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TELECOMMUNICATIONS LAW UPDATES

FCC Unveils Proposed Wireless Calling Party Pays Rules

The FCC recently released the text of its Calling Party Pays Declaratory Ruling and Notice of Proposed Rulemaking, one of the major initiatives at its June "Wireless Day" meeting. Calling Party Pays ("CPP") is a service option under which the party calling a wireless subscriber is billed for the call. Most wireless subscribers in the US are currently billed for both incoming and outgoing calls. The widespread use of CPP in many other countries throughout the world, in which wireless subscribership is much higher, had a considerable influence on the FCC's decision to propose a limited regulatory framework to eliminate existing barriers to utilization of CPP in the US.

The FCC did not propose to mandate CPP. However, the FCC and the wireless industry anticipate that nationwide availability of CPP as an option would substantially boost penetration rates for wireless services. The FCC observed that many wireless subscribers currently try to minimize their charges for incoming calls by not publicizing their phone numbers, or by keeping their phones turned off for lengthy periods. Ultimately, it hopes that CPP will spur greater competition between wireless and wireline local exchange providers, and that subscribers even may be encouraged to choose wireless as their sole local provider.

In its Declaratory Ruling, the FCC confirmed the view that CPP falls within the definition of a Commercial Mobile Radio Services ("CMRS") offering. Thus, under Section 332 of the Communications Act, the states are preempted from prohibiting CPP and from regulating CPP rates, but still retain jurisdiction over "other terms and conditions" of CPP services.

In the Notice of Proposed Rulemaking ("NPRM"), the FCC highlighted the issues on which it needs additional information to develop rules to promote CPP. It identified two main barriers to broader availability of CPP — the absence of a nationwide calling party notification mechanism and limited availability of reasonably-priced billing and collection services. The FCC noted that because the states retain consumer protection authority over CMRS services, it needs to work with the states in developing the notification system. Therefore, it directed its Wireless Telecommunications Bureau to work with the National Association of Regulatory Utility Commissioners ("NARUC"), the industry and consumer representatives, in seeking a consensus approach for implementing its notification scheme.

The FCC favors a uniform nationwide notification announcement that will verbally alert calling parties to the following information: 1) that they are calling a wireless CPP subscriber and will be billed for the call; 2) the identity of the wireless carrier; 3) the per minute rate and other charges for which they will be billed; and 4) that they have the opportunity to terminate the call before billing occurs. The FCC also sought comment on other notification options, such as special telephone number codes for CPP subscribers, or whether it ultimately could transition from the detailed notification announcement to a more streamlined announcement or a tone method. In addition, the FCC asked whether its proposed notification procedures are sufficient to create an implied contract between the calling party and the wireless carrier for billing purposes, and whether marketplace forces will place competitive pressures on the rates that can be charged to callers under CPP.

The FCC currently does not regulate or require the provision of billing and collection services by local exchange carriers ("LECs"). Thus, it sought additional comment to help it identify any new requirements that may be needed to implement nationwide CPP, and its jurisdiction to impose any such requirement. The FCC is considering mandatory LEC billing and collection, as well as less intrusive approaches, such as imposing a nondiscrimination obligation on any LEC that offers CPP billing and collection, or mandating that LECs provide sufficient billing data to allow wireless carriers or third parties to perform billing and collection.

Many wireless industry leaders have long been lobbying the FCC to adopt regulations to promote CPP, and the industry generally reacted to the FCC's June vote with enthusiasm (as did wireless users who were surveyed by the press in "man in the street" interviews). The FCC's proposals are far from being a "done deal," however, because some difficult substantive and political hurdles still must be cleared.

The biggest hurdles may be the consumer protection issues — and the need for the FCC to embark upon a collaborative process with the states to resolve them. One hurdle was cleared last week, when a draft resolution opposing the FCC's CPP proposal was voted down at NARUC's Summer Committee Meetings. There are hints that consumer advocates generally may be taking a more active interest in wireless services. For example, the industry recently has been hit with a flurry of negative articles on billing practices and service quality in several major newspapers and wire services. The FCC's CPP proposals could be closely scrutinized by consumer advocates, since the notification, rates and billing issues will affect all telephone users.

The FCC's flexibility in crafting the final billing and collection rules also could be constrained by LEC opposition to mandates in this area. Bell South's immediate response to the FCC's action may be a preview of the debate on those sections of the proposal. Bell South (which has substantial wireless holdings) noted that while it does not oppose CPP, "we don't think it's rational to expect our wireline customers to help pay for an elaborate and expensive billing and collection system that we may be required to offer to wireless companies, especially if there is no real demand for it."

Ultimately, carrier demand for CPP could be the real key to the fate of this rulemaking. Some industry analysts are questioning whether CPP really is that critical to the future growth of the industry, especially in light of the regulatory costs the industry may incur in achieving final rules. These analysts suggest that CPP is not as significant to future growth as other industry developments, such as the successful introduction of new pricing schemes that allow consumers to select different-sized "buckets" of service minutes at attractive prices.

Interested parties may file comments on the FCC's proposals no later than August 18, and replies to these comments may be filed no later than September 8.

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