SELECTED FCC DOCKET SUMMARIES, 2006–2007

***In re* AT&T Inc. and BellSouth Corporation Application for Transfer of Control, *Memorandum Opinion and Order*, WC Docket No. 06-74, (December 26, 2006).**

On December 26, 2006, the Federal Communications Commission ("Commission") issued a Memorandum Opinion and Order ("Order") approving the merger of AT&T Inc. ("AT&T") and BellSouth Corporation ("BellSouth"). In this Order, the Commission determined that the merger will significantly benefit the public interest. The merger will allow for deployment of Broadband throughout the entire AT&T-BellSouth in-region in 2007. It will increase competition in the market for advanced pay television because of AT&T's ability to provide Internet Protocol-based video more quickly than BellSouth can do on its own. Also, it will combine the management of Cingular Wireless, which is currently a joint venture controlled by both AT&T and BellSouth. This will provide more reliable wireless service and boost the amount of available wireless products. Lastly, the merger will create a unified, end-to-end IP-based network that can offer more effective government communications, especially in the areas of disaster response and recovery and national security.

The Commission analyzed the competitive effects of the merger on six key groups of services and found that it was unlikely to cause anticompetitive effects in most related markets, the one exception being special access competition. The record indicated that there are a small number of buildings in the BellSouth in-region territory where AT&T and BellSouth are the only carriers that have direct connections. Other competitive entry is unlikely here and the merger might have an effect on the market for Type I wholesale special access services. However, the Commission also found that AT&T's commitment to divest indefeasible use of rights for the affected facilities will remedy the competitive harm. The potential harm does not affect Type II wholesale special access services because a sufficient number of other competitors with similar types of facilities will remain in the region after the merger and this will alleviate the loss of AT&T as competition in BellSouth's region.

The Commission also analyzed the other five service groups where anticompetitive effects were not found. In regards to retail enterprise, competition for medium to large enterprise customers will remain strong because these customers are sophisticated, high-volume purchasers of services and there will still be a significant number of carriers in the market. After ex-

amining the record, the Commission further found that the merger will not exert major pressure with respect to small enterprise customers. As for both mass market voice competition and mass market Internet competition, the Commission found that neither would experience anticompetitive effects in the market. AT&T and BellSouth were not a significant presence in the mass market voice services market outside of their respective regions nor were they exerting significant pressure on each other in their respective in-region territories. The Commission also anticipates that the recent growth of intermodal competitors will be in increasingly significant force in this market. AT&T and BellSouth also do not provide significant levels of mass market Internet service outside of their respective regions so there are no horizontal effects on the market. Even though the merger may result in slight vertical integration, the newly merged entity will not have the incentive to act anticompetitively in this area. Finally, the merger will not affect Internet backbone or international competition. The Tier 1 backbone market is not likely to bend to monopoly. In fact, the Commission expects that a number of Tier 1 backbones will remain as competitors to the merged entity.

Overall, the Commission found that the merger will result in greater competition in the broadband and video markets. The Commission expects there will be noticeable advantages to consumers in terms of both services and prices and these advantages will be apparent now, not at some future point in time. The Commission also projects the merger to benefit the combined entity by allowing it to increase its worldwide reach and better position itself to provide the services currently in demand by the consumer population. The Order strives to strike a reasonable balance between both consumer and corporate interests.

Summarized by Allison Corley

***In re* Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, *Declaratory Ruling*, FCC 07-30, WT Docket No. 07-53 (Mar. 22, 2007)**

In this declaratory ruling the Federal Communications Commission ("Commission" or "FCC") issued three primary findings. The first finding classified wireless broadband Internet access service as an "information service" under the Communications Act of 1934, as amended. This finding placed wireless broadband Internet access service within the definition of "information service" as opposed to the confines of "telecommunications service." In order to reach this conclusion, the Commission relied upon its past treatment of Internet access service provided over cable system facilities, wireline facilities, and BPL facilities. In all three of these situations, the Commission made its classification decision based on the end user's experience; an approach upheld by the Supreme Court in *National Cable & Telecommunications Association v. Brand X Internet Services, 545 U.S.*

967 (2005) (*"Brand X"*). Relying on this end user approach, the Commission found that Internet access service provided over cable, wireline, and BPL all fell within the definition of information service. This same analysis was applied to wireless broadband Internet and it too was defined as an information service. This finding is therefore consistent with prior FCC classifications and the *Brand X* decision. The Commission's finding on this issue provides the regulatory certainty necessary to spur growth and development of wireless Internet in rural and underserved areas.

The second finding classified the transmission component of wireless broadband Internet access service as "telecommunications" rather than "telecommunications service." The definition of a "telecommunications service" requires that the telecommunications be a stand-alone service offered for a fee directly to the public. In this case, the transmission component does not act as a stand-alone service. For this reason, the transmission component cannot be a "telecommunications service." Furthermore, because the transmission component provides for transmission of information, between points specified by the end user, without changing the content or form of the information, it falls within the regulatory definition of "telecommunications."

The final finding of the Commission determined that mobile wireless broadband Internet access service is not a "commercial mobile service" under section 332 of the 1934 Act. In order to fit within the definition of commercial mobile service, the mobile wireless Internet service must be classified as an "interconnected service." In this case, the FCC found that mobile wireless Internet does not fall within the definition of "interconnected service" and is therefore not a "commercial mobile service." An interconnected service is one that allows subscribers to communicate with all other users on the public switched network. Mobile wireless Internet users must rely on another service or application to communicate with all other users on the public switched network and therefore they are not part of an interconnected service. Because users of mobile wireless Internet access are not part of an interconnected service, their service is not classified as a "commercial mobile service."

As stated by FCC Chairman Kevin J. Martin, these classifications eliminate unnecessary regulatory barriers, provide a level playing field for wireless services, and encourage investment and competition within the wireless broadband market.

Summarized by Blair Dickhoner

***In re* Implementation of the Telecommunications Act of 1996: Telecommunication Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services, *Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 96-115; WC Docket No. 04-36 (April 2, 2007)**

Pursuant to 47 U.S.C. § 222 (2000), every telecommunications carrier has a duty to protect the confidentiality of its customers' customer proprietary network information (CPNI). CPNI consists of phone numbers called by a consumer, the frequency, duration, and timing of such calls, as well as any services purchased by the consumer. Such highly-sensitive and personal information can be compromised by "pretexting," the practice of pretending to be a particular customer or other authorized person in order to obtain access to that customer's call detail or other private communications records. Pretexting is increasingly becoming extremely problematic, with dozens of state Attorneys General calling attention to suits by telelcommunications carriers seeking to enjoin pretexting activities.

The first action taken by the Federal Communications Commission ("Commission") in this report was to prohibit carriers from releasing call detail information based on customer-initiated telephone contact. There are three exceptions where this prohibition does not apply. First, a carrier may furnish detail information if the customer provides the carrier with a pre-established password. A password would be established at the time of service initiation, when carriers can easily authenticate customers. If a password is forgotten, carriers are allowed to created back-up customer authentication methods for lost or forgotten passwords, provided that these back-up methods are not based upon readily available biographical information. Another method by which customers can access detail information is if they initiate a telephone call to a carrier, asking the carrier to send the call detail information to an address of record. Finally, a carrier may call the telephone number of record and disclose call detail information. This new rule was created to prevent pretexter phishing and other pretexter methods for gaining unauthorized access to customer account information. The Commission notes that while carriers and customers will be subject to a small burden by this new rule, the ongoing burdens of the new authentication requirements will be minimal and will further the public interest in maintaining the security and confidentiality of call detail information.

The Commission then extended the requirement to protect CPNI to online accounts and carrier retail locations. Carriers are further required to provide notice to customers of account changes, including whenever a password, online account, or address of record is created or changed. This report further delineates the procedure for carriers must follow upon the occurrence of security breaches to customers' CPNI. If a customer's CPNI has been disclosed to a third party without the customer's permission, the telecommunications carrier shall notify law enforcement of the breach no

later than seven business days after a reasonable determination of a breach by sending electronic notification through a central reporting facility to the United States Secret Service (USSS) and the FBI. The carrier may then notify the customer seven days after the USSS and FBI have been notified. If the carrier believes that there is an extraordinarily urgent need to notify a customer or class of customers in order to avoid immediate and irreparable harm, carriers may immediately provide notification of the breach to the affected customers.

For carriers engaging in joint ventures with other telecommunications companies or independent contractors, the Commission has modified the rules to require these carriers to obtain opt-in consent from customers in order to disclose a customer's CPNI to these new partners. The Commission also extended its CPNI protection requirements to providers of interconnected VoIP service. The Commission plans to enforce these new rules by investigating compliance; if the Commission finds that a carrier has not taken sufficient steps adequately to protect the privacy of a CPNI, the carrier may be sanctioned for such an oversight, through methods such as forfeiture.

The Commission concluded the report by seeking comment on whether to extend password protection rules to include optional or mandatory password protection for non-call detail CPNI. Additionally, the Commission seeks comment on whether rules pertinent to audit trails should be adopted. Turning to physical safeguards, the Commission seeks comment as to what physical safeguards carriers currently are using when they transfer or allow access to CPNI, to ensure that they maintain the security and confidentiality of the CPNI. Finally, the Commission queried as to whether it should adopt rules that require carrier to limit data retention and what should maximum amount of time that a carrier should be able to retain customer records.

Summarized by Tara Cottrill