

BMJ&D Telecom Update

Published by the Law Offices of Blooston, Mordkofsky, Jackson & Dickens

Vol. 3, No. 50

December 20, 2000

Industry Awaits Commission Reciprocal Comp Order

FCC Appears to Be Poised to Phase In Bill-and-Keep; Two 'Working Papers' Describe Possible Changes

As the end of the year approaches, many in the telecommunications industry anticipate that the FCC will soon adopt an order to gradually replace the current system of reciprocal compensation payments for local dial-up calls to Internet service providers (ISPs) affiliated with competitive local exchange carriers (CLECs), with some form of "bill-and-keep" system. But it remains unclear whether the regime the FCC adopts will favor ISPs and CLECs or incumbent LECs (ILECs). Numerous press reports in recent weeks have cited FCC staffers' statements that the Commission hopes to complete an order by the end of 2000. At our press time, the Commission had not yet adopted the order, but its Office of Plans and Policy had released two detailed "working papers" which may provide clues about the bill-and-keep policy the FCC intends to adopt.

Widespread anticipation of reciprocal compensation reform has led several ILECs, CLECs, ISPs and state commissions to file *ex parte* communications with the FCC in recent weeks to criticize elements of the "plan" they have been reading about in the press. "Regardless of one's views on the jurisdictional nature of Internet-bound calls, the fact remains that terminating these calls has a cost. Mandatory bill and keep does not result in adequate compensation where traffic is not in balance," the three members of the Washington Utilities and Transportation Commission said in a letter last week.

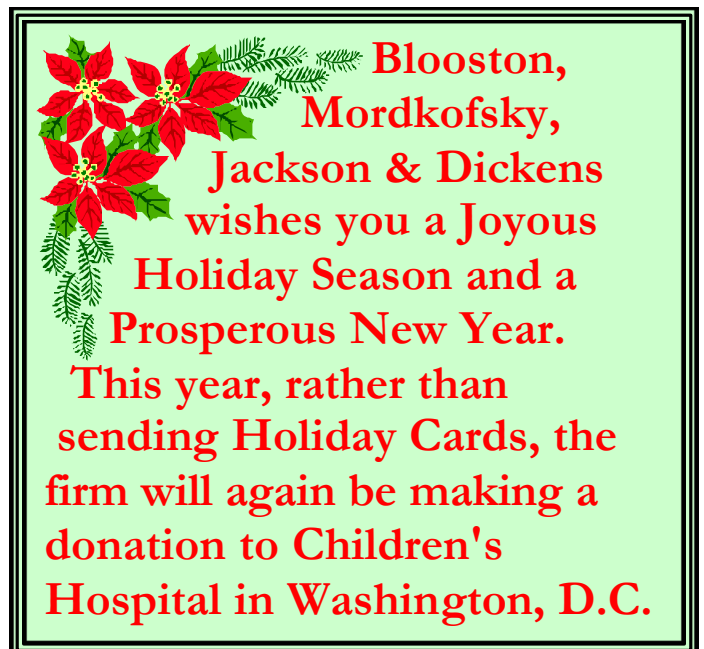
From the other side of the debate, the U.S. Telecom Association (USTA) complains that it has been reading suggestions that the bill and keep provision will not be mandatory. USTA also said, "It is distressing, if true, to read that the FCC is considering the adoption of an order that does not unequivocally reaffirm its earlier determination that Internet-bound traffic is interstate."

In an early 1999 order, the FCC found that dial-up calls to access the Internet constitute "interstate traffic." However, under interconnection agreements regulated by state commissions, the FCC has continued to allow ISPs to treat dial-up calls to their servers as local calls and to allow CLECs to receive reciprocal compensation for ter-

minating Internet-bound traffic. The U.S. Court of Appeals for the District of Columbia Circuit early this year remanded that order, directing the FCC to explain the reasoning behind its designation of dial-up Internet traffic as "interstate." The expected Commission order is to be in response to that remand.

A reading of the two working papers released last week suggests that the new FCC regime might not be significantly different from the current system. The two papers both propose "default" interconnection rules that would be activated only in the event that carriers cannot reach an interconnection agreement. The new approaches would do nothing to change state arbitrated agreements that currently require reciprocal compensation payments, and do not deal with the interstate traffic definition remanded by the D.C. Circuit.

One of the papers, entitled "Bill and Keep at the Central Office as the Efficient Interconnection Regime," proposes a system called "Central Office Bill and Keep" (COBAK). Under this system, two networks could deploy direct transport facilities between their central offices (COs). That traffic would be treated on a simple bill-and-keep basis. However, if calling party traffic physically interconnects at another point in the called party's network, the calling party network would pay the cost of transporting the traffic to the called party's CO. The paper claims that



COBAK "significantly reduces ISP reciprocal compensation problem," but does not eliminate it.

The second paper, "A Competitively Neutral Approach to Network Interconnection," proposes a complex system that attempts to identify the incremental costs of interconnection and to split them between carriers. Carriers would then recover any remaining costs from their customers. The goal of this approach is to develop a "competitively neutral" cost recovery program that can be applied to all forms of interconnection, regardless of the size, location or technologies of two different networks. In other words, the same regime used to regulate interconnection between ILECs and CLECs could be used for interconnection between ILECs and other entities, such as wireless carriers or small rural LECs.

The benefit of the plan, according to the authors, would be the reduction of FCC and state commission involvement in interconnection. "As new entrants appear and new types of networks arise, current interconnection regimes become increasingly difficult to administer," the paper concludes.

BMJ&D contacts: Ben Dickens and Gerry Duffy.

LAW & REGULATION

GAO Identifies Flaws in E-Rate Program

Vague FCC Rules and Lax USAC Administration Lead to Some Schools and Libraries Receiving Funding for Ineligible Products and Services; \$1.3 Billion in Committed Funds Remains Unused

The Government Accounting Office (GAO), the federal agency that audits and reviews the efficiency of various government programs, has found serious problems with the FCC's program for providing discounted Internet access in schools and libraries, more widely known as the "e-rate." The FCC has committed to \$3.7 billion in e-rate funding for the first two years of the program, which began in 1998, and is in the process of distributing another \$2.25 billion in third-year funds. According to the GAO, several million dollars have been spent on products and services that are ineligible for funding under the e-rate program. In addition, as of Aug. 31, \$1.3 billion -- or 35 percent of the funds committed during the first two years of the program -- had not been used.

Under the current system, telecommunications service providers contribute to the schools and libraries program, which is administered by the Universal Service Administrative Co. (USAC) through its Schools and Libraries Di-

vision (SLD). Schools and libraries apply annually for funds to pay for Internet service, inside wiring and other eligible products and services needed to access the web. The program faced a number of understandable start-up challenges during its first year, GAO says. The agency concludes, however, "these challenges continue as the program enters its fourth year."

Part of the problem can be traced to vague FCC rules governing e-rate distribution. For example, Commission rules provide a list of products and services that are eligible for e-rate discounts, including Internet access, local phone service and certain types of internal wiring necessary to network data service to various classrooms. Some products are ineligible, such as TV sets, telephones for voice communications and personal computers used as workstations rather than web servers. Another category of "conditionally eligible" does not appear to be well defined.

While wireline voice service is not eligible, personal communications service and cellular telephones "are conditionally eligible if used at a place of instruction for educational purposes," GAO said. "Other items are always ineligible for e-rate support, even though they may be necessary or desirable for providing students or library patrons with access to advanced telecommunications services, such as the Internet," GAO said. That category of ineligible products appears to include items such as anti-virus and web filtering software.

The GAO report recommends that the FCC clarify and revise its list of eligible and conditionally eligible products and services. It also recommends that the FCC revise the e-rate application form to require more detailed information about desired products and services, and calls for reform of SLD's process for ensuring compliance with the FCC's eligibility rules. In some cases, it appears that SLD has approved funding for clearly ineligible items.

During its audit, GAO says that it reviewed 44 second-year applications for internal wiring in which SLD had screened out \$20 million in requests for ineligible items. GAO's review identified at least \$6 million in additional requests that SLD failed to identify. "This amount understates the extent of the problem because it does not include cases in which we found funds mistakenly committed for ineligible items whose costs could not be determined from the applications materials," GAO said.

GAO notes that the FCC received applications for \$4.7 billion in requests for e-rate funds, which is significantly more than the \$2.25 billion cap on annual funding for schools and libraries. The fact that \$1.3 billion in funding for the first two years of the program have not been used is, therefore, a matter of concern. The report recom-

mends that the FCC set up a system for following up with applicants to determine why they are not using their funds.

The FCC did not dispute the findings of the GAO report and said in a response penned by Andrew Fishel, the FCC's managing director, that the Commission has begun implementing some of the report's recommendations. "It deserves noting that this program is unique," Fishel said. "It requires knowledge of the rapidly and ever changing field of information technology by both program staff and applicants. Equipment that did not exist in 1996 is now eligible for support, and each year now, better and cheaper equipment and services are available to schools to meet their communications needs."

BMJ&D contacts: Ben Dickens and Gerry Duffy.

Commission Sets New Timetable for Digital Wireless TTY Service

CDMA/TDMA Manufacturers Report That They Are Ready to Deploy by June 30, 2002; GSM and iDEN Manufacturers Might Not Make Deadline

The FCC has set a **June 30, 2002**, deadline for wireless carriers operating digital airlink technologies to begin offering text telephone (TTY) service. The Commission is requiring carriers to deploy all necessary TTY hardware and software upgrades by **Dec. 31, 2001**, giving them an additional six months before the service launch deadline for testing and systems integration. Carriers must submit reports 15 days after the end of each quarter detailing their TTY deployment and testing progress, with the first report due **April 15, 2001**, and the final report due **July 15, 2002**, 15 days after the final deadline.

An FCC order adopted in 1997 originally set a Dec. 31, 1998 deadline for all wireless carriers to provide TTY service. Carriers using digital technologies, however, found that the encoded tones that activate TTY devices could not be transmitted clearly over their networks. The FCC granted 104 waivers of the TTY deadline to digital carriers to remain in effect while an industry group, the Wireless TTY Forum, worked to develop TTY compliant standards. Lucent Technologies has developed a TTY Forum-approved system for code division multiple access and time division multiple access networks. An Ericsson-developed system for global system for mobile communications (GSM) networks is still in the standards review process. Motorola Inc. is developing a system for its proprietary iDEN technology, which is currently employed by Nextel Communications.

Equipment manufacturers have claimed that they will need later deadlines to reach full industry compliance. The FCC replied that "while there may be an issue as to whether solutions for GSM and iDEN systems will be available by Dec. 31, 2001, we believe the June 30, 2002, final deadline provides ample time for completion of standards work, testing and deployment of GSM and iDEN solutions."

With the adoption of the new deadlines, the FCC declared the 104 deployment waiver requests moot and dismissed them.

BMJ&D contacts: Hal Mordkofsky and John Prendergast.

Law & Regulation in Brief

SNEAK APPOINTMENT: President Clinton on Monday (Dec. 18) announced **the recess appointment of Susan Ness to the FCC**. Ness, the longest-serving current commissioner, has been with the FCC since 1994 and has continued to serve since her term expired in June 1999. Clinton re-nominated Ness in July 1999, but the Senate declined to confirm the nomination. The President has the authority to make emergency appointments to the federal government without Senate confirmation when Congress is out of session. **The appointment is for one year. Clinton's action delays the timing of an alternative nomination by the incoming Bush Administration.** A White House press release announcing the move suggested that the appointment could not be delayed another minute. "This position is vital to the daily operation of the FCC," the White House said.

AUCTION 35 UPDATE: Bids in the FCC's C/F-block personal communications service auction (Auction No. 35) increased sharply over the past week. At press time today (Dec. 20), **the auction had completed 17 rounds and reached a total of \$8.664 billion in net bids.** Verizon was the leading bidder with \$4.315 billion in net bids for 47 licenses. Salmon PCS, a partner of Cingular Wireless, had \$1.12 billion in net bids for 77 licenses and AT&T's partner, Alaska Native Wireless, held high bids on 75 licenses for \$928 million in net bids. Bidders have two more days to compete before the FCC suspends Auction 35 for the holidays on Friday. The auction will resume on Thursday, Jan. 4. BMJ&D contacts: Hal Mordkofsky, John Prendergast, Gerry Duffy and Cary Mitchell.

JAMA SESSION: A report published this week in the Journal of the American Medical Association (JAMA) **found no link between cellular telephone usage and the risk of brain cancer.** The report's findings came as welcome news to the wireless industry, which has been buffeted in recent years by numerous articles and research projects claiming to make a cancer/phone con-

nection. The wireless industry and the National Cancer Institute funded the study conducted by the American Health Foundation. "We are pleased that the study has been published in open manner, particularly in such a prestigious scientific publication," the Cellular Telecommunications and Internet Association said. The study found a statistically insignificant increase in the risk of a certain type of brain cancer after only a few years. The report says, however, that future studies should track the probability of tumors forming after 10 or 15 years of cellular phone usage. BMJ&D contacts: Ben Dickens and Gerry Duffy.

ANOTHER VIRGINIA DISPUTE: Cox Communications

Inc. is asking the FCC to preempt Virginia State Corporation Commission (VSCC) jurisdiction over a disputed interconnection agreement with Bell Atlantic-Virginia (Verizon). The FCC received comments last month on a similar petition filed by WorldCom, which claimed that VSCC violated federal law by offering to arbitrate its interconnection agreement with Bell-Atlantic-Virginia using state rather than federal standards (BMJ&D Telecom Update, Nov. 1). Cox is requesting that the Commission combine consideration of its pre-emption request with the WorldCom petition. Comments on the Cox request are due **Dec. 29** (CC Docket No. 00-249). Reply comments are due **Jan. 10, 2001**. BMJ&D contacts: Ben Dickens and Gerry Duffy.

FCC Meetings and Deadlines

Dec. 21 – Deadline for comments on Kansas independent telcos' petition to declare that fixed local services provided by Western Wireless in the state are not CMRS. Reply comments due Jan. 8, 2001 (WT Docket No. 00-239).

Dec. 21 – Deadline for comments on proposed Phase 2 reforms of FCC accounting reporting rules as part of the Commission's 2000 Biennial Review. Reply comments due Jan. 30, 2001 (CC Docket No. 00-199). Initial comments on proposed Phase 3 reforms are also due Jan. 30, and reply comments on Feb. 28.

Dec. 21 – Deadline for comments on FCC's list of LECs that qualify for waiver of CALEA capability requirements through March 31, 2001. Reply comments due Jan. 4, 2001 (CC Docket No. 97-213 and File No. NSD-L-00-234).

Dec. 21 – Deadline for reply comments on Nextel Communications petition to clarify rules requiring incumbent up 200 channel SMR licensees to participate in "good faith" relocation negotiations (PR Docket No. 93-144).

Dec. 26 – Deadline for reply comments on NECA's proposed changes to TRS/VRS reimbursement rates (CC Docket No. 90-571).

Dec. 29 – Deadline for comments on Cox petition to preempt Virginia State Corporation Commission jurisdiction over disputed interconnection agreement with Verizon. Reply comments due Jan. 10, 2001 (CC Docket No. 00-249).

Jan. 5, 2001 – Deadline for comments on proposed automatic roaming rules and sunset of manual roaming rules for CMRS carriers. Reply comments due Feb. 5 (WT Docket No. 00-193).

Jan. 5, 2001 – Deadline for comments on requests by Nextel Communications and Hawaiian Wireless Inc. for waivers of the FCC's Phase II E911 implementation deadlines. Reply comments due Jan. 22 (CC Docket No. 94-102).

Jan. 5, 2001 – Deadline for comments on proposed new methodologies for estimating cost recovery amounts for TRS/VRS services. Reply comments due Jan. 19 (CC Docket No. 98-67).

Jan. 8, 2001 – Deadline for comments on proposed creation of "CSAT" satellite-based rural Internet access service. Reply comments due Feb. 9 (IB Docket No. 00-203).

Jan. 8, 2001 – Deadline for reply comments on petition to reopen consideration of lifting hearing aid compatibility exemption for broadband PCS handsets (RM 8658).

Jan. 8, 2001 – Deadline for oppositions and responses petitions to deny the proposed merger of Deutsche Telekom, VoiceStream Wireless and Powertel Inc. (IB Docket No. 00-187).

Jan. 10, 2001 – Deadline for reply comments on Notice of Inquiry into open access to cable modem facilities for ISPs not affiliated with the cable TV industry (GN Docket No. 00-185). In the same docket, the FCC seeks comments on petition for declaratory ruling that cable operators offering telephone service are required to contribute to universal service.

CRITICS ON ALL SIDES: Deutsche Telekom (DT) continues to hear opposition to its proposed \$35 billion acquisition of VoiceStream Wireless. **A group of investors last week filed a \$3 billion class action suit against DT in U.S. District Court for the Eastern District of New York.** The plaintiffs claim that DT's Security and Exchange Commission (SEC) filings failed to report significant financial losses connected to its wireless network buildout in Europe. DT's stock price, similar to the prices of most publicly traded telecommunications companies, has dropped sharply in the last six months. Also last week, **Senator Ernest Hollings continued his campaign to block the merger, which, he claims, violates a federal statute prohibiting the governments of foreign countries from acquiring U.S. telecommunications companies.** The German government, which currently holds a controlling interest in DT, has announced its intention to divest its interest sometime after the VoiceStream merger. In a 12-page *ex parte* submission to the FCC, Hollings provided detailed descriptions of the German government's control over DT's day-to-day operations and its shareholder meetings. Hollings also claims that DT already is exerting inappropriate influence over VoiceStream. He referred to an Oct. 4 SEC filing in which DT reports that VoiceStream must receive prior approval from DT executives before changing elements of its participation in the C/F-block personal communication service auction (Auction No. 35), which began Dec. 12. "Such conditions demonstrate that rather than an autonomous bidder, VoiceStream will serve as an agent for Deutsche Telekom and the German government in the auction," Hollings said. BMJ&D contacts: Hal Mordkofsky and John Prendergast.

MASS. WITHDRAW: Verizon Communications has withdrawn its Section 271 application to provide in-region long-distance service in the state of Massachusetts. In a statement released Monday (Dec. 18), Verizon said that it would re-file its application "promptly." A number of entities raised objections in comments on the petition, which had been approved by the Massachusetts Department of Transportation and Energy. Verizon said its re-filing would focus on those objections and update figures in the original filing to suggest that the carrier provides non-discriminatory access to digital subscriber line (DSL) service. FCC Chairman William Kennard gave a list of other items he would like to see in the re-filing, including information showing improved operation support systems for competitive LECs ordering DSL loops. BMJ&D contacts: Ben Dickens and Gerry Duffy.

EXCHANGE TRANSFER COMMENTS: The Federal Register has published the comment dates for the recently adopted FCC Notice of Proposed Rulemaking (NPRM) **examining possible changes in the rules for universal service support for non-rural local exchanges that are acquired by other non-rural LECs.**

Initial comments are due **Jan. 17, 2001** (CC Docket No. 96-45) and reply comments are due **Feb. 1**. Section 54.305 of the FCC's rules requires that when a carrier acquires an exchange that it "step into the seller's shoes" for the purpose of future high-cost support payments. The FCC believes this rule will no longer be necessary for transfers between non-rural carriers once the Commission has phased out interim hold-harmless policies (BMJ&D Telecom Update, Dec. 13). BMJ&D contacts: Ben Dickens and Gerry Duffy.

CORES COMMENTS: The Federal Register also published comment dates for the Commission's proposal to require all entities that do business with it to obtain an FCC Registration Number through the Commission Registration System (CORES) (BMJ&D Telecom Update, Dec. 6). Comments are due **Jan. 16, 2001** (MD Docket No. 00-205). Reply comments are due **Jan. 29**. BMJ&D contact: Richard Rubino.

INDUSTRY TRENDS

TI Claims New Chip Supports 22 Mbps Unlicensed Wireless Data

Technology Advance Said to Double Data Rate of Current 2.4 GHz ISM Standard

Texas Instruments (TI), in partnership with a number of other companies, has developed a technology that would enable an unlicensed wireless data network to operate at up to 22 Mbps. TI's ACX101 chip is designed to double the data rate of the current Institute of Electrical and Electronics Engineers (IEEE) 802.11b standard for high-speed data networking in the 2.4 GHz unlicensed band. At the same time, TI claims that networks upgraded with the chip remain in compliance with the FCC's Part 15 limits on operation in the unlicensed industrial, scientific and medical (ISM) bands.

If successful, the TI chip could enable the deployment of inexpensive wireless Internet access at speeds unmatched by any other service other than fiber to the home. Upgraded systems also could significantly improve indoor networking system in office buildings, campus areas or multi-dwelling residential buildings. Internet entrepreneurs could purchase new systems or apply the chip to existing IEEE 802.11b equipment.

In the mid-1990s, IEEE adopted the industry-developed 802.11 standard, which provided for up to 2 Mbps operation in the 2.4 GHz band using wireless local area networks that could transmit to a distance of about 1,000 feet. In recent years, a number of manufacturers have worked on redesigns of the standard to provide for faster

performance and wider propagation. In 1999, IEEE adopted two variations on the standard, including the 11 Mbps 802.11b.

TI's chip proposal is a response to current efforts to further upgrade the IEEE 802.11 standard to a next-generation system, which will be designated IEEE 802.11g. The 802.11 working group has held a number of meetings over the past year, with the latest held last month to consider three finalist proposals, including the TI chip. All 802.11g proposals must operate on the 2.4 GHz band with the same 5 MHz channels employed in the 802.11b standard. Proposals must be extensions of 802.11b in order to maintain full backward compatibility and must perform at least at 20 Mbps. TI claims that its technology covers all of these conditions. In addition, it claims that the system will operate in the same spectrum as other 2.4 GHz systems in full compliance with the Part 15 rules.

BMJ&D contacts: Hal Mordkofsky, John Prendergast and Gerry Duffy.

Industry Trends in Brief

LOCATION ASSOCIATION: A group of eight companies specializing in global positioning service and network overlay location technologies has formed the **Wireless Location Industry Association (WLIA)**. The group says it will focus on providing public information about location technologies to promote new services and will develop self-regulating privacy standards. The FCC has required cellular, personal communications service and covered specialized mobile radio carriers to implement technologies that will allow emergency agencies to locate the originator of a wireless call to within a few meters. Beyond the public safety applications, carriers could apply location technologies to a number of moneymaking applications. However, some are concerned that commercial use of location technologies could lead to invasions of wireless subscribers' privacy. The Cellular Telecommunications and Internet Association (CTIA) recently petitioned the FCC to set location privacy standards (BMJ&D Telecom Update, Nov. 29). WLIA's efforts could lead to an industry-based alternative to a federal standard. BMJ&D contacts: Hal Mordkofsky, John Prendergast, Gerry Duffy and Cary Mitchell.

RURAL BROADBAND ROLLOUT: The National Telephone Cooperative Association (NTCA) says that **79 percent of its rural telco membership recently surveyed will be providing some form of broadband telecommunications service by the end of 2001**. One-hundred ninety-four out of approximately 500 NTCA member companies responded to the survey, in which 71 percent said they would provide broadband service by the end of 2000. Digital subscriber line (DSL) is the most

common form of broadband network among the rural telcos, with 69 percent the companies surveyed indicating they would provide DSL by the end of 2001. That figure appears to jibe with a study conducted by the National Exchange Carrier Association (NECA), which estimated that 65 percent of all access lines provided by rural telcos by the end of 2002 would be at least capable of supporting DSL transmissions (BMJ&D Telecom Update, June 21). **Like NECA, NTCA concludes that prohibitive costs will make it difficult to build out DSL service to the remaining subscriber base, especially to subscribers located more than 30,000 feet from a telco's central office.** "Broadband service ubiquity seems all but impossible in members' service areas without financial incentives and support," NTCA concludes. The association supports eliminating current caps on universal service high cost support for individual telcos as a way to ensure funding to build out facilities.

HOLIDAY CLOSING: In observance of the holidays, BMJ&D offices will be closed on Monday & Tuesday, Dec. 25-26. The BMJ&D Telecom Update will take a one-week break. The next issue of the newsletter will be dated Jan. 3, 2001.

LAW OFFICES BLOOSTON, MORDKOFSKY, JACKSON & DICKENS

2120 L St. NW, Suite 300
Washington, D.C. 20037
(202) 659-0830
(202) 828-5568 (fax)

Harold Mordkofsky, 828-5520, halmor@bmjd.com
Robert M. Jackson, 828-5515, rmj@bmjd.com
Benjamin H. Dickens, Jr., 828-5510, bhd@bmjd.com
John A. Prendergast, 828-5540, jap@bmjd.com
Gerard J. Duffy, 828-5528, gjd@bmjd.com
Richard D. Rubino, 828-5519, rdr@bmjd.com
Mary J. Sisak, 828-5554, mjs@bmjd.com
D. Cary Mitchell, 828-5538, cma@bmjd.com
Kathleen A. Kaercher, 828-5544, kak@bmjd.com
Michael B. Adams, Jr., 828-5562, mbs@bmjd.com
Douglas W. Everette, 828-5529, dwe@bmjd.com

Randy Sukow, editor, 828-5566, rms@bmjd.com

If you would like to receive an e-mail version of the newsletter, contact Althea Pierce at 828-5521 or abp@bmjd.com and indicate your format preference: MS Word 97, Adobe Acrobat (.pdf) or plain text.

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