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Communications Law Bulletin, November 2008

November 2008

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Communications Law Bulletin, November 2008

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The Month in Brief: General Election Results Will Affect Oversight of Telecom Industry

With a new, Democratic Administration about to take office and substantial Democratic gains in the House and Senate, changes are expected both in Executive Branch policy and in the personnel of the principal committees on Capitol Hill.

On matters of policy, the appointment of two net neutrality advocates (Susan Crawford of the University of Michigan Law School and Kevin Werbach of the Wharton School) to the Obama Federal Communications Commission ("FCC" or "Commission") transition team encouraged net neutrality supporters, and the President-elect's stated support for wider broadband deployment encouraged some observers to believe that the new Administration might support the extension of universal service subsidies to include support of broadband services.

On the Hill, Rep. Henry Waxman (D-Cal.) won a caucus vote to succeed Rep. John Dingell (D-Mich.) as Chair of the House Energy Committee Commerce Committee. Waxman is likely to support any net neutrality policy initiatives of the new Administration, and sponsored a bill, earlier this year, that requires carriers to offer roaming services on demand as a condition of receiving universal service support.

On the Senate side, Senator Daniel Inouye (D-Haw.) predicted that Jay Rockefeller (D-W.Va.) would succeed him as Chair of the Commerce, Science and Transportation Committee, although Senator Rockefeller has declined to comment on the decision. Chairman Ted Stevens (R-Alaska), the present Chair of the Senate Commerce Committee, recently was convicted of corruption charges and has conceded defeat in his re-election campaign to Mark Begich, the Democratic mayor of Anchorage, Alaska.

Finally, President-elect Obama's possible choice for FCC Chairman remains a subject of intense speculation. One plausible rumor suggests that the new President will appoint an interim Chairman – perhaps Michael Copps – to manage the Commission until the vetting process for a new Chairman is complete.

Closed Captioning and Distributed Transmission Orders Get Unanimous Support

The FCC unanimously approved two digital television ("DTV") orders regarding closed captioning and digital distributed transmission systems the day before the November 4 open meeting. The closed captioning order clarifies distributors' obligations for closed caption digital programming, such as requiring stations to pass through text on shows they receive from elsewhere. It also establishes a streamlined consumer complaint process and seeks comment on how the exemption in Section 79.1(d)(12) should apply to digital broadcasters on multicast. The distributed transmission order allows TV stations to deploy small antennas across their broadcast area to fix DTV coverage gaps. Although broadcasters can apply for special waivers and temporary authority to begin work on distributed transmission systems before the February 2009 cutoff, critics claim the order comes too late because there is not enough time to build out before the DTV transition, leaving some viewers without coverage.

California PUC Decision Helps CLECs Access Retired Copper Loop Facilities

The California Public Utilities Commission ("CPUC") rule changes will help competing carriers identify and pursue new copper loop resources. Pursuant to an early November rule adoption, the CPUC has crafted a new notification and negotiation process for copper loop retirements by incumbent local exchange carriers ("ILECs"). Under the new process, ILECs replacing copper loops with fiber must notify the CPUC (the filing will be made public) at the same time they file a notice of network change with the Federal Communications Commission.

Competitive local exchange carriers ("CLECs") interested in purchasing or leasing retired copper facilities must request negotiations with the ILEC within 20 days. Parties must negotiate in good faith, and the CPUC will offer non-binding arbitration at the request of either side if negotiations break down. CPUC's arbitration decisions may be appealed to the FCC or in court. Some CLECs and one PUC member raised questions about whether the new rule adequately protects competitors who continue to rely on copper facilities.

Net Neutrality May Get a Second Wind in U.S.

After a slowdown in the net neutrality policy battle, many now believe that federal net neutrality rules have again become more likely in light of the Democratic election victories in November. President-elect Obama voiced support for net neutrality during his campaign, and soon after the election, Senator Byron Dorgan (D-N.D.) announced his intention to introduce a new net neutrality bill in January. The fate of such a bill may depend, in part, upon the outcome of Comcast's appeal of the FCC's recent decision regarding Comcast's blocking of BitTorrent (*see* "Comcast Appeals Net Neutrality Decision and Files Compliance Plan," in the September, 2008 issue of this Bulletin). If the D.C. Circuit decides that the FCC does not have the legal authority to enforce its broadband principles in such a manner, there may be more of a push for legislation clarifying such authority.

Meanwhile, at the FCC, Free Press filed an *ex parte* letter asking the FCC to initiate a notice of proposed rulemaking to require broadband providers to disclose network monitoring or traffic management activities that affect end users' access to lawful content or applications on the Internet. Free Press argues that the FCC has ancillary jurisdiction to impose such a requirement, and that the FCC should require industry-wide disclosure, regardless of access technology. In addition, Free Press asks that broadband providers be required to disclose detailed information regarding the number of users on shared Internet connections, the total upload and download capacity of the connection, the amount of network spectrum devoted to broadband versus other service, the peak times of network congestion, and the peak utilization of each component of the network during times of congestion. The current FCC – in light of the imminent transition of power in Washington and the preoccupation with intercarrier compensation/universal service reform and the upcoming DTV transition – has not shown any indication that it intends to act on this request by Free Press.

North of the border, on November 20, the Canadian Radio-television and Telecommunications Commission

("CRTC") issued a decision contrasting with the FCC's Comcast ruling discussed above. Responding to a complaint filed by an association of Canadian Internet service providers ("ISPs"), the CRTC ruled that Bell Canada can continue to "shape" traffic (by slowing down certain bandwidth-intensive activities such as peer-to-peer sharing) on its wholesale networks leased to smaller, independent providers. The CRTC did hold, however, that Bell Canada must notify these wholesale customers thirty days in advance of making changes that will affect performance of the network. The CRTC found that Bell Canada's network management practices were not unjustly discriminatory, and noted that Bell Canada applied the same "shaping" practices to wholesale customers as it did to its own retail customers. Nonetheless, the CRTC did issue a public notice establishing a broader "consultation and hearing" process regarding network management practices of ISPs. The filing deadlines extend through the spring of 2009, with a public hearing set for July 6, 2009, in Quebec. The CRTC stated that it intends to issue a decision in this broader proceeding within 120 days after the record closes, which could be as early as the fall of 2009.

Wireless Developments

Wireless Industry Further Consolidates
The FCC approved at its November 4 open meeting two transactions that further consolidate and redefine the wireless market in the United States. Specifically, the FCC approved the merger of national carrier Verizon Wireless with regional carrier Alltel Corporation. In addition, the FCC approved the combination of Sprint Nextel Corporation's and Clearwire Corporation's WiMAX network assets to facilitate the creation of a new nationwide broadband provider. AT&T, Inc. appears to be following suit, recently announcing its proposed acquisition of regional carrier Centennial Wireless.

The recently approved mergers are notable for several reasons other than the continuing trend in consolidation. First, the FCC revised its initial spectrum screen that it uses to identify markets in which the proposed transaction may result in competitive harm. The screen, previously limited to cellular, PCS, SMR, and 700 MHz spectrum, now includes any Advanced Wireless Service ("AWS") and Broadband Radio Service ("BRS") spectrum that is available in each market for mobile telephony/broadband services. Under the new screen, the FCC will conduct a more detailed competitive analysis in markets in which the merged entity would aggregate more than the following amounts of spectrum:

95 MHz	Cellular, PCS, SMR, 700 MHz
115 MHz	Cellular, PCS, SMR, 700 MHz, BRS
125 MHz	Cellular, PCS, SMR, 700 MHz, AWS-1
145 MHz	Cellular, PCS, SMR, 700 MHz, BRS, AWS-1

Because Verizon Wireless and Alltel have overlapping service areas, the FCC's initial competitive analysis also included a review of Herfindahl-Hirschman Index ("HHI") market concentration and the change in the HHI.

The FCC identified 43 markets in the Sprint Nextel/Clearwire transaction under the initial screen, but ultimately concluded that the number of competitors that would exist in each market post-transaction mitigated the likelihood of competitive harm. In contrast, the FCC's initial screen identified more than 200 at-risk markets in the Verizon Wireless/Alltel merger. Verizon Wireless voluntarily committed to divest business units in 100 markets in California, Colorado, Georgia, Idaho, Illinois, Kansas, Minnesota, Montana, Nevada, New Mexico, North Carolina, North Dakota, Ohio, South Carolina, South Dakota, Utah, Virginia, and Wyoming. The FCC then concluded that another 5 markets in Michigan, Iowa, and Tennessee must be divested.

Roaming also became a fairly controversial issue in the Verizon Wireless/Alltel transaction. FCC approval was conditioned on certain commitments by Verizon Wireless; although Democratic Commissioners Copps and Adelstein concurred, they argued the roaming conditions should have been stronger. Specifically, Verizon Wireless committed to:

- honor Alltel's existing agreements with other carriers to provide roaming on Alltel's CDMA and GSM networks;
- offer to each regional, small, and/or rural carrier that has a roaming agreement with Alltel to keep the rates set forth in that agreement in force for the full term of the agreement;
- offer to each regional, small, and/or rural carrier that currently has roaming agreements with both Alltel and Verizon Wireless the option to select either agreement to govern all roaming traffic between it and post-merger Verizon Wireless; and
- not adjust upward the rates set forth in Alltel's existing agreements with each such regional or small carrier for the full term of the agreement or for four years from the closing date, whichever occurs later.

Although certain commenters had expressed concern regarding Verizon Wireless' intent to continue operating

Alltel's GSM roaming network, the FCC noted that Verizon Wireless planned to maintain that business "for as long as it makes business sense to do so."

The FCC also imposed universal service and E911 conditions on both the Verizon Wireless/Alltel and the Sprint Nextel/Clearwire transactions. Specifically, Verizon Wireless and Sprint Nextel must phase out their receipt of universal service high-cost support over a five-year period. The carriers also must use county-level data to measure compliance with the FCC's E911 location accuracy requirements. The Department of Justice ("DOJ"), based upon Verizon Wireless' divestiture commitments, also approved the merger with Alltel. (DOJ approval was not required in the Sprint Nextel/Clearwire transaction.) It is expected that both transactions will close by the end of the year.

On the heels of the FCC's approvals, AT&T announced that it will purchase Centennial Wireless, a rural carrier operating in the Midwest, Southeast, and Puerto Rico and the U.S. Virgin Islands, for $944 million cash and assumption of $1.4 billion in unsecured debt. AT&T would acquire Centennial Wireless' 1.1 million customers through the transaction and strengthen its nationwide footprint in several rural markets. The parties hope to obtain the necessary government and shareholder approvals by the end of the second quarter 2009.

FCC Opens White Spaces for Unlicensed Use

The FCC adopted at its November 4 open meeting a Second Report and Order ("Order") establishing new rules to allow innovative wireless devices to operate on an unlicensed secondary basis in the television "white spaces" – i.e., open broadcast television spectrum between TV channels 2-51. The FCC expects these new devices "to provide broadband data and other services for consumers and businesses."

Opening the white spaces for unlicensed use has long been opposed by the broadcasting industry as well as manufacturers and users of wireless microphones, due to interference concerns. The FCC, however, believes that the Order provides sufficient protection for incumbents. The new rules allow for fixed and personal/portable unlicensed devices, but the devices must have geolocation capability and Internet access to a database of incumbent services (including TV stations, cable headends, and locations where wireless microphones are used) so that the devices can determine what spectrum may be used at a particular location. The devices also must be able to "listen" to the airwaves to sense wireless microphones. According to the FCC, it adopted "conservative" technical measures and will continue to oversee and monitor closely the use of white space devices to ensure they do not cause harmful interference to incumbents.

All white space devices will need to be certified by the FCC laboratory, which will test the devices to ensure they comply with the FCC's technical rules. Although some devices without geolocation and database access may be permitted, they will be subject to a more rigorous certification process. The FCC also announced that it would release a separate notice of inquiry that will consider higher-power limits in white spaces in rural areas, as well as using those white spaces for point-to-point backhaul.

Although a majority of the Commissioners approved the Order, Commissioner Adelstein took issue with the lack of transparency that prevailed in the white spaces proceeding. Commissioner Tate also dissented in part from the Order, arguing that unlicensed devices should have been limited to the white spaces in channels 31-51. Commissioner Tate also stated that she would have preferred to adopt a "specific and expedited complaint process" for incumbents, although Chairman Martin noted that incumbents can avail themselves of the existing interference compliant process.

December Open Meeting May Include Important Wireless Items

According to Chairman Martin, the FCC's next open meeting – scheduled for December 18 – could include multiple wireless items.

Chairman Martin has asked the other FCC Commissioners to consider how AWS-3 spectrum could be used to establish a free, national wireless broadband service. An options memo circulated by Martin offers three proposals in which 20 or 25 MHz of AWS-3 would be licensed to a provider under the condition that it offer free broadband services.

The FCC also may consider new rules regarding the re-auction of the 700 MHz D Block. The FCC proposes to establish a unique private-public partnership in which the D Block licensee would be responsible for building out a broadband network that would be shared by public safety users as well as the D Block licensee's commercial users. The item, however, continues to be heavily debated by the public safety communities and carriers alike.

Chairman Martin intends to circulate an order establishing new rules that would allow the 2.3 GHz band to be shared by wireless communication service ("WCS") licensees and satellite digital audio radio service

("SDARS") licensee Sirius XM Radio, Inc. The new rules purport to balance interference concerns to allow broadband operations on the 2.3 GHz band.

FCC Enforcement Bureau Addresses Payola, the U.S.-Haiti International Route, and Unauthorized *Pro Forma* Transactions

The FCC has initiated a comprehensive "payola" investigation of Spanish-language radio stations, and specifically dealings with Univision Music, a Latin music label. A former Univision executive has alleged in a 2006 civil suit against the company that he was fired when he refused to continue to pay radio stations to play songs on Univision labels. According to the executive, an intermediary working for Univision provided him with $450,000 for such payoffs. (Univision has been subsequently acquired by Universal Music Group.) It appears that most, if not all, of the more than 50 stations identified in the civil suit have received Letters of Inquiry from the FCC seeking information about "an alleged widespread payola scheme."

In other developments, the FCC entered into a consent decree with IDT Corporation, ending an investigation into potential anti-competitive arrangements on the U.S.-Haiti international route (which was still subject to the FCC's international settlements policy at the time of the alleged filing failures). The FCC specifically was investigating whether IDT failed to file its service agreement (and subsequent modifications) with Telecommunications D'Haiti S.A.M. setting forth their rates on the U.S.-Haiti route. Under the consent decree, IDT agreed to voluntarily contribute $400,000 to the U.S. Treasury and implement a three-year compliance plan.

The FCC recently issued a notice of apparent liability for forfeiture against SkyPort Global Communications, Inc. for engaging in unauthorized transfers of control. The case is notable in that the FCC fined SkyPort for consummating *pro forma* transfers of control without prior FCC approval. The FCC proposed a total forfeiture of $3,000, representing the base forfeiture of $1,000 prescribed by FCC rules for an unauthorized *pro forma* transfer of control of SkyPort's international Section 214 authorization and two earth station licenses.

FCC Pulls Intercarrier Compensation/Universal Service Reform Plan from November 4 Meeting Agenda but Releases Further Notice on Alternative Plans on November 5

On November 3, in the face of increasing Congressional and rural carrier opposition to FCC Chairman Martin's draft intercarrier compensation ("ICC") and universal service fund ("USF") reform plan, as well as pressure from the other four Commissioners to seek further comment, Chairman Martin deleted the plan from the November 4 open meeting agenda. The other Commissioners issued a joint statement expressing "disappoint[ment] that the Chairman has withdrawn the fundamental reform item from tomorrow's agenda." They stated that they provided "bi-partisan, constructive and substantive suggestions" on his draft reform plan (discussed in last month's Bulletin), and that "notice and comment should be sought on the proposals, with an understanding that we would all be prepared to vote on December 18." Chairman Martin replied later that afternoon that he was "disappointed that we will miss the opportunity for comprehensive reform" and expressed "doubt" that the other Commissioners "will truly be ready to complete this much needed reform on December 18."

Chairman Martin also stated that he "instructed the Bureau to draft a narrow order to address the Court's remand" of the FCC's rules governing the intercarrier termination rates applicable to non-access calls to Internet Service Providers ("ISP Remand Rules"). Late in the evening on November 5, the deadline set by the U.S. Court of Appeals for the D.C. Circuit to resolve the ISP-bound traffic issue, the FCC released: (1) an Order on Remand responding to the D.C. Circuit; (2) a Report and Order addressing a 2007 Joint Board Recommended Decision; and (3) a Further Notice of Proposed Rulemaking ("FNPRM") addressing the ICC and USF reform issues. The FNPRM attached Chairman Martin's original draft plan circulated in October, an alternative draft plan circulated on November 5, and a narrow draft USF reform plan, and requested comment on all three proposals.

Order on Remand

In the remand order, the FCC articulated a new rationale for the ISP Remand Rules, originally promulgated in 2001 in response to a previous remand by the D.C. Circuit Court of Appeals. The FCC noted that the court has never questioned the interstate nature of ISP-bound traffic, and concluded that the FCC "plainly has authority to establish pricing rules for interstate traffic, including ISP-bound traffic," under section 201(b) of the Communications Act ("Act"). The FCC also stated that no court had questioned its policy rationale for the $0.0007-per-minute terminating rate cap on non-access calls to ISPs and the other ISP Remand Rules, namely that applying higher reciprocal compensation rates to the unbalanced flow of calls to ISPs generates tremendous arbitrage incentives. Based on that rationale, the FCC determined that, pending adoption of comprehensive ICC reform, it would maintain the $0.0007 rate cap and the "mirroring rule" requiring any ILEC opting to take advantage of the $0.0007 rate to agree to accept the same rate on all non-access calls it terminates.

In a separate statement, the Chairman expressed doubt that an order that "retains artificial and unsupported distinctions between types of IP traffic and maintains an interim rate without establishing an end game will be seen any more favorably by the Court than the Commission's two previous attempts." He asserted that the order "perpetuate[s] the current patchwork of rates for different traffic . . . to combat arbitrage. Yet arbitrage exists precisely because traffic is terminated at a variety of rates." He also stated that the $0.0007 rate cannot be justified and is unexplained, other than as a "perpetual interim rate . . . to nowhere." He expressed his belief that the FCC would have been on much stronger ground adopting his draft reform plan, thereby ending special treatment of ISP-bound or any other category of traffic. The other four Commissioners noted in a joint statement that the order sets forth the FCC's legal justification for the ISP Remand Rules and "preserves the ability to move towards a more unified intercarrier compensation regime." On November 21, noting that the Order on Remand is the FCC's "third attempt, put forth at the close of the 11th hour of the [court's] deadline," to explain the legal basis for the ISP Remand Rules, Core Communications, Inc. filed a petition for review of the Order on Remand on the grounds that it is "arbitrary, capricious, not the product of reasoned decision-making, and not supported by substantial evidence."

Report & Order and FNPRM

In the Report & Order, the FCC reviewed the background of the Joint Board's 2007 Recommended Decision regarding restructuring of the high-cost USF program and decided not to implement the Joint Board's recommendations. Instead, the FCC released the FNPRM attaching the three reform plans.

Chairman's Original Plan: The first of the three draft plans is largely consistent with the reported provisions discussed in last month's Bulletin.

USF Reform: The plan caps ILEC high-cost support at December 2008 levels and subjects ILECs to a broadband Internet access deployment requirement. If an ILEC does not make this broadband commitment for a particular service area, support will be transitioned to the winning bidder of a reverse auction that commits to deploy broadband throughout the service area within ten years and to take on carrier of last resort ("COLR") obligations. Competitive eligible telecommunications carriers ("CETCs") will also qualify for continued high-cost support, but based on their own costs, as long as they commit to offer broadband Internet access services to all customers within five years. The identical support rule is eliminated, and support is frozen for each CETC at the 2008 level.

There will be only one winner for each auction, based on the lowest bid for the highest broadband capacity "tier" any bidder is willing to provide. Winning bidders must meet all federal and state COLR requirements, the requirements set forth in the *ETC Designation Order*, and the new ten-year broadband commitment, and must provide all supported services at a retail price comparable to the ILEC's price for the equivalent service. Support will be transitioned from the ILEC to the winning bidder as the winning bidder builds out its network in the ILEC's study area.

CETCs will qualify for continued high-cost support based on their own costs, but "will be entitled to continue to receive support . . . frozen at the amount of support . . . that the competitive ETC received in 2008." If no CETC elects to show its own costs in a study area, the FCC will conduct a reverse auction to award support to a broadband mobility provider. The plan also establishes a Broadband Lifeline/Link Up Pilot Program, under which $300 million will be available for each of the next three years to support broadband access for low-income consumers.

The plan adopts a telephone numbers–based universal service fund contribution methodology for residential services, under which a $1.00 fee would be assessed monthly for residential telephone numbers or "functional equivalent identifiers," but seeks comment on a possible connections-based system for business services because many high-capacity business services, such as private line and special access services, do not use telephone numbers. In the interim, business services would continue to contribute based on interstate and international revenues. Services to low-income consumers are exempt. To accommodate the unique situation of prepaid wireless service providers, prepaid wireless contribution assessments also would be reduced based on a provider's total volume, but other requested discounts and exemptions, such as for wireless family share plans, are denied.

ICC Reform: The plan establishes a ten-year transition to reduced termination rates. In the first stage, intrastate access rates are reduced to interstate access rate levels over a two-year period. In stage two, carriers will reduce their unified terminating access rates to an interim uniform termination rate set by the state over the next two years. In stage three, the stage two interim rates will be further reduced over a six-year glide path to a state-set final uniform termination rate to be applied to all services by all carriers in each state, using a new "additional costs" methodology set forth in the plan. Any carrier with a lower termination rate or rates may not raise them to meet a higher state-set rate at any point in the transition. Thus, the current ISP remand rates will remain in effect in each state until the state-set termination rate falls to or below $0.0007 per minute. CMRS providers will not be permitted to charge for terminating access until the end of the transition period.

The plan classifies services that originate calls on IP networks and terminate them on circuit-switched networks, or vice versa, as information services because of the net protocol conversion that occurs in such calls, and preempts state "traditional telephone company" regulation of such services. States are authorized, however, to set termination rates for such services under the transition. The plan finds that originating access charges should be eliminated at the end of the transition but leaves the process for such elimination to a Further Notice included in the plan.

The plan finds that the Total Element Long Run Incremental Cost ("TELRIC") standard has led to excessively high reciprocal compensation rates, and sets forth an incremental cost standard to meet the "additional costs" requirement of Section 252(d)(2) of the Act, under which common costs are not considered. The plan states that, by leaving the setting of all terminating rates to each state under a methodology established in the plan, the resulting regime conforms to the Act. The plan adopts simplified interconnection rules proposed by AT&T and Verizon to "define functions governed by a uniform terminating rate." The plan also requires all intercarrier rates to be symmetrical with the state-set termination rates under the transition.

The plan increases Subscriber Line Charge ("SLC") caps and permits ILECs to increase their SLCs to the new caps to recover lost revenue. The plan also permits new universal service subsidies in the form of a new non-portable supplement to the high-cost funds now received by rate-of-return ("ROR") and price cap ILECs. Citing the USTelecom proposed "phantom traffic" rules, the plan strengthens the call signaling rules. The plan also seeks further comment on how to implement a connections-based contribution system for business services and additional ICC issues, including a possible transition toward the elimination of originating access charges.

Narrow USF Plan: Under this plan, overall high-cost funding is capped at the 2007 levels. It eliminates the identical support rule and establishes a reverse auction system to distribute high-cost support to both ILECs and CETCs. The auction system is similar to the auction scheme in the first plan, except that the USF plan selects the single winner of each auction on the basis of the lowest bid that meets all applicable service obligations. The USF plan adopts a numbers-based contribution system for residential telephone numbers, with a monthly contribution assessment of $0.85 per residential number, and a connections-based system for business services, with a monthly assessment of $5 for connections up to 64 kbps and $35 for connections over 64 kbps. Prepaid wireless services are assessed in the same manner as in the first plan. No other category of service, including wireless family share plans or stand-alone voice mail services, is exempted from full assessment on each number.

Chairman's Alternative Plan: This plan is quite similar to his original plan, with modifications to accommodate concerns expressed in last-minute *ex parte* filings by mid-sized ILECs and other parties, which are attached to the FNPRM. Under these modifications, ROR ILEC high-cost support mechanisms will continue to operate as they do today through 2010 and will then be frozen by study area at 2010 levels. CETC high-cost support will be completely eliminated over a five-year transition through equal reductions each year.

The alternative plan also would make it easier for ROR ILECs to qualify for additional high-cost support than in the original plan. Such funding replaces not only revenues lost as a result of intercarrier rate reductions but also losses resulting from loss of access lines and traffic volume, using 2008 as a base year, to ensure that ROR ILECs have an opportunity to earn their authorized ROR. The traffic volume replacement component remains in effect for the first five years of the transition and is capped at amounts starting with $100 million in year one and increasing by increments of $100 million each year to $500 million in year five.

Related Issues: The FNPRM also seeks comment on issues related to the Chairman's two ICC/USF reform plans: whether the additional cost standard used under Section 252(d)(2) of the Act should be the existing TELRIC standard or the incremental cost standard described in the draft plans; and whether the reduced and unified terminating rate to be set under the ICC reform should be a single, statewide rate for each state or a single rate for each operating company. Comments are due November 26 and reply comments are due on December 3.

Video Competition Developments

FCC Launches Probe into Cable Industry Digital Channel Lineups

In late October, the FCC announced plans to investigate cable operators' changes to their channel lineups and packages. No Public Notice was released, but industry sources reported that several cable companies received Letters of Inquiry ("LOIs") from the Enforcement Bureau. LOI recipients reportedly include Bend Cable, Bright House Networks, Cablevision, Comcast, Cox, Charter, GCI, Harron, RCN, Suddenlink, Time Warner Cable, and Verizon.

Responses to the LOIs were due November 13, and the LOIs sought information from November 1, 2006, to the present. The LOIs requested, among other things, information and explanations for subscriber complaints about channels that were removed from analog programming packages and available only in digital packages, including a spreadsheet detailing the charges associated with each channel that was moved. The LOI recipients also were asked about fees and costs associated with cable boxes capable of receiving digital channels. Trade press the week after the LOI responses were due indicated that the cable companies balked at answering many of the questions, including data on wholesale programming costs, per-channel cost, and details of carriage contracts. Verizon reportedly offered no data because it claimed it had made no changes to its channel lineup.

The Enforcement Bureau's efforts are seen by many as a possible springboard to reviving a la carte cable programming, an initiative long supported by Chairman Martin. Mandating disclosure of individual channel fees could arm the Commission for pressuring cable companies to let subscribers purchase only the channels they want. Some industry experts and the National Cable & Telecommunication Association, however, question whether the FCC has jurisdiction to investigate cable rates (which are not regulated). The investigation also appears to contradict the Commission's generally strong support for the transition to all-digital video programming.

Louisiana Municipalities Mount Legal Challenges to Statewide Video Franchising

In late October, several Louisiana municipalities filed a lawsuit in state court arguing that the recently enacted statewide video franchising law causes unconstitutional state interference in contracts between local authorities and cable companies. *See* June, 2008 issue of this Bulletin. Because the law permits cable companies to be released from existing municipal franchises in favor of 15-year state franchises, they argue, municipalities are left without compensation or recourse. The municipalities further charge the new law is discriminatory because it applies only to cities whose home charters are dated 1974 or later.

The portion of the law allowing franchisees to opt out unilaterally from municipal contracts is suspended until the court's ruling is handed down.

Legislative Activity in Final Days of Congressional Session

In the final days of this Congressional session, a few communications-related bills are still expected to be signed into law. The Senate passed a DTV bill (S-3663) on November 20 that would allow stations to continue their analog broadcasts for 30 days after the February 17 transition for public safety and consumer purposes. Under this bill, broadcasters would be permitted to "scroll" a message telling viewers that they may need converter boxes and to air emergency broadcasts. A similar bill (HR-7013) has also been introduced in the House. These bills have strong support, and therefore may be signed into law before the end of the year.

Congress also passed a bill on November 17 that would require the FCC to study advanced blocking technologies that would give parents control over content that their children can access over various media. The study would cover a range of technologies – TVs, DVD players, VCRs, cable set-top boxes, satellite receivers, and wireless devices. President Bush is expected to sign the bill into law. The study must begin within 90 days after the bill is signed, with results reported back to Congress within 270 days after the bill is signed into law.

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.

November 26, 2008	Comments due on **intercarrier compensation/USF reform FNPRM**.
December 2, 2008	Comments due on **petition for rulemaking seeking 110 MHz cap** on spectrum below 2.3 GHz.
December 2, 2008	Comments due on **petition for rulemaking regarding exclusivity arrangements between CMRS providers and handset manufacturers**.
December 3, 2008	Reply comments due on **intercarrier compensation/USF reform FNPRM**.
December 9, 2008	Reply comments due on **NOI on development of devices capable of supporting multiple audio entertainment services.**
December 15, 2008	Reply comments due on **service quality, customer satisfaction, infrastructure and operating data gathering NPRM** (for facilities-based broadband and telecommunications providers).

December 15, 2008	Reply comments due on **USF administration NOI.**
December 22, 2008	Reply comments due on **petition for rulemaking seeking 110 MHz cap** on spectrum below 2.3 GHz.
December 22, 2008	Reply comments due on **petition for rulemaking regarding exclusivity arrangements between CMRS providers and handset manufacturers**.
January 12, 2009	Deadline for electronic filing of **children's TV reports for preceding four quarters**.
January 12, 2009	Deadline for **700 MHz licensees to file DTV Consumer Education Report** for 4Q08.