of complaints against UTOPIA. Qwest claims UTOPIA will could engage in predatory pricing thanks to tax subsidies; UTOPIA illegally occupies its pole space; and UTOPIA installations have damaged Qwest facilities. The consortium of 11 Utah cities asked the U.S. Dist. Court, Salt Lake City, to dismiss Qwest's June 1 suit because it hasn't stated legally recognized claims against UTOPIA (Case 2:05-cv-00471-PGC). Meanwhile, the city of Riverton flatly denied a Qwest claim in the suit that the city forced private land developers to provide free underground conduit for UTOPIA's exclusive use. The city said when it requires developers to lay underground telecom conduit, it must be available to all telecom providers.

SBC SEEMS TO BE WINNING STATE RETAIL RATE DEREGULATION WAR

SBC has championed, and has won major retail rate deregulation in Oklahoma and Michigan, while consumer advocates in Wisconsin are trying to stop an SBC deregulation bid. The Oklahoma Corporation Commission ("OCC") voted 2-1 to approve retail rate deregulation for SBC, replacing a system of non-indexed price caps in place since 1999. The only possible hurdle to the implementation of this deregulation is a court appeal by SBC's local-service rival, Cox Communications. If imposed, the 44-page Order will allow SBC to set retail rates at any point above a cost floor to be fixed by regulators. Price increases in rural areas would be limited to no more than \$2 a month, or \$24 a year over the next six years. In return for rate deregulation, SBC has agreed to expand its DSL service to 68 specified rural communities statewide in the next 2 years. Meanwhile, the Michigan Public Service Commission voted 2-1 to approve SBC's petition there for complete retail rate deregulation of residential and business service in 30 lower cities and towns. The order includes Detroit, and its suburbs, and the cities of Ann Arbor, Flint, Grand Rapids, Lansing, Mt. Clemens, Pontiac and Ypsilanti. The deregulation will apply to all telecom service providers in the affected cities and will take effect 45 days after the carriers give notice to customers of the change. The Commission plans to review the situation in these markets after deregulation has been in effect a full year. Finally, in Wisconsin, the Wisconsin Citizens Utility Board ("CUB") asked the PSC to deny a pending SBC petition for rate deregulation of retail basic services in its urban and suburban market areas.

MUNICIPAL BROADBAND FIGHT TURNS DIRTY IN LAFAYETTE

Last month, we reported that the city of Lafayette, Louisiana was set to square off against BellSouth and Cox over the provision of municipal broadband. Comments have been submitted to the Louisiana Public Service Commission on those proposed regulations, intended to prevent improper cross subsidies of the proposed municipal broadband service from other municipal revenue sources. BellSouth called for a rule prohibiting the Lafayette Utilities System ("LUS") from making

loans from its utilities division to the new broadband business unit, citing a statutory definition that improper subsidies include loans below market rates. LUS said that section permits its utilities division to make loans to other municipal units as long as they're at market rates. BellSouth also wanted a rule prohibiting holders of LUS telecom bonds from collecting payments from the existing utilities division if the telecom bonds went into default. But LUS said such a rule would directly conflict with a provision in the 2004

antisubsidy law that allows municipalities to "pledge the resources" of utilities to get financing for a new telecom venture. During the course of this battle, it has been reported that LUS contractors have twice cut a BellSouth phone cable while laying their own, the second time cutting off service to about 1,900 BellSouth cus-

tomers for several hours. LUS claimed the line location was not properly marked by BellSouth because it was 3 feet off from the marked location. The earlier incident cut service to 3,200 BellSouth customers for an entire day in another part of the city.



Historic homes on Ferry Street in Lafayette, Louisiana

Industry News

Telecommunications Industry News and Notes

VERIZON/MCI MERGER UPDATE

While the relevant federal agencies are still looking at the proposed mega-merger between Verizon and MCI, these reviews are more of a formality. Most predict that if any entity decides to reject or place significant conditions on the merger, it will be a state utility commission. Many states have simply disclaimed jurisdiction over the merger, while New Hampshire and Minnesota have already approved. The following states appear to be giving serious consideration to the merger (NY and CA especially), and have set their procedural schedules on the matter (case number in parentheses). Information on the pending SBC/AT&T merger is also included below:

Alaska: (U-05-24) Initial comments due July 15. Further proceedings to be determined.

Arizona: (T01846B-05-0279) Companies' initial briefs filed. Initial intervenor briefs Aug. 30. Reply briefs Sept. 6. Prehearing conference Sept. 9. Hearings open Sept. 14. Further proceedings to be determined. SBC-AT&T (T03346A-05-0149) Initial briefing cycle completed. Discovery request deadline July 15. Prehearing conference July 15. Hearings open July 21. Further proceedings to be determined.

California: (A0504020) Public comment hearings Aug. 15- 18. Rest of schedule will depend on whether evidentiary hearings are required. Parties disagree on need; motions in favor are due Aug. 26 with opposition motions Aug. 30. If evidentiary hearings are required, they would be Sept. 21-23, with final briefs Oct. 7, final replies Oct. 14 and a Dec. 1 decision date. Without evidentiary hearings, final briefs are Sept. 26, final replies Oct. 3 and a Nov. 18 decision date.

Connecticut: (05-04-11) DPUC draft decision disclaims jurisdiction. Comments on draft July 27 and hearing Aug. 4. Final decision due Aug. 10.

Hawaii: (05-01-08) Record complete. Consumer counsel had no objections to approval. No major opposition. Decision expected by mid-Aug.

Louisiana: (U-28641) Record complete. ALJ recommended approval. On agenda for decision at PSC's July 20 meeting.

Maine: (2005-154) Original March approval request withdrawn and refiled in May. PUC on July 8 determined that merger requires investigation. Procedural schedule for review not set, but PUC rules require decision by early Nov.

Minnesota: (PA 05-425) Record complete. Staff recommended approval. No major opposition. On PUC decision agenda for July 14 meeting. SBC-AT&T (PA 05-0349) Record complete. Staff says no adverse competition impacts foreseen. No major opposition. On PUC decision agenda for July 14 meeting.

New Jersey: (TM-05030189) First briefing cycle concludes Aug. 19. Evidentiary hearings Sept. 20-22. Final briefs Oct. 14 and final replies Oct. 28. Decision due by Dec. 2. SBC-AT&T (TM-05020168) Hearings and final briefs completed. Final replies July 22. Decision due Aug. 17.

New York: (05-C-0237) Oral public-comment hearings July 21-28 at various locations around state will cover both mergers. PSC staff recommended certain conditions for approval. Comments on staff recommendations due Aug. 5 with replies Aug. 22. Further proceedings to be determined.

Ohio SBC: (05-0497) Final company briefs July 18. Final intervenor briefs Aug. 25. Final replies Sept. 9. Decision due in fall.

Pennsylvania: (A-310350F0009) First briefing cycle concludes Aug. 28. Evidentiary hearings Aug. 13-15. Final briefs Oct. 4 and final replies Oct. 18. Public comment hearing planned, date not yet set.

Vermont: Public comment hearing July 19. Initial briefing cycle concludes July 27. Discovery concludes Aug. 17. Final prehearing motions Sept. 8. Evidentiary hearings Oct. 6-7. Final briefs Oct. 21. Final replies Oct. 28. Decision due by Nov. 28.

Virginia: (PUC-2005-00051) Initial comments July 18. Staff recommendations Aug. 12. Replies to staff recommendations Aug. 26. Evidentiary hearings Sept. 1-6. Further steps to be determined.

West Virginia: (05-0349-T-PC) Final briefs Sept. 6. Final replies Sept. 16. State consumer advocate and competitor interests opposed. Decision due by Oct. 17.

NEW STUDY PREDICTS EXPLOSION IN BROADBAND PENETRATION

According to a new report by Forrester Research, approximately 71 million households in the United States will have broadband access by the year 2010. If that occurs, it would be a significant jump

from the current level of broadband access. Last year, 29% of North American households connected to the Net via a broadband connection. This ratio will skyrocket to 62 percent by 2010, according to the report.

Forrester polled 68,000 households on technology adoption, covering 347 brands in sectors such as devices, media, telecommunications, retail, finance and health care, to come to these predictions.

LoKT Firm News

What's new at LoKT

LOKT LAUNCHES NEW WEBSITE

The Law Office of Kristopher Twomey invites you to take a look around our newly remodeled website: www.lokt.net. In addition to a new look, the site features more information and resources, including an archive of all of our LoKT newsletters, industry presentations, attorney profiles, and much more. Take a look and tell us what you think!



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(Screen shot of the new www.lokt.net)

September 2005

THIS MONTH'S FILING DEADLINES AND OTHER DATES TO REMEMBER:

Sun	Mon	Tue	Wed	Thu	Fri	Sat
				1 FCC Form 477 Due	2	3
4	5	6	7	8	9	10
11	12 FCC XO Petition Comments	13	14 E911 for VoIP Comments	15	16	17
18	19	20	21	22	23	24
25	26	27	28 FCC VoIP 911 acknowledgement deadline	29	30	

- FCC Form 477 (Local competition and all *facilities-based* providers of *broadband* connections to end-user locations) due 9/1. Go to <http://www.fcc.gov/broadband/data.html> for more info.
- FCC XO Petition Comments (Sep. 12)
- Louisiana Service Standard Report: For period 1/1-6/30; due 9/30.
- FCC E911 Customer acknowledgements due (Sep. 28). Compliance Letter (all interconnected VoIP providers) due 11/28.
- Kris will be leading a regulatory policy panel at ISPCON. ISPCON will be October 18-20 at the Santa Clara (CA) convention center.
- Kris will be presenting information on regulatory issues for WISPs and CLECs at WISPCON VII in Dallas, October 9-11.

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