

# BloostonLaw Telecom Update

Published by the Law Offices of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP  
www.bloostonlaw.com

Vol. 11, No. 10

March 12, 2008

## **Cellular/PCS Carriers May Face Patent Infringement Claims From DTL**

Some CMRS carriers have recently received letters from a company named Digital Technology Licensing LLC (DTL), alleging infringement of US Patent 5,051,799 (the "799 Patent") for a "Digital Output Transducer." The alleged infringement comes from operating a cellular telephone network and sale of Bluetooth headsets and other devices within the United States. DTL's letter requests that the recipient either cease all activities that infringe upon the 799 Patent or take a nonexclusive license.

DTL claims to have "already successfully licensed the 799 Patent to Nokia, Samsung and Ericsson", and that it "recently settled its infringement suit against Cingular Wireless and AT&T Mobility." DTL also claims that it is "actively pursuing a reasonable royalty" from Sprint Nextel, T-Mobile USA, Verizon Wireless and Motorola Corp. It would therefore appear that the claim applies to PCS as well as cellular.

On review of various Federal Court dockets, it appears that DTL filed patent infringement lawsuits in April 2005 against Verizon, in April 2006 against Cingular, and just last fall against T-Mobile USA, AT&T Mobility, and Sprint Nextel.

The Cingular and AT&T cases appear to have been settled and were voluntarily dismissed this past January; the Verizon case was stayed pending mediation last August; and the cases against T-Mobile and Sprint Nextel remain pending at the pre-discovery stage before the Federal District Court in New Jersey.

*(Continued on Page 2; See "Patent Infringement" under "Law and Regulation.")*

**AUCTION NO. 73 UPDATE:** The auction appears to be nearing an end, as bidding has slowed. After 207 rounds, the total remains near \$19.59 billion, with only 5 new bids.

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## **Wireless Spam Looms As Big Problem For Cell Phones**

Wireless spam. It is illegal. But it is happening. According to the *Washington Post*, more than 1 billion text messages are sent every day in the United States, and U.S. consumers are expected to receive about 1.5 billion spam text messages in 2008, up from 1.1 billion last year and 800 million in 2006, based on reports from Ferris Research of San Francisco. The *Post* reports that Verizon Wireless says it blocks an average of more than 200 million spam text messages every month, and that, generally, wireless carriers are increasing their efforts to take legal action against spammers and to use more sophisticated spam filters.

The major problem with wireless spam is that it **costs** the recipient—the cell phone user has to pay for the unwanted message. **Thus, the FCC and the industry need to find a way to correct this problem before it gets totally out of hand.**

As the *Post* pointed out, "spam is often a nuisance, but more malicious messages can lead to a new form of fraud called 'smishing,' a variation of a spam e-mail at-

tack known as 'phishing.' Smishing attacks, called such because text messages are also known as SMS [short messaging service] messages, disguise themselves as legitimate messages from e-commerce or financial sites such as eBay, PayPal or banks, and seek to dupe consumers into giving up account numbers or passwords."

One problem is that political campaigns use text messaging to mobilize voters, travel sites use them for promotions to existing customers, and TV shows (even cable news programs) ask viewers to use their cell phones for polling purposes. This, of course, opens the door to hackers.

As the *Post* reports: "Spammers use similar techniques to target people through text messages as they do through e-mail. They harvest phone numbers from databases or hack into the records of legitimate companies that have permission to send text messages, such as travel sites or online retailers. The guesswork involved in targeting cell phone numbers is easier than randomly selecting e-mail addresses; while an e-mail address has a unique sequence of characters and a variable length, phone numbers are 10 digits. Therefore, it is easier to blitz thousands of potential customers at once."

Although consumer complaints about text messaging spam have so far been minimal, according to the Federal Trade Commission, overall wireless spam traffic is on the rise. Large carriers—AT&T, Sprint Nextel, T-Mobile, and Verizon Wireless—already employ anti-spam filters, and plan to unveil flat-rate billing plans for text messaging. According to IAG Research, approximately 20% of the total revenue for wireless carriers comes from delivering text messages. So there is a huge incentive for carriers to block wireless spam.

BloostonLaw contacts: Hal Mordkofsky, John Prendergast, and Cary Mitchell.

## LAW & REGULATION

**PATENT INFRINGEMENT (Continued from Page 1):** But rather than waiting for DTL to file an infringement suit against it, or agreeing to license DTL's technology (as Nokia, Ericsson and Samsung have apparently done), Motorola appears to have gone on the offensive by filing a complaint for declaratory judgment of patent non-infringement in the Southern District of New York. Motorola's suit alleges, among other things, that Motorola has not infringed the 799 Patent, that the 799 Patent is invalid, and that the 799 Patent is unenforceable due to "inequitable conduct in its procurement." Regardless of whether DTL's patent infringement claims have any merit, DTL has shown a willingness to pursue patent litigation, which can be time consuming and expensive. Carriers who receive any correspondence from DTL or its

representatives should take the matter seriously, and notify counsel without delay. Oftentimes, contracts with equipment vendors contain indemnification provisions that will protect the carrier from any patent infringement claims. However, such indemnification may be conditioned on promptly notifying the vendor and consulting with the vendor with regard to any legal defense. Therefore, any response to patent infringement claims should be carefully coordinated with your equipment vendor at every stage. BloostonLaw contacts: Hal Mordkofsky, John Prendergast, and Cary Mitchell.

**COMMENTS SOUGHT ON NANPA TECHNICAL REQUIREMENTS DOCUMENT:** The FCC's Wireline Competition Bureau (WCB) has asked for comment on the technical requirements document that will be used in preparing the solicitation for the North American Numbering Plan Administrator's (NANPA's) next term of administration. The NANPA is the numbering administrator responsible for making telecommunications numbers available on an equitable basis. On July 9, 2003, NeuStar, Inc. was awarded the federal contract to serve as the NANPA for a total of five years. The contract is renewable annually and expires July 8, 2008. In order to have an impartial entity continue to administer the North American Numbering Plan, the Wireline Competition Bureau must select a NANPA for another contract term. The entity selected to serve as the NANPA will manage the North American Numbering Plan (NANP) resources in accordance with the terms and conditions of a Federal Acquisition Regulation (FAR) based contract. At the Bureau's request, the North American Numbering Council (NANC), the federal advisory committee on numbering matters, examined the existing technical requirements document for the NANPA, as updated by NeuStar. On February 29, 2008, the NANC forwarded its proposed technical requirements document to the Deputy Bureau Chief. The Bureau has reviewed and slightly modified that proposed document. It is anticipated that the technical requirements document will form the basis for a Statement of Work in the solicitation for the NANPA. For this reason, the public notice seeks comment on those technical requirements. The NANC's technical requirements document, as modified, does not, in any way reflect the position of the Commission as to the final technical requirements or contract terms for the anticipated solicitation. **Comments are due March 21, and replies are due March 28.** All comments must reference **CC Docket No. 92-237 and CC Docket No. 99-200**. BloostonLaw contacts: Ben Dickens, Gerry Duffy, and Mary Sisak.

**FCC EXTENDS COMMENT DATES FOR BROADCAST LOCALISM NPRM:** The FCC has extended the comment cycle for its Notice of Proposed Rulemaking (NPRM) on broadcast localism. **Comments in this MB Docket No. 04-2333 proceeding are now due April 28, and replies are due June 11.** The NPRM requests

comment on several proposed rule changes designed to enhance broadcast localism and diversity, to increase and improve the amount and nature of broadcast programming that is targeted to the local needs and interests of a broadcast station's community of service, and to provide more accessible information to the public about broadcasters' efforts to air such programming. The extension of time was requested by certain named state broadcasters associations and noncommercial broadcast organizations, National Public Radio, Inc., the Association of Public Television Stations, the Public Broadcasting Service, and the National Association of Broadcasters. No oppositions were filed to the requested extension. BloostonLaw contact: Gerry Duffy.

**COMMENT CYCLE SET FOR SECOND FNPRM ON LOW POWER FM STATIONS:** The FCC has established a comment cycle for its Second Further Notice of Proposed Rulemaking (FNPRM) regarding certain aspects of interference protection rights for low power FM (LPFM) stations. In the FNPRM, the Commission seeks comment on whether additional LPFM service and technical rule changes are warranted, including: establishing a second-adjacent channel waiver standard; implementing a licensing presumption that would protect certain operating LPFM stations from subsequently proposed community of license modifications; imposing an obligation on full-service station applicants to assist an LPFM station potentially impacted by implementation of its new station or modification proposal; creating contour protection-based licensing standards for LPFM stations; and establishing LPFM-FM translator protection priorities. **Comments in this MM Docket No. 99-25 proceeding are due April 7, and replies are due April 21.** BloostonLaw contacts: Hal Mordkofsky, John Prendergast, and Richard Rubino.

**FCC REINSTATES USF SUPPORT FOR NEW FLORENCE:** The FCC has directed the Universal Service Administrative Company (USAC) to recommence disbursing high-cost universal service support to New Florence Telephone Company (NFTC) as of April 1, 2007, the date as of which the Missouri Public Service Commission (PSC) certified that NFTC will use federal high-cost support consistent with its intended purposes. NFTC is a rural, incumbent local exchange carrier (LEC) serving the New Florence, Missouri, exchange. High-cost payments to NFTC and Cass County Telephone Company (CassTel) were suspended in 2004 as a result of a Missouri PSC investigation into alleged wrongdoing by CassTel. Even though there was no alleged wrongdoing by NFTC, at that time, 66 percent of NFTC's ownership was common with CassTel, and the PSC stated that it was not required to justify its decision to withhold universal service certification for NFTC, that NFTC shareholders had ties to criminal entities, and that it was continuing its investigation into NFTC. Last year, the FCC imposed certain conditions on CassTel and its successor entity

before directing USAC to provide prospective high-cost support to that entity. Because the facts underlying NFTC ceasing to receive high-cost support are substantially the same as those that led to CassTel ceasing to receive support, and in reliance on NFTC having implemented safeguards that are substantially the same as required by the Bureau in the *CassTel-FairPoint Order*, the FCC said, NFTC should recommence receiving high-cost universal service support subject to two additional conditions: (1) Any amounts owed by NFTC to USAC must be repaid prior to NFTC receiving high-cost support; and (2) DCRI must provide independent annual audits upon FCC request. BloostonLaw contacts: Ben Dickens, Gerry Duffy, and Mary Sisak.

## DEADLINES

**MARCH 31: FCC FORM 507, UNIVERSAL SERVICE QUARTERLY LINE COUNT UPDATE.** *Line count updates are required to recalculate a carrier's per line universal service support, and is filed with the Universal Service Administrative Company (USAC). This information must be submitted on July 31 each year by all rate-of-return incumbent carriers, and on a quarterly basis if a competitive eligible telecommunications carrier (CETC) has initiated service in the rate-of-return incumbent carrier's service area and reported line count data to USAC in the rate-of-return incumbent carrier's service area, in order for the incumbent carrier to be eligible to receive Interstate Common Line Support (ICLS). This quarterly filing is due **March 31** and covers lines served as of September 30, 2007. (Normally this filing is due March 30, but this year, March 30 falls on a Sunday.) Incumbent carriers filing on a quarterly basis must also file on **July 31** (for lines served as of December 31, 2007); **September 30** (for lines served as of March 31, 2008); and **December 30** (for lines served as of June 30, 2008). BloostonLaw contacts: Ben Dickens, Gerry Duffy, and Mary Sisak.*

**MARCH 31: FCC FORM 525, COMPETITIVE CARRIER LINE COUNT QUARTERLY REPORT.** *Competitive eligible telecommunications carriers (CETCs) are eligible to receive high cost support if they serve lines in an incumbent carrier's service area, and that incumbent carrier receives high cost support. CETCs are eligible to receive the same per-line support amount received by the incumbent carrier in whose study area the CETC serves lines. Unlike the incumbent carriers, CETCs will use FCC Form 525 to submit their line count data to Universal Service Administrative Company (USAC). **This quarterly report must be filed by the last business day of March (for lines served as of September 30 of the previous year); the last business day of July (for lines served as of December 31 of the current year); the last business day of September (for lines served as of March 31 of the current year); and the last***

**business day of December (for lines served as of June 30 of the current year).** CETCs must file the number of working loops served in the service area of an incumbent carrier, disaggregated by the incumbent carrier's cost zones, if applicable, for High Cost Loop (HCL), Local Switching Support (LSS), Long Term Support (LTS), and Interstate Common Line Support (ICLS). ICLS will also require the loops to be reported by customer class as further described below. For Interstate Access Support (IAS), CETCs must file the number of working loops served in the service area of an incumbent carrier by Unbundled Network Element (UNE) zone and customer class. Working loops provided by CETCs in service areas of non-rural incumbents receiving High Cost Model (HCM) support must be filed by wire center or other methodology as determined by the state regulatory authority. CETCs may choose to complete FCC Form 525 and submit it to USAC, or designate an agent to file the form on its behalf. BloostonLaw contacts: Ben Dickens, Gerry Duffy, and Mary Sisak.

**MARCH 31: FCC FORM 508, PROJECTED ANNUAL COMMON LINE REVENUE REQUIREMENT FORM:** Section 54.903(a)(1) of the FCC's rules requires each rate-of-return incumbent telecommunications carrier to provide information needed to calculate the Projected Annual Common Line Revenue Requirement for each of its study areas in the upcoming funding year to the Universal Service Administrative Company (USAC). This information must be submitted on March 31 each year, in order for the carrier to be eligible to receive Interstate Common Line Support. This collection of information stems from the Commission's authority under Section 254 of the Communications Act. The data in the form will be used to calculate the amount of support, if any, that each reporting carrier is eligible to receive from the Interstate Common Line Support Mechanism. Carriers are permitted to submit a correction to their March 31 projected carrier common line revenue requirements and supporting data from **April 1** until **June 30** for the upcoming funding year (July 31, 2008, through June 30, 2009). Additionally, on June 30, carriers are permitted to submit an update to the projected data for the ICLS funding year ending on that date. Permitting these revisions to projected data for current and upcoming ICLS funding years will mitigate the lag between projected and actual data filings and give carriers more meaningful opportunities to revise projections to adjust ICLS where necessary. After the June 30 correction deadline each year, any corrections to projected common line revenue requirement and supporting data shall be made in the form of true-ups, using actual cost and revenue data that a carrier must report in **FCC Form 509, Annual Common Line Actual Cost Data Collection Form**. (This form is due December 31.) BloostonLaw contacts: Ben Dickens, Gerry Duffy, and Mary Sisak.

**MARCH 31: Last day to submit revisions to FCC Form 497, Lifeline and Link-Up Worksheet, for 2006.** The Universal Service Administrative Company's (USAC's) administrative window for submitting revisions to Form 497 will close March 31 for all months prior to January 2007. This applies to submission of data on Form 497, including original (first-time) submissions and revisions of previously submitted data. USAC's administrative window for submitting data for the year 2005 is currently closed. BloostonLaw contacts: Ben Dickens, Gerry Duffy, and Mary Sisak.

**MARCH 31: ANNUAL INTERNATIONAL CIRCUIT STATUS REPORTS.** Carriers are reminded that Section 43.82 of the Commission's rules requires each facilities-based carrier that provides international telecommunications services to file a Circuit Status Report by March 31, 2008. The report should contain data as of December 31, 2007. The information that must be filed and filing format for the Circuit Status Report is described in detail in the Circuit Status Filing Manual. All facilities-based carriers must file a Circuit Status Report if they had any activated or idle circuits as of December 31, 2007. If carriers did not have any activated or idle circuits as of December 31, 2007, they are not required to file this report or file any letter stating that they have no circuits to report. The Filing Manual requires carriers to report the total number of activated and the total number of idle circuits using the following categories: submarine cable, satellite, and landline (cable or microwave). The Filing Manual defines international facilities-based circuits as "international circuits in which a carrier has an ownership interest. For this purpose, the term ownership interest includes outright ownership, indefeasible right of use (IRU) interests, or leasehold interests in bare capacity in an international facility, regardless of whether the underlying facility is a common or non-common carrier submarine cable or ... satellite system." The Filing Manual further explains that leasehold interests in bare capacity "are distinct from private lines leased from another reporting international carrier." Thus, any telecommunications carrier that has leased an international circuit from another common carrier, a non-common carrier, or a foreign carrier, other than a lease of private line "service" or "capacity" from a common carrier, must file a Circuit Status Report and include that circuit in its report. Such a circuit should be reported as a facilities-based circuit, and not as a facilities-based resold circuit. Private line resellers should report their resold circuits using the Facility Codes 11, 12 and 13 as specified in the Filing Manual. Facilities-based carriers that are regulated as dominant on particular U.S. international routes under Section 63.10 must provide their circuit status information on a facility-specific basis for the dominant route only. Carriers should provide the information in a separate appendix using the same table format in the Filing Manual, but they should add a column labeled "Facility Name" after "Data field #2". Carriers are reminded to file their reports

on compact disc (CD) media. The FCC will not accept reports filed on diskettes. But it will accept Excel files. BloostonLaw contacts: Ben Dickens, Gerry Duffy, and Mary Sisak.

**APRIL 1: FCC FORM 499-A, TELECOMMUNICATIONS REPORTING WORKSHEET.** This form must be filed by all contributors to the Universal Service Fund (USF) support mechanisms, the Telecommunications Relay Service (TRS) Fund, the cost recovery mechanism for the North American Numbering Plan Administration (NANPA), and the shared costs of local number portability (LNP). Contributors include every telecommunications carrier that provides interstate, intrastate, and international telecommunications, and certain other entities that provide interstate telecommunications for a fee. **Even common carriers that qualify for the de minimis exemption must file Form 499-A. Entities whose universal service contributions will be less than \$10,000 qualify for the de minimis exemption. De minimis entities do not have to file the quarterly report (FCC Form 499-Q), which was due February 1, and will again be due May 1. Form 499-Q relates to universal service contributions, but not to the TRS, NANPA, and LNP mechanisms. Form 499-A relates to all of these mechanisms and, hence, applies to all providers of interstate, intrastate, and international telecommunications services.** Form 499-A contains revenue information for January 1 through December 31 of the prior calendar year. And Form 499-Q contains revenue information from the prior quarter plus projections for the next quarter. The reporting requirements for determining interconnected voice over Internet protocol (VoIP) providers' contribution to the shared costs of numbering administration and LNP require interconnected VoIP providers to file an annual FCC Form 499-A. **Block 2-B of the Form 499-A requires each carrier to designate an agent in the District of Columbia upon whom all notices, process, orders, and decisions by the FCC may be served on behalf of that carrier in proceedings before the Commission. Carriers receiving this newsletter may specify our law firm as their D.C. agent for service of process using the information in our masthead. There is no charge for this service.** BloostonLaw contacts: Hal Mordkofsky, Ben Dickens, Gerry Duffy, and John Prendergast.

**APRIL 21: FCC FORM 497, LOW INCOME QUARTERLY REPORT.** This form, the Lifeline and Link-Up Worksheet, must be submitted to the Universal Service Administrative Company (USAC) by all eligible telecommunications carriers (ETCs) that request reimbursement for participating in the low-income program. **The form must be submitted by the third Monday after the end of each quarter.** It is available at: [www.universalservice.org](http://www.universalservice.org). BloostonLaw contacts: Ben Dickens, Gerry Duffy, and Mary Sisak.

**MAY 1: FCC FORM 499-Q, TELECOMMUNICATIONS REPORTING WORKSHEET.** All telecommunications common carriers that expect to contribute more than \$10,000 to federal Universal Service Fund (USF) support mechanisms must file this quarterly form. The FCC has modified this form in light of its recent decision to establish interim measures for USF contribution assessments. The form contains revenue information from the prior quarter plus projections for the next quarter. Form 499-Q relates only to USF contributions. It does not relate to the cost recovery mechanisms for the Telecommunications Relay Service (TRS) Fund, the North American Numbering Plan Administration (NANPA), and the shared costs of local number portability (LNP), which are covered in the annual form (Form 499-A) that was due April 1. BloostonLaw contacts: Ben Dickens and Gerry Duffy.

**MAY 1: RATE INTEGRATION CERTIFICATION.** Non-dominant interexchange carriers (IXCs) that provide detariffed domestic interstate services must certify that they are providing such services in compliance with their geographic rate averaging and rate integration obligations. An officer of the company must sign this annual certification under oath. The FCC has issued the following guidelines: (1) Any carrier that provides interstate services must charge its subscribers in rural and high-cost areas rates that do not exceed the rates that the carrier charges subscribers in urban areas; (2) to the extent that a carrier offers optional calling plans, contract tariffs, discounts, promotions, and private line services to its interstate subscribers in one state, it must use the same ratemaking methodology and rate structure when offering such services in any other state; (3) an interstate carrier may depart from geographic rate averaging when offering contract tariffs, Tariff 12 offerings, optional calling plans, temporary promotions, and private line services; and (4) carriers may offer optional calling plans on a geographically limited basis as part of a temporary promotion that does not exceed 90 days. But this limited exception does not exempt optional calling plans from geographic rate averaging requirements. Clients with questions about the FCC's detariffing or rate integration requirements should contact us. We have a model rate integration certification letter that may be printed on your letterhead. BloostonLaw contacts: Ben Dickens and Gerry Duffy.

**MAY 31: FCC FORM 395, EMPLOYMENT REPORT.** Common carriers, including wireless carriers, with 16 or more full-time employees must file their annual Common Carrier Employment Reports (FCC Form 395) by May 31. This report tracks carrier compliance with rules requiring recruitment of minority employees. Further, the FCC requires all common carriers to report any employment discrimination complaints they received during the past year. That information is also due on **May 31**. The FCC encourages carriers to complete the discrimination report requirement by filling out Section V of Form 395, rather

than submitting a separate report. Clients who would like assistance in filing Form 395 should contact Richard Rubino.

**JUNE 30: ANNUAL ICLS USE CERTIFICATION.** Rate of return carriers and CETCs must file a self-certification with the FCC and the Universal Service Administrative Company (USAC) stating that all Interstate Common Line Support (ICLS) and Long Term Support (LTS) will be used only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. In other words, carriers are required to certify that their ICLS and LTS support is being used consistent with Section 254(e) of the Communications Act. **Failure to file this self-certification will preclude the carrier from receiving ICLS support. We, therefore, strongly recommend that clients have BloostonLaw submit this filing and obtain an FCC proof-of-filing receipt for client records.** BloostonLaw contacts: Ben Dickens and Gerry Duffy.

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\*Limited to Matters and Proceedings before Federal Courts and Agencies

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

## FCC Meetings and Deadlines

*Mar. 14* – Deadline for comments on public interest groups' request for "anti-discrimination" classification for text messaging (WT Docket No. 08-7). Extended from Feb. 13.

*Mar. 14* – Deadline for reply comments on IP Feature Group request to forbear from applying access charges to voice-embedded Internet communications (WC Docket No. 07-256). Extended from Feb. 6.

*Mar. 17* – Deadline for reply comments on Embarq, Frontier requests for forbearance from ARMIS reporting requirements (WC Docket No. 07-24).

***Mar. 19* – FCC open meeting.**

*Mar. 21* – Deadline for comments on NANPA technical requirements document (CC Docket No. 92-237 and CC Docket No. 99-200).

*Mar. 24* – Deadline for reply comments on NPRM regarding forbearance petitions (WC Docket No. 07-247).

***Mar. 24* – FCC order extending LNP requirements to VoIP providers, and reinstating intermodal requirement for small wireline carriers takes effect.**

*Mar. 24* – Deadline for comments on NPRM regarding additional VoIP numbering issues (WC Docket No. 07-243 and 244).

*Mar. 26* – Deadline for comments, data for annual CMRS report (WT Docket No. 08-27).

*Mar. 28* – Deadline for comments on cable and broadcast attribution rule (MB Docket No. 92-264).

*Mar. 28* – Deadline for reply comments on NANPA technical requirements document (CC Docket No. 92-237 and CC Docket No. 99-200).

***Mar. 31* – FCC Form 507, Universal Service Quarterly Line Count Update, is due.**

***Mar. 31* – FCC Form 525, Competitive Carrier Line Count Quarterly Report, is due.**

***Mar. 31* – FCC Form 508, Projected Annual Common Line Revenue Requirement Form, is due.**

***Mar. 31* – Annual International Circuit Status Reports are due.**

***Apr. 1* – FCC Form 499-A, Telecommunications Reporting Worksheet, is due.**

***Apr. 3* – Deadline for comments on USF reform NPRMs—Joint Board, Identical Support Rule, and Reverse Auctions NPRMs (WC Docket No. 05-337).**

*Apr. 7* – Deadline for reply comments on pole attachment NPRM (WC Docket No. 07-245).

*Apr. 7* – Deadline for comments on broadcast localism NPRM (MB Docket No. 04-2333).

*Apr. 7* – Deadline for comments on Second FNPRM on low power FM stations (MM Docket No. 99-25).

***Apr. 10* – FCC open meeting.**