

THE DAILY RECORD

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Telecom Law:

Timely telecom tidbits

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It's the beginning of summer and farmers' markets are starting to provide a sampler of freshly grown, seasonal produce.

With this in mind, this telecom law update will be a quick sampler/ overview of issues that may be of interest. Of particular interest to me at this time are the sales of Avaya and BCE Inc., and updates in the Federal Excise Tax claim process.

Avaya

From my perspective, the most interesting thing about the Avaya sale to two private equity firms is that Nortel was involved in the bidding until the very last minute. I think this indicates there is real, sustainable value in Avaya, not only in its current and future products, but in the revenue stream it generates (estimated to be between one-third and one-half of its revenue) from long-term maintenance contracts.

Ultimately, both *The New York Times* and *The Wall Street Journal* have made it clear that, aside from price, Nortel backed down on bidding due to concerns about the integration of products and services between the two companies.

My advice to end-users of Avaya equipment is to review their agreements, particularly with respect to long-term maintenance and make sure that responses to service calls are within the scheduled time frame and other terms are being met. The terms of the maintenance agreement most likely allow an ownership change without a change in terms, but this is an area where things can change without notice to customers.

Finally, the change in ownership is unlikely to attract attention from regulators because it does not raise eyebrows in terms of antitrust or other potential areas of malfeasance of federal interest. According to Avaya and its buyers, business will continue as usual. Avaya's not going anywhere, and what's likely to happen is that the company will be resold after restructuring to enhance profitability for new owners. Stay tuned, but at this point, the change isn't a season-ending cliffhanger.



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BCE Inc.

On the heels of the Avaya ownership issue, BCE Inc. (parent company of Bell Canada) announced on June 30 that it will be acquired for \$32.6 billion (U.S.), along with the assumption of \$15.9 billion in debt, by an investment arm of Ontario Teachers Pension Plan, Providence Equity Partners and Madison Dearborn Partners. BCE is Canada's largest telecommunications group, and includes Bell Canada and other media operations enterprises, notably CTVglobe-media, a conglomerate that includes the Toronto *Globe and Mail*. Prior to the transaction, the

Ontario Teachers Pension Plan was the largest single shareholder of BCE.

Bidders for BCE included Canadian telecom provider Telus, although Telus abandoned bidding prior to the close. Until only recently, Telus suggested it perhaps was not quite ready to throw in the towel on the bidding war.

While the proposed ownership change, which will take BCE private, requires the approval of shareholders and Canadian regulators, it is anticipated that it will improve efficiency and maximize shareholder value prior to another sale down the road. Unlike Avaya, Canadian regulators must approve the transaction because of the requirement that telecommunications companies have majority ownership held by Canadian firms.

FET update

As I mentioned in a previous update, the IRS gently changed its position on taxpayers' ability to amend returns in order to seek refunds of the previously paid Federal Excise Tax on telecommunications.

While this topic was covered on numerous occasions, advise clients who have been reluctant to do the heavy lifting associated with filing a claim that they will have the same three-year period as they would for other purposes to amend tax returns for this purpose.

Taxpayers still will be able to choose between the estimated and actual methods, and the research and assembly (and need for knowledgeable consultants) along with the maintenance of documents will need to be as intensive, but the eligibility

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for claiming funds remains for three years following the due date of the entity's annual tax return.

Verizon, Vonage and patents

On June 25, appeals were argued in the Verizon Vonage suit regarding patent infringement. In doing some homework on this topic, I found a very interesting essay by Timothy B. Lee, an adjunct scholar at the Cato Institute, in the June 9 edition of *The New York Times*.

On the most basic level, the issue in this case and numerous others is that Verizon patented a technology that is very obvious — the translation of telephone numbers into Internet

addresses. The technology is essential to the workings of Internet telephony. While Vonage now must come up with its own, unique process for making such translations, "independent development is no defense to patent infringement," whatever the reason. What Lee argues in the *Times* piece is that the most effective way to use patents in the current environment is to patent everything, then stockpile patents to use as bargaining chips in subsequent negotiations. (Just ask the folks at Research in Motion, developers of the BlackBerry, if you want more details on how this process works.)

During the June 25 arguments, the judge asked Verizon and Vonage to seek common ground. This one, at the moment, is a cliffhanger.