Evolving Federal Communications Policies - Recent FCC Decisions and Policy Initiatives Affecting Local Government and What to Expect from the FCC in the Coming Year Regarding Broadband Services Provided by Wireline Telecommunications Carriers and Cable Operators

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This paper examines how recent rulings and policies adopted by the Federal Communications Commission ("FCC") governing broadband services affect local governments, municipalities, and state public utility commissions. Many of the FCC's decisions and policies limit existing state and local government authority to regulate broadband services offered by wireline telecommunications providers and cable operators. Further, this paper looks at how the resolution of pending FCC rulings may further impinge on local government authority. The FCC appears poised to continue limiting states' authority over broadband services provided by wireline telecommunications carriers and cable providers as part of its effort "to create a regulatory environment that promotes broadband deployment" and removes "legacy regulations, like tariffs and price controls, that discourage carriers from investing in their broadband networks."[1/] The importance of these issues to states and local municipalities is highlighted by the National League of Cities announcement that telecommunications issues top its federal lobbying agenda for 2007.[2/]

I. Creation of a National Policy on Broadband Deployment and Internet Access

In a series of decisions from 2002 to 2005, the FCC took steps to help fulfill the Congressional goal of encouraging the rapid deployment of advanced services[3/] and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[4/] Through these decisions, the FCC has severely limited the ability of state and local governments to regulate broadband and other advanced services.

A. Cable Modem Decision

In 2002, the FCC determined that cable modem service was properly classified as an interstate information service subject to Title I of the Communications Act of 1934, as amended ("Act"), not a cable service subject to Title VI of the Act, and that there is no separate offering of telecommunications service by cable modem providers.[5/] The FCC thus found that cable modem service was within the scope of the FCC's jurisdiction rather than a service subject to state authority. At the same time, however, the FCC recognized that cable modem service is provided

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1/ Remarks of FCC Chairman Kevin J. Martin, Phoenix Center, US Telecoms 2006 Symposium (Dec. 6, 2006).

2/ Christine Becker and Sherry Conway Appel, *NLC Sets 2007 Lobbying Agenda* (Jan. 22, 2007), *available at* http://www.nlc.org/Newsroom/Nation_s_Cities_Weekly/Weekly_NCW/2007/01/22/13242.cfm.

3/ 47 U.S.C. § 157nt. While Section 706 does not constitute an independent grant of authority to the FCC, the FCC may use the authority granted to it under the statute (including forbearance authority under Section 10) to encourage the deployment of advanced services. *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd. 24011, ¶¶ 69-77 (1998); *see also Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978, ¶ 176, n.564 (2003) (reaffirming the FCC's earlier findings).

4/ 47 U.S.C. § 230(b)(2).

5/ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, 17 FCC Rcd. 4798 (2002) ("*Cable Modem Ruling*"), *rev'd Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *rev'd NCTA v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

over the facilities of cable systems that occupy the public rights-of-way in local communities and is provided by cable operators that are subject to local franchising requirements and to state consumer protection and customer service standards.

To rectify this apparent contradiction and still satisfy its goals of encouraging investment and innovation in broadband services and facilities, the FCC sought to remove any regulatory uncertainty by issuing a *Notice of Proposed Rulemaking*.[6/] The FCC stated that it "would be concerned if a patchwork of State and local regulations beyond matters of purely local concern resulted in inconsistent requirements affecting cable modem service, the technical design of the cable modem service facilities, or business requirements that discouraged cable modem service deployment across political boundaries."[7/] The FCC feared that the application of state and local government regulations to cable modem service might limit the ability of the FCC to achieve its national broadband policy goals and thus sought comment on how the classification of cable modem service as an information service should preclude state and local authorities from regulating cable modem service and facilities in a certain way.[8/]

In response to the *Notice of Proposed Rulemaking*, state and local governments argued that the FCC should not preempt state and local laws, including laws regulating cable modem service, the public rights-of-way, customer proprietary network information ("CPNI"), and truth-in-billing ("TIB").[9/] The comment cycle for the *Notice of Proposed Rulemaking* closed in July 2002, but as of January 2007, the FCC had taken no further action "to clarify the authority of State and local governments with respect to cable modem service" in order to facilitate the FCC's national policy goals.[10/]

B. pulver.com Order

In February 2004, the FCC adopted an order declaring pulver.com's Free World Dialup service to be an interstate information service.[11/] The FCC determined that its assertion of federal jurisdiction over Free World Dialup was consistent with the national policy of nonregulation and would facilitate the further development of Internet applications, which would, in turn, encourage more consumers to demand broadband service.[12/] The FCC determined that state regulation over the service would risk "eliminating an innovative service

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6/ *Cable Modem Ruling* ¶ 96.

7/ *Cable Modem Ruling* ¶ 97.

8/ *Cable Modem Ruling* ¶ 98.

9/ *See, e.g.*, Reply Comments of the People of the State of California and the California Public Utilities Commission, GN Docket No. 00-185 (filed July 16, 2002); Reply Comments of the Office of the Attorney General of the State of Texas, GN Docket No. 00-185 (filed Aug. 6, 2002).

10/ *Cable Modem Ruling* ¶ 96 (stating the FCC's goals when issuing the *Notice of Proposed Rulemaking*).

11/ *Petition for Declaratory Ruling that pulver.com's Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd. 3307 (2004) ("*pulver.com Order*"). Free World Dialup facilitates point-to-point broadband Internet protocol voice communications and is only provided within pulver.com's network to those customers who subscribe to the service.

12/ *pulver.com Order* ¶¶ 17, 19.

offering" that "promotes consumer choice, technological development and the growth of the Internet, and universal service objectives."[13/]

C. Vonage Order

In November 2004, the FCC found that IP-enabled services possessing certain characteristics were interstate services and thus attempts to apply state entry, rate, and 911 requirements to such services were preempted.[14/] *Vonage* preemption[15/] applies to IP-enabled services that have the same basic characteristics as Vonage's service, including: (1) a requirement for a broadband connection from the user's location; (2) a need for IP-compatible customer premises equipment ("CPE"); and (3) a service offering that includes a suite of integrated capabilities and features, able to be invoked sequentially or simultaneously, that allows customers to manage personal communications dynamically, including enabling them to originate and receive voice communications and access other features and capabilities, even video. The FCC determined that its decision to preempt most state regulation of Vonage and other similar services was consistent with the national policy of nonregulation of the Internet and would drive consumer demand for broadband connections thereby encouraging more broadband investment consistent with its national goals.[16/]

Several state commissions, the National Association of Regulatory Utility Commissioners ("NARUC"), and the National Association of State Utility Consumer Advocates ("NASUCA") appealed the FCC's decision arguing that it was arbitrary and capricious for the FCC to preempt state regulation of the service offered by Vonage and other similar providers.[17/] A decision from the Eighth Circuit Court of Appeals is pending. During the pendancy of the appeal, some state commissions have determined that they may not regulate the subset of IP-enabled services defined by the FCC while others, like Missouri, have used the uncertainty in the law as a chance to regulate IP-enabled service providers.[18/]

13/ *pulver.com Order* ¶ 21. As further evidence of its interstate classification, the FCC attempted to apply its traditional end-to-end jurisdictional analysis to Free World Dialup, but ultimately determined that application of the doctrine to Internet-based services is difficult, if not impossible. *pulver.com Order* ¶¶ 21-22.

14/ *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd. 22404, ¶ 1 (2004) ("*Vonage Order*").

15/ The FCC reiterated its previous findings in the *pulver.com Order* that applying the end-to-end analysis to Internet-based services is difficult, if not impossible, and determined that, while there may be some indirect proxies available to determine jurisdiction (such as NPA-NXX or billing address), these proxies do not fit in the Internet world and would impose substantial costs on Vonage to retrofit its network into the traditional voice service model. *See Vonage Order* ¶¶ 25, 26-29.

16/ *Vonage Order* ¶¶ 34-36.

17/ *Minnesota Pub. Util. Comm'n v. FCC*, No. 05-1069 (8th Cir. filed Jan. 6, 2005) (consolidating *Public Util. Comm'n of Ohio v. FCC*, No. 05-3114 (8th Cir. filed Aug. 3, 2005); *People of the State of N.Y. v. FCC*, No. 05-3118 (8th Cir. filed Aug. 3, 2005); and *National Assoc. of State Util. Consumer Advocates v. FCC*, No. 05-112 (8th Cir. filed Jan 11, 2005)). All of these cases were originally consolidated in the Ninth Circuit and were transferred to the Eighth Circuit on August 12, 2005. *See Minnesota Pub. Util. Comm'n v. FCC*, No. 05-1069, Docket (8th Cir. filed Jan. 6, 2005).

18/ *See, e.g.*, "Comcast Files Complaint Against Missouri PSC," BUSINESS JOURNAL (KANSAS CITY), Oct. 12, 2006 (describing Comcast's efforts to stop the Missouri Public Service Commission from regulating Comcast's voice over Internet protocol ("VoIP") service).

D. Wireline Broadband Order

In September 2005, the FCC determined that, similar to cable modem services, wireline broadband Internet access service is appropriately classified as an interstate information service.[19/] In addition to providing parity with cable modem services, the objective of the FCC's classification was to "promote the availability of competitive broadband Internet access services to consumers, via multiple platforms, while ensuring adequate incentives are in place to encourage the deployment and innovation of broadband platforms" consistent with the FCC's national policy goals.[20/]

E. Broadband Consumer Protection Notice

As it did in the *Cable Modem Ruling*, the FCC recognized the need to address how states would be involved in the regulation of broadband services. Thus, the FCC issued a *Notice of Proposed Rulemaking* in conjunction with the *Wireline Broadband Order* seeking comment on the consumer protection rules that should apply in the broadband age while remaining consistent with the national policy framework for broadband services. These include: whether the FCC should extend privacy requirements similar to the Act's CPNI requirements to broadband Internet access service providers;[21/] whether the FCC should impose current anti-slamming requirements on providers of broadband Internet access service; whether TIB requirements should be applied to broadband Internet access service providers;[22/] whether it should impose

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19/ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd. 14853 (2005) ("*Wireline Broadband Order*"). Several competitive telecommunications carriers have appealed the FCC's decision and a decision is pending. *See Time Warner Telecom v. FCC*, No. 05-4769, Petition for Review (3d Cir. filed Oct. 26, 2005).

20/ *Wireline Broadband Order* ¶ 3. Numerous state commissions filed comments with the FCC before the adoption of the *Wireline Broadband Order*. Some states argued that wireline broadband Internet access services should be classified as telecommunications services and expressed concern with the effect of classifying the services as information services, which would remove the services from traditional telecommunications regulation, including universal service contributions. *See, e.g.*, Comments of the Public Service Commission of Wisconsin, CC Docket No. 02-33 (filed May 3, 2002); Initial Comments of the Illinois Commerce Commission, CC Docket 02-33 (filed May 2, 2002). Others argued that the FCC must resolve other pending questions before classifying wireline broadband Internet access service as an information service, such as questions regarding the obligations that apply to such services and the state role in regulation. *See* Letter from James Bradford Ramsey, NARUC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33 (filed Aug. 4, 2005).

21/ *Wireline Broadband Order* ¶¶ 148-49. In a separate proceeding, the FCC also asked whether CPNI obligations should be applied to VoIP service providers. *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Petition for Rulemaking to Enhance Security and Authentication Standards for Access to Customer Proprietary Network Information*, 21 FCC Rcd. 1782, ¶ 28 (2006). According to recent press reports, a draft item is circulating among the FCC commissioners, which would address whether the existing customer opt-out provisions are adequate to protect the privacy of CPNI and whether additional security measures, such as consumer-set passwords, audit trails, encryption, limitations on data retention, and requirements to provide notice should be adopted. *See, e.g., Martin: FCC Would Be Able to Hold 700 MHz Band Auction as Early as August*, TR DAILY, Jan. 17, 2007 (Martin indicating that he hopes his fellow Commissioners will complete action soon on a CPNI item, which had been circulating since December 2006).

22/ On March 18, 2005, the FCC addressed billing practices by carriers in three ways: (1) by extending its TIB rules, which previously had applied only to wireline carriers, to wireless carriers; (2) by denying a petition for

network outage reporting requirements; and whether Section 254(g) policies concerning rural and urban rate parity should be applied to wireline broadband Internet access providers.[23] The FCC concluded by requesting comments concerning federal-state involvement in the regulatory regime and how joint efforts should be coordinated.[24/]

A handful of state commissions filed comments in response to the *Notice of Proposed Rulemaking*. Generally, the states argued that the consumer protections currently applicable to traditional telecommunications services should be applied to broadband services.[25/] On the issue of preemption, the Public Utilities Commission of Ohio argued that states are in the best position to respond to the needs of their consumers, and thus, there should be a division of powers between the states and the FCC with regard to broadband services.[26/] In addition, the Arizona Corporation Commission filed a petition for clarification and/or reconsideration of the *Wireline Broadband Order* asking the FCC to determine that (1) a combined DSL/VoIP offering is classified as a telecommunications service and (2) the transmission component when offered on an unbundled basis is classified as a telecommunications service.[27/]

F. Broadband Policy Statement

After three years of taking steps to fulfill its national broadband policy goals, in September 2005, the FCC issued a *Policy Statement* setting forth its "approach to the Internet and broadband that is consistent with . . . Congressional directives."[28/] The FCC has stated that it intends "to incorporate these principles into [its] ongoing policymaking activities."[29/] Thus, to

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declaratory ruling filed by NASUCA that sought to prohibit wireless and wireline carriers from imposing any separate line item or surcharge on a customer's bill that was not mandated or authorized by federal, state or local law; and (3) by adopting a *Further Notice of Proposed Rulemaking* seeking comment on the need for additional billing requirements and tentatively concluding that state billing rules should be preempted. *See generally Truth-in-Billing and Billing Format; National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing*, 20 FCC Rcd. 6448 (2005), *rev'd National Assoc. of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238 (11th Cir. 2006). In response to the *Further Notice of Proposed Rulemaking*, several states argued that, while a dual system of regulation under which the states enforce the federal rules was acceptable, complete preemption of state authority over carrier billing practices was unnecessary and unlawful. *See, e.g.*, Comments of the Oklahoma Corporation Commission in Response to Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, CG Docket No. 04-208 (filed June 23, 2005); Comments of the Arizona Corporation Commission, CG Docket No. 04-208 (filed June 24, 2005); Reply Comments of the Public Utilities Commission of Ohio, CG Docket No. 04-208 (filed July 22, 2005); Reply Comments of the People of the State of California and the California Public Utilities Commission, CG Docket No. 04-208 (filed July 25, 2005).

[23] *Wireline Broadband Order* ¶¶ 150-56.

[24/] *Wireline Broadband Order* ¶ 158.

[25/] *See, e.g.*, Reply Comments of the People of the State of California and the California Public Utilities Commission, CC Docket No. 02-33 (filed Mar. 1, 2006).

[26/] Comments of the Public Utilities Commission of Ohio, CC Docket No. 02-33 (filed Jan. 17, 2006).

[27/] Petition of the Arizona Corporation Commission for Clarification and/or Reconsideration, CC Docket No. 02-33 (filed Nov. 16, 2005).

[28/] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd. 14986 (2005) ("*Policy Statement*").

[29/] *Wireline Broadband Order* ¶ 96.

ensure "that broadband networks are widely deployed, open, affordable, and accessible to all consumers," the FCC adopted the following principles: (1) consumers are entitled to access the lawful Internet content of their choice; (2) consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement; (3) consumers are entitled to connect their choice of legal devices that do not harm the network; and (4) consumers are entitled to competition among network providers, application and service providers, and content providers. The FCC determined that these principles would encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet.[30/]

G. Forbearance Petitions

FCC staff has indicated that the "primary driver" of the 2007 agenda may be the numerous petitions for forbearance pending before the FCC, many of which have statutory deadlines expiring this year.[31/] In December 2004, Verizon filed a petition asking the FCC to forbear from the application of traditional common carrier (Title II) regulations and *Computer Inquiry* access requirements for Verizon's high-speed data services such as frame relay, ATM, IP-VPN, Ethernet services, and non-TDM optical networking, optical hubbing, and optical transmission services (although Verizon did commit to continue contributing to the universal service fund on revenues generated from the provision of these services to end users).[32/] In March 2006, the statutory deadline for FCC action on Verizon's petition lapsed, and Verizon's forbearance request took effect by operation of law.[33/] In their joint statement, Chairman Martin and Commissioner Tate indicated that allowing Verizon's petition to take effect was "another step in establishing a regulatory environment that encourages [broadband] investments and innovation," which is "one of the highest priorities of the FCC."[34/]

Qwest, BellSouth, AT&T, and several smaller incumbent local exchange carriers ("ILECs") have filed similar "me too" petitions asking the FCC to grant them the same relief provided to Verizon by operation of law.[35/] In response to these petitions, the California Public

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30/ The FCC's principles are similar to those adopted by NARUC in November 2002. *See* Letter from James Bradford Ramsey, NARUC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33 (filed Feb. 4, 2003).

31/ *FCC's Wireline Agenda Includes Petitions for Forbearance, USF, IP Voice Classification*, TR DAILY, Jan. 16, 2007.

32/ *Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, Petition for Forbearance, WC Docket No. 04-440 (filed Dec. 20, 2004).

33/ *Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to Their Broadband Services is Granted by Operation of Law*, WC Docket No. 04-440, News Release (rel. Mar. 20, 2006).

34/ Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate, WC Docket No. 04-440 (rel. Mar. 20, 2006).

35/ *See, e.g.*, *Pleading Cycle Established for Comments on Qwest and AT&T Petitions for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, WC Docket No. 06-125, Public Notice, DA 06-1464 (rel. July 19, 2006); *Pleading Cycle Established for Comments on Embarq Local Operating Companies' Petition for Forbearance under 47 U.S.C.§ 160(c) from Application of Computer Inquiry and Certain Title II Common Carriage Requirements*, WC Docket No. 06-147, Public Notice, DA 06-1545 (rel. July 28, 2006); *Pleading Cycle Established for Comments on the Frontier and Citizens Communications*

Utilities Commission asked the FCC to issue an order with respect to the forbearance petitions to clarify the parameters and scope of the forbearance granted to Verizon and, if applicable, to the other ILECs, including the exact services for which forbearance has been granted.[36/] It is likely that the "me too" petitions will be granted (or allowed to take effect by operation of law) consistent with the FCC's "policy environment that facilitates and encourages broadband investment" by "allowing market forces to deliver the benefits of broadband to consumers."[37/]

H. Cable Franchising

On December 20, 2006, the FCC demonstrated that it was following the principles adopted in the *Policy Statement* when it found that the current process used by local franchising authorities to award franchises for the provision of "competitive" cable television services "constitutes an unreasonable barrier to entry that impedes the achievement of the interrelated federal goals of enhanced cable competition and accelerated broadband deployment."[38/] As of January 25, 2007, the text of the FCC's decision had not been released, but the News Release announcing the adoption of the item indicates that the FCC's decision will significantly curtail local franchising authorities' power in the franchising process for "competitive" franchises (*i.e.*, franchises issued to telephone companies such as Verizon and AT&T that are entering the video market to compete with incumbent cable operators). For instance, the FCC found that certain practices constitute an unreasonable refusal to award a competitive franchise, such as: (1) causing negotiations to extend beyond certain timeframes; (2) requiring that an applicant agree to unreasonable build-out requirements; (3) demanding certain fees; and (4) requiring an applicant to undertake unreasonable obligations relating to public, education, and governmental ("PEG") and institutional networks ("I-Nets").

To create "a regulatory environment that promotes broadband deployment," which is "a major Commission objective,"[39/] the FCC preempted any local laws, regulations, and requirements to the extent they impose greater restrictions on market entry than the rules adopted by the FCC. The FCC determined that it did not have enough information to make a preemption determination with respect to franchising decisions made at the state level, and thus, its decision addresses only decisions made by county-level or municipal-level franchising authorities. In the

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Incumbent Local Exchange Telephone Carriers Petition for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services, WC Docket No. 06-147, Public Notice, DA 06-1671 (rel. Aug. 23, 2006); *Pleading Cycle Established for Comments on BellSouth Petition for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, WC Docket No. 06-125, Public Notice, DA 06-1490 (rel. July 21, 2006); *Pleading Cycle Established for Comments on Petition of ACS of Anchorage, Inc. for Forbearance from Certain Dominant Carrier Regulation of its Interstate Access Services and from Title II Regulation of Its Broadband Services in the Anchorage, Alaska Incumbent Local Exchange Carrier Study Area*, WC Docket No. 06-109, Public Notice, DA 06-1263 (rel. June 12, 2006).

36/ Reply Comments of the Public Utilities Commission of the State of California, WC Docket No. 06-147 (filed Sept. 27, 2006).

37/ Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate, WC Docket No. 04-440 (rel. Mar. 20, 2006).

38/ *FCC Adopts Rules to Ensure Reasonable Franchising Process for New Video Market*, MB Docket No. 05-311, News Release (rel. Dec. 20, 2006) ("*Franchising News Release*").

39/ *Franchising News Release*, Statement of Kevin J. Martin at 2.

Further Notice of Proposed Rulemaking that will accompany the FCC's decision, the FCC seeks comment on how the FCC's findings in the *Report and Order* should be applied to existing franchisees (*i.e.*, incumbent cable operators) and the FCC's authority to take its action. The FCC tentatively concludes that the framework adopted for new "competitive" franchisees should apply to existing franchisees at the time of their next franchise renewal. The FCC indicated in the News Release that it will conclude its rulemaking and issue a decision on the issues raised by the *Further Notice of Proposed Rulemaking* no later than six (6) months after the release of the *Report and Order*.

In the comment cycle leading up to the *Report and Order*, many state and local government organizations submitted comments to the FCC arguing that states and localities, not the FCC, were in the best position to address franchising issues because the adoption of a single, nationwide standard could result in unanticipated or dysfunctional results.[40/] It is likely that many of these same comments will be made in response to the *Further Notice of Proposed Rulemaking* with regard to removing local franchising authority over existing franchisees. In addition, it would not be surprising if state and local government groups appealed the FCC's *Report and Order* based on the view that the FCC has usurped the authority granted to state and local governments over the cable franchising process.

II. Resolution of Pending FCC Proceedings Will Further Facilitate the National Broadband Policy Established by Congress and the FCC

In 2004, the President of the United States issued a directive that the mandates of the Act, requiring "the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans"[41/] be fully implemented by 2007, with "broadband technology to every corner of our country by the year 2007."[42/] As we enter 2007, this goal has not met due, in large part, to the FCC's inaction on several critical issues. Indeed, Commissioner Copps has recognized that the "goal of having universal broadband access by 2007 has provided a failure" and that "the FCC needs to do more to make sure broadband technology is available across the country."[43/] As discussed above, the FCC has committed to utilizing the principles adopted in

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40/ *See, e.g.*, Letter from the Indiana Regulatory Utility Commissioners to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311 (filed Dec. 13, 2006); Comments of the Southwest Suburban Cable Commission, MB Docket No. 05-311 (filed Feb. 13, 2006); Texas Coalition of Cities for Utility Issues' ("TCCFUI") Reply Comments on Cable Franchising NPRM, MB Docket No. 05-311 (filed Mar. 27, 2006).

41/ 47 U.S.C. § 157nt.

42/ *A New Generation of American Innovation*, at 11 (April 2004), *available at* http://www.whitehouse.gov/infocus/technology/economic_policy200404/innovation.pdf ("This country needs a national goal for…the spread of broadband technology. We ought to have…universal, affordable access for broadband technology by the year 2007, and then we ought to make sure as soon as possible thereafter, consumers have got plenty of choices when it comes to [their] broadband carrier."); *see also* President George W. Bush, Remarks to American Association of Community Colleges Annual Convention (Apr. 26, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/04/20040426-6.html (stating that "[b]roadband is going to spread because it's going to make sense for private sector companies to spread it so long as the regulatory burden is reduced — in other words, so long as policy at the government level encourages people to invest, not discourages investment").

43/ *Copps: Better Analysis Needed to Spur Broadband Deployment*, TR DAILY, Jan. 18, 2007.

the broadband *Policy Statement* to govern its decision making process going forward. Swift federal action is therefore necessary to bring competition, advanced telecommunications, and broadband services to those parts of the country most in need.

A. Universal Service

Chairman Martin has indicated that he expects the FCC to make progress on its goal to reform the universal service program in 2007, but the direction the agency will take depends on two factors both of which are discussed below: (1) the outcome of the appeals court review of the FCC's decision to broaden the contribution base; and (2) the impending recommendation from the Federal-State Joint Board on Universal Service ("Joint Board") as to whether reverse auctions should be used to govern universal service fund disbursements.[44/] The FCC has repeatedly recognized that the universal service fund supports the deployment of broadband facilities in rural areas, including for rural health care providers, and in the nation's schools and libraries.[45/]

Expansion of Contribution Base. On June 27, 2006, the FCC released an order requiring interconnected VoIP service providers[46/] to begin contributing to the federal universal service fund beginning in the fourth quarter of 2006.[47/] The FCC used its authority under the universal service regulations and its Title I ancillary jurisdiction to find that interconnected VoIP service providers are "providers of interstate telecommunications" for purposes of universal service.[48/]

Interconnected VoIP service providers must report and contribute to the fund on all their interstate and international end user telecommunications revenues.[49/] Providers may do so by: (1) reporting actual interstate telecommunications revenues; (2) applying to their total telecommunications revenues a 64.9% interstate "safe harbor" percentage; or (3) relying on a pre-approved traffic study to establish an alternative percentage to apply to their total telecommunications revenues.[50/] The FCC warned, however, that an interconnected VoIP provider with the capability to track the jurisdictional confines of its customer calls (and thus report actual usage) would no longer qualify for the preemptive effects of the *Vonage Order* discussed above and would be subject to state regulation. NARUC and the states appealing the *Vonage Order* have used these statements by the FCC as support for their arguments that the

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44/ *FCC to Take Aim at Additional Video Market Entry Barriers*, TR STATES NEWSWIRE, Jan. 18, 2007.

45/ *See, e.g.*, *Availability of Advanced Telecommunications Capability in the United States*, Federal Communications Commission Fourth Report to Congress, FCC 04-208 at 32, 34, 42 (rel. Sept. 9, 2004).

46/ Interconnected VoIP services are defined as those that (1) enable real-time, two-way voice communications; (2) require a broadband connection from the user's location; (3) require IP-compatible CPE; and (4) permit users to receive calls from and terminate calls to the public switched telephone network ("PSTN"). *See* 47 C.F.R. § 9.1.

47/ *Universal Service Contribution Methodology*, 21 FCC Rcd. 7518 (2006) ("*VoIP USF Order*").

48/ *VoIP USF Order* ¶ 35.

49/ *VoIP USF Order* ¶ 52. The FCC determined that interconnected VoIP service providers are providing telecommunications services for purposes of universal service when they complete communications to and from the PSTN. *See VoIP USF Order* ¶ 41.

50/ *VoIP USF Order* ¶ 52.

FCC wrongly preempted state regulation over the IP-enabled services offered by Vonage and similar services offered by others. A few parties also have appealed the *VoIP USF Order* itself, and the appeal is pending before the Court of Appeals for the District of Columbia.[51/]

Use of Reverse Auctions. In general, proposals to use auctions in the universal service context contemplate competitive bidding for the obligation to serve a specified area at an acceptable quality of service for a specified term, with the benefit of receiving universal service support to do so.[52/] The auction would be used to determine the amount of high cost universal service funding to be provided to eligible telecommunications carriers ("ETCs") under Section 254 of the Act. Of specific importance to state regulators are the FCC's questions regarding the appropriate role of state commissions in the administration of the auction process, the oversight of winning bidders, and the distribution of funds.[53/] Under the current methodology, state commissions play an important role in designating carriers to be eligible for universal service support (*i.e.*, ETCs), and the FCC asks how a reverse auction would comport with the current ETC designation process, especially in light of state authority to apply conditions to state-designated ETCs. A handful of state commissions filed comments on the use of reverse auctions. A few states supported the use of auctions as long as there were regulatory safeguards in place and the process was properly structured.[54/] One state asserted that if states are to have the primary role in the auction process, which several thought they should, then a cost recovery mechanism must be developed for state commissions to perform these new duties.[55/]

The Joint Board is scheduled to meet in February 2007 to discuss the possibility of implementing reverse auctions. Once the Joint Board releases its recommendations, the FCC will seek comment on those recommendations. The FCC has one year to complete any proceeding to implement the recommendations from the Joint Board,[56/] and thus this issue may be addressed in 2007.

B. Intercarrier Compensation

Although the FCC has been pondering how to proceed with respect to intercarrier compensation for many years, recent news reports indicate that the FCC will focus on the issue in 2007.[57/] In April 2001, the FCC issued a *Notice of Proposed Rulemaking* seeking comment on

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51/ *Vonage Holdings Corp. v. FCC*, No. 06-1276 (D.C. Cir. filed July 18, 2006).

52/ *Federal-State Joint Board on Universal Service Seeks Comment on the Merits of Using Auctions to Determine High-Cost Universal Service Support*, FCC 06J-1, Public Notice, WC Docket No. 05-337, ¶ 4 (rel. Aug. 11, 2006) ("*Reverse Auctions Notice*").

53/ *Reverse Auctions Notice* ¶ 7.

54/ *See, e.g.*, Ex Parte Comments of the Florida Public Service Commission in Response to the Federal Communications Commission's Public Notice Seeking Comment on Behalf of the Universal Service Joint Board, WC Docket No. 05-337 (filed Nov. 20, 2006); Reply Comments of the Montana Public Service Commission, WC Docket No. 05-337 (filed Nov. 8, 2006).

55/ *See, e.g.*, Comments of the Iowa Utilities Board, WC Docket No. 05-337 (filed Oct. 10, 2006).

56/ 47 U.S.C. § 254(a)(2).

57/ *FCC's Wireline Agenda Includes Petitions for Forbearance, USF, IP Voice Classification*, TR DAILY, Jan. 16, 2007.

the adoption of a unified regime for all traffic subject to intercarrier compensation.[58/] After nearly four years of inaction, the FCC issued a *Further Notice of Proposed Rulemaking* in March 2005 seeking to refresh the record on the adoption of a unified regime.[59/] The *2005 ICC FNPRM* reiterated many of the same questions raised in the earlier notice and sought comment on various intercarrier compensation regimes proposed by the industry. Recognizing that its actions impact the goal of broadband deployment, the FCC asked whether it should consider a particular intercarrier compensation regime that "encourages the efficient investment in, and deployment of, network infrastructure, including investment in broadband infrastructure" while ensuring that the regime is technologically and competitively neutral.[60/]

In 2006, a working group comprised of numerous industry players filed a proposed intercarrier compensation plan entitled the Missoula Plan.[61/] Proponents of the Missoula Plan claim that the Missoula Plan will help manage "the transition from the old narrowband world to a new world of widely available broadband connectivity" while removing "artificial regulatory barriers to broadband deployment."[62/] Numerous carriers have supported the Missoula Plan, including AT&T, BellSouth, Global Crossing, Level 3, and many rural ILECs. Several others have opposed the Missoula Plan, such as Verizon, the National Cable & Telecommunications Association, and numerous competitive local exchange carriers ("CLECs"). If adopted by the FCC, the Missoula Plan could significantly modify the way in which carriers are compensated and could limit the application of state rules in some instances. Many states have taken issue with the Missoula Plan because it would give the FCC the authority to mandate intrastate access rates and usurp state commission power over interconnection agreements.[63/] Other states contend that the restructuring mechanisms set forth in the Missoula Plan will benefit some states while disadvantaging others.[64/] And nearly all of the states dislike the fact that consumers will be required to pay higher universal service and subscriber line charges to fund the changes proposed by the Missoula Plan.[65/]

58/ *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd. 9610 (2001) ("*2001 ICC NPRM*").

59/ *Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd. 4685 (2005) ("*2005 ICC FNPRM*").

60/ *2001 ICC NPRM* ¶ 33.

61/ Letter from The Missoula Plan Supporters to Chairman Baum, CC Docket No. 01-92 (filed July 24, 2006) ("Missoula Plan").

62/ Missoula Plan, Executive Summary at 1.

63/ *See, e.g.*, Comments of the Connecticut Department of Public Utility Control, CC Docket No. 01-92 (filed Oct. 30, 2006); Comments of the New Jersey Board of Public Utilities, CC Docket No. 01-92 (filed Oct. 25, 2006).

64/ *See, e.g.*, Comments of the New York State Department of Public Service, CC Docket No. 01-92 (filed Oct. 25, 2006).

65/ *See, e.g.*, Comments of the Florida Public Service Commission in Response to the Federal Communications Commission's Public Notice Seeking Comment on the Missoula Intercarrier Compensation Reform Plan, CC Docket No. 01-92 (filed Oct. 25, 2006); Comments of the Public Utility Commission of Texas, CC Docket No. 01-92 (filed Oct. 26, 2006).

C. Time Warner Cable Petitions

It is precisely the types of obstacles outlined by Time Warner Cable's petitions, which are described below, that Congress intended to eliminate by mandating that the FCC promote the deployment of advanced services and remove any regulatory, economic, and operational impediments to competition. Many other state commissions are being confronted with the same questions raised by Time Warner Cable in its petitions. Some state commissions have deferred action pending the FCC's review,[66/] some have agreed with the South Carolina and Nebraska commissions,[67/] and others have taken a different approach.[68/] There also are several federal court cases pending on this subject.[69/] Numerous parties participating in the FCC proceedings have asked the FCC to act expeditiously to provide guidance and direction on these issues of federal law to ensure that consumers in all areas of the United States receive the benefits of new and innovative product offerings as envisioned by Congress and the FCC's *Policy Statement*.

Petition for Preemption. On March 1, 2006, Time Warner Cable filed a petition for preemption asking the FCC to preempt a ruling by the South Carolina Public Service Commission ("PSC") denying Time Warner Cable's affiliate, Time Warner Cable Information Services (South Carolina), LLC ("TWCIS(SC)"), an expanded certificate of public convenience and necessity ("CPCN") to offer services in geographic areas served by rural local exchange carriers ("RLECs") (TWCIS(SC) already had been granted a CPCN to serve certain portions of South Carolina).[70/] Although the South Carolina PSC previously found that TWCIS(SC) could

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66/ *See, e.g.*, Docket Nos. 2005-402-C, 2005-403-C, 2005-404-C, 2005-405-C, and 2005-406-C, *Time Warner Cable Information Services (South Carolina), LLC, Complainant/ Petitioner, vs. St. Stephen Telephone Company, Defendant/Respondent, et al.*, Order 2006-215 (S.C.P.S.C. Sept. 13, 2006).

67/ *See, e.g.*, Docket Nos. TMC-1, Sub 1, TMC-3, Sub 1, TMC-5, Sub 1, *Petition of Time Warner Cable Information Services (North Carolina), LLC for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, to Establish Interconnection Agreements with Atlantic, Randolph, and Star Telephone Membership Corporations, et al.*, Order Consolidating and Dismissing Proceedings (N.C.R.E.A. July 19, 2006).

68/ *See, e.g.*, Case No. 05-0402, *Sprint Communications L.P. d/b/a Sprint Communications Company L.P. Petition for Consolidated Arbitration with Certain Illinois Incumbent Local Exchange Carriers pursuant to Section 252 of the Telecommunications Act of 1996*, Arbitration Decision (I.C.C. Nov. 8, 2005); *appeal pending* Case No. 3:06-CV-00073-GPM-DGW, *Harrisonville Telephone Company, et al. v. Illinois Commerce Commission, et al.*, Complaint for Declaratory and Other Relief (S.D. Ill. filed Jan. 26, 2006); Cases 05-C-0170, 05-C-0183, *Petition of Sprint Communications Company L.P., Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Intercarrier Agreement with Independent Companies, et al.*, Order Resolving Arbitration Issues (N.Y.P.S.C. May 24, 2005), Order Denying Rehearing (N.Y.P.S.C. Aug. 24, 2005), *aff'd Berkshire Telephone Corp., et al. v. Sprint Communications Company L.P.*, 2006 U.S. Dist. LEXIS 78924 (W.D.N.Y. Oct. 30, 2006).

69/ *See, e.g.*, Case No. 05-CV-3260, *Sprint Communications Company L.P. v. Nebraska Public Service Commission, et al.*, Complaint for Declaratory and Injunctive Relief (D. Neb. filed Oct. 11, 2005); *Iowa Telecommunications Services, Inc. d/a/b Iowa Telecom, et al. v. Iowa Utilities Board, et al.*, Complaint (S.D. Iowa filed June 23, 2006); Case No. 06-CV-825, *Consolidated Communications of Fort Bend Company and Consolidated Communications of Texas Company v. The Public Utility Commission of Texas, et al.*, Complaint for Declaratory and Other Relief (W.D. Tx. filed Oct. 12, 2006).

70/ *Petition of Time Warner Cable for Preemption Pursuant to Section 253 of the Communications Act, as Amended*, WC Docket No. 06-54, Petition for Preemption (filed March 1, 2006); *see also Pleading Cycle Established for Comments on Time Warner Cable's Petition for Preemption Regarding the South Carolina Public Service Commission's Denial of a Certificate of Public Convenience and Necessity*, 21 FCC Rcd. 2280 (2006).

enter into interconnection agreements with RLECs by virtue of its status as a "telecommunications carrier," RLECs in South Carolina have claimed that TWCIS(SC) cannot obtain interconnection without having certification from the PSC to offer service in those RLEC territories. By denying TWCIS(SC)'s request to expand its CPCN, the South Carolina PSC has barred TWCIS(SC) from entering certain rural areas of South Carolina, and the lack of certification in certain rural areas has made it impossible for TWCIS(SC) to obtain direct interconnection with RLECs without which Time Warner Cable cannot provide residential VoIP services.

Petition for Declaratory Ruling. In addition, Time Warner Cable filed a petition for declaratory ruling on March 1, 2006 asking the FCC to find that telecommunications carriers are entitled to interconnect with ILECs, in particular RLECs, for the purpose of selling telecommunications services to entities like Time Warner Cable and other VoIP service providers.[71/] Time Warner Cable asked the FCC to confirm that entities still operate as "telecommunications carriers" when they provide wholesale services to VoIP service providers rather than retail service directly to end users. Time Warner Cable's declaratory ruling petition was the result of orders issued by the South Carolina PSC and the Nebraska PSC, both of which rejected attempts by telecommunications carriers (Verizon (formerly MCI) and Sprint, respectively) to interconnect with RLECs in order to provide underlying telecommunications services in support of Time Warner Cable's VoIP product. The South Carolina and Nebraska commissions found that, because Verizon and Sprint were not offering retail services directly to end users, those entities were not "telecommunications carriers" and thus were not entitled to interconnect with the RLECs or establish reciprocal compensation arrangements with the RLECs. Time Warner Cable and several other providers have explained to the FCC that denying VoIP service providers access to the PSTN through arrangements with CLECs is inconsistent with Act's and the FCC's goals for promoting pro-competitive policies.

D. IP-Enabled Services

In February 2004, the FCC adopted a generic *Notice of Proposed Rulemaking* seeking comment on the legal and regulatory framework for IP-enabled services, including VoIP services.[72/] While the *Notice of Proposed Rulemaking* asked many questions regarding the appropriate framework for IP-enabled services, the FCC did not offer any tentative conclusions, and asked commenters to categorize and classify different types of IP-enabled services based on whether the service is: 1) functionally equivalent to traditional telephony; 2) substitutable for traditional telephony; 3) interconnected with the PSTN and uses North American Numbering Plan numbers; 4) a peer-to-peer service; and 5) a private carriage or common carriage service.[73/]

71/ *Petition of Time Warner Cable for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, Petition for Declaratory Ruling (filed March 1, 2006); *see also Pleading Cycle Established for Comments on Time Warner Cable's Petition for Declaratory Ruling That Competitive Local Exchange Carriers May Obtain Interconnection to Provide Wholesale Telecommunications Services to VoIP Providers*, 21 FCC Rcd. 2276 (2006).

72/ *IP-Enabled Services*, 19 FCC Rcd. 4863 (2004) ("*IP-Enabled Services NPRM*").

73/ *IP-Enabled Services NPRM* ¶¶ 35-37.

The FCC also asked commenters to address the proper legal classification and regulatory framework to be applied to each category of IP-enabled service and the jurisdictional nature of each type of service.

FCC staff has stated that one of the items on the FCC's plate for 2007 is "IP technology in terms of voice services" because "there's certainly a lot up in the air about that, and carriers are interested in getting some conclusive determinations as to the classification of their services."[74/] The FCC has recognized that IP-enabled services generally, and VoIP services in particular, will encourage consumers to demand more broadband connections, and thus the FCC's goal is to facilitate this transition.[75/] As Commissioner Copps pointed out, "[o]nly when everyone, everywhere in America has access to broadband, will the IP transformation [the FCC] herald[s] here really take place."[76/]

CONCLUSION

In recent years, the FCC has started to actively implement the national framework for Internet and broadband services outlined by Congress and envisioned in the FCC's *Policy Statement*. Nonetheless, the FCC must take swift action on pending matters to ensure consumers have access to broadband services everywhere in the country as specifically contemplated by the Act and directed by the President. The President's 2007 deadline is here and broadband technology is not in "every corner of our country." Obstructionists, particularly in the rural markets, are frustrating consumer access to advanced services despite laws designed to prevent such market protectionism policies. The question is: Who will prevail in 2007 - consumers or those unwilling to let go of the antiquated regimes of the narrowband world?

74/ *FCC's Wireline Agenda Includes Petitions for Forbearance, USF, IP Voice Classification*, TR DAILY, Jan. 16, 2007.

75/ *IP-Enabled Services NPRM* ¶ 5.

76/ *IP-Enabled Services NPRM*, Statement of Commissioner Michael J. Copps, Concurring at 2.