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Communications Law Bulletin, October 2008

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Related Practices:

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Communications Law Bulletin, October 2008

In this issue:

The Month in Brief

This issue of our Bulletin covers developments at the Federal Communications Commission ("FCC" or "Commission"), the courts, the Congress, and the states in October 2008. It goes to press just before a true "Super Tuesday," when a general election and an unusually full FCC open meeting will be held on the same day. We will leave it to the mainstream media to report on the election, but our November issue will thoroughly cover the events at the FCC. In the meantime, we report here on a busy month of October, and include our usual list of deadlines for your calendar.

FCC Streamlines Satellite Earth Station License Process

In an effort to promote broadband Internet access services, the FCC adopted new rules further streamlining its satellite earth station licensing procedures. Specifically, the FCC adopted an "off-axis" equivalent isotropically radiated power ("EIRP") envelope approach as a method to apply for Fixed Satellite Service earth station licenses in the conventional C-band and Ku-band.

According to the FCC, the off-axis EIRP envelope approach provides "earth station applicants the flexibility to reduce their power levels to compensate for a small antenna diameter." The FCC concluded that using off-axis EIRP envelopes will allow it to license routinely more earth station applications, "expediting the provision of satellite services to consumers and enhancing the types of services available, without increasing the likelihood of harmful interference to adjacent satellite operators or to terrestrial wireless operators."

California Passes New Broadband and Prepaid Services Laws and Considers Copper Loop Retirement Issues

California enacted three new legislative bills to support universal service and the development of broadband infrastructure within the state that should help companies finance broadband deployment, particularly given the difficulties some companies may face in obtaining private funding.

Specifically, in SB-1193 California established a new "Advanced Services Fund" that will finance state grants of up to 40% of the costs incurred by a service provider to deploy broadband services into unserved areas. The Advanced Services Fund, set to expire at the end of 2012, will be funded by a new surcharge on consumers' bills. California also enacted SB-1149 and SB-780, which extend the current state Rural Telecom Infrastructure Grant Program and the state's high-cost universal service programs, respectively, until the end of 2012. The programs were scheduled to expire in December. The Rural Telecom Infrastructure Grant Program uses state universal service monies to allocate $10 million annually to support broadband deployment in remote areas, and was amended to allow the state to roll over unspent funds to the next year.

California also recently enacted two bills that could significantly impact providers of prepaid phone services. Under AB-2136, prepaid service providers must clearly disclose in advertising and at point-of-sale any geographic limitations, conditions, or ancillary fees that would effectively decrease the stated value of the service. Consumers must be able to read these disclosures without opening any packaging. Prepaid service providers also must disclose any rate or term changes when consumers renew or recharge their prepaid service. In addition, AB-2885 extends the authority of the California Public Utilities Commission ("CPUC") to investigate and take action against prepaid service providers for violations under existing state consumer protection laws. In the past, only the state attorney general could pursue enforcement for such violations.

CPUC Commissioners have offered dueling proposals regarding the retirement of copper loop by incumbent carriers. In response to a petition by CalTel, a trade group that represents competitive carriers, the CPUC is considering whether and how incumbents' retirement of copper loop should be regulated to ensure that competitors are not disadvantaged. Under Commissioner Timothy Simon's proposal, incumbents must notify the CPUC and competitive carriers when they intend to retire copper loops and must negotiate a solution if the retirement will harm the competitors' ability to serve customers. As a last resort, competitive carriers could take over the operation and maintenance of the copper loops. Although Commissioner Rachelle Chong initially advocated that the CPUC take no action regarding copper loops, she modified her proposal after Commissioner Simon released his proposal. Commissioner Chong now proposes that incumbents be required to send competitors copies of the network change notifications the incumbents file with the FCC. A competitive carrier then would have 20 days to request negotiations to buy or lease the copper loop that is being retired. Comments on the Commissioners' proposals are due November 2 in Case No. 08-01-005.

FCC Clarifies "Junk Fax" Requirements

On October 14, 2008, the Commission released an Order on Reconsideration that clarifies some of the obligations imposed by the FCC's rules adopted pursuant to the Junk Fax Prevention Act of 2005 ("Junk Fax Act").

When it was enacted in 2005, the Junk Fax Act effectively reversed an FCC decision to permit fax advertising to be sent only with the prior, written consent of the recipient, even where the sender and recipient had an established business relationship ("EBR"). The Junk Fax Act requires the FCC to permit the sending of fax ads to persons with whom the sender has an EBR, so long as the fax includes on its first page a notice and contact information that permits recipients to "opt out" of further commercial faxes from the sender. The Junk Fax Act also permits EBR-based faxes to be sent only to fax numbers that have been voluntarily communicated to the sender by the recipient, or that appeared on a directory, advertisement, or website to which the recipient voluntarily agreed to make its fax number available.

In 2006, the Commission released an order that adopted, in nearly verbatim form, the Junk Fax Act requirements. The recent Order on Reconsideration makes the following clarifications of the Junk Fax Act obligations set out in the 2006 order:

- Fax numbers obtained from a recipient's own directory, advertisement, or website will be presumed to have been made voluntarily available for public distribution by the recipient, and may therefore be used in sending fax advertisements to entities with which the sender has an EBR. Senders are not required to make any additional investigation of the circumstances under which fax numbers appearing on the recipient's own directories, advertisements, or websites were made available, although senders still are liable for errors of third-party contractors that senders hire to compile fax numbers.

- "Reasonable steps" to verify that a recipient's fax number was voluntarily made available for public distribution do not necessarily require direct contact with the recipient, if the sender can demonstrate that fact by other means (for example, if the sender can show that permission was given at the point of collection of the fax number). The burden is on the sender, however, to demonstrate "that the circumstances surrounding the acquisition of the facsimile number reasonably indicate that the recipient agreed to make the facsimile number available for public distribution."

- The requirement that the sender provide "clear and conspicuous notice of a cost-free mechanism for transmitting opt-out requests" is satisfied "when the opt-out notice directs the recipient to a dedicated webpage that allows the recipient to opt-out of future facsimile advertisements."

The Commission declined, however, to find that placement of an opt-out notice on a fax cover sheet satisfies the requirement that the notice be placed on the first page of the fax advertisement, and also declined to place a time limit on the effectiveness of recipients' opt-out requests.

Pending Mergers Advance to Open Meeting Agenda

At this writing, the agenda for the FCC's November 4, 2008 Open Meeting includes the adoption of two orders on proposed communications company mergers: specifically, the transfer to Verizon Wireless of licenses, authorizations, and leasing arrangements held by Alltel; and the transfer to New Clearwire of licenses, authorizations, and leasing arrangements now controlled by Sprint Nextel.

Both deals have attracted opposition.

Notably, public interest groups, the Computer and Communications Industry Association ("CCIA"), the Rural Cellular Association, the National Telecommunications Cooperative Association ("NTCA"), and other companies and organizations have asked that the Verizon-Alltel item be delayed or denied. Points of contention include the post-merger loss of Alltel as a roaming partner for other carriers, and claims that Verizon has failed to open its network to equipment providers and remote wireless applications. These concerns notwithstanding, FCC rejection of the merger is unlikely, although Chairman Martin will require Verizon to continue to honor Alltel's roaming agreements with other carriers, implement enhanced 911 location accuracy technology, and divest some assets in addition to the markets it already has agreed to sell.

The Sprint Nextel-Clearwire deal has been less controversial, but still has met with open access demands and will be subject to the proposed enhanced 911 location accuracy requirements that Chairman Martin plans to impose on both of the pending mergers.

Wireless Developments

Petitions for Rulemakings

The FCC Wireless Bureau announced on October 10 that it is seeking comment on two petitions for rulemakings. The first petition, initiated by the Rural Cellular Association, asks the Commission to investigate the widespread use and anticompetitive effects of exclusivity arrangements between commercial wireless carriers and handset manufacturers, and adopt rules to prohibit such arrangements when contrary to public interest. The second, initiated by the Rural Telecommunications Group, asks the Commission to impose a 110 MHz spectrum cap on licensees of commercial terrestrial wireless spectrum below 2.3 GHz. Comments are due on both petitions no later than 40 days after publication in the Federal Register, and reply comments are due no later than 60 days after publication in the Federal Register.

Dual-Mode Phone 911 Obligations NOT Addressed in FCC Order Implementing NET 911 Act

Despite last-minute rumors that the Commission would require dual-mode phones to comply with Voice over Internet Protocol ("VoIP") E911 rules as a part of the Implementation of the NET 911 Improvement Act Order released October 21, requirements for dual-mode phones were conspicuously missing. In a separate statement, Commissioner Jonathon S. Adelstein acknowledged that a number of E911 compliance and policy questions were raised regarding dual-mode commercial mobile radio service/VoIP handsets that use Wi-Fi technology. But, given the tight Congressional deadline for implementing the Act and concern about limiting the development of more robust E911 solutions, the Commission ultimately decided to tackle those issues in a separate proceeding.

Limits on Taxpayer Right to Recover Tax Costs Through Line Item Surcharges

Two recent federal Court of Appeals decisions provide guidance for businesses generally, and telecommunications service providers in particular, regarding state restrictions intended to prevent or limit vendors from recovering their gross receipts tax costs through the use of line item surcharges on customer bills. Cumulatively, these decisions appear to signify that states cannot prohibit vendors from recovering tax costs directly from customers or reflecting those costs as line-item charges, but the states do have leeway to prescribe when and how such line item customer charges can be applied.

The United States Court of Appeals for the Sixth Circuit in *Bellsouth Telecommunications Inc. v. Farris*, ___F.3d___, 2008 WL 4133382 (6th Cir. Sept. 9, 2008),affirmed in part a Kentucky federal district court decision that held a Kentucky statutory provision (KRS § 136.616(3), "Section 3"), prohibiting telecommunications services providers ("TSPs") subject to a gross receipts tax from either collecting the tax directly from customers or stating the tax as a line item charge on customer bills, violated the First Amendment of the United States Constitution. First, the court agreed with the district court that the Tax Injunction Act (28 U.S.C. § 1341) did not bar this lawsuit, finding that the TSPs challenging the statute did not seek to avoid paying taxes or to limit the amount of their taxes due, but merely sought relief to end a ban on what the taxpayer may do to recover the tax from, and say about the tax to, its customers. Second, the court agreed that the "not stating the tax" portion of the statute violated the First Amendment.

Like the district court, the Court of Appeals concluded that this clause restricted speech, finding that line items on a bill were "hybrid" expression implicating both commercial and political speech. Applying the constitutional test applicable to commercial speech, the court concluded that the statute regulates speech, not conduct, as it prohibits providers from stating the tax on the bill. While the court accepted that Kentucky has a substantial interest in avoiding potential consumer confusion about whether consumers, rather than the providers, bear legal responsibility for the tax, the court concluded that the statute does not directly advance the Commonwealth's interest because the Commonwealth allowed providers to tell their customers anything about the tax, no matter how confusing, in all settings (e.g., in advertisements or on billing inserts) *except* on a customer invoice. Finally, the court concluded that the statutory prohibition was over-inclusive in that such ban was more extensive than necessary to serve the Commonwealth's interest in preventing customer confusion over legal liability for the tax. The court stressed that regulating speech must be a last resort, and noted that Kentucky had a "full arsenal of options," short of restricting speech, to address such customer confusion.

However, the court distinguished the "no direct collection" clause, stating that the terms of the clause refer to non-expressive conduct, not speech, and as a result lie beyond the protection of the First Amendment. On remand, the district court issued a Modified Judgment confirming that the "no direct collection" clause of Section 3 does not violate the First Amendment, but that Kentucky is enjoined from enforcing Section 3 and from applying the related penalty to prohibit TSPs from using line items in customer bills to recover their costs for the gross revenues tax, so long as the TSPs do not purport to shift the legal incidence of the tax by describing the line item as a direct tax on the customers themselves. *AT&T v. Rudolph*, Case 3:06-cv-00016-KKC (Oct. 22, 2008).

The Ninth Circuit Court of Appeals in *Peck v. Cingular Wireless, LLC*, 535 F.3d 1053 (9th Cir. Aug. 7, 2008), vacated a Washington federal district court's decision that had dismissed state law claims by wireless carrier customers that the carriers unlawfully violated Washington law restricting their ability to pass on the Washington business and occupations tax as a separate line item charge on their bills. The district court found that an FCC Order, ruling that state laws prohibiting or restricting the use of such line items constitute rate regulation preempted by the Communications Act, was entitled to deference, notwithstanding that the Eleventh Circuit Court of Appeals held that such FCC Order was invalid in *Nat'l Ass'n of State Utility Consumer Advocates v. FCC* ("*NASUCA*"), 457 F.3d 1238 (11th Cir. 2006), *cert. denied*, *Sprint Nextel Corp. v. NASUCA*, 128 S. Ct. 1119 (Jan. 22, 2008).

The Ninth Circuit Court of Appeals determined that the district court was wrong not to follow the *NASUCA* decision, which the Ninth Circuit found to be binding both within and without the Eleventh Circuit as to the validity of the FCC's Order. The court explained that when federal agency rules are challenged in more than one court of appeals, as was the case in *NASUCA*, 28 U.S.C. § 2112 requires that the petitions be consolidated and assigned to a single Circuit, which thereby becomes and remains the sole forum for addressing the validity of such rules. In this instance, the challenges were consolidated and assigned to the Eleventh Circuit, which held that the FCC's Orderwas invalid. In the absence of any valid FCC interpretation, the court agreed with the Eleventh Circuit's determination in *NASUCA* that the use of the term "rates" in the Communications Act, 47 U.S. Code § 332(c)(3)(A), does not comprehend how line items are displayed or presented on wireless consumers' bills, but rather such practices constitute terms and conditions permitted by the Communications Act to be regulated by the states. As to the Washington statute at issue, RCW § 82.04.500, the court concluded that, as interpreted by the Washington Supreme Court, the statute simply structures the contract's negotiation and disclosure of the tax recovery, and therefore acts as a consumer protection statute. *See Nelson v. Appleway Chevrolet, Inc.,* 157 P.3d 847 (Wash. 2007). Consequently, the court held that the Communications Act does not preempt state claims brought pursuant to RCW 82.04.500

because the statute regulates the disclosure, not the reasonableness or propriety, of the underlying rates. The court remanded the case to the federal district court to determine whether the court still had subject matter jurisdiction over these customer claims.

FCC Implements NET 911 Act

Following President Bush's signature on the New and Emerging Technologies ("NET") 911 Improvement Act of 2008, the FCC issued an order to implement the law. The FCC already requires that interconnected VoIP providers offer enhanced 911 ("E911") service to their customers, and the new law and implementing order provide interconnected VoIP providers with a right to access all capabilities needed to provide 911 and E911 service.

The FCC declined to adopt detailed regulations; rather, the FCC adopted a series of general standards. First, the FCC determined that interconnected VoIP providers must have access to the capabilities that are "necessary" for the provision of E911 service (and noted that such capabilities may be used by VoIP providers *only* for the provision of E911 service). Second, in determining which capabilities must be made available, the FCC determined that they must include all capabilities used by wireless providers today or those that are necessary for interconnected VoIP providers to provide the required E911 service. Third, the FCC determined that such access must be provided by *any* entity that owns or controls such capabilities (whether incumbent local exchange carriers ("ILECs"), wireless providers, states and localities, or third-party commercial providers). Fourth, instead of mandating any particular pricing methodology, the FCC adopted a general standard requiring that the necessary capabilities be provided to VoIP providers at "reasonable" rates, terms, and conditions. The FCC further stated that one indicia of "reasonableness" is whether VoIP providers are able to access the necessary capabilities at the same rates, terms, and conditions as wireless providers.

In adopting these new standards, the FCC noted that it was not abrogating any existing commercial agreements that VoIP providers may have already reached with owners of E911 capabilities. The FCC also required all VoIP providers to comply with applicable industry network security standards. Finally, the FCC noted that ILECs and other owners of the necessary capabilities may use the information acquired from VoIP providers (and their VoIP customers) *solely* for the provision of E911 service, and not for marketing purposes.

FCC Activates System for Filing of 911/E911 Reports

The Public Safety and Homeland Security Bureau has activated the E911 Architecture Information System to collect reports submitted under Section 12.3 of the Commission's rules. This rule requires certain local exchange carriers ("LECs"), commercial mobile radio service ("CMRS") providers, and interconnected VoIP providers to file reports addressing the redundancy, resiliency, and reliability of their 911 and E911 networks and systems. (Certain small carriers/providers are exempt from this requirement – please contact Morrison & Foerster if you have any questions regarding the applicability of this requirement to your company.) These reports, which will be treated as confidential, are **due February 6, 2009**.

Legislative Developments

Senate Bill Directs FCC to Take a Fresh Look at Content Blocking Technologies
On October 1, the Senate passed the Child Safe Viewing Act (S-602), sponsored by Senator Pryor (D-Ark.), which requires the FCC to issue a notice of inquiry ("NOI") to consider the availability of advanced blocking technologies to help protect children from harmful content on a variety of communications platforms. The NOI would cover blocking technologies incorporated in, among other things, television sets, set-top boxes, wireless communications devices, and DVD players. Senator Pryor noted that it was time for the FCC to take a fresh look at what blocking technologies are available and in use today, particularly because in his view the Commission has not periodically reviewed this area since television V-Chips were mandated several years ago. Some more aggressive measures were eliminated from the bill at the markup stage, including a provision requiring the FCC to consider mandatory use of advanced blocking technologies.

Commerce Committee to Report on FCC Processes
The House Commerce Committee announced in the first week of October that it intends to release a written report, in place of a hearing, on the results of its investigation of FCC processes. The report will cover the Committee's investigation of the Commission and Chairman Martin's leadership that was initiated near the end

of 2007. Due to additional time needed to fully process documents and other materials released to Congress for its review, the House was unable to hold a hearing on the report before the current session closed. The investigation began in January and picked up speed in early summer when most of the requested FCC documents were delivered to Congress. Congressional staffers have also interviewed FCC staff, members of the public, and several telecom industry figures.

President Signs Broadband Mapping Bill on October 10

On October 10, President Bush signed into law the Broadband Data Collection Act ("BDCA"), which was passed by the House in late September. The BDCA enhances and expands federal and state collection of data on the deployment and adoption of broadband service. The bill also promotes Internet safety for children. For more information about the BDCA, *see* Communications Law Bulletin, September 2008.

FCC Investigating Whether Military Analysts Interviewed on Broadcast News Programs Received Improper Consideration from the Pentagon

FCC Commissioner Jonathan Adelstein announced on October 7 that the FCC is seeking information from military analysts concerning allegations that they received consideration from the Pentagon to depict the war in Iraq in a more favorable light during television interviews. The Enforcement Bureau sent letters of inquiry to 19 former military officers and five networks, according to Adelstein. House Commerce Committee Chairman John Dingell (D. Mich.) and Rosa DeLauro (D. Conn.), Chair of the House Appropriations Subcommittee on Agriculture, the FDA and Related Agencies, requested an FCC investigation on this issue. Adelstein said that "[w]e have an obligation to pursue this investigation" of claims that "there was an attempt to deceive the American people concerning one of the most controversial issues facing the country," and that the FCC should quickly finish its investigation.

FCC Chairman Martin Circulates Draft Intercarrier Compensation and Universal Service Reform Plan to Be Adopted at November 4 Open Meeting

After more than seven years of discussion, debate, and delay, the FCC appears to be ready to adopt comprehensive reform of its system of intercarrier payments and high-cost universal service support. At a news briefing on October 15, FCC Chairman Kevin Martin announced the outlines of a draft plan that would "modernize" the FCC's intercarrier compensation and universal service regime for a broadband, Internet Protocol ("IP")-based communications industry. The 169-page draft, which includes a report and order, order on remand addressing the termination rates applicable to non-access calls to Internet Service Providers ("ISPs"), and a further notice of proposed rulemaking, will be voted on at the FCC's November 4 open meeting.

Given all of the moving parts in the Chairman's plan, it is not clear whether he can secure two more votes for it by November 4. He stated on October 15 that three weeks should be enough time in light of his previously expressed intentions on these issues. The plan has been subjected to heavy lobbying by the industry, however, as well as intensive negotiations among the commissioners, none of whom, other than the Chairman, has given any hint of his or her possible views. A wide range of competitive carriers, cable providers, and large ILECs have endorsed the plan as reducing rates and encouraging efficiency and competition. Rural carriers and state commission officials, however, have vehemently opposed the plan on substantive and jurisdictional grounds, characterizing it as a jerry-built, last-minute program that would have a devastating impact on rural ILECs and their subscribers, especially in the current economic climate. They have argued that such a large, complicated amalgam of proposals that, according to one party, was "designed seemingly in secret," should be put out for public comment before the commissioners, who are still learning all of the issues raised by the plan, decide whether to adopt it.

Intercarrier Pricing Reform: The full text of the draft plan has not been released, and accounts of the plan in published reports change almost daily. Based on recent public sources, however, the plan apparently would establish a pricing standard under which state commissions would ultimately reduce intercarrier termination rates to \$0.0007 or less per minute of use ("MOU") for all traffic, including IP-based traffic, over a ten-year transition. In the first step, each carrier's terminating intrastate and interstate access rates would be reduced after two years to its lowest terminating access rate level. In the second step, each carrier's terminating access and reciprocal compensation rates would be blended into a uniform terminating rate after four years. No existing terminating rate, including ISP-bound non-access traffic terminating rates and "mirroring" rates now set at \$0.0007/MOU under the *ISP Remand Order*, could be raised during this phase. Also, because the plan is intended as a default scheme, rates set in interconnection agreements would continue to operate.

In the third step, each state would reduce all carrier terminating rates to a unified termination rate over a five-year glide path. Notwithstanding cost differences among the states, including high-cost rural states, it is expected that the unified terminating rate would be below \$0.0007/MOU in every state because the FCC would establish an incremental cost standard that assumed the use of fiber and the most advanced soft switches and software in building the network. Presumably, by reducing all terminating rates to $0.0007/MOU or less, the final phase of the transition would address the remaining issues involving ISP-bound non-access traffic, thereby meeting the November 5 deadline for resolution of those issues set by the U.S. Court of Appeals for the D.C. Circuit. By authorizing each state to set termination rates at each phase, the FCC apparently hopes to sidestep any jurisdictional concerns regarding intrastate access rates.

The draft also reportedly incorporates simple interconnection rules that place the financial responsibility for delivering traffic to the terminating carrier's network on the calling party's service provider (e.g., the caller's LEC in the case of a local call or the caller's interexchange carrier for a long distance call). The draft designates certain categories of network points where a called party's service provider must permit other carriers to exchange traffic. Until there is a unified rate, the originating carrier will be responsible for paying the highest terminating rate on any traffic that lacks proper call signaling information.

Intercarrier Compensation Replacement Funding: In order to make up for the reduced revenue from intercarrier compensation rates, carriers would be permitted to raise subscriber line charges ("SLCs"). The SLC cap for residential lines would be increased by $1.50 (to $8.00), and the multiline business line SLC cap would be increased by $2.30 (to $11.50). Rate-of-return ILECs would also be eligible for additional high-cost universal service fund ("USF") support to replace some of the intercarrier compensation revenue reduction, but it is not clear how much funding rate-of-return carriers would receive from this replacement mechanism or what criteria would be applied. There would be no replacement high-cost support for price-cap ILECs.

Universal Service Reform: Aside from the limited additional replacement mechanism funding for rate-of-return ILECs, there would be new restrictions on current high-cost USF support, which would be capped at current levels. In order to retain current high-cost funding levels, an ILEC would have to make a broadband deployment commitment under which it would have five years to make broadband service (at speeds of 768 kbps or greater) available throughout its service area. It would have to meet this goal by making broadband available to 20% of its service area the first year and an additional 20% each following year. If an ILEC refused to deploy broadband or failed to hit the 20% incremental benchmark in a given service area, the ILEC would have to participate in a reverse auction to retain high-cost support. The reverse auction could include wireless carriers, but it is unclear what regulatory obligations wireless auction winners would inherit.

There would also be new restrictions on high-cost support for wireless competitive eligible telecommunications carriers ("CETCs"). The Identical Support Rule, under which wireless CETCs have received the same amount of support per line as the ILEC serving the same area, would be eliminated. In order to receive high-cost support, a CETC would have to make the same broadband commitment as ILECs, and wireless CETCs would have to file cost data. In order to receive high-cost support going forward, a wireless CETC would be required to meet the applicable rural or non-rural high-cost benchmark for the ILEC serving the same area. In measuring its costs against the ILEC criteria, the wireless CETC could not include its spectrum costs and would have to calculate its per-line costs using the number of ILEC lines in its service area as the denominator.

A wireless CETC that could not meet this cost standard would be required to participate in a reverse auction to obtain support. The ceiling price for the reverse auction would be the highest total amount earned by a CETC in the relevant service area, and there would be only a single winner in each auction. Existing CETCs could continue receiving high-cost support under the current rules in Alaska, Hawaii, Puerto Rico, and U.S. Territories, but the details are still being worked out.

There also would be $300 million annually for at least three years for broadband pilot programs for Lifeline and Link-Up support. The Link-Up subsidy would be 50% (up to $100) per device (e.g., modems) necessary for a broadband link. The Lifeline subsidy would be double the current Lifeline amount to offer low-income service. In order to qualify for this support, carriers would have to make broadband available to everyone in the relevant study area.

The methodology used to calculate service providers' USF contribution obligations would shift to a hybrid numbers and revenue-based system, under which residential numbers would be assessed $1.00 per month, and services to business customers, including schools and universities, would be assessed based on interstate revenues, pending resolution of the further notice of proposed rulemaking.

Further Notice: The further notice requests comment on several issues deferred in the draft report and order. Although the draft finds originating access charges to be inconsistent with the new regime, the further notice addresses how such charges should be eliminated. The further notice also requests comment on: whether the FCC needs to address tandem transit issues; the ultimate USF contribution mechanism to be applied to business customers; whether rate-of-return ILECs need any additional USF support; and whether any regulatory changes to the FCC's rules are needed to implement the plan.

Given all of the conflicting pressures on the FCC and the litigation risks inherent in a wide-ranging reform of such a complex regime, there is no assurance that the Chairman's plan or any comprehensive plan can be hammered out and adopted by November 4. Rural and state commission opponents argue that the plan has no resemblance to any proposals previously put out for public comment and argue that the FCC should limit any action on November 4 to the ISP-bound traffic issues that the D.C. Circuit ordered to be resolved by November 5. Congress has also weighed in, with at least four letters, signed by a total of 11 Senators and 64 House members, expressing concern as to the impact of the proposal on rural consumers and broadband investment and urging the FCC to delay action until it can seek public comment on the plan. One of those letters, by Reps. Rick Boucher (D. Va.) and Lee Terry (R. Neb.) and co-signed by 59 other members, also stated that the FCC should wait for comprehensive legislative reform of the universal service program "in the next Congress" before adopting new USF rules. The key vote at the FCC's open meeting may turn out to be that of Commissioner Deborah Tate, who is part of the Republican majority but is also a former chair of the Tennessee Regulatory Authority ("TRA"). She has said that it is "important" that the FCC not preempt the states. The TRA has joined other state commissions in calling for public comment.

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 3, 2008	Deadline for filing **Form 499-Q (Telecommunications Reporting Worksheet)**.
November 3, 2008	Comments due on **700 MHz Third NPRM.**
November 10, 2008	Comments due on **NOI on development of devices capable of supporting multiple audio entertainment services.**
November 12, 2008	Reply comments due on **700 MHz Third NPRM.**
November 13, 2008	Comments due on **USF administration NOI.**
November 14, 2008	Comments due on **service quality, customer satisfaction, infrastructure and operating data gathering NPRM** (for facilities-based broadband and telecommunications providers).
November 17, 2008	**Hearing aid compatibility report** due.
November 21, 2008	Reply comments due on **embedded advertising and sponsorship ID NPRM**.
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 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**.