On February 21, 2006, the Federal Communications Commission ("Commission") issued Notices of Apparent Liability and Memorandum Opinion and Order ("Order") regarding viewer complaints filed with the Commission over a three-year period, alleging that certain television programs were indecent, profane, or obscene. In this Order, the Commission levied fines against a number of broadcasters for airing material that was indecent, profane, obscene, or some combination thereof. Additionally, the Commission declined to assess fines against some broadcasters as the programs in question aired before the Commission set forth its current standard in the In re Complaints Against Various Broadcast Licenses Regarding the Airing of the "Golden Globe Awards" Program, Memorandum Opinion and Order, 19 F.C.C.R. 4975 (Mar. 3, 2004) [hereinafter Golden Globe Awards Order of 2004]. Finally, the Commission listed a number of programs that did not meet the standard for finding of indecent, profane, or obscene programming.

To determine if broadcast material is indecent, the Commission must satisfy a two-part determination. The first portion is that the material must "describe or depict sexual or excretory organs or activities" and be "patently offensive" with respect to community standards. Further, in order to determine if material is patently offensive, the Commission has created a three-part contextual analysis. These factors are "the explicitness or graphic nature of the description," "whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities," and "whether the material panders to, titillates, or shocks the audience."

With respect to profanity, the Commission referred back to its Golden Globe Awards Order of 2004 for a definition of profanity as language "so grossly offensive to members of the public who actually hear it as to amount to a nuisance." The Commission stated that profanity would be reviewed on a case-by-case basis, instead of reviewed by a fixed set of standards.

The Commission applied these tests in response to complaints filed in reaction to various television programs between 2002 and 2005. In the most extreme case, the Commission found a program to be indecent which included pixilated nudity and dialogue that was extremely suggestive of sexual activity. Additionally, the Commission found a Spanish-language program to be indecent when a female guest wore an open-front dress. This
program fulfilled all three prongs of the test for patently offensive material, that is, it depicted sexual organs, the nudity is dwelled upon, and that the intent was to pander to the audience.

In addition to these two examples, the Commission found four other programs to be indecent. The fines for these indecency violations ranged from $15,000 to $220,000 for repeated violations within the same program. The Commission also found four additional programs to be indecent as defined by their own guidelines, but decided not to impose fines, as most of these programs preceded the decision in the Golden Globe Awards Order of 2004, which held that isolated use of offensive words is indecent, reversing a previous decision by the Commission. The broadcasters of these programs would have, in all likelihood, been fined but for the existing precedent at the time of the broadcast.

Finally, the Commission determined that other programs that were brought to their attention do not warrant fines for indecency or profanity. The Commission admitted that while some of these examples were upsetting to some viewers, the programs were not found to be “patently offensive” by current community standards. By rejecting these programs as not being indecent, the Commission attempted to give guidance to broadcasters as to what may or may not be actionable offenses in the future.

Summarized by Larry Santucci

*In re Communications Assistance for Law Enforcement Act and Broadband Access and Services, Second Report and Order and Memorandum Opinion and Order, 21 F.C.C.R. 5360 (May 3, 2006).*

On May 3, 2006, the Federal Communications Commission (“Commission”) issued a *Second Report and Order addressing several issues raised in the proceeding’s Notice of Proposed Rulemaking* regarding implementation of the Communications Assistance for Law Enforcement Act (“CALEA”). The Second Report and Order discusses the assistance capabilities required pursuant to section 103 of CALEA for facilities-based broadband Internet access providers and providers of interconnected Voice over Internet Protocol (“VoIP”). Furthermore it specifies what providers must do to facilitate electronic surveillance of their equipment, facilities and services by the Department of Justice, the Federal Bureau of Investigations, and the Drug Enforcement Administration (collectively “LEAs”), pursuant to court orders or other lawful authorizations.

The Second Report and Order first examined the obligations of facilities-based broadband Internet access and interconnected VoIP providers to implement CALEA. Although packet technologies are fundamentally dif-

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ferent from the circuit switched technologies that were the primary focus of the Commission's earlier decisions on CALEA, carriers, manufacturers, and LEAs have applied the statutory definition of call-identifying information in developing standards or proprietary solutions for packet technologies. In some cases, however, the exact application of these terms remains to be determined. The Commission determined that despite requests for extensions, applying the May 14, 2007 compliance date to all facilities-based broadband Internet access and interconnected VoIP services is reasonable for compliance and will best serve the public interest. The Commission further determined that it would be premature to preempt the ongoing industry process of developing additional standards for packet-mode technologies. At a later date, the Commission will evaluate whether the availability of a trusted third party ("TTP"), in which a TTP would operate a service bureau with a system that has access to a carrier's network equipment and remotely manages the intercept process for the carrier, makes call-identifying information "reasonably" available to a carrier within the context of CALEA section 103.

Additionally, the Commission examined the scope of relief available to telecommunications carriers pursuant to CALEA sections 107(c) and 109(b), issued new guidelines to govern the filing and evaluation of petitions associated with those rule sections, and disposed of pending section 107(c) petitions. Sections 107(c) and 109(b) provide only limited and temporary relief from CALEA compliance requirements. The Commission discussed the requirements for seeking relief under both sections, emphasizing the high burden to obtain relief. The Commission concluded that section 107(c) extension relief is not available for applications that include equipment, facilities, and services installed or deployed on or after October 25, 1998. A public notice will be issued in the future setting forth the deadline by which any carrier that has a 107(c) petition on file must submit a letter attesting that its pending petition exclusively concerns equipment, facilities, and services installed or deployed before October 25, 1998. Thereafter, the Commission will dismiss all non-conforming petitions and petitions for which clarifying letters have not been received.

Third, the Commission addressed CALEA enforcement issues. The Commission found that it has authority under section 229(a) to enforce CALEA, as that section gives the Commission authority to "prescribe such rules as are necessary to implement the requirements of the [CALEA]" and that its enforcement authority is complementary to, not duplicative of, the authority granted LEAs under sections 108 and 201. The Commission also adopted a tentative conclusion to codify the requirement that all carriers subject to CALEA are to comply, at a minimum, with the assistance capability requirements of section 103.

Fourth, the Commission examined CALEA cost issues and specified cost recovery mechanisms for wireline, wireless, and other telecommunications carriers and specified a date for facilities-based broadband Internet access
and interconnected VoIP providers to comply with CALEA system security requirements. The Commission affirmed its tentative conclusion that carriers bear the responsibility for CALEA development and implementation costs for post-January 1, 1995, equipment and facilities. Further, the Commission concluded that while carriers have authority to recover through intercept charges the costs associated with carrying out an intercept that is accomplished using a CALEA-based intercept solution, they are prohibited from recovering through intercept charges the costs of making modifications to equipment, facilities, or services and the costs of deploying CALEA-based intercept solutions that comply with the assistance capability requirements of CALEA section 103. Carriers may absorb the costs of CALEA compliance as a necessary cost of doing business, or, where appropriate, recover some portion of their CALEA section implementation costs from their subscribers. The Commission declined to adopt a national surcharge to recover CALEA costs.

Finally, the Commission addressed the CALEA compliance obligations of providers of future telecommunications services and technologies. The Commission determined that newly identified carriers must comply with the system security requirements in section 105 of CALEA and section 229(b) of the Communications Act, as codified in the Commission's rules, within 90 days of the effective date of the Second Report and Order.

Summarized by Susan Lehman


In May 2006, the Federal Communications Commission ("FCC") released a Declaratory Ruling and Further Notice of Proposed Rulemaking ("Declaratory Ruling") regarding the industry practice of restricting access to Video Relay Services ("VRS") to particular providers of the telecommunications service for the hearing and speech impaired. Petitioner's requested that VRS providers who restricted the service no longer receive compensation from the Interstate Telecommunications Relay Service Fund which allows for reimbursement of reasonable costs associated with providing VRS. The FCC agreed with petitioners, concluding that limiting access to VRS was inconsistent with the congressionally mandated goal of providing, to the greatest extent possible and in the most universally accessible manner feasible, telecommunications relay service ("TRS") to persons with hearing or speech disabilities under Title IV of the American's with Disabilities Act of 1990 ("ADA").

2 See 47 C.F.R. §§ 64.2100-64.2106.
Title IV obligates common carriers to provide TRS in any area in which they also offer telephone transmission services. The FCC opinion notes that Congress specifically mandated that relay services offer TRS in a manner that is functionally equivalent to voice telephone service. Such functional equivalency standards are necessary to ensure equal access to the fundamental concept of a nationwide communications system that is both efficient and without delay. These considerations are found particularly important when weighing the implications of unequal access to emergency services.

Petitioners took particular issue with the industry practice of limiting equipment compatibility to that which the provider supplied. In early 2002, VRS emerged as a viable conduit by which persons using American Sign Language (ASL) could place video phone calls using an expert interpreter and a broadband internet connection to initiate calls via the internet. As the growth of VRS supplanted TRS as the most reliable form of telecommunications service for the hearing and speech impaired, companies vying for a higher market share in the industry consistently hindered unfettered access to VRS by requiring that users install more than one device if they wished to use more than one service provider.

Petitioners requested that the FCC require providers seeking compensation from the TRS fund to remove restrictions on VRS equipment that prohibit universal access to the eight current providers. Petitioner’s main contention was that these restrictions unduly violated principles of functional equivalency set forth by the ADA. Petitioners assert further that imposing such requirements would promote interoperability and foster competition by encouraging other providers to enter the marketplace. Sorenson, the only VRS provider to oppose the petition, defended its service restrictions as a product of their total service platform—an offering they contend was developed at great expense. Additionally, Sorenson posited that the goal of TRS regulations was to encourage the development of new technology and that such development would be stifled by requiring universal access to VRS across the board.

The FCC was not persuaded by Sorenson’s arguments and granted petitioner’s request to lift restrictions on VRS interactivity. In regards to functional equivalency, the FCC found that restricting access to competing VRS systems under the former regime limited the hearing and speech impaired for it provided inferiorly delayed and often incompatible service. Furthermore, the FCC found it unduly burdensome to hinder the ability of the hearing and speech impaired in a manner inconsistent with that provided the voice telephone user by forcing upon the VRS user installation and mastery of different equipment in order to achieve universal service. Finally, this outcome was deemed to be sufficiently within the public interest and in furtherance of the goal of allowing unfettered and equal access to emergency services. As such, the FCC announced an effective date of
60 days whereby the Declaratory Ruling would disqualify any provider so restricting the use of its service from compensation via the TRS fund.

In an attached Further Notice of Proposed Rulemaking, the FCC sought comment on the feasibility of establishing a universal proxy database for VRS numbers and whether the FCC should adopt certain standards to ensure that all VRS providers can receive, place, and route calls to any VRS consumer, and that all VRS consumers can make and receive calls through any VRS provider.

Summarized by Ted Harries

In re Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation (and subsidiaries, debtors-in-possession) to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee, Memorandum Opinion and Order, 21 F.C.C.R. 8203 (July 13, 2006).

A Memorandum Opinion and Order ("Opinion and Order"), released on July 21, 2006, by the Federal Communications Commission ("FCC" or "Commission"), detailed its approval of the acquisition of substantially all of Adelphia Communications Corporation and subsidiaries, debtors-in-possession's ("Adelphia") domestic cable systems, by Time Warner Inc. ("Time Warner"), Time Warner Cable Inc. ("Time Warner Cable"), and Comcast Corporation ("Comcast"). The proposed transaction involved a complex combination of cable system sales and swaps. The FCC found that granting the acquisitions, along with certain conditions, served the public interest.

The Opinion and Order followed Adelphia, Comcast, and Time Warner's (collectively the "Applicants") filing of 210 applications on May 18, 2005, seeking approval for the proposed transactions. After the Commission issued a Public Notice regarding these transactions, six petitions to deny were filed, along with 26,172 informal comments. The Federal Trade Commission ("FTC") also reviewed the proposed transactions pursuant to section 7 of the Clayton Act, limiting its review to examining the competitive effects of the transaction. The FTC found that it was unlikely that the proposed transactions would violate the Clayton Act by substantially lessening competition in any region in the United States.

Before the Commission could grant approval, it first had to find that the proposed transactions served the public interest, necessity, and conven-

ience pursuant to sections 214 and 310(d) of the Communications Act of 1934 ("Act"). First, the Commission determined whether the Applicants demonstrated that the proposed transactions complied with the Commission’s rules, specific provisions of the Act, and other applicable statutes. Second, the Commission considered whether the transactions would result in public interest harms by impairing the implementation or objectives of the Act. Third, the FCC balanced the potential public interest harms and benefits of the transactions. The Applicants had to show, by a preponderance of the evidence, that the balance favored the public interest.

This Opinion and Order found that granting the Applications proposed by the parties, subject to certain conditions, served the public interest. The proposed transactions were found to be in compliance with the Act, rules, and statutes. Under the circumstances, the FCC found the potential public interest benefits from the transactions outweighed the potential harms. However, the Commission found that possible harms existed in regards to the markets in which Time Warner and Comcast may have existing or future ownership interests in Regional Sports Networks ("RSNs"), as well as possible harms to the carriage of unaffiliated programming. As a result, the FCC chose to impose remedial conditions to address these potential harms.

The FCC also found numerous benefits that would result from the possible transactions. These included benefits in Adelphia markets of accelerated deployment of Voice over Internet Protocol ("VoIP") service and advanced video services. Furthermore, the proposed transactions were found to help facilitate the resolution of Adelphia’s bankruptcy proceeding.

Before deciding to approve the Applicants’ proposed transaction, the Commission outlined the potential harms they found from the review of the record. One potential harm centered on the ownership interest of RSNs. The Commission found that Comcast and Time Warner would be able to raise the price of access to RSNs through the imposition of uniform price increases for all multichannel video programming distribution ("MVPDs"), including their own, resulting in increased retail rates, few choices for consumers, and discouraging new entrants. The Commission chose to address this issue by imposing the requirement, as a condition of approval of the transaction, that Time Warner and Comcast make their affiliated RSNs available to other MVPDs, and in the event the parties are unable to reach an agreement, that the MVPD be able to request arbitration in case of dispute.

In light of the benefits of the acquisition, however, the Commission concluded that the Applicants had provided insufficient information showing that they will be able to improve or further deployment high-speed internet service for Adelphia subscribers. Furthermore, the Applicants did not sufficiently quantify or verify the cost savings from increased clustering. The

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2 47 U.S.C. §§ 214, 310(d).
Commission also decided that increased clustering was not likely to enhance competition with local exchange carriers for the provision of voice, video, and data, the triple play of services. Lastly, the unwinding of Comcast’s Time Warner Entertainment interest was not found to be a transaction-specific benefit.

Although the Commission voted to approve the transaction, Commissioner Michael J. Copps addressed his concern regarding the RSNs in his dissenting statement. He asserted that limiting the definition of “must have” content to RSNs will be detrimental to the consumer. Furthermore, he disagreed with the Commission’s choice to exempt Philadelphia from the commercial arbitration remedy.

When balancing the public interest benefits and harms, the Commission examined the magnitude and likelihood of the potential public interest harms, which they found not likely to result in relation to the proposed transactions. In addition, the Commission found that the transactions would result in some public interest benefits. Thus, since the proposed transactions, as conditioned were found the serve the public interest, convenience, and necessity, the Commission granted approval.

Summarized by Anita Bhatia


In November 2006, the Federal Communications Commission (“FCC”) further examined complaints against four television shows, finding material broadcast on two of the programs indecent and profane, comments broadcast on a third show neither indecent nor profane, and dismissing complaints against involving the fourth television program. The FCC’s decisions in these four matters vacate and replace Section III.B of its omnibus order, In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, Notices of Apparent Liability and Memorandum Opinion and Order, 21 F.C.C.R. 2664 (Feb. 21, 2006).

The FCC first examined comments made by Nicole Richie, an awards presenter during the Fox Network broadcast of the 2003 Billboard Music Awards. During the live broadcast, Richie said, “Have you ever tried to get cow shit out of a Prada purse? It’s not so fucking simple.” Based on a two-part analysis—that the language depict sexual or excretory organs or activity, and that the material is patently offensive as measured by contemporary community standards—the FCC found Richie’s statement to be indecent. The FCC stated that the “F-Word” has an inherently sexual connotation, even when used only as a modifier or intensifier.
In assessing whether Richie’s statements were patently offensive, the FCC applied a three part test, examining “(1) the explicitness or graphic nature of the description; (2) whether the material dwells on or repeats at length the descriptions; and (3) whether the material panders to, titillates or shocks the audience.” The FCC noted that the factors analyzed by the U.S. Supreme Court in *FCC v. Pacifica Found.*, 438 U.S. 726 (1978)—time of day, program content, and composition of the audience, among others—weigh in favor of finding Richie’s comments indecent. The FCC also rejected the contention that a single utterance of the “F-Word” or the “S-Word” is not actionably indecent, citing *In re Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, Policy Statement*, 16 F.C.C.R. 7999 (Mar. 14, 2001) for the proposition that “even relatively fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness.” Finally, the FCC rejected arguments that holding Fox liable would be inequitable, noting the insufficiency of the measures employed by Fox in safeguarding such a live broadcast from the use of expletives. Thus, the FCC concluded the broadcast of the 2003 Billboard Music Awards violated indecency prohibitions in 18 U.S.C. § 1464.

The FCC also concluded that Richie’s statement was profane. The FCC clarified that “profane” as used in 18 U.S.C. § 1464 is reasonably interpreted to mean “grossly offensive,” against the network’s contention that profane has an inherently religious meaning. Finally, the FCC rejected arguments that its definition of “indecent” was unconstitutionally vague, noting that the *Pacifica* court and others had accepted and applied the definition. The FCC defended the low level of scrutiny applied by courts to regulations limiting language used in broadcast media, citing the vast reach of broadcast media, its unique accessibility by children, and the lack of methods for protecting viewers that are available to other forms of media.3

Next, during live broadcast of the 2002 Billboard Music Awards, award-recipient Cher said “People have been telling me I’m on the way out ever year, right? So fuck ‘em.” Applying the same analysis described above, the FCC found Cher’s comments both indecent and profane. However, the FCC chose not to sanction Fox for the indecent and profane speech used in either the 2002 or 2003 Billboard Music Awards, stating that “it was not clear at the time that broadcasters could be punished for the kind of comment at issue.”

The third program in question was CBS’s “The Early Show.” During a December 13, 2004 airing of that show, one guest—runner-up in the CBS show “Survivor: Vanuatu” — said that she “knew [the show’s winner] was a bullshitter from Day One.” The FCC deferred to CBS’s characterization

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3 The FCC stated that television rating systems and the V-Chip are imperfect and ineffective protections when compared to analogous filtering software that efficiently blocks inappropriate material on the internet.
The FCC reaffirmed precedent holding that it should exercise caution when evaluating complaints involving news programming. As such, FCC dismissed the indecency complaint against CBS’s “The Early Show.”

Finally, the FCC dismissed as procedurally insufficient a number of complaints regarding the ABC program “NYPD Blue.” The complaints, all filed by one viewer from Alexandria, Virginia, alleged that several episodes of the show used the “S-Word.” The complaint stated that the broadcast “originally aired at 9:00 p.m. CST on Kansas City affiliate KMBC” and was “also seen in homes across the country on ABC affiliates.” No complaints were filed by anyone who watched the program on KMBC, and the affiliate on which the program aired in Virginia showed it during the 10:00 p.m. to 6:00 a.m. safe harbor. Since no complaint came from an actual viewer of the material in a location where it was aired outside the safe harbor time, the FCC found the complaints procedurally insufficient and dismissed them.

Summarized by Derek Richmond