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Reality Check

It May Be Time for a Regulatory Audit

By Neil S. Ende

If your company is like many telecommunications services re-sellers, it has not fully considered regulatory issues in structuring the business, nor in budgeting or planning timelines. Don't make this mistake--it can be costly.

Like it or not, the telecommunications industry remains subject to myriad, often complex, frustrating and ever-changing regulatory requirements at the state and federal levels. These requirements include entry regulation in the form of certification and tariffing requirements, regulations addressing day-to-day operational issues, including rules regarding the acquisition of new customers (i.e., slamming and third-party verification), payphone dial-around issues and periodic reporting requirements. Properly understood, these requirements can be managed effectively and need not be an undue burden on your business. The key is to get on top of them early and work them into your business plan and day-to-day operations.

The following is a partial list of key regulatory issues that you should consider and strategies that can be employed to manage them effectively.

Entry Regulation

Jurisdiction over telecommunications service providers and resellers is divided between the states and the federal government. As a general matter, the states have jurisdiction over telecommunications services, local and interexchange, that originate and terminate within the boundaries of their state (intrastate services). The federal government has jurisdiction over telecommunications services that originate within the boundaries of one state and terminate outside that state but within the 50 United States (interstate services), as well as telecommunications services that originate within the United States and terminate outside the United States (international services).

Facilities-based service providers, facilities-based resellers and non-facilities-based resellers can be subject to entry regulation. As a general matter, agents and distributors (as contrasted with resellers) are not subject to entry regulation. The legal distinctions between these operating arrangements and the business implications of each can be complicated and should be discussed with experienced

telecommunications counsel before you decide how best to structure your operations. This discussion should occur, of course, before you seek certification and/or file tariffs at the state or federal level.

At the federal level, all entities selling or reselling interstate services are required to file a tariff setting forth the terms and conditions under which those services will be provided. With respect to international services, both facilities-based providers and resellers are required to obtain a so-called 214 certificate from the Federal Communications Commission (FCC) and to file a tariff. Absent an opposition or other problem (which is very rare if the application is prepared properly), the entire process normally takes from four to six weeks.

State entry regulations vary significantly by state. In the interexchange marketplace, where entry regulation exists, it generally takes one of three forms:

1. A simple registration or notification requirement;
2. A formal certification and tariffing process; and
3. A formal tariffing process.

Local service providers are generally subject to even more rigorous certification requirements. It is important to keep in mind that, regardless of the form of the entry regulation, it is a condition precedent to the offering of service; that is, you need to file and receive any required approval before you begin to provide service. It is not enough simply to have made the filing. Entities providing service without necessary approvals and/or tariffs are subject to significant fines and, in some states, may be required to disgorge some or all revenues received from the provision of service prior to approval.

Where formal certification is required for interexchange services, the process generally consists of a reasonably straightforward application in which you provide data regarding your ownership, finances (in some states) and planned operations. Certification applications for local services are, as a general matter, much more comprehensive. The application is then reviewed, either by a commission staff person or by an administrative law judge. Depending on the state, this process can take from several weeks to a couple of months for interexchange service providers. Where local services are at issue, it can often take many months for the application to be approved. State filing fees range from no charge to several hundred dollars.

Where formal tariffing is required, some states either allow or require that the tariff be filed along with the certificate application. Other states bifurcate the process, requiring approval of the application before the tariff is filed. As with the certification process, interexchange tariffs are generally straightforward and subject to minimal scrutiny; local tariffs are quite complex and are generally reviewed in much greater detail.

One final point should be kept in mind. Many states require you to obtain foreign corporation authority as part of the telecommunications certification process. This generally requires you to obtain a Certificate of Good Standing from the state of incorporation and to file that, along with an application form, with the state in which you are seeking foreign corporation status. Typically, you also will be required to identify an agent on whom service of process can be served within each foreign jurisdiction. There are a number of companies that will provide this service for an annual fee.

Operational Regulation

The myriad state and federal regulations applicable to your day-to-day operations cannot be addressed properly in a single article. Instead, we will highlight two of them here.

Third-Party Verification (TPV)/Slamming. Over the past several years, Congress, the FCC and many states have become increasingly active in establishing formal procedures for changes in a customer's presubscribed carrier. Essentially, these rules currently require that all changes in a customer's presubscribed carrier be verified either by a written and signed Letter of Authorization (LOA), by toll-free electronic verification or through a verification process performed by a third party independent from the service provider. The FCC is currently considering revisions to its TPV rules, including verifications through the Internet.

Payphone Dial Around. Few issues have been more controversial in the past few years than the FCC's rules regarding dial-around compensation. The purpose of these rules is to ensure that payphone operators are compensated for the use of their equipment to originate calls wherein the caller dials around the payphone's presubscribed carrier. At present, interexchange carriers (IXCs) are required to compensate the payphone provider on a per-call basis. The specific rules applicable to compensation are detailed and arcane, as are the procedures to effectuate billing and payment.

Periodic Reporting Requirements

You've obtained your certificates, filed your tariffs, dealt with the regulations applicable to your day-to-day operations. Your business is now up and running smoothly. You've taken a deep breath--firmly believing that you've slain the regulatory beast--and you're now completely free to spend your time and resources running your business. Unfortunately, life is never that easy. Like a bad rash, regulatory filing requirements may subside for a while, but they never really go away. Indeed, the list of periodic reporting requirements at the state and federal levels is far too long to address properly here. The following, however, are a few important federal requirements that you should keep in mind.

Tariff Updates. Where required, tariffs must reflect the rates, terms and conditions under which telecommunications services currently are being provided. Thus, when rates, terms or conditions are added, deleted or modified, you must amend your tariff before such modifications are put into place.

Universal Service Surcharge. As a matter of regulatory policy, the FCC is committed to ensure that all citizens have access to affordable telephone services. Whether true or not, the FCC believes that to meet this objective it is necessary to subsidize the provision of those services in certain circumstances. The FCC also believes that the revenues necessary to provide that subsidy should be derived from a surcharge on interstate traffic. Essentially, the surcharge is assessed against all telecommunications service providers that provide interstate telecommunications services.

North American Numbering Plan Contribution. The North American Numbering Plan (NANP) is the basic numbering scheme for the telecommunications networks located in Anguilla, Antigua, Bahamas, Barbados, Bermuda, British Virgin Islands, Canada, Cayman Islands, Dominica, Dominican Republic, Grenada, Jamaica, Montserrat, St. Kitts and Nevis, St. Lucia, St. Vincent, Turks and Caicos Islands, Trinidad and Tobago and the United States (including Puerto Rico, the U.S. Virgin Islands, Guam and the Commonwealth of the Northern Mariana Islands). The FCC has adopted rules requiring U.S. telecommunications providers to contribute to the funding of the administration of the NANP based on their proportionate share of gross U.S.-originated international, interstate and intrastate revenues less payments to other providers. Only those carriers providing services internationally must make the required filing and contribution.

Painful as it may be, it is critical that you stay on top of your regulatory and compliance filings and that they be made in a timely and accurate manner. Professional resources are available to help in this effort--you should take advantage of them so that you can dedicate yourself to the more enjoyable task of building a thriving telecommunications enterprise.

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