

# BloostonLaw Telecom Update

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## **After Adopting USF Cap, FCC Seeks to Refresh Record in Related Dockets**

*After adopting an interim cap on high-cost Universal Service Fund (USF) support for competitive eligible telecommunications carriers (see separate story on this page), the FCC invited parties wishing to refresh the record on open dockets addressing universal service and/or intercarrier compensation reform to do so promptly. Dockets addressing such reform include:*

*\*Inter-carrier Compensation Reform, CC Docket No. 01-92*

*\*Inter-carrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68*

*\*Federal-State Joint Board on Universal Service, CC Docket No. 96-45*

*\*Universal Service Contribution Methodology, WC Docket No. 06-122*

*\*High-Cost Universal Service Support, WC Docket No. 05-337*

*\*Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight, WC Docket No. 05-195*

*Other proceedings that raise these and related issues include:*

*\*Lifeline and Link-Up, WC Docket No. 03-109*

*Rural Health Care Support Mechanism, WC Docket No. 02-60*

*\*Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6*

*\*Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers, CC Docket No. 00-256*

*\*Changes to the Board of Directors for the National Exchange Carrier Association, Inc., CC Docket No. 97-21*

*\*Jurisdictional Separations and Referral to the Federal-State Joint Board, CC Docket No. 80-286.*

*Contact Ben Dickens, Gerry Duffy, and Mary Sisak.*

## INSIDE THIS ISSUE

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- Cyren Call's O'Brien urges rural carriers to bid on D Block.

## **FCC Caps USF For CETCs At March 2008 Levels For Each State In Which They Were Eligible To Receive Support**

The FCC last Thursday, May 1, released its long-awaited order imposing an interim cap on total annual high-cost Universal Service Fund (USF) support for competitive eligible telecommunications carriers (CETCs). The FCC is clearly targeting wireless CETCs. Such support will be capped at the level of support that they were eligible to receive in each state during March 2008 on an annualized basis. The FCC vote on the WC Docket No. 05-337 item was 3-2, with Commissioners Michael Copps and Jonathan Adelstein dissenting.

The Commission also adopted two limited exceptions from the specific application of the interim cap. First, a CETC will not be subject to the interim cap to the extent it files cost data demonstrating that its costs meet the support threshold in the same manner as the incumbent local exchange carrier (LEC). Second, the Commission adopted a limited exception for CETCs serving tribal lands or Alaska Native regions. The interim cap will remain in place only until the Commission adopts comprehensive high-cost universal service reform. The Commission said it plans to complete a final order on comprehensive reform as quickly as feasible after the com-

ment cycle is completed in the pending WC Docket No. 05-337. Finally, the Commission resolved most of the pending petitions for ETC designation. (Contact the firm for a list of the designations.)

The FCC said it did not find it necessary to adopt additional caps on support provided to incumbent LECs at this time because, as the Federal-State Joint Board on Universal Service had noted in its *Recommended Decision*, high-cost support to incumbent LECs has been flat and is therefore exerting less pressure on the universal service fund. Moreover, the FCC said, incumbent LEC high-cost loop support is already capped, and incumbent LEC interstate access support is subject to a targeted limit. Incumbent LEC disbursements from other support mechanisms, like local switching support and interstate common line support, have been stable in recent years. Further, the FCC said, although high-cost model support has no actual cap, it does have built-in restraints on growth, which derive from the fact that support is based on stable statewide average estimated costs. Accordingly, the FCC limited the interim cap to high-cost support provided to competitive ETCs.

**Operation of the Cap:** Under the state-based cap, support will be calculated using a two-step approach. First, on a quarterly basis, the Universal Service Administrative Company (USAC) will calculate the support each competitive ETC would have received under the existing (uncapped) per-line identical support rule, and sum these amounts by state. Second, USAC will calculate a state reduction factor to reduce this amount to the competitive ETC cap amount. Specifically, USAC will compare the total amount of uncapped support to the cap amount for each state. Where the total state uncapped support is greater than the available state cap support amount, USAC will divide the state cap support amount by the total state uncapped amount to yield the state reduction factor. USAC will then apply the state-specific reduction factor to the uncapped amount for each competitive ETC within the state to arrive at the capped level of high-cost support. Where the state uncapped support is less than the available state capped support amount, no reduction will be required.

For example, if, in State A, the capped amount is \$90 million, and the total uncapped support is \$130 million, the reduction factor would be 69.2 percent ( $\$90/\$130$ ). In State A, each competitive ETC's uncapped support would be multiplied by 69.2 percent to reduce support to the capped amount. If, in State B, however, the capped amount is \$100 million, and the total uncapped support is \$95 million, there would be no reduction factor because the uncapped amount is less than the capped amount. Finally, if, in State C the base period capped amount is \$0 (i.e., there were no competitive ETCs eligible to receive support in State C in March 2008), then no competitive ETCs would be eligible to receive support in that

state during the interim cap. Each quarter, for the duration of the cap, a new reduction factor would be calculated for each state.

Finally compliance with the terms of this limited exception will be verified through certification and reporting requirements. Specifically, a competitive ETC seeking to receive high-cost support pursuant to this limited exception must certify the number of lines that meet the limited exception requirements. The competitive ETC also must provide a specific description of how it confirmed that it had met the certification threshold.

**Limited Exceptions:** Regarding the two limited exceptions to the operation of the interim cap, the FCC said: First, consistent with the *ALLTEL-Atlantis Order* and the *AT&T-Dobson Order*, it is in the public interest to adopt a limited exception to the interim cap if a competitive ETC submits its own costs. Specifically, a competitive ETC will not be subject to the interim cap to the extent that it files cost data demonstrating that its costs meet the support threshold in the same manner as the incumbent LEC.

Second, the FCC also adopted a limited exception to the interim cap for competitive ETCs that serve tribal lands or Alaska Native regions (the Covered Locations). The FCC permitted competitive ETCs serving Covered Locations to continue to receive uncapped high-cost support for lines served in those Covered Locations. Because many tribal lands have low penetration rates for basic telephone service, the FCC did not believe that competitive ETCs are merely providing complementary services in most tribal lands, as they do generally.

Participation in this limited exception to the interim cap is voluntary and will be elected by the competitive ETC on a study area by study area basis. Therefore, any competitive ETC that does not or cannot opt into the limited exception, or that does not or cannot opt into the limited exception for a particular Covered Location, will remain subject to the interim cap. Support for competitive ETCs that do opt into the limited exception will continue to be provided pursuant to section 54.307 of the Commission's rules, except that the uncapped per line support is limited to one payment per each residential account. If a competitive ETC serves lines in both Covered Locations and non-Covered Locations (or only Covered Locations), the universal service administrator shall determine the amount of additional support – after application of the interim cap – necessary to ensure that a competitive ETC receives the same per-line support amount as the incumbent LEC for the lines qualifying for the exception.

Compliance with the terms of this limited exception will be verified through certification and reporting requirements. Specifically, a competitive ETC seeking to receive high-cost support pursuant to this limited exception

must certify the number of lines that meet the limited exception requirements. The competitive ETC also must provide a specific description of how it confirmed that it had met the certification threshold.

Even with the total amount of support provided to competitive ETCs being capped, continued growth in competitive ETC lines would have the effect of reducing the amount of interstate access support (IAS) received by incumbent LECs, due to the operation of the formula for calculating IAS, the FCC said. To prevent the implementation of the interim cap on competitive ETC support from having this unintended consequence on incumbent LEC support, the FCC found it necessary to adjust the calculation of IAS for both incumbent LECs and competitive ETCs. Accordingly, it divided IAS into separate pools for incumbent LECs and competitive ETCs and separately cap the amount of IAS support for both types of carriers. The annual amount of IAS available for incumbent LECs shall be set at the amount of IAS that incumbent LECs were eligible to receive in March 2008 on an annual basis. This amount shall be indexed annually for line growth or loss by price cap incumbent LECs. The annual amount of IAS available for competitive ETCs shall be set at the amount of IAS that competitive ETCs were eligible to receive in March 2008 on an annual basis. Subject to these constraints, the FCC directed USAC to calculate and distribute IAS for each pool to eligible carriers consistent with the existing IAS rules.

**The order will become effective 30 days after publication in the Federal Register. However, there are information collection requirements pertaining to the reporting and recording requirements that must be submitted to the Office of Management and Budget (OMB) for approval.**

In his dissenting statement, **Commissioner Copps** said: "The majority's response ... while they will attempt to bill it as an 'interim, emergency cap,' has no sunset period and commits only to completing comprehensive reform 'as soon as feasible.' Remember that old song 'The Twelfth of Never'?"

**Commissioner Adelstein** said: "While I am deeply skeptical about the imposition of artificial caps on universal service, I have long been concerned about fund growth and the need to manage scarce resources responsibly. One apparent obstacle to that goal is the current designation process, which gives State commissions strong incentives to designate additional universal service recipients but places no corresponding financial responsibility for those designations. Going back to my days on the Joint Board, I have urged both our Commission and our State commission colleagues to exercise caution in granting CETC designations. Yet, the cap mechanism adopted by the Commission today suffers from a major flaw because it penalizes most harshly the

very States that heeded calls for discretion in the designation process."

BloostonLaw contacts: Ben Dickens, Gerry Duffy, and Mary Sisak.

## LAW & REGULATION

**FCC ORDER MODIFYING PCS, AWS POWER LIMIT RULES PUBLISHED IN FEDERAL REGISTER:** The FCC's order modifying its rules governing Broadband Personal Communications Services (PCS) and Advanced Wireless Services (AWS-1) to permit the use of a power spectral density model (PSD) when measuring and calculating emissions and power limits has been published in the Federal Register (BloostonLaw Telecom Update, March 26). The order will become effective June 2. This order is consistent with the FCC's April 2007 decision to allow a PSD model in the commercial services portions of the 700 MHz Band. The FCC said the new rule changes offer greater flexibility to PCS and AWS-1 operators, are more technologically neutral, and will better accommodate broadband technologies. The Commission added that the PSD model also has the potential to reduce network infrastructure costs, thus enabling providers to offer enhanced wireless broadband services, including to consumers living in rural America. The existing PCS and AWS-1 rules measure radiated power in terms of watts *per emission* and limit power output regardless of bandwidth size. In the PSD model, radiated power levels are calculated on a watts-*per-megahertz* basis when operating with greater than one megahertz of bandwidth. In addition, the FCC said, under the existing rules, power levels are measured using *peak* values, while under the new rules, power levels may now be measured using *average* values. The Commission said this is a more practical way to measure power levels and will accommodate new wireless technologies that produce emissions with sub-microsecond power spikes. In order to prevent interference that may occur from measuring average power levels, the FCC adopted a peak-to-average ratio limit of 13 dB. In the Order, the FCC declined to adopt a proposal to double the base station effective isotropic radiated power limits for PCS and AWS-1 licensees. This proposal raised significant concerns regarding potential harmful interference to operators in adjacent spectrum bands. The FCC also declined to change radiated power limit rules for other services besides PCS and AWS-1 at this time. BloostonLaw contacts: Hal Mordkofsky, John Prendergast, and Cary Mitchell.

**FCC OPENS NEW DOCKET ON MIGRATORY BIRDS REMAND CASE; CTIA, PCIA FILE RULEMAKING PETITION:** The FCC's Wireless Telecommunications Bureau (WTB) has opened new **WT Docket No. 08-61** in response to the decision of the U.S. Court of Appeals for

the District of Columbia Circuit that the FCC must reexamine its rules and policies governing antenna towers.

In *American Bird Conservancy, Inc. v. FCC*, the Court affirmed in part and vacated and remanded in part the Commission's 2006 *Memorandum Opinion and Order* relating to a petition filed by the American Bird Conservancy, the Forest Conservation Council, and the Friends of the Earth (BloostonLaw Telecom Update, February 20). In this case, the petitioners had asked the D.C. Circuit to review the Commission's order denying in part and dismissing in part their petition seeking protection of migratory birds from collisions with communications towers in the Gulf Coast region. Their petition claimed that Commission rules and procedures for approving new towers failed to comport with the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and the Migratory Bird Treaty Act (MBTA). The court vacated the *Order* because the Commission failed to apply the proper NEPA standard, to provide a reasoned explanation on consultation under the ESA, and to provide meaningful notice of pending tower applications. In a related matter, **CTIA-The Wireless Association, the National Association of Tower Erectors (NATE), and PCIA** last Friday asked the FCC to launch a Notice of Proposed Rulemaking (NPRM) to implement the Public Notice portion of the Court's *Remand Order*. The petitioners (also known as the "Infrastructure Coalition") state that (1) the FCC's Antenna Structure Registration (ASR) rules should be revised to incorporate a notice, comment, and approval process for ASR applications modeled on the successful procedures now in use for transfer and assignment applications; and (2) the FCC's rules should be revised to clarify that any objection on environmental grounds filed against an ASR application must be filed as a Petition to Deny, subject to Section 309(j) of the Communications Act. **Comments on the Infrastructure Coalition's WT Docket No. 08-61 petition are due May 27.** There is no reply comment date. BloostonLaw contacts: Hal Mordkofsky, John Prendergast, and Richard Rubino.

**CYREN CALL'S O'BRIEN URGES RURAL CARRIERS TO BID ON D BLOCK:** Cyren Call Chairman Morgan O'Brien last week urged rural carriers to band together and bid on the 700 MHz D Block license when the FCC re-auctions it—presumably this fall, according to RCR Wireless and FierceBroadbandWireless. Speaking at the Rural Cellular Association (RCA) annual meeting in Las Vegas, Nevada, O'Brien said the potential benefits for rural carriers include the resources necessary to offer advanced wireless services to their customers, a way to bypass ongoing roaming data issues as well as a stronger position in which to compete against the nationwide operators, according to the press reports. O'Brien said he thinks the FCC will loosen some of the bidding rules on the D Block, including either lowering or eliminating the previous \$1.33 billion reserve price as well as

altering a penalty that would see the auction winner not only lose the license, but up to 10% of the license price if they were unable to come to an agreement with the Public Safety Spectrum Trust (PSST) within six months of the auction's conclusion, RCR reported. O'Brien also made a point of highlighting a timing issue, noting the parties at the FCC involved in approving such a proposal could change following the presidential elections, RCR said. Apparently, RCA members are willing to consider setting up a committee to study the possibility of putting together a rural consortium to bid on the D Block. BloostonLaw contacts: Hal Mordkofsky, John Prendergast, Cary Mitchell, and Bob Jackson.

**FCC'S ORDER MODIFYING HAC RULES FOR DIGITAL WIRELESS HANDSETS IS PUBLISHED IN FEDERAL REGISTER:** The FCC's First Report & Order modifying its hearing aid compatibility (HAC) rules to address issues related to both radio frequency (RF) interference reduction and inductive coupling capability with hearing aids operating in telecoil mode has been published in the Federal Register (BloostonLaw Telecom Update, March 5). Many of the rule changes were proposed by representatives of both the wireless industry and the deaf and hard of hearing community in a "Joint Consensus Plan," on which the FCC sought comment in November 2007. The modifications expand the rules first adopted by the Commission in 2003 that required wireless service providers and handset manufacturers to offer a certain number of digital wireless phone handset models that are compatible with the use of hearing aids. The Order is effective June 6, 2008, except for Sections 20.19(f)(2), 20.19(h), and 20.19(i) which contain information collection requirements that are not effective until approved by the Office of Management and Budget (OMB). The Commission will publish a document in the Federal Register announcing the effective date for those sections. The Commission will send a copy of the First Report & Order and Order on Reconsideration and Erratum in a report to Congress and the Government Accountability Office (GAO) pursuant to the Congressional Review Act. Public and agency comments on Information Collection Requirements are due to OMB on or before July 7, 2008.

**FCC SEEKS COMMENT ON PETITIONS FOR RECONSIDERATION OF ORDER DENYING HAC WAIVER REQUESTS:** The FCC has asked for comment on seven petitions for reconsideration of its recent *Memorandum Opinion and Order* addressing requests to extend the September 18, 2006, deadline to provide handsets that meet the hearing aid compatibility standard for inductive coupling. Each of these petitions seeks reconsideration of that portion of the *Memorandum Opinion and Order* in which the Commission denied the particular petitioner's request for extension of the deadline. Specifically, the following reconsideration petitions were filed: (1) a joint petition from CTC Telecom, Inc., Blanca Tele-

phone Company, and Farmers Cellular Telephone, Inc.; (2) a petition from Iowa Wireless Services, LLC dba iwireless, on behalf of itself and 37 related licensees; (3) a petition from IT&E Overseas, Inc.; (4) a petition from North Dakota Network Co.; (5) a joint petition from SLO Cellular, Inc. dba Cellular One of San Luis Obispo, and Entertainment Unlimited; (6) a petition from South Slope Cooperative Telephone Co., Inc. dba South Slope Wireless; and (7) a petition from Uintah Basin Electronic Telecommunications dba UBET Wireless. **Comments on these WT Docket No. 01-309 petitions are due May 22, and replies are due June 2.** BloostonLaw contacts: Hal Mordkofsky, John Prendergast, Cary Mitchell, and Bob Jackson.

## DEADLINES

**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 Form 395 is newly revised this year—prior versions are obsolete.)** The FCC encourages carriers to complete the discrimination report requirement by filling out Section IV 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.

**JULY 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.

**JULY 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 **July 31** and covers lines served as of December 31, 2007. Incumbent carriers filing on a quarterly basis must also file on **September 30** (for lines served as of March 31, 2008); **December 30** (for lines served as of June 30, 2008), and **March 31, 2009**, for lines served as of September 30, 2008). BloostonLaw contacts: Ben Dickens, Gerry Duffy, and Mary Sisak.

**JULY 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 the 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 previous 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.

**JULY 31: REPORT OF EXTENSION OF CREDIT TO FEDERAL CANDIDATES.** This report (in letter format) must be filed by January 30 and July 31 of each year, but ONLY if the carrier extended unsecured credit to a candidate for a Federal elected office during the reporting period. BloostonLaw contacts: Hal Mordkofsky and John Prendergast.

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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

*May 9* – Deadline for reply comments on SDTA request to clarify and/or reconsider FCC's order extending LNP to VoIP providers (WC Docket No. 07-243).

***May 14* – FCC open meeting.**

*May 14* – Deadline for comments on AT&T's request to review USAC audit finding regarding Form 497 (WC Docket No. 03-109).

*May 15* – Deadline for comments on price cap ILECs' short form TRPs (WCB/Pricing File No. 08-14).

*May 16* – Deadline for reply comments on RCC, Northwest Dakota Cellular recon petitions seeking to use postcards instead of bill stuffers to comply with DTV Consumer Education Order (MB Docket No. 07-148).

*May 16* – Deadline for short-form application in closed Auction No. 77 (cellular service in two unserved areas).

***May 19* – Deadline for reply comments on USF reform NPRMs—Joint Board, Identical Support Rule, and Reverse Auctions NPRMs (WC Docket No. 05-337).** Extended from May 5.

*May 19* – Deadline for comments on VTel petition for declaratory ruling regarding interconnection rights for LECs, VoIP providers (WC Docket No. 08-56).

*May 22* – Deadline for reply comments on price cap ILECs' short form TRPs (WCB/Pricing File No. 08-14).

*May 22* – Deadline for comments on EEOC forms (FCC Forms 395-A and B) (MM Docket No. 98-204).

*May 22* – Deadline for comments on CTIA, PCIA, NATE petition for rulemaking on migratory birds remand case (WT Docket No. 08-61).

*May 22* – Deadline for comments on petitions for reconsideration of order denying HAC waiver requests (WT Docket No. 01-139).

*May 29* – Deadline for reply comments on AT&T's request to review USAC audit finding regarding Form 497 (WC Docket No. 03-109).

*May 30* – Deadline for reply comments on FNPRM proposing to eliminate "30 Market Rule" for BAS transition before 2 GHz MSS operations can begin (WT Docket No. 02-55).

***May 30* – Effective date of revised DTV consumer education rules.**

*May 30* – Deadline for comments on homeowner association antenna restrictions (CSR-7861-O, CSR-7862-O).

***May 31* – FCC Form 395, Employment Report, is due.**

*June 2* – Deadline for upfront payments for closed Auction No. 77 (cellular service to two unserved areas).

*June 2* – Deadline for reply comments on petitions for reconsideration of order denying HAC waiver requests (WT Docket No. 01-139).

*June 6* – Deadline for reply comments on EEOC forms (FCC Forms 395-A and B) (MM Docket No. 98-204).