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The Month in Brief

This issue of our Bulletin combines developments in December 2009 and January 2010 at the Federal Communications Commission ("FCC" or "Commission"), the courts, Congress and elsewhere. We also include our usual list of deadlines for your calendar.

FCC Proposes Changes to Telemarketing Regulations

The FCC announced at year's end that its January open meeting would consider new rules for calls that deliver artificial or prerecorded voice messages (sometimes referred to as "robo-calls"). The FCC adopted the item at its January 20, 2010 meeting and released the full text of its Notice of Proposed Rulemaking ("NPRM") on Friday, January 22, 2010.

As expected, the NPRM proposes that the FCC eliminate its established business relationship exception for robo-calls and adopt the Federal Trade Commission's ("FTC") requirement that such calls be made only pursuant to the consumer's express written consent. Adoption of the new rules would affect entities such as financial institutions and common carriers that are not subject to FTC jurisdiction, and have so far been required only to comply with the more lenient rules of the FCC.

The Commission will take written comments on the proposal up to 60 days after the Notice of Proposed Rulemaking is published in the Federal Register, and will take replies to those comments up to 30 days after the initial comments are due.

Because of the range and importance of the issues raised in the NPRM, affected entities should give serious consideration to filing comments in the proceeding. Our summary of the NPRM, and some suggestions for comment topics, follow.

What the NPRM Says

The NPRM's principal proposal is that sellers and telemarketers be required to obtain telephone subscribers' express written consent – which would include electronic consent – to receive prerecorded telemarketing calls "even where there exists an established business relationship between the caller and the consumer." The express written consent requirement would apply even for numbers not listed on the national do-not-call registry, and the proposed consent would be effective only if it referred specifically to prerecorded messages (not just to telemarketing calls generally).

The FCC proposes to retain existing exceptions for non-commercial calls, calls that are commercial but do not contain an advertisement (such as an airline's flight delay announcement), and calls by tax-exempt nonprofit organizations. The FCC also proposes an exception for healthcare-related calls, such as immunization reminders, prescription reminders, and similar messages from healthcare-related entities subject to the Health Insurance Portability and Accountability Act.

The NPRM also proposes a requirement that telemarketing calls include an interactive, automatic mechanism consumers can use to make an opt-out request, and seeks comment on a "per-campaign" standard (rather than the

present 30-day standard) for measuring the maximum percentage of live telemarketing sales calls that a telemarketer may drop as a result of automated dialing.

Finally, the FCC seeks comment on possible implementation periods for the proposed rules, and suggests emulating the FTC's decision to delay its express written consent requirement for 12 months and delay its interactive opt-out requirement for three months.

Possible Issues for Comment

1. Elimination of the EBR Exception and Requirement of Express Written Consent

Opponents of the principal change proposed in the NPRM – i.e., the elimination of the established business relationship exception to the consent requirement for prerecorded telemarketing calls – face an uphill fight. All five commissioners wrote separate statements in support of the change, and the FCC clearly believes that this is an area in which it needs to catch up with the Federal Trade Commission and harmonize the two agencies' rules. The Commission seemed especially impressed with the consumer comments that were filed with the FTC on this question in 2006, and the strong opposition in those comments to permitting robo-calls on the basis of prior inquiries or purchases involving the caller. As a policy matter, therefore, the Commission is strongly inclined to decide that the established business relationship exception should be dropped.

This is not to say that opposition to the proposal is pointless. Notably, the Commission acknowledges in the NPRM that the legislative history of the Telecommunications Consumer Protection Act suggests that consent requirements will be satisfied by written *or* oral consent, and the NPRM also invites comment on the possible burdensomeness of the express written consent requirement for callers. Comments based on those points might gain some traction if they are well supported.

2. The Autodialer Restrictions

One observation, at paragraph 20 of the NPRM, seems to come entirely out of left field. There, the Commission notes that the statutory restriction on autodialed calls to mobile telephone numbers and certain other numbers contains a "prior express consent" exception that is identical to the consent exception for prerecorded voice calls to residential numbers. The Commission then "tentatively" concludes that "any written consent requirement adopted by the Commission should apply to both provisions," and asks for comment on that tentative conclusion.

This paragraph reveals the Commission's intention to strengthen what is already one of the most restrictive provisions of the Commission's rules – the prohibition against placing autodialed calls, including text messaging calls, to a mobile telephone number without the called party's prior express consent. This prohibition, which applies to a call made for any non-emergency purpose, was adopted at a time when mobile telephone service was rare and expensive. It makes little sense in a time when many consumers use mobile devices exclusively and purchase the associated service in large buckets of minutes.

Under its present rules, as interpreted by the Commission, callers at least may dial mobile numbers automatically on the strength of a consumer's having given the number to the caller at the time a business relationship was established. However, the proposed express written consent requirements are much more restrictive, and their application to the autodialer regulations could have a profound effect on the ability of businesses to communicate with their customers even for non-telemarketing purposes. Affected parties should consider opposing this suggestion, and might wish to use this opportunity to urge the Commission to revisit the entire question of autodialed calls to mobile devices.

3. Preemption of State Telemarketing Laws

The NPRM is based largely on the Commission's belief that jurisdictional inconsistencies between FCC rules and FTC rules should be eliminated. With that in mind, this is a good time to remind the FCC of the much greater jurisdictional inconsistencies between state telemarketing laws and federal telemarketing laws as those laws affect interstate calling. Those inconsistencies, which cause far more confusion than the differing FCC/FTC requirements, are the subject of several preemption petitions that the FCC has ignored for years.

The NPRM raises a number of important issues, and anyone affected by the telemarketing laws should review the full text, which can be downloaded from http://www.fcc.gov/.

Comcast and NBC Universal File for Merger Approval

On January 25, 2010, Comcast Corp. ("Comcast") and NBC Universal ("NBCU") made their initial filing under the Hart-Scott-Rodino Act for Justice Department approval of Comcast's proposed purchase of a 51% stake in NBCU, which would be acquired from General Electric Co. for $13.75 billion. An application for FCC approval of the transaction was made on Thursday, January 28, 2010.

The Comcast-NBCU deal has caused considerable concern about the new entity's control over cable distribution, broadcast networks, cable channels, and motion picture studios. In order to respond to those concerns, Comcast has made a number of public commitments, including promises to increase public interest programming, extend program access rights to the NBC and Telemundo stations it will obtain as a result of the deal, and not migrate NBC and Telemundo broadcast programming to the cable platform. Critics of the deal, however, are expected to advocate much stronger concessions, and Comcast has already signaled that it will not accept merger conditions that address issues unrelated to the transaction.

The Justice Department has indicated that it, rather than the Federal Trade Commission, will take the lead in scrutinizing the antitrust implications of the merger. It also is reported that documents submitted to the Justice Department in support of the transaction will be shared with the FCC.

FCC Proposes Annual National Testing of Emergency Alert System

In mid-January, the FCC released an NPRM seeking comment on proposed rules to require Emergency Alert System ("EAS") participants to participate in annual, nationwide testing of the EAS system and to provide their test

results to the FCC. Current EAS rules require state and local testing, but a national test of the system has never been conducted. The data from a recent statewide test in Alaska could help to provide a framework for national testing, the purpose of which would be to ensure preparedness in the event of any national alert issued by the President. The resulting data would allow the government to identify and address any failures, and the data would be publicly available.

Comments on the proposal are due 30 days after publication of the NPRM in the Federal Register, and replies are due 60 days after publication in the Federal Register.

As Open Internet Comments Roll In, D.C. Circuit Appears Skeptical of FCC's Actions Against Comcast

As the FCC faced an avalanche of comments in its open Internet proceeding (*see* "Commission Starts Promised Net Neutrality Proceeding" in October 2009 edition of the CLB), on January 8 the D.C. Circuit heard oral arguments in Comcast's appeal of the FCC's 2008 finding that Comcast had violated the FCC's Internet Policy Statement when it blocked certain peer-to-peer file transfers. In the Comcast case, the FCC had relied primarily upon its ancillary jurisdiction under Title I of the Communications Act, and the judges seemed skeptical of the FCC's actions and legal authority at the oral argument.

Since the 2008 Comcast decision, the FCC has proposed that the Internet Policy Statement be codified and expanded to apply nondiscrimination and transparency requirements. Comments on this pending rulemaking proceeding were due January 14, and replies are due March 5.

Following the Comcast oral argument, the FCC reportedly is weighing options to clarify its authority over Internet service providers. Without well-defined authority, any open Internet rules adopted in the pending rulemaking would be subject to renewed challenge in the courts.

Wireless Developments

Wireless Microphones and Other Unlicensed Devices Must Vacate the 700 MHz Band by June

The FCC unanimously voted to adopt an Order prohibiting the "manufacture, import, sale, lease, offer for sale or lease, or shipment of wireless microphones and other low power auxiliary stations intended for use in the 700 MHz band." The prohibition becomes effective upon publication of the Order in the Federal Register. The FCC also established June 12, 2010, as the date by which such unlicensed devices must vacate the 700 MHz band, although they may have to move earlier if notified by a 700 MHz licensee. Any operation of an unlicensed device must stop immediately if it causes harmful interference to a 700 MHz commercial or public safety licensee. Clearing the 700 MHz band is an important component of the Digital Television Transition, allowing wireless licensees to roll out new communications services, including those based upon fourth-generation technology, without fear of harmful interference.

The FCC is requiring manufacturers and retailers to provide "clear notice to consumers about the basic terms and conditions under which they may use wireless microphones and how they may find out more information." The FCC also is launching a consumer outreach plan to help consumers determine if they may own unlicensed devices that operate in the 700 MHz band and whether they can be returned to different frequencies.

A Further Notice of Proposed Rulemaking accompanied the Order, which seeks comment on whether wireless microphones should be allowed to operate on an unlicensed basis in the TV bands. The Further Notice also seeks comment on proposed technical standards for "wireless audio devices," which includes wireless microphones.

FCC Order Creating "Shot Clock" for State and Local Tower Siting Review Is Challenged

Not unexpectedly, the FCC's November order establishing a "shot clock" under which state and local governments must review and act upon tower siting requests has been challenged by several government entities. (The FCC's ruling provides that state and localities have 90 days to review collocation applications and 150 days to review other types of siting applications. If the state or locality has not acted by the deadline, an applicant can seek court relief within 30 days.)

Five municipal groups have requested that the FCC stay the effective date of the new shot clock rules. The municipal groups argue that the decision is contrary to Section 332(c)(7) of the 1996 Telecommunications Act. If the FCC does not stay the entire decision, however, the groups alternatively request that the FCC stay the requirement that state and local governments have 30 days to notify applicants that their filings are incomplete. The groups also filed a petition for reconsideration or clarification of the 30-day incompleteness deadline. The groups' requests have been opposed by CTIA and PCIA.

The city of Arlington, Texas also has appealed the FCC's decision to the United States Court of Appeals for the Fifth Circuit (New Orleans). According to the city, the FCC exceeded its authority when it adopted the shot clock requirements, and the FCC's decision is arbitrary and capricious, an abuse of discretion, and otherwise contrary to law.

The Possible Reallocation of Broadcast Spectrum for Broadband Services Sparks Debate

The FCC's National Broadband Plan Public Notice #26, which sought comment in December on whether TV broadcast spectrum should be repurposed for wireless broadband use, triggered significant debate among broadcasters, commercial wireless companies, and public safety entities.

According to the wireless industry, up to 800 MHz of additional spectrum must be allocated for commercial use in order to meet growing consumer demand for wireless broadband services. CTIA and the Consumer Electronics Association ("CEA") argue that by shifting full-power TV stations to a low-power architecture, 100-180 MHz of TV broadcast spectrum would be available for commercial wireless services. Under this proposal, full-power TV stations would be grouped into a smaller portion of the existing TV broadcast allocation by reducing the spectral separation between licensees. Other members of the wireless industry noted that consumers are increasingly using means other than over-the-air broadcasts to receive video programming, such as multichannel video programming distributors and the Internet.

However, broadcasters urge the FCC to make wireless companies demonstrate that they are using already-allotted commercial wireless spectrum efficiently before reallocating TV broadcast spectrum. One group of broadcasters noted that "the channel-sharing and service area reductions contemplated in the Public Notice" would eliminate their ability to "innovate and meet public demand" and would likely lead to "widespread viewer reception difficulties."

Two public safety groups – the National Public Safety Telecommunications Council and the Association of Public Safety Communications Officials – also urged the FCC to consider public safety needs when looking at TV broadcast spectrum. According to the groups, a part of TV channels 14-20 are allocated for public safety use and other private land mobile radio communications services in 11 of the largest U.S. metropolitan areas and "has become a principal source of radio spectrum for interoperable public safety communications systems." The groups further argue that public safety entities require access to more spectrum, not less.

In response to some broadcasters' claims that the FCC intended on shutting down free over-the-air broadcast service, members of the staff working on the national broadband plan stated that they intend to recommend that any reallocation of TV broadcast spectrum for wireless broadband services be voluntary.

More than 9,600 Paging Licenses to Be Auctioned

Auction No. 87, in which more than 9,600 paging licenses will be made available to bidders, is scheduled to begin May 25, 2010. The auction will include 7,752 licenses in the lower paging bands (35-36 MHz, 43-44 MHz, 152-159 MHz, and 454-460 MHz) and 1,851 licenses in the upper paging bands (929-931 MHz). These are licenses that went unsold in prior auctions, licenses on which a winning bidder defaulted, or licenses that were cancelled or terminated. Consistent with several prior recent auctions, the FCC proposes to use anonymous bidding procedures in which bidders' license selections, upfront payments, and any other information that may reveal the bidders' identities is kept confidential until bidding closes.

Specifications for Wireless Alert System Are Announced

The FCC and Federal Emergency Management Agency announced the adoption of design specifications for the Commercial Mobile Alert System ("CMAS"). The "C" specification relates to the development of a gateway interface that will allow wireless carriers participating in the CMAS to provide their customers with prompt and accurate emergency alerts and warnings through their mobile devices.

The CMAS permits government and public safety officials to send 90-character, geographically targeted text messages to wireless subscribers regarding public emergencies, Amber alerts, and Presidential emergency messages. The announcement of the C specification begins a 28-month period in which participating wireless carriers must develop, test, and deploy the system. The CMAS is scheduled for completion by April 7, 2012.

DOJ Ends Antitrust Inquiry into Text Messaging

The Antitrust Division of the U.S. Department of Justice ("DOJ") has concluded an inquiry into whether larger commercial wireless carriers colluded to increase text messaging rates. The inquiry apparently was triggered by concerns raised by Senator Herb Kohl (D-WI), the chairman of the Senate Judiciary Committee's antitrust, competition policy, and consumer rights subcommittee, who held a hearing earlier last year on text messaging rates. Senator Kohl subsequently sent a letter to the FCC and DOJ asking them "to take action to ensure that the wireless telephone market is open to competition, and to remove undue barriers to entry and expansion by new competitors." According to the FCC, it is still looking at various other issues identified in Senator Kohl's letter, including early termination fees, exclusive handset arrangements, roaming, and special access.

FCC Seeks Comment on Signal Amplification Techniques

The FCC seeks comment on multiple petitions for rulemaking and petitions for declaratory rulings dating back to 2005 regarding the proper use of signal boosters on Part 22, 24, 27, and 90 licenses. Although signal boosters and other amplification techniques can expand wireless services to the benefit of consumers, wireless operators, and first responders, improper installation and use of these devices can interfere with other carriers' network operations and cause harmful interference. Comments and replies regarding the petitions are due February 5 and February 22, respectively.

Signal Jamming Company Seeks New STA

CellAntenna Corporation filed a request for special temporary authority (an "STA") with the FCC to conduct a 15-minute demonstration of its wireless signal jamming technology at a vacant Maryland prison. According to Maryland officials, the demonstration will be postponed pending FCC approval. Despite ongoing concerns about jamming equipment interfering with operations of commercial wireless networks, government officials remain interested in the technologies as one way to deter prison inmates from using smuggled wireless phones.

In related matters, the National Telecommunications and Information Administration ("NTIA") is reviewing the results of tests it recently conducted using CellAntenna's equipment in its Boulder, Colorado labs. According to NTIA, it does not have authority to permit the use of jamming technologies by non-federal entities, including state agencies that may house federal inmates, but if the Boulder tests are successful, NTIA will work with the Federal Bureau of Prisons to schedule a test at a Maryland federal prison. The lab test results are expected to be reported by the end of January.

New FCC Location for Paper Filings

The FCC announced that, effective December 28, 2009, hand-delivered and/or messenger-delivered paper filings for the FCC Secretary should be taken to the FCC's contractor at FCC Headquarters at 445, 12th Street, S.W., Room TW-A325, Washington, D.C., 20554. The FCC has also closed its filing location at 236 Massachusetts Avenue. All other filing procedures for paper submissions (e.g., ensuring that all filings are submitted without envelopes) remain unchanged.

- **New Bill Would Allow Larger Groups of FCC Commissioners to Meet: H.R. 4167, introduced in early December by Representative Stupak (D-MI.) would allow three or more FCC commissioners to meet behind closed doors provided a member from both political parties is also present. The meeting would need to be reported on the FCC's website within five days afterwards. Commissioner Copps released a statement strongly supporting the bill, noting that the existing ban on more than two Commissioners meeting outside a public forum was "stifling collaborative discussions among colleagues, delaying timely decision-making, discouraging collegiality and short-changing consumers and the public interest."**

- **Wireless ETF Bill Introduced: Also in early December, a new bill introduced by Senators Klobuchar (D-MN), Webb (D-VA) and Begich (D-AK) would require wireless carriers to pro-rate early termination fees ("ETFs"). Most customers currently are subject to ETFs between $175 and $350, with the higher fees usually associated with heavily discounted smart-phones tied to two-year contracts. The bill would prohibit carriers from charging ETFs that are higher than the discount on the phone at the time it was purchased, and would also require greater disclosure of ETFs and contract duration.**

- **Satellite Reauthorization Legislation: Work on a satellite reauthorization bill will continue in early 2010. The House has passed a reauthorization bill but the Senate has not. As an interim measure, existing satellite regulations and transmission rights were extended for a two-month period as a rider to the December 2009 defense spending bill. New reauthorization legislation could be attached to an appropriations or other "must pass" bill, or the Senate could pass the bill by unanimous consent and seek a House conference. In addition to reauthorizing satellite TV companies' licenses to import distant signals into local markets, Congress is looking to require satellite TV providers to carry public television stations in high definition format and provide for a study of satellite providers' financial and satellite capacity limitations.**

- **Satellite Indemnification Bill: On December 23, the Senate approved H.R. 3819, the Commercial Space Launch Indemnification Extension, which enables the government to take on liability if a failed satellite launch attempt causes damage. Indemnification covers U.S. commercial launch services providers against third-party liability claims for Federal Aviation Administration-licensed launches.**

- **Prepaid Calling Card Bill: Republicans in the House are raising concerns about H.R. 3993 (introduced in early November), a bill to require prepaid calling card providers to more explicitly disclose terms and fees to consumers. The bill would repeal the Federal Trade Commission's existing inability to impose common carrier regulations, which would enable it to sue carriers accused of selling fraudulent prepaid calling cards. However, since the bill also empowers states to police carrier practices, Republicans like Representative Stearns (R-FL) worry that varying state laws could make compliance difficult for the industry.**

- **700 MHz Reauction and Wireless Phone in Prisons: Both houses of Congress are working on the 2010 appropriations bill, which includes a provision directing the FCC to reauction the 700 MHZ D Block. The D Block failed to find a winning bid in a 2007 auction, when offered as a nationwide license to be used for a public-private partnership for a nationwide interoperable pubic safety network. The appropriations bill also would direct NTIA to develop a plan to combat illegal contraband cell phones in prisons.**

- **Bill to Add More FCC Tech Staff: In mid-December, Senators Warner (D-VA) and Snowe (R-ME) introduced legislation that would authorize each FCC Commissioner to hire an additional technical staff member for in-depth consultations.**

- **Spectrum Inventory Bills: The House is considering two bills aimed at making more spectrum available to support wireless communications. The Radio Spectrum Inventory Act, H.R. 3125, introduced in July 2009 by**

Representative Waxman (D-CA), directs the FCC and NTIA to inventory all federal spectrum to identify bands that could be reallocated for commercial use. The Spectrum Relocation Improvement Act of 2009, H.R. 3019, introduced in June 2009 by Representative Inslee (D-WA), provides for new, streamlined processes for federal agencies vacate spectrum once it was been reallocated.

- **Telecom Taxes: Both houses of Congress introduced bills in 2009 affecting telecom-related taxes. Under S. 1266 and H.R. 2428, the U.S. Department of Transportation would require some new highway projects to incorporate installation of broadband conduits. S. 1147 would offer tax credits to encourage broadband deployment. H.R. 691 extends a business tax credit for rural phone service. Several bills (S. 71, S. 47, H.R. 3011, H.R. 2203) seek to repeal the excise tax on telephone services, while H.R. 1521 and S. 1192 would end state taxes on mobile phone services.**

FCC Asks for Extension Until March of Delivery for National Broadband Plan; Broadband Mapping Grant Awards Issued on Rolling Basis

On January 7, 2010, FCC Chairman Julius Genachowski asked for a ne-month extension of the deadline to deliver the National Broadband Plan ("NBP") to Congress. Regular readers of the Communications Law Bulletin will not be surprised to learn that the Chairman cited the voluminous record compiled over the last several months as the primary reason behind the request for more time. As we have reported and the Chairman has observed, the Commission must review more than 35 public workshops, nine field hearings, a broad Public Notice seeking general input, 30 "targeted" Public Notices, and countless posts on the Commission's "Blogband" page. The Chairman also noted that the "additional time will enable the FCC to continue to obtain input from key stakeholders and more fully brief Commissioners and the House and Senate Committees on aspects of the Plan as it comes together."

Commissioner McDowell was widely quoted in the press as being "disappointed that the FCC's broadband team is unable to deliver a national broadband plan to Congress by the statutorily mandated deadline," but hopes that the quality of the final product will reflect the additional time used to prepare it. Commissioner Meredith Baker voiced similar disapproval of the request for extension.

Provided Congress agrees, the National Broadband Plan would be due March 17, 2010. Members of the FCC's Omnibus Broadband Initiative team updated the Commission on the status of the NBP at the January 16, 2010 Open Meeting. Blair Levin noted several critical regulatory issues that will need to be addressed as part of the NBP, including reform of the Universal Service Fund, the importance of promoting mobile broadband, and the need to address broadband adoption through promoting digital literacy.

FCC Public Notices Seeking Input on National Broadband Plan

As noted in several previous editions of this Bulletin, while the National Broadband Plan Notice of Inquiry ("NOI") sought public input on a wide variety of broadband issues, the Commission changed its approach in the second half of 2009 and sought comment on targeted issues through individual public notices. Input on these targeted issues supplements the record received in response to the National Broadband Plan NOI and the discussions at the National Broadband Plan staff workshops that have been held to date. All of the comment cycles for these Public Notices have closed. Recent Public Notices are mentioned in brief below:

- **NBP Public Notice #18 - Relationship Between Broadband and Economic Opportunity: November 12, 2009 FCC Public Notice (DA 09-2414) sought comment on broadband issues specific to small businesses (businesses with**

500 or fewer employees), medium and large businesses (businesses with more than 500 employees), and nonprofit organizations. Comments were due December 4, 2009.

- **NBP Public Notice #19 - Role of the Universal Service Fund and Intercarrier Compensation in the National Broadband Plan: November 13, 2009 FCC Public Notice (DA-2419) sought comment on the extent to which reform of the Commission's universal service and intercarrier compensation policies could further the goal of making broadband universally available to all people of the United States. Comments were due December 7, 2009.**

- **NBP Public Notice #20 - Moving Toward a Digital Democracy: November 17, 2009 FCC Public Notice (DA 09-2431) sought comment on how broadband can help to bring democratic processes (e.g., elections, public hearings, and town hall meetings) into the digital age in order to encourage and facilitate citizen opportunities to engage and participate in their democracy. Comments were due December 10, 2009.**

- **NBP Public Notice #21 - Data Portability and its Relationship to Broadband: November 18, 2009 FCC Public Notice (DA 09-2433) sought comment on broadband and portability of data and their relation to cloud computing, transparency, identity, and privacy. Comments were due December 9, 2009.**

- **NBP Public Notice # 22 - Research Necessary for Broadband Leadership: November 18, 2009 FCC Public Notice (DA 09-2434) sought suggestions and ideas to support a new Broadband Task Force proceeding to develop research recommendations for Congress to enable the U.S. to advance broadband deployment in the U.S. over the next decade and to be a global leader in broadband networking in the years 2020 and beyond. Comments were due December 8, 2009.**

- **NBP Public Notice # 23 - Network Deployment Study Conducted by the Columbia Institute for Tele-Information: November 20, 2009 FCC Public Notice (DA-2458) sought comment on the study released by the Columbia Institute for Tele-Information (part of Columbia Business School in New York) reviewing projected deployment of new and upgraded broadband networks. Commenters are invited to discuss, among other things, whether the study accomplishes its intended purposes, provides a complete and objective survey and review of the subject matter, how accurately and comprehensively the study examines the projected deployment of new and upgraded broadband networks, and how accurately and comprehensively the study examines the nature and future of broadband adoption. Comments were due December 4, 2009.**

- **NBP Public Notice # 24 - Broadband Measurement and Consumer Transparency of Fixed Residential and Small Business Services in the U.S.: November 24, 3009 FCC Public Notice (DA-2474) sought comment on whether there are opportunities to protect and empower American consumers by ensuring sufficient access to relevant information about communications services, including data on service quality and transparency issues for multi-unit buildings. Commenters were invited to submit additional information on fixed residential and small business Internet broadband services, which are the specific subset of the services covered by the 2009 *Consumer Information and Disclosure Notice of Inquiry* (FCC 09-68, released Aug. 28, 2009). Comments were due December 14, 2009.**

- **NBP Public Notice # 25 - Transition from Circuit-Switched Network to All-IP Network: December 1, 2009 FCC Public Notice (DA 09-2517) sought comment on relevant policy questions that a Notice of Inquiry on the topic of transitioning to an all-IP network should raise in order to assist the Commission in considering how best to monitor and plan for the transition. In particular, commenters were asked to discuss which policies and regulatory structures may facilitate or hinder the efficient migration to an all-IP world, as well as what aspects of traditional policy frameworks are important to consider, address, and possibly modify in an effort to protect the public interest in an all-IP world. Comments were due December 21, 2009.**

- **NBP Public Notice # 26 - Uses of Spectrum: December 2, 2009 FCC Public Notice (DA-2518) sought specific data on the use of spectrum currently licensed to broadcast television stations and whether broadcasters could use market-based mechanisms to contribute to the broadband effort any spectrum in excess of that which they need to meet their public interest obligations and remain financially viable. Commenters were asked to discuss, among other issues, what factors the Commission should consider when examining and comparing the benefits of spectrum used for over-the-air television broadcasting and those of spectrum used for wireless broadband services; the impact to the U.S. economy if insufficient additional spectrum were made available for wireless broadband deployment; the impact on the U.S. if broadcast service were diminished due to reallocating broadcast spectrum to other uses; and potential approaches to increase spectrum availability and efficiency. Comments were due December 21, 2009.**

- **NBP Public Notice # 27 - Video Device Innovation: December 3, 2009 FCC Public Notice (DA-2519) sough comment on how the Commission can encourage innovation in the market for video devices that will assist the Commission's development of a National Broadband Plan, as well as meet the Commission's statutory obligations to promote a competitive market for navigation devices under Section 629 of the Communications Act of 1934. The Public Notice observed the increasing trend of streaming videos over the Internet, video offerings by companies traditionally considered telephone companies, and Internet-based video subscription services. Commenters were invited to discuss what technological and market-based limitations keep retail video devices from accessing all forms of video content that consumers want to watch; whether a retail market for network agnostic video devices would spur broadband use and adoption and achieve Section 629's goal of a competitive navigation device market for all MVPDs; whether the home broadband service model could be adapted to allow video networks to connect and interact with home video network devices; and what obstacles stand in the way of video convergence. Comments were due December 21, 2009.**

- **NBP Public Notice # 28 - Broadband Deployment Financing: December 18, 2009 FCC Public Notice (DA-2610) sought comment on the extent to which the challenges of bringing broadband access to rural communities are a result of the lack of private financing for network deployment, whether through capital investment, debt financing, or other financial support. Commenters were asked to discuss the potential private sector and government funding vehicles for effective financing of broadband deployment projects in rural and high-cost areas. Comments were due January 8, 2010.**

- **NBP Public Notice # 29 – Privacy Issues Raised by the Center for Democracy and Technology: January 13, 2010 FCC Public Notice (DA 10-62) sought comment on the relevance of online privacy protections to broadband adoption and deployment. In particular, commenters are invited to offer input on several "significant" questions about the use of personal information and privacy in an online, broadband world raised by the Center for Democracy and Technology in a letter to the Commission dated January 11, 2010. The questions cover a variety of topics, including consumers' expectations of privacy on the Internet; ways to promote the development of technologies that protect online privacy; the creation and protection of "transactional data" that could be sensitive or harmful if misused (location information, health data, etc.); and the ever-growing use of third-party applications. Comments were due January 22, 2010.**

- **NBP Public Notice # 30 – Reply Comments on National Broadband Plan: January 13, 2010 FCC Public Notice (DA 10-61) seeks comment any and all matters and issues raised in the NBP proceeding since the initial workshops and public notices in August 2009. This Public Notice was prompted by a January 11, 2010 Request for Opportunity to Submit Reply Comments filed by Media Access Project ("MAP"). MAP asked the FCC for the opportunity for interested parties to submit reply comments addressing issues that have been raised during the course of the NBP proceeding, noting that the many public notices, workshops, field hearings, and recent dialogue on the issues have "cast new light and added new perspectives on many of the questions raised in those notices and meetings." Comments were due January 27, 2010.**

NTIA Releases Second NoFA and Issues Rolling Broadband Mapping Grants

On January 15, the National Telecommunications and Information Administration and the Rural Utilities Service ("RUS") released two separate notices of funds availability ("NoFAs") in the second round of NoFAs under the American Reinvestment and Recovery Act ("Recovery Act"), together totaling $4.8 billion, including a new streamlined application process. For grants awarded in this round, NTIA will focus on middle-mile broadband projects, while RUS will target last-mile projects. In particular, NTIA grants will be targeted at middle-mile projects that support connections for public computer centers, libraries, hospitals, and universities. By separating NTIA and RUS funds in separate NoFAs, interested parties can apply for funds under both programs. Applications will be accepted from February 16 to March 15, 2010.

Awards for broadband mapping projects have been rolling out in late 2009 and early 2010. The American Reinvestment and Recovery Act allocated up to $350 million for broadband mapping grants, administered by the NTIA. Based on current projections, NTIA may not need the full amount allocated, but the grant award process is ongoing. NTIA received applications for mapping grants from all 50 states, the District of Columbia, and all five U.S. territories. Under the ARRA, grants cover 80% of the cost of the mapping project and grant recipients must pay the remaining 20%. Broadband mapping data gathered by the states will be incorporated into the national broadband map to be created by NTIA. In some cases, recipients are state agencies like public utilities commissions; in other cases, grants are being made to non-profit 501(c)(3) organizations like Connected Nation.

The first set of awards was made in October for Arkansas, California, the District of Columbia, Indiana, North Carolina, New York, Vermont, and West Virginia. In early November, NTIA announced state broadband mapping grants for Alabama, Idaho, Maryland, Massachusetts, Washington, Wisconsin, and Wyoming. On November 30, NTIA announced broadband mapping grants for projects in Alaska, Colorado, Delaware, Kansas, Louisiana, and Missouri. In the third week of December, NTIA awarded 15 grants for broadband mapping and planning projects for Arizona, Florida, Georgia, Illinois, Michigan, Minnesota, Nevada, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, and Puerto Rico. On New Year's Eve, NTIA awarded five grants for projects in Iowa, Montana, New Hampshire, Utah, and the U.S. Virgin Islands. In mid-January, NTIA awarded a total of 10 grants under the State Broadband Data and Development Grant Program for broadband mapping projects located in Connecticut, Hawaii, Kentucky, Maine, Mississippi, Nebraska, New Mexico, Oklahoma, Pennsylvania, and Texas.

NTIA received applications from all U.S. states, the five U.S. territories, and the District of Columbia for grants under its State Broadband Data and Development Grant Program.

As of press time, NTIA has made 51 grants totaling $97 million, and the agency plans to announce additional grants in 2010.

Intercarrier Compensation Developments

A number of long-pending access charge and other intercarrier compensation issues were finally clarified in the last couple of months.

Qwest v. Farmers Reconsideration Order

On November 25, 2009, the FCC decided the long-pending reconsideration petition filed in November 2007 by Qwest Communications Corp. in its "traffic-pumping" complaint case against Farmers and Merchants Mutual Telephone Co. ("Farmers"). Farmers, an incumbent local exchange carrier (incumbent LEC, or "ILEC"), had entered into arrangements with "free" conference calling services under which the services sent their traffic to numbers located in Farmers' local exchange in return for fees paid by Farmers based on the volume of terminated traffic. Qwest carried long distance calls bound for the conference calling firms and paid Farmers terminating access charges to deliver those calls.

Qwest brought a complaint against Farmers for the excessive interstate access rate of return earned by Farmers. In its 2007 decision in *Qwest Communications Corp. v. Farmers and Merchants Mutual Tel. Co.* ("*Qwest*"), the FCC held that, because Farmers' interstate tariff was given "deemed lawful" status under Section 204(a)(3) of the Act, Farmers was insulated from damages liability.

Qwest's complaint also alleged that, irrespective of Farmers' access rate level and earnings, Farmers' imposition of any access charges was improper because the conference calling firms were not "end users" as defined in Farmers' access tariff. Qwest claimed that Farmers therefore did not provide access services under its tariff in terminating calls to the firms. In its 2007 *Qwest* order, the FCC found, based on Farmers' representations that the conference calling firms purchased tariffed end-user access services and paid the subscriber line charge, that the firms were access customers of Farmers and thus end users under Farmers' access tariff.

Qwest filed a petition for reconsideration and a motion to compel production of documents, arguing that Farmers had back-dated contracts and invoices to make it appear that the conference calling firms had been purchasing tariffed services. Qwest requested that the FCC accordingly find that the firms were not customers under the tariff, but rather, were business partners with Farmers in its scheme to manipulate the FCC's rules. The FCC granted the motion to compel and initiated additional proceedings to consider Qwest's evidence.

In the November 25 reconsideration order, the FCC found that the evidence demonstrated that the conference calling firms were in fact not end users under Farmers' tariff and that Farmers thus was not entitled to impose terminating access charges on Qwest for terminating Qwest's traffic to the firms. The FCC noted that, in addition to evidence that the firms did not purchase tariffed services from Farmers, Farmers' net payment of fees to the firms for the traffic they generated also showed that the firms were not access customers of Farmers. Farmers' contracts with the firms also prohibited Farmers from providing the same services to any competitor, which is "antithetical to the notion of tariffed service." Based on redacted confidential information, the FCC found that Farmers' back-dated contracts and billings of the firms were attempts to create the appearance of compliance with its tariff after Qwest's complaint was filed.

The FCC accordingly held that Farmers' practice of charging Qwest tariffed switched access rates for its termination of traffic violates Section 201(b) of the Act. The FCC noted, however, that Farmers might still be due some payment for its termination services to Qwest, which could be determined in Qwest's supplemental complaint for damages. This order, as well as the similar order issued by the Iowa Utilities Board ("IUB") in the related traffic pumping complaint case brought by Qwest (discussed in the September Bulletin), reflects a willingness on the part of regulatory agencies to drill down into the details of carriers' arrangements with their customers to determine their compliance with tariff and regulatory requirements.

IUB Reconsiders Qwest Decision

On December 3, 2009, the IUB granted rehearing as to one aspect of its September 21 order in the related traffic pumping complaint case brought by Qwest (*Qwest Communications Corp. v. Superior Tel. Cooperative, et al.*). In the September 21 order, the IUB had found Great Lakes Communications Corp. ("Great Lakes") and other defendant LECs liable for improperly assessing intrastate access charges against Qwest and other long distance companies.

The IUB also directed the North American Numbering Plan Administrator and the telephone number Pooling Administrator to commence proceedings to reclaim all blocks of telephone numbers assigned to Great Lakes. As reported in the November Bulletin, Great Lakes and other defendant, sought a preliminary injunction in federal

district court against number reclamation, and a Magistrate recommended that an injunction be granted. Following the Magistrate's recommendation, Qwest filed a motion with the IUB to withdraw its reclamation directive so that the parties would not have to litigate the issue before the IUB, the court, and the FCC. In its December 3 order, the IUB determined that, although it has "sufficient authority to order reclamation in this case," it agreed with Qwest that "litigating this issue in multiple forums is not efficient." The IUB accordingly granted Qwest's motion and a similar request by Great Lakes and substituted a request to the FCC to conduct a "for cause audit" of Great Lakes' use of numbering resources in place of its prior reclamation directive.

Eighth Circuit Affirmance of Nebraska PSC UNE Order

On December 29, 2009, the U.S. Court of Appeals for the Eighth Circuit largely affirmed an order of the Nebraska Public Service Commission ("PSC") setting rates that competitors must pay to lease unbundled network elements ("UNEs") of Qwest's local telephone network in Nebraska. The PSC previously set UNE rates for Qwest's "local loops" connecting end-user customers to its network for three different zones reflecting geographic cost differences. The PSC used the prescribed total element long-run incremental cost ("TELRIC") methodology to derive the UNE rates. The PSC subsequently developed a new method for allocating Nebraska universal service funding, the "long-term universal service funding mechanism." This method targeted subsidies to high-cost rural, out-of-town areas and provided that subsidies for certain UNEs be portable from ILECs to competitive LECs ("CLECs"). In a third proceeding, the PSC reflected the new universal service allocation methodology in its UNE rate zones by deaveraging the zones into in-town and out-of-town zones.

Qwest sought review of the deaveraged UNE rates in federal district court under Section 252(e)(6) of the Communications Act on the grounds that the revised rates were not based on TELRIC, as required by FCC regulations. The district court upheld the revised rates. On appeal, the Eighth Circuit affirmed, holding that neither the Act nor FCC rules require that deaveraging existing rates that comply with the TELRIC standard requires a new TELRIC cost study. The deaveraging method did not nullify the results of the TELRIC cost studies upon which the local loop UNE rates were originally based. The court also held that there were no objective criteria in the record showing that the deaveraged rates were not cost-based. Finally, the court held that the deaveraged in-town rates were not so low that they would discourage facilities-based competition. The court found that the in-town rates comply with TELRIC, and that is all that is required. The court nevertheless remanded the order to the district court with instructions to remand the case to the PSC for the limited purpose of determining a workable method of delineating the boundary between in-town and out-of-town zones. This decision suggests that courts will give substantial deference to state commission UNE rate setting that is arguably based on required criteria.

ISP-Bound Traffic Remand Order Upheld by D.C. Circuit

On January 12, 2010, the FCC finally won judicial approval, on its third attempt, for its approach to setting intercarrier rates for local interconnected calls to Internet service providers ("ISPs"). Section 251(b)(5) of the Act requires the establishment of reciprocal compensation arrangements for calls originated by customers of one LEC that are handed off to an interconnected LEC for delivery to its customers. The originating LEC pays the terminating LEC reciprocal compensation. Where one of the LECs is an ILEC, Section 251(c) of the Act obligates the ILEC to negotiate reciprocal compensation rates with the other LEC pursuant to Section 252 of the Act, which authorizes state regulatory commissions to arbitrate disputes.

Since 1999, the FCC has been concerned that the assessment of reciprocal compensation for the termination of ISP-bound local calls, also referred to as dial-up Internet traffic, was distorting the telecommunications and Internet service markets. A CLEC could sign up ISPs as customers and thereby charge an ILEC reciprocal compensation for local dial-up Internet calls originated by the ILEC's subscribers and handed off to the CLEC for termination to an ISP. Because ISPs do not originate calls, the one-way flow of compensation was not "reciprocal," leading to inefficient entry by CLECs intent on serving ISPs, rather than providing viable local telephone services competing with the ILECs' local services.

In order to ameliorate what it viewed as arbitrage behavior by CLECs serving ISPs, the FCC imposed a rate-cap scheme, including a cap of $0.0007 per minute, in 2001 on the compensation paid by originating LECs to terminating LECs on dial-up Internet calls, which was significantly below the reciprocal compensation rates negotiated by the LECs under Sections 251 and 252. The D.C. Circuit reversed and remanded the FCC's 2001 order in 2002 because the FCC had not satisfactorily explained its authority to cap ISP-bound traffic termination rates. In 2008, the FCC reimposed the ISP-bound terminating rate-cap system, which was appealed by Core Communications, Inc. ("Core"), and various state regulatory agencies.

In affirming the FCC in its January 12 opinion, the D.C. Circuit held that, because dial-up Internet calls ultimately reach servers in other states and foreign countries, such calls are "interstate communications that are delivered through local calls." They are therefore governed by Section 201(b) of the Act, which authorizes the FCC to regulate interstate telecommunications rates, as well as the Section 251/252 regime governing interconnected local calls supervised by state commissions. A savings clause in Section 251(i) of the Act provides that nothing in Section 251 limits the FCC's authority under Section 201. Accordingly, the court concluded that the FCC has the authority to set rates for the termination of dial-up Internet calls.

The court rejected the argument that, because the FCC has no jurisdiction over local calls, it cannot set termination rates for local dial-up Internet calls, pointing out that any call to the Internet must be considered interstate telecommunications under the FCC's traditional "end-to-end" call jurisdictional analysis. The court also rejected the argument that the different treatment accorded to dial-up Internet traffic subject to the low rate cap and other interconnected local calls subject to reciprocal compensation rules, is arbitrary and capricious, explaining that the FCC provided a solid rationale for that difference. The court pointed out that, under the typical reciprocal compensation regime, the traffic flows are balanced, while dial-up Internet traffic is one-way. That difference provides tremendous arbitrage opportunities that must be addressed.

In finally upholding the FCC's authority to cap termination rates typically paid by ILECs to CLECs serving ISPs, the D.C. Circuit's opinion is a significant victory for ILECs seeking to control costs and a loss for CLECs like Core. The opinion notes, however, that access charge rates for intrastate long distance calls are not covered by the Section 251/252 regime or Section 201, leaving a potential jurisdictional gap in any future FCC attempt to implement a broad-based intercarrier compensation regime.

Recent Enforcement Actions Cover a Wide Range of Activities

Hearing Aid Compatibility Enforcement Actions

On November 25, 2009, the Spectrum Enforcement Division ("SED") of the Enforcement Bureau ("Bureau") released a Notice of Apparent Liability for Forfeiture ("NAL") against Smith Bagley, Inc. ("SBI"), a Tier III wireless carrier, for apparently failing either to offer consumers at least eight digital wireless handset models that meet the FCC's radio frequency interference standards for hearing aid compatibility ("HAC"), or to ensure that at least 50% of the handset models offered complied with the interference standards. In August 2009, SBI, in response to an inquiry from the Wireless Telecommunications Bureau, amended its January 2009 Hearing Aid Compatibility Status Report to acknowledge that in the last four months of 2008, SBI had offered only seven handsets that met the required standard and that those seven models did not constitute 50% of the total number of handset models offered. The NAL noted that recent decisions have established a base forfeiture amount of $15,000 per handset model for violations of the HAC requirements and proposed a forfeiture of $15,000, with no adjustment, for SBI's failure to comply.

On January 14, 2010, the SED released seven NALs and issued two citations against carriers and manufacturers for apparent violations of the wireless handset HAC status report filing requirements. The NALs proposed forfeitures

ranging from $5,000 to $18,000, for a total of $87,000. Some of the NALs also alleged violations of the HAC public website posting requirements, and at least one of the NALs alleged a failure to respond to a Letter of Inquiry ("LOI") from the Bureau. The NALs pointed out the SED has established a base forfeiture amount of $6,000 for failure to file a HAC status report and proposed forfeitures of that amount for each omitted report. The one exception was in the case of a carrier that had made a good faith but unsuccessful attempt to file a timely report, meriting a downward adjustment to $5,000. Because the HAC website postings are more current than the status reports and may be the primary means through which consumers obtain HAC information, the SED also established $6,000 as the base forfeiture for a violation of the web posting requirements.

Issuance of Bureau's First Enforcement Advisories

On January 15, Bureau Chief Michelle Ellison announced a new initiative with the release of the first Enforcement Advisories addressing consumer protection issues. She stated that these Advisories are designed to educate businesses about and alert consumers to what is required by the FCC's rules, the purpose of those rules, and why they are important to consumers. She stated that "[c]consumer protection enforcement is at the core of the Bureau's mission" and that the Bureau hopes that the Advisories will become a familiar tool for industry and counsel in their compliance reviews.

The first two Advisories address the HAC rules and the FCC's consumer proprietary network information ("CPNI") rules, which concern the confidential information that carriers collect from consumers in the course of serving them. The HAC Advisory discussed the previous day's NALs and citations and the importance of the reports that carriers and manufacturers are required to submit concerning their HAC compliance, as well as their required website postings concerning their HAC handset models. The CPNI Advisory stressed the obligation of carriers and VoIP providers to file annual certifications on March 1, 2010, regarding their compliance with the CPNI rules and described the types of information covered by the rules. Attached to the Advisory were a list of frequently asked questions ("FAQs") regarding the importance and scope of the annual CPNI certification requirement, a template for the certification, and the text of the CPNI rules. The FAQs also described some of the more frequent deficiencies found in previous years' filings.

Unauthorized Assignments of Licenses

On December 14, 2009, the Bureau released an order adopting a Consent Decree with BNSF Railway Co. ("BNSF") terminating an investigation of BNSF's compliance with Section 310(d) of the Communications Act in connection with the sale to another railroad of BNSF's communication system for a portion of railroad track. BNSF failed to seek FCC approval for the assignment of land mobile and microwave licenses prior to consummation of the transaction. BNSF later filed applications seeking FCC consent to the assignment of the licenses, all of which were granted.

BNSF has also failed to disclose on FCC Forms 601 and 603, submitted with various FCC filings, its 1998 guilty plea to a felony and payment of a $10 million fine and $9 million in remediation costs for violating the Clean Water Act and another statute. BNSF states that its employees responsible for FCC filings had little or no contact with employees involved in environmental matters and were unaware of BNSF's felony conviction. Upon learning of the omitted felony conviction disclosures, BNSF promptly disclosed the conviction to the FCC.

Under the Consent Decree, BNSF agreed to develop and implement a compliance plan to ensure compliance with Section 310(d) and FCC Rule 1.17, requiring truthful statements to the FCC. Elements of the plan include designation of a compliance officer, development of a compliance manual (including due diligence instructions), compliance training for relevant employees, and the submission of periodic compliance reports. The compliance plan requirements terminate after three years. BNSF also agreed to make a voluntary contribution to the U.S. Treasury of $110,000.

On January 4, 2010, the Bureau's Investigations and Hearings Division released an NAL against Shop at Home Holdings, Inc. ("SHH"), for its apparent acquisition of two satellite earth station licenses without prior FCC consent in violation of Section 310(d). SHH acquired the licenses as part of a larger corporate transaction in 2006. In 2008, SHH learned of the need to obtain prior FCC consent for the assignment of licenses and filed remedial applications seeking such consent, which were granted in 2009. The NAL stated that the base forfeiture for the unauthorized assignment of a license is $8,000. Because SHH operated the licenses for two years without filing corrective applications, the NAL proposed a forfeiture of $16,000.

BELA TV Indecency Consent Order

On January 21, the Bureau released an order adopting a Consent Decree with Bela TV, LLC, former licensee of Station KBEH (TV), terminating an investigation of possible violations of the FCC's restrictions on indecent, profane, and obscene programming. The Consent Decree states that the Bureau received multiple complaints alleging that Station KBEH had violated the indecency rules during its broadcast of the program "Atrévete" in February 2006. In October 2006, the Bureau directed an LOI to Bela TV regarding the broadcast, to which Bela TV responded. Bela TV agreed to make a voluntary contribution of $25,000 to the U.S. Treasury, but no compliance program was included in the Decree.

Universal Service Developments

Universal Service Contribution Factor Passes 14 Percent

The Universal Service Fund contribution factor for the first quarter of 2010 increased to 14.1%. The 1.8% increase from the fourth quarter of 2009 marks the highest contribution amount since the Universal Service Fund was created. The contribution factor, which has been increasing gradually over time, highlights the continued need for universal service reform by the FCC.

D.C. Circuit Upholds Interim Cap on Competitive ETC Support

The U.S. Court of Appeals for the District of Columbia concluded that it would not overrule the FCC's May 2008 decision creating an interim cap on universal high-cost support received by competitive eligible telecommunications carriers ("ETCs"). The cap went into effect in August 2008. Accordingly, competitive ETCs likely will continue to face decreasing high-cost support until the FCC completes its overhaul of the universal service support mechanism.

According to the court, the FCC did not violate the notice-and-comment requirements set forth in Administrative Procedures Act. Numerous commenters expressed support and opposed the cap, and the FCC clearly took all of the views into account in its order. The court also rejected arguments that the cap violated Section 254 of the Communications Act of 1934, as amended, noting that the FCC rightfully could consider ways to sustain the Universal Service Fund by restricting excessive spending. The court noted that the FCC "apparently reasons that 'sufficiency' encompasses not just affordability for those benefited, but fairness to those burdened. The agency seeks to strike an appropriate balance between the interests of widely dispersed consumers with small stakes and a concentrated interest group seeking to increase its already large stake." The court further explained that competitive ETCs "enjoy a significant advantage over ILECs under the current support system" and rejected claims that the cap contradicted the FCC's competitive neutrality principles.

The FCC Considers Interim Changes to the Non-Rural High-Cost Universal Service Program

The FCC issued a further notice of proposed rulemaking seeking comment on various "interim changes" to the universal service mechanism that provides high-cost support to carriers operating in non-rural areas. The further notice was in response to a 2005 remand by the U.S Court of Appeals for the Tenth Circuit (Denver) in its "Qwest II" decision that had raised questions about the FCC's non-rural high-cost rules.

The FCC promised in March 2009 to address the court's remand in a final decision by April 16, 2010. However, the FCC decided that it "should not attempt wholesale reform of the non-rural high cost mechanism at this time" because its national broadband plan will include recommendations for modifying the universal service mechanism. Accordingly, the FCC seeks comment only "on certain interim changes to address the court's concerns and changes in the marketplace," including "what changes should be made to the Commission's rules regarding the rate comparability review and certification process" and whether the FCC should require "carriers to certify that they offer bundled local and long distance services at reasonably comparable rural and urban rates."

Comments and replies on the further notice are due 30 and 45 days, respectively, after publication in the Federal Register.

The Federal-State Joint Board Issues Its Annual Universal Service Monitoring Report
According to the Federal-State Joint Board on Universal Service, the Universal Service Fund grew to $7 billion in 2008. Support for the high-cost program increased $200 billion from 2007 to $4.5 billion, with competitive eligible telecommunications carriers receiving the additional funds. The rural health care support program also increased to $49 million in 2008. The low-income program saw a reduction in support to $819 million. The Schools and Libraries Program remained around $1.8 billion in 2008.

The Joint Board also reported that the telecommunications industry received approximately $235 billion in end-user revenues in 2008. Revenues for fixed local service providers increased by $3 billion to $78 billion, while wireless revenues increased $2 billion to $118 billion. Revenues for toll services fell $10 billion to $39 billion.

Audit Identifies More than 1,000 Companies that May Be in Violation of Form 499-A Filing Requirements
According to the FCC's Office of Inspector General ("OIG") in its semi-annual report to Congress, more than 1,000 telephone companies may not have filed an annual Form 499-A as required by FCC rules. The FCC hired an independent auditing firm to gather data from state commissions and compare them to federal records. In September 2009, OIG issued 49 letters to potential non-filers asking whether they were required to file FCC Form 499-A. OIG expects to provide further information about the audit and its results in its next report to Congress.

FCC Expands Services Supported Under E-Rate Program
The FCC issued an order listing the services that will be eligible for discounts under the universal service Schools and Libraries or "E-Rate" Program in 2010, including certain newly supported services. Specifically, the FCC confirmed that interconnected Voice-over-Internet-protocol and text messaging services will continue to be eligible for E-Rate funding. The FCC also clarified the eligibility requirements concerning video on-demand services, Ethernet, web hosting, wireless local area network (LAN) controllers, and virtualization software. The FCC decided, however, that telephone broadcast messaging, unbundled warranties, power distribution units, softphones, interactive white boards, and e-mail archiving tools are not eligible. A further notice of proposed rulemaking accompanied the order, which seeks comment on services that should be designated as eligible for E-Rate support in 2011. Comments and replies on the further notice are due 30 and 45 days, respectively, after publication in the Federal Register.

FCC Closes "Terrestrial Loophole" to Promote Competitive Program Access

On January 20, the FCC released the First Report and Order in MB Docket No. 07-198 (*Program Access R&O*) establishing procedures for pay-TV providers to obtain "must have" television programming from competitors. Among other things, the new rules apply to cable operators that have withheld from competitors terrestrially delivered regional sports networks, thus closing the so-called "terrestrial loophole" that has long frustrated satellite providers and other competitive video providers.

Section 628(c)(2) of the Communications Act requires the Commission to adopt regulations prohibiting cable operators or affiliates from engaging in unfair acts involving cable-affiliated programming that is delivered to cable operators via satellite link. Until now, cable operators have been able to escape this requirement (and thus withhold valuable content from competitors) if the programming was delivered to the cable operator via fiber or other terrestrial connection rather than via satellite.

The new *Program Access R&O* concludes that the FCC has authority under Section 628(b) of the Communications Act to take action if a cable operator engages in unfair acts with respect to terrestrially delivered, cable-affiliated programming that significantly hinder a multichannel video programming distributor from providing cable-owned programming to consumers. To address specific complaints about cable operators withholding certain valuable sports programming, the *Program Access R&O* adopts a rebuttable presumption that an unfair act involving a terrestrially delivered, cable-affiliated regional sports network triggers Commission oversight under Section

628(b). Complainants may pursue program access claims similar to the claims they previously have been able to pursue for satellite-delivered, cable-affiliated programming.

Because claims involving terrestrial programming require an additional factual inquiry regarding whether the unfair act "significantly hinders the complainant from providing satellite cable programming to consumers," the Commission plans to allow additional time to present rebuttal information. The Public Notice accompanying the *Program Access R&O* notes that several complaints already are before it alleging that cable operators are withholding terrestrially delivered regional sports networks. Each of those complaints must still be considered by the FCC, but complainants may decide either to pursue their claims as filed or, should they want to invoke the added protections contained in the *Program Access R&O*, may file a supplemental filing alleging that the defendant has engaged in an unfair act after the effective date of the new rules.

The Commission passed the item 4-1, with Commissioner McDowell voicing concerns that Section 628(b) does not authorize the FCC to regulate programming delivered over terrestrial links.

Public Interest Groups File Petition for Rulemaking to Establish Common Set-Top Box Gateway

Public Knowledge, Free Press, Media Access Project, Consumers Union, CCTV, Center for Media & Democracy, and the Open Technology Initiative of New America Foundation filed a petition for rulemaking ("Petition") in mid-December asking the Commission to initiate a rulemaking to promote competition for pay-TV set-top boxes. The petition invokes Section 629 of the Communications Act, which requires the Commission to create a competitive market for video devices.

The current set-top box regime promotes the "CableCARD" standard for separable security to be used by third-party manufacturers desiring to offer set-top boxes to consumers. However, according to the Petition, the CableCARD regime has not been sufficient to facilitate adoption of third-party manufactured and marketed devices because such devices could not access the full range of programming offered by the pay-TV provider. Under the Petition, pay-TV providers would use a "gateway device" with a common output, which could in turn be used to connect third-party manufacturers' navigation devices. The Petition further suggests that the gateway specification should provide standards for (1) a physical connection, (2) a communication protocol, (3) authentication, (4) service discovery, and (5) content encoding.

While the Petition asks the FCC immediately to open a rulemaking, the cable industry hopes the Commission will take a more cautious approach by merely seeking further information on the state of the set-top box industry. The Commission already has taken a step towards gathering more information by including in the National Broadband Plan proceeding a Public Notice seeking comment on how to encourage innovation in the market for video devices (National Broadband Plan Public Notice # 27, DA 09-2519, rel. Dec. 3, 2009). When asked about the need for FCC action in the set-top device market at the Consumer Electronics Show in early January, Commissioner McDowell said he would "welcome" a further notice of proposed rulemaking, and Commissioner Baker agreed there could be room for improvement in promoting competition in the market.

Upcoming Deadlines for Your Calendar

Note: Although we try to ensure that the dates listed below are accurate as of the day this edition goes to press, please be aware that these deadlines are subject to frequent change. If there is a proceeding in which you are particularly interested, we suggest that you confirm the applicable deadline. In addition, although we try to list

deadlines and proceedings of general interest, the list below does not contain all proceedings in which you may be interested.

February 5, 2010	**Comments due on petitions regarding wireless signal boosters and other signal amplification techniques.**
February 10, 2010	**Reply comments due on coalition petition for expedited rulemaking regarding Section 271 unbundling obligations.**
February 12, 2010	**Reply comments due on NPRM on proposed changes to local switching support rules.**
February 12, 2010	**Reply comments due regarding high-cost USF support for non-rural carriers (10th Circuit *Qwest* remand).**
February 17, 2010	**National Broadband Plan due to Congress (although a one-month extension has been requested).**
February 17, 2010	**Reply comments due on analytical framework for special access.**
February 22, 2010	**Reply comments due on petitions regarding wireless signal boosters and other signal amplification techniques.**
February 22, 2010	**Reply comments due on Cbeyond petition for expedited rulemaking regarding access by competitive providers to ILEC fiber loops.**
February 24, 2010	**Comments due on NOI on children and electronic media.**
March 1, 2010	**Form 477 (local broadband reporting) due.**
March 1, 2010	**Annual CPNI compliance certification due.**
March 5, 2010	**Reply comments due on net neutrality NPRM.**
March 8, 2010	**Comments due on future of media and information needs of communities in digital age.**
March 16, 2010	**Short-form application deadline for Auction 87 (Lower and Upper Paging Bands).**
March 26, 2010	**Reply comments due on NOI on children and electronic media.**
March 31, 2010	**International circuit status and circuit addition reports due.**