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Communications Law & Regulation

# FHH TELECOM LAW

Current Issues in Telecommunications Law and Regulation

*Twisting the Rubik's Cube*

## FCC Sets Out To Reform USF

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As diligent readers of last month's *FHH Telecom Law* know, a major component of the FCC's National Broadband Plan (NBP) is a revision to the Universal Service Fund (USF), as the FCC attempts to shift USF from supporting legacy voice services to supporting primarily broadband services (including broadband voice). Working quickly to implement the NBP, the FCC has now released a combined Notice of Inquiry (NOI) and Notice of Proposed Rulemaking (NPRM) on USF. In administrative law parlance, an NOI is a preliminary inquiry seeking to gather information prior to actually proposing rules, while an NPRM proposes specific rules for adoption.

Generally, the NOI asks for comment on the economic model proposed in the NBP to more precisely target support for areas where there is "no private-sector business case for carriers to provide broadband and voice services." The NOI also seeks comment on how to quickly increase broadband penetration in unserved areas on an immediate interim basis while the Commission is considering final rules to implement fully the new broadband "Connect America Fund" mechanism. The associated NPRM seeks comments on a number of proposals to cut legacy universal service spending in high-cost areas and to shift support to broadband communications. These proposals include: capping the overall size of the high-cost program at 2010 levels; re-examining the current regulatory framework for smaller carriers in light of competition and growth in unregulated revenues; and phasing out support for multiple competitors in areas where the market cannot support even one provider. These proposals would effect a major re-vamping of the USF system as we know it.

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*Roamin' Forum*

## FCC Resolves Home Roaming, Asks About Mandatory Data Roaming


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In an Order/Further Notice of Proposed Rulemaking adopted at its April 21 meeting, the FCC slightly modified its current rules on the obligation to provide automatic roaming to other CMRS carriers, while temporizing on the question of whether to extend automatic roaming privileges to data services.

The modest change concerns the elimination of "home roaming" as an exclusion from the usual automatic roaming rule applicable to voice, SMS and push-to-talk services. In 2007 when the FCC originally declared that the enabling of automatic roaming was a common carrier obligation, it carved out an exception for home roaming. Home roaming, of course, refers to the situation where a carrier's customers roam on another carrier's network while they are in their home carrier's licensed service area – not at all the circumstance that roaming is usually thought to apply.

The exclusion of home roaming from the roaming mandate made a certain sense. If carriers could simply have their own customers roam on their competitors' networks in markets where they themselves had licenses, there would be no incentive for them to build out the portions of the market that would be difficult or expensive to reach or serve. They could simply piggy-back on their competitor by having their subscribers roam in the remote parts of their service areas where the competitor had spent the time, money and effort to erect facilities. This seemed to run counter to the Commission's policy of fostering facilities-based competition wherever possible.

Nevertheless, a gaggle of Tier II and Tier III carriers –

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## *Inside this issue*


*Part 17: Subject to change*

# FCC Proposes Top-To-Bottom Make-Over Of Antenna Structure Rules

*By Alan Campbell*
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You know how people have been telling you for, like, years that you really ought to clean out your refrigerator? And when you finally get around to it, you find that those fuzzy things that look like a science experiment sprouting behind the old jar of maraschino cherries at the back of the top shelf have sell-by dates that expired several years ago?

That's what the FCC is rolling up its sleeves to do right now – but instead of its refrigerator, it is the rules governing antenna structure construction, lighting, marking and maintenance that need cleaning out. To start that process, the Commission has released a Notice of Proposed Rulemaking (*NPRM*) looking to overhaul its tower-related rules, which comprise Part 17 of the rules. While the Commission has targeted a number of particular changes (see below for examples), the proceeding broadly encompasses the entire regulatory scheme of Part 17. Anyone who has an antenna structure or expects to build one may want to take the opportunity to offer suggestions, since history suggests that, once the structure rules are revised, they're likely to stay in place for a while.

The FCC, of course, has long required all of its regulatees to comply with various non-RF related aspects of their antenna structures. (Insider tip: While you may be tempted to refer to them as "towers," don't; the government prefers the fancier and more all-encompassing term "antenna structures.") It routinely fines miscreants for non-compliance with lighting and painting specifications. The goal is to keep aviators and aviation passengers from flying into those structures.

But because the focus here is on aviation, the FCC shares antenna structure responsibilities with the Federal Aviation Administration (FAA). Historically, the FCC has let the FAA set most of the substantive standards (*e.g.*, for lighting and painting of structures), even though the FCC has the responsibility for enforcing those standards. But the two agencies don't coordinate as well as they might – and, as a result, discrepancies between the FAA's requirements and their FCC equivalents can develop.

For example, the FCC rule section on painting/lighting specifications currently requires conformance with an FAA circular that was superseded by the FAA more than six years ago. (This problem had been called to the FCC's attention back in 2006.) The FCC proposes to fix the problem now by deleting references to *any* circulars, and requiring instead that structure owners comply with whatever determination the FAA issues with respect to their particular structures.

Along the same lines, Sections 17.14 and 17.17 of the Commission's rules – which specify which structures are subject to notification to the FAA and which are exempt – merely parrot the FAA's rules. The FCC correctly observes that this approach "risks creating confusion in the event the FAA were to change its criteria". So instead, the FCC proposes simply to cross-reference, in its own rules, the corresponding FAA rule.

Curiously, discrepancies within the FCC's own rules have developed as well.

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*Big time bump-up in build-out rules in store?*

# Tough Love For WCS Licensees?

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Of the many tasks which the FCC set for itself in its National Broadband Plan (NBP), we took particular note of one. At page 86 of the NBP, the FCC committed to "accelerat[ing] efforts to ensure that WCS [Wireless Communications Service] spectrum is used productively for the benefit of all Americans." We had to smile at the use of the word "accelerate" in this context since the FCC has been doing precisely nothing for the last 13 years to bring this spectrum to productive use. In fact, in contravention of its own rules it has been sitting on applications for almost three years which could already have been providing innovative WCS service in the 2.3 GHz band. This is one of the weaknesses of the NBP: it fails to acknowledge how the Commission's own inaction and irresolution have often stymied, thwarted or delayed the very objectives which the FCC now claims are so urgently needed.

*The penalty for failing to achieve the proposed goals: death*

Nevertheless, the FCC has to start somewhere, and its first step has been to request expedited comment on some very rigorous build-out standards for the 2.3 GHz WCS service. Currently, licensees in this service need demonstrate only that they have provided "substantial service" at the end of their ten-year license. The term "substantial service" has not been defined with any specificity; instead, the Commission has invoked the ancient formula of "service which is sound, favorable and substantially above a level of mediocre service that just might minimally warrant renewal". Still, the FCC did deign to identify a few reasonably delineated safe harbors that licensees could rely on: for mobile and point-to-point uses, service to 20% of the population would be deemed "substantial"; for fixed point-to-point uses, service to four links per million of population would do the trick.

But now, apparently determined to bring WCS spectrum to productive use, the FCC is proposing to swing 180 degrees from those relatively liberal build-out requirements and instead impose requirements that are among the harshest ever. Specifically, the FCC is proposing that licensees engaging in point-to-point or mobile uses must cover 40% of their licensed population in 30 months and 75% of the population in 60 months. Point-to-point users would have to have 15 links per million of population in 30 months, 30 links per million of population in 60 months, and minimum but unspecified payloads.

To tighten the requirement even further, the FCC suggests that all the defined markets which comprise each licensed area might also have to have 25% coverage in 30 months/50% coverage in 60 months. This latter requirement would ensure that service be provided broadly over all segments of a licensee's licensed territory rather than clumping around major population centers. The penalty for failure to achieve these goals: death, or its regulatory equivalent, forfeiture of the entire license.

The new suggested requirements are extremely aggressive, exceeding any build-out requirement ever imposed for geographic licenses that cover large expanses. It's not even clear that there's enough WCS equipment in the whole world to meet these standards if the FCC were to adopt them tomorrow. Nor would most rational business plans call for building out on a scale this vast and this quick with no existing ecosystem whatsoever of customers to provide the demand for which this extraordinary construction project would be the supply. Nevertheless, the FCC has put this proceeding on a super-fast track, allowing only 15 days (to April 21) for comments and 10 days (to May 3) for replies. (The comment track was so fast that the deadlines for comments has already gone by.)

The regulatory train appears to be pulling out of the station and, although it may be headed in the wrong direction, no one can say it isn't accelerating.

*The Comcast decision*

# Court Says No To FCC-Imposed Network Neutrality

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Just two months ago, the FCC took the Nation to the mountaintop and showed us the promised land of broadband – every man, woman, and child among us interconnected by high-speed Internet. Part of the dream foresees an Internet free of any provider's control, giving everyone access to all of the content on the planet.

That last part – Commission-protected freedom from providers' control – has now taken a serious hit from the U.S. Court of Appeals for the D.C. Circuit. The Court has concluded that the FCC lacks authority to require providers to treat Internet content even-handedly.

Comcast launched the case back in 2007, when it deliberately hindered its Internet customers' access to certain file-sharing services (possibly, some critics thought, to protect its parent company's on-demand cable services from competition). Comcast stopped the practice after the story came out, and after its claims that it was "just controlling congestion" were shown to be untrue. The FCC subsequently imposed certain reporting and disclosure requirements on Comcast's traffic management practices. Comcast took the FCC to court, where the oral argument did not go well for the FCC.

In April the court ruled squarely for Comcast and against the FCC, holding that the powers granted to the FCC by Congress do not include the power to regulate Comcast's provision of Internet service.

The FCC's position was a little shaky from the start. It never had a rule prohibiting the Comcast action that caused all the trouble, just a loosely-worded policy statement. And nothing in the Communications Act, from which the FCC derives all of its authority, specifically authorizes control over Internet traffic. The FCC thus had to fall back on a claim of "ancillary authority", based on a catch-all statutory provision that allows the FCC to do pretty much anything "as may be necessary in the execution of its functions."

But as the Court had previously held on a number of occasions, ancillary authority applies only if (1) some other statutory provision covers the subject matter, ***and*** (2) the challenged action is "reasonably ancillary" to the FCC's exercising of its authority under (1). The FCC passed the first test, but not the second. The "other provisions" on which the FCC relied, said the Court, were either mere statements of congressional policy (which cannot support ancillary authority) or statutory provisions that miss the specific topics involved in Comcast's behavior.

*For the time being, at least, Internet providers are free to favor or block content as they choose.*

As a result, the FCC is legally barred from imposing or enforcing network neutrality.

The FCC still has a few options. For example, it can ask the same court for a hearing *en banc* (Latin for "lots more judges") or appeal to the Supreme Court. Or it can ask Congress for a law that gives it the authority it needs. There may be other alternatives as well, involving adjustments to the existing regulations for a better fit with the existing statutes, but their likelihood of success in court remains to be seen.

But right now, the view from the broadband mountaintop is a little murky. For the time being, at least, Internet providers are free to favor or block content as they choose. And no use complaining to the FCC.

*FCC or FTC?*

## A Lobbyist's Look At The *Comcast* Question

*By Catherine McCullough*
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Across the post-*Comcast* playing field, the governmental players are staking out their positions on the question of who, if anybody, has the authority to enforce network neutrality.

A recent hearing before the Senate Commerce Committee provided examples: Chairman Rockefeller, emotionally describing how lack of service affected his constituents during the recent West Virginia coal-mining disaster, said he will put his considerable power behind writing a bill to give the FCC unambiguous authority to protect consumers; Ranking Member Hutchison – who doesn't have the final say over any majority bill now, but whose party could hold all the cards if elections go the Republicans' way in November – warned the FCC that there would be consequences if it acted to reclassify.

And in an exercise I've seen repeated in that Committee room by other agency leaders, Chairman Genachowski stuck to his written testimony and gently tiptoed around the hard questions (like how the FCC might plan to make the National Broadband Plan a reality given the new hazy regulatory climate).

If you were Mr. Genachowski, how would *you* deal with the conundrum of network neutrality in the aftermath of *Comcast*?

You could take up Rockefeller's suggestion and ask Congress to give the FCC express statutory authority. But there are downsides of going to Congress for a remedy: chairs could shift during the November elections, and besides – would you really want to risk opening the Communications Act to amendments? (Shot clock, anyone?) And let's not forget about timing – you want the NBP to move ahead *now*, not at some indefinite future point, after the full range of the Congressional process has managed to inch its way to some (unpredictable) conclusion at some point in the indefinite future.

Or you could take Hutchison up on her dare and reclassify internet access as a Title II telecommunications service. But as many have observed, that would almost certainly lead back to court.

Or maybe, as Fletcher, Heald's own Mitchell Lazarus has suggested, the FCC could find a more tailored way out. These last two options, however, involve the FCC re-jiggering its own legal authority from within – which risks potential punishment from the minority party (not a purely hypothetical risk, as Hutchison's comments, noted above, demonstrate).

So what's the answer?

If I were Mr. Genachowski, stuck between a legal rock and a political hard place, I might look for some other way out of the bind – a way that would permit regulation of net neutrality while keeping my agency both out of court *and* out of any politically costly cross-fire in Congress. If only I had a protector. Or in this case, a consumer protector. You see where I am going with this: I would consider handing off the net neutrality hot potato to my regulatory siblings at the Federal Trade Commission (FTC).

The FTC can't regulate common carriers. But so far ISPs aren't common carriers, thanks to the FCC's consistent reluctance thus far to so categorize them. And if ISPs aren't common carriers, the FTC can step in.

Section 5(a) of the FTC Act gives the agency jurisdiction over "unfair or deceptive acts or practices", and FTC Chairman Leibowitz has been willing in the past to assert jurisdiction in order to protect consumers.

Remember, dear Readers, Chairman Leibowitz has sunk significant political capital into asserting his agency's power over online commerce issues and other consumer protection initiatives that are threatened if someone in the government can't enforce net neutrality. So the FTC could be expected to welcome the authority to regulate ISPs and implement net neutrality.

And – just as politically important here – if the FTC were to be deemed the principal locus of control over the issue, Chairman Rockefeller and his Senate Commerce Committee – and their colleagues on the House side – would lose no power. The Commerce Committees have oversight authority over *both* the FCC and the FTC, so allowing one of the two agencies to take up regulation in an area – say, net neutrality – previously controlled by the other agency

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# Microwave Group Asks FCC To Change Rules For 3650-3700 MHz

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A plan to fix problems with the FCC's novel licensing scheme in the 3650-3700 MHz band has come from the Fixed Wireless Communications Coalition (FWCC), a diverse group of fixed microwave users, providers, and manufacturers.

The 3650-3700 MHz band is unusual. In most shared bands, the rules require frequency coordination prior to licensing. A coordinator tries to slot each newcomer's application into a frequency band where it will neither cause interference to incumbents, nor receive interference. The scheme protects those in first from those who arrive later, although the degree of protection varies with the type of service.

In the 3650-3700 MHz band, however, the FCC has established a kind of do-it-yourself frequency coordination on the fly. Before starting operation, each incoming user is expected to consult a database of other users, and to tailor the new station's locations and parameters to avoid causing interference. The new location and parameters then go into the database for the guidance of those who come later. Licensees are expected to resolve any interference problems among themselves. The rules also require the use of "contention-based protocols" in the equipment to help prevent interference problems from arising in the first place.

It turns out the FCC means what it says about people working out problems on their own. A licensee in the band went to the FCC with a complaint that a newcomer had not bothered to check the database, was causing interference, and had not cooperated in fixing it. To the surprise of many, the FCC refused to intervene, reiterating that it would leave a resolution to the parties. (We reported on the case back in the January issue of *FHH Telecom Law*.)

The FWCC expressed concern about this outcome, fearing that users with critical applications would avoid the band, rather than risk interference over which they have no control. Part of the problem, it thinks, is that some of the key rules for the band use language that is merely advisory. The FWCC does not ask the FCC to play referee (a role the Commission plays in other contexts) – but the FWCC does want the rules reworded to make users' responsibilities more clear.

Specifically, where the rule now says that licensees "should" consult the database, "should" try to avoid causing interference, and "are expected to" cooperate in resolving interference issues, the FWCC asks for an amendment to make these steps mandatory. In other words, licensees would not only be encouraged, but required, to play together nicely. This, the FWCC suggests, will preserve the speedy set-up and flexibility offered by the present rules, while improving the quality of service and giving providers better assurance that they can reliably meet customers' needs.

***(A Lobbyist's Look** - Continued from page 5)*
would not realign Congressional power in any way. All Chairman Rockefeller has to do is ask his Consumer Protection Subcommittee Counsels to join his meetings with his Communications Counsels.

But even if the FTC is standing by, ready, willing and able to take over, and even if that approach would likely be acceptable to the powers-that-be on the Hill, there's still one big question: would Mr. Genachowski voluntarily give up the power he believes his agency has? Jurisdiction does not switch hands easily or often in this town, but Mr. Genachowski's boss, President Obama, might not care which of his agencies holds authority, as long as his National Broadband Plan's infrastructure is protected.

One thing, I believe, is certain: net neutrality enforcement authority will be assigned eventually Like a handful of chips thrown into the air on a casino floor, no part of government's power will be left un-gathered and unused. The only question left is who will pick them up.

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*Dueling press releases*

# The FCC Acts In Mysterious Way

## *Commissioners signal intent to impose modified Title II common carrier regulation on broadband Internet*

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This FCC is not letting any grass grow under its feet. Only a month ago, the U.S. Court of Appeals for the D.C. Circuit pulled the rug out from under the FCC's authority to regulate the Internet. In the intervening weeks, there was much speculation about what the Commission should or would do to bring the Good Ship Internet back on course. Suggestions included turning the entire matter over to the Federal Trade Commission, seeking a change in the Communications Act to expressly grant the FCC the authority to regulate the Internet, appealing to the Circuit Court *en banc* or the Supreme Court to reverse the *Comcast* decision, or trying to more solidly justify its ancillary authority over the Internet.

The most widely discussed option, however, was simply re-classifying broadband Internet access as a telecommunications service.

*A flurry of battling press releases telegraphed the Commission's path.*

While this would require some major backtracking by the Commission (it had previously solemnly declared broadband Internet access to be an "information service" and thus exempt from Title II regulation), it is not uncommon for administrative agencies to change their minds. The re-classification would deposit broadband Internet access safely back in the nest of common carrier services which no one disputes the Commission has authority to regulate. The only question then would be whether to employ the heavy hammer of full Title II monopoly style regulation or the light feather of minimal regulation applied to wireless carriers, or something in between.

On May 6, the Commission telegraphed which way it's going, but it did so not by an official order but by a flurry of battling press releases.

Chairman Genachowski began the process by issuing a press release indicating his intention to re-classify broadband Internet (or at least the so-called transport component) as a telecommunications service. This would establish the FCC's authority to regulate under Title II of the Act. He also indicated that the regulation would be as light as possible – just enough to mandate net neutrality and curb abuses of the Internet. In other words, the FCC would forbear from most forms of common carrier regulation but would insist on certain basic principles. Those basic principles would include: reasonable and just interconnection; non-discriminatory terms and conditions of service; access to Universal Service Funds; protection of private customer information; and access by the disabled to telecommunications equipment and services.

The FCC's General Counsel, Austin Schlick, then released a legal memo laying out the legal basis for the approach the Chairman had espoused. They both refer to this as a "third way" of regulating the Internet because only the "transport" component of Internet communications will be subject to Title II regulation; the information component will remain unregulated (or maybe still somehow subject to ancillary jurisdiction).

Inquiring minds would love to know what elements of the Internet will be deemed "transport" and what "information" – that difficult line remains to be drawn. (Remember, the FCC itself had opined that broadband Internet was a single integrated unitary offering, so it will have some 'splainin' to do when it now divides broadband into separate components.) The Schlick Memo pragmatically pointed out that one benefit of the "Third Way" is that it will require only one Court review – far more efficient than the dozens of case-by-case adjudications that would have been necessary if the Commission had tried to justify each regulatory provision under its limited ancillary authority. Since everyone can agree that regulatory uncertainty is bad, any process that gets things settled quickly has at least one thing going for it.

Commissioner Copps quickly chimed in with a press release mostly supporting the Chairman's Title II approach but, as always, wanting to know the details. Hot on the heels of that release came a joint commu-

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*Short answer: Yes*

# Is The FCC's Regulation Of VoIP In Jeopardy After *Comcast*?

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According to *Comcast v. FCC*, the FCC came up short when it tried to show that it has the authority to regulate Comcast's Internet access traffic management practices. To paraphrase the Vice President, this is a Big Deal – because the FCC's ability to promulgate net neutrality rules is seriously threatened as a result.

But the implications of *Comcast* go beyond that. They could, for example, gut the Commission's regulation of Voice over Internet Protocol (VoIP) service.

The focus of *Comcast* was the scope of the FCC's "ancillary jurisdiction". The question boils down to this: if Congress hasn't seen fit to expressly grant the FCC authority to regulate in a particular area, what regulatory actions, if any, can the FCC take in that area? In *Comcast* the court made clear that the regulation must be "reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities." Importantly, the court held that mere statements of federal policy in the Communications Act are not "statutorily mandated responsibilities."

*We suspect that many of the FCC's regulations of interconnected VoIP would not survive the* Comcast *analysis.*

VoIP allows consumers to make and receive telephone calls over the Internet. From the user's perspective, VoIP is functionally the same as "plain old telephone service" (POTS). Both allow the user to make and receive calls to and from points otherwise reachable by regular telephone. But the two are technologically different: POTS uses time division multiple access or analog switching to create circuits while VoIP uses session initiated protocol to send and receive messages in packets via the Internet and Internet Protocol. VoIP is basically no more than a software application. So, like any other software application, it isn't subject to FCC regulation, right?

Not according to the FCC.

Seeing the obvious functional similarity between VoIP and POTS, the FCC decided that VoIP should be regulated like POTS. But is VoIP an "information service" or a "telecommunications service?" Labels are important here: "telecommunications services" fall under the Title II common carrier regulation imposed on POTS, while "information services" would ***not*** be subject to such regulation. Complicating matters, the FCC has expressly declined to attach either label to VoIP, although the Commission has imposed a whole host of POTS-like common carrier regulations on VoIP providers.

The claimed basis for those regs? Our old friend, "ancillary jurisdiction".

Claiming ancillary jurisdiction, the FCC has subjected interconnected VoIP providers to: the consumer privacy regime of Section 222 of the Communications Act; the service discontinuation requirements of Section 214; the telephone disability access rules (which include mandatory payments into the disability fund); number porting requirements; and 911 emergency calling regulations. (The FCC also requires interconnected VoIP providers to contribute to the Universal Service Fund, but that requirement is based on direct statutory authority – no need to invoke "ancillary" authority.)

In the wake of *Comcast*, the obvious question arises: are these requirements *really* lawful exercises of "ancillary jurisdiction"? We have no crystal ball that will tell us how the court might rule if/when it faces these issues, but it is our professional judgment that many of the FCC's regulations of interconnected VoIP would not survive the *Comcast* analysis.

*Comcast* says that, if the FCC does not have express statutory authority to act in a certain area, the FCC may regulate that area ***only*** if the regulation is "reasonably ancillary" to "statutorily mandated responsibilities". In *Comcast*, the FCC argued that Sections 1 and 706 of the Act were sources of "ancillary jurisdiction" – and the court disagreed. As the *Comcast* court saw it, those sections are merely statements of Congressional policy, not

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*(**Comcast and VoIP** - Continued from page 8)*
specific statutory mandates sufficient to support ancillary jurisdiction.

The potential bad news for VoIP regs is that the FCC has repeatedly relied on – you guessed it – Sections 1 and 706 to assert jurisdiction over VoIP. The FCC's essential thinking is that VoIP looks so much like (indeed, is a substitute for) POTS that the Commission is justified in imposing POTS regulation on VoIP.

That may seem rational, but rationality is not the issue. The issue is the limit of FCC authority. Mere similarity in functionality is immaterial if the FCC can't demonstrate that its regulation of VoIP is in fact related to – ancillary to – some specific statutorily mandated responsibility. Regulations imposed under ancillary jurisdiction must have some discernible effect on areas which are subject to direct jurisdiction. Moreover, the *Comcast* court made it clear that the FCC must independently justify each aspect of any regulation based upon "ancillary jurisdiction". The Commission can't generally assert ancillary jurisdiction over an area and then rely on that broad assertion to regulate the area any old way the FCC feels like.

*Rationality is not the issue.*

Let's examine each of the FCC's VoIP regulations and see how they fare under the *Comcast* test:

***Privacy Requirements***. Section 222 of the Act requires "telecommunications carriers" to use efforts to safeguard "customer proprietary network information" (CPNI). But VoIP providers haven't been pigeon-holed by the FCC as "telecommunications carriers", so Section 222 does ***not*** specifically authorize the imposition of CPNI obligations on VoIP. To get around that problem, the FCC claimed "ancillary jurisdiction" flowing from Sections 1 and 706 of the Act. (Check it out in Paragraphs 54-59 of the FCC's 2007 decision.) But we know from *Comcast* that Sections 1 and 706 are statements of policy, not "statutorily mandated responsibilities", so there's no ancillary authority there. That leaves the FCC with only Section 222 to justify the regulation – but where, to use the *Comcast* court's lingo, is the "ancillariness"? Section 222 applies to a specific class of entities – "telecommunications carriers" – but the FCC has declined to assign interconnected VoIP providers to that class. Accordingly, the FCC can't rely on Section 222 as a source of ancillary jurisdiction to subject interconnected VoIP providers to its requirements. Sure, safety and privacy are lofty values – but, support of lofty values does not create jurisdiction. Score: VoIP providers 1, FCC 0.

***Discontinuation of Service***. Making sure that a carrier doesn't abandon a route is a big deal when the carrier is the only carrier serving that route. So Section 214 requires, among other things, that carriers get certificates from the FCC before discontinuing service. VoIP providers are not "carriers", but that didn't stop the FCC from imposing identical discontinuation obligations on VoIP. As a result, VoIP folks must notify customers and governors in affected states and get a service discontinuation certificate from the FCC before discontinuing service. Jurisdiction or not? Probably not. To justify the imposition of these obligations, the FCC relied on ancillary jurisdiction based on Sections 1, 214 and 706 of the Act. We hate to sound like a broken record, but Sections 1 or 706 won't do the trick, which leaves only Section 214. But again, Section 214 applies only to "carriers", a classification to which the FCC has ***not*** assigned interconnected VoIP providers. Nor can discontinuance of a VoIP service really be said to affect in any material way the regulation of any "carriers". Ergo, the FCC has not shown a ground for the existence of ancillary authority to impose Section 214 obligations. Score: VoIP providers 2, FCC 0.

***Disability Access Requirements***. Section 255 of the Act requires that a "provider of telecommunications service make its service readily accessible to persons with disabilities." The idea is to assist people with speech and hearing disabilities by assuring the availability of options such as TTY, "speech-to-speech", captioned telephone service and 711 abbreviated dialing. Section 255 applies to providers of "telecommunications service"; it says nothing about providers of VoIP. Nonetheless, citing ancillary jurisdiction supposedly arising from Title I as well as Section 255, the FCC imposed Section 255 requirements on VoIP providers. (Check out paragraphs 21-24.) But (yawn) Section 1 doesn't work for this purpose. And while the Commission also claimed that Section 255 might do the trick, that claim falls short because Section 255 applies solely to a "provider of telecommunications service", and the FCC has declined to classify VoIP as a "telecommunications service". Score: VoIP providers 3, FCC 0.

***Local Number Portability Requirements***. The Act (Section 251(e), to be specific) gives the FCC jurisdiction over the assignment of telephone numbers. Section 251 (b) requires "local exchange carriers" to allow customers to port their numbers from carrier to carrier. Clearly, VoIP providers are not "local exchange carriers", but that

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*FCC looks to shuffle the deck from CABLEcard to AllVid*

# Changes In The Cards?

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In recent years, the number of new avenues to connect to the Internet for video programming has grown exponentially. Driving this, of course, is the availability of more and more video-based distribution services out there that will deliver video to the comfort and privacy of your living room. While folks previously only watched YouTube on their computers, recent technological developments have given us internet-accessible DVRs, Blue-Ray disc players, and gaming devices such as Wii and PlayStation that can access and deliver video programming from Netflix, Pandora, and Hulu. Even televisions themselves are being manufactured to access the internet and relay programming to the home viewer.

In this atmosphere of rapid growth, the Commission recently released two notices relating to set-top boxes and their progeny. The basis for the Commission's interest in this area is the requirement contained in Section 629 of the Communications Act, which gave the Commission authority to develop rules to spur the development of devices used for multichannel video program distribution (MVPD). The over-arching goal was the creation of a free, open and competitive market for video connection devices similar to that which developed for CPE ("customer-provided equipment" or "customer premises equipment") when the telephone network was thrown open to non-Bell devices.

The first notice, the Fourth Further Notice of Proposed Rulemaking, seeks to update the CableCARD rules and policies. The CableCARD is a device that, once installed into retail devices such as television or retail navigational devices (think TiVo), eliminates the need for a separate set-top box. Section 629 was part of the Telecommunications Act of 1996, and it took seven years for the industry (MVPDs and manufacturers) to develop a standard for the device. However, the standard adopted in 2003 did not address two-way communications such as Video on Demand, and the device requires professional installation.

In the National Broadband Plan, the Commission indicated that it would examine whether there should be changes to the existing rules to encourage the greater use of CableCARD devices. In particular, the Commission is seeking comment on rules that would: (i) ensure that devices are able to access multi-stream video programming; (ii) make the pricing, billing and installation practices of CableCARD equipment transparent and similar to those for leased set-top boxes with the CableCARD already installed; and (iii) encourage the rapid development of new retail CableCARD devices.

While the Commission recognizes that the CableCARD regime is somewhat outdated, it seeks to make these changes to its rules as an interim measure while it implements what it believes to be the next generation of devices, namely, the AllVid device. The second notice, a Notice of Inquiry, is intended to jumpstart the quest for such a device. The AllVid approach, still merely a "concept" developed by the Commission in the National Broadband Plan, would serve as a gateway between consumer premises equipment such as DVRs, computers, and televisions on one side, and the proprietary systems of MVPDs on the other side. While the Commission acknowledges that such a "gateway" device is in concept form only, it believes that the adoption of this concept would lead to a nationwide interoperability standard like Ethernet and the standard phone-jack of yesteryear.

*An "AllVid" device would provide nationwide interoperability, like the standard phone jack of yesteryear.*

Under the AllVid concept, MVPD's would be able to deliver their services directly to a small device, which would connect to the navigational devices such as computers, DVRs, televisions, and gaming systems. The MVPD would not have the headaches of working with individual device manufacturers, and the Commission believes that this concept will spur development of a retail market for new devices without the need for the manufacturers to deal with the MVPDs. Just as fax machines and answering machines could perform different services so long as they could be plugged into the standard RJ-11 phone jack, the Commission believes that AllVid devices will free up parties on either end of the gateway device to develop new and innovative methods for delivering service to consumers.

*(Continued on page 17)*

*Planning starts for:*

# EAS - The Next Generation!

***Proposing to boldly go where Part 11 has never gone before***

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Attention, anyone interested in the Emergency Alert System (EAS) – and that would include current EAS participants as well as wannabes. The Next Generation of EAS is in the works – and now's your chance to influence it. The Public Safety and Homeland Security Bureau (PSHSB) has invited comments on possible changes to any or all of Part 11 of the Commission's Rules. This invitation comes in anticipation of a rewrite of the EAS rules which will be necessary to accommodate the Common Alerting Protocol (CAP) standard.

CAP standard? Surely you remember back in 2007, when the FCC notified all EAS participants that they must be prepared to accept CAP-based EAS alerts 180 days after FEMA publishes the applicable CAP technical standards. FEMA recently announced its intention to publish those standards as soon as the third quarter of 2010, so time is now of the essence for the FCC to get all of its EAS ducks in a row.

*The goal: instantaneous, ubiquitous notification to everybody, anywhere.*

So what is this CAP thing, really?

According to the FCC, CAP is as "an open, interoperable, data interchange format for collecting and distributing all-hazard safety notifications and emergency warnings to multiple information networks, public safety alerting systems, and personal communications devices." It's part of the federal government's deployment of the Integrated Public Alert and Warning System (IPAWS). The goal of IPAWS is to allow officials who have to respond to emergencies – think FEMA, the National Weather Service, State Governors, other public safety officials – to get the word out to the public about emergency situations as efficiently and comprehensively as possible. In the old days, such officials generally had to rely on the broadcast EAS system. Now, in addition to EAS, the CAP approach will ideally enable them to send a single, geo-targeted alert simultaneously across multiple platforms, including cellular, internet, satellite and cable television providers. Instantaneous, ubiquitous notification to everybody, anywhere. The CAP approach will even enable special formatting of alerts for non-English speakers and persons with disabilities.

In other words, it's EAS all grown up for the digital age.

Unlike many of the FCC's efforts in the traditional silo model, the new EAS systems are intended to cross technological boundaries and, thus, impact everyone from broadcasters to cellular phone operators to MVPD providers. Commercial television broadcasters are already required (by the 2006 WARN Act) to incorporate CAP-enabled EAS equipment as part of their digital transition (a requirement the FCC later clarified to extend to digital NCE TV stations). There is at present no similar obligation for radio stations, but it's reasonable to assume that a requirement is in the works. We encourage radio operators in particular to participate in the molding of new EAS rules: since it seems an odds-on mortal lock that radio operators will be looking at significant changes in their EAS obligations, it only makes sense that they should be involved in the planning of those changes as early in the process as possible. Cellular providers participating in the Commercial Mobile Alert System (CMAS) likewise should embrace the opportunity to shape rules which have never before been applicable to the industry.

The PSHSB invitation for comments casts a very wide net. Essentially, it asks for any and all suggestions about how any aspect of the EAS rules might be modified in connection with the shift to a CAP-based alerting approach. Interestingly, the PSHSB is ***not*** a formal notice of proposed rulemaking (NPRM) (even though a fine print reference in the Federal Register version might suggest otherwise). That's because the Commission is not now in a position to make any concrete proposals about its own rules – and won't be in such a

*(Continued on page 12)*

***(Roamin' Forum** - Continued from page 1)*

vigorously opposed by AT&T and Verizon – sought reversal of this decision. It seemed that the smaller carriers were licensed in many territories where it was infeasible to serve all or part of the territory, at least for the immediate future. In the meantime, the home roaming exclusion gave AT&T and Verizon the right to forbid roaming altogether in those markets, putting the junior carriers at a significant competitive disadvantage.

It was a close case, with merit to both sides, but the FCC came down on the side of the smaller operators: it mandated home roaming upon request. The Commission eased the sting somewhat for AT&T and Verizon by permitting a carrier presented with a roaming request to rebut the presumption that such a request is reasonable.

*The FCC came down on the side of the smaller operators.*

With the announcement of the new National Broadband Plan in March, the table appeared set for the Commission to also act on the long-pending question of whether carriers should be required to offer automatic roaming for data, in addition to voice, services. The FCC had punted on this issue in 2007 by the time-honored dodge of seeking more information. Having sat on the facts it developed three years ago, it may now honestly claim that that record is stale and it must therefore delay action again by seeking new facts.

(*Author's observation: This is one of the tearing-one's-hair-out aspects of administrative law. An agency can procrastinate on an issue for years, and then, when it takes the matter up again, claim with a straight face that it now needs to gather more information because of the passage of time. Procrastination actually becomes a legal justification for more procrastination.)*

In any case, the FCC is seeking further input on this issue, which has taken center stage now that broadband has become the golden idol which the FCC worships. Clearly, if mobile broadband is to become a reality, there will have to be some understanding about the availability of roaming to broadband subscribers who travel to non-home markets. Among the issues the FCC has teed up is the question of whether a non-home carrier can discriminate between its own subscribers and roamers by, *e.g.*, placing limits on roaming access to its network that do not apply to its own subscribers. Because bandwidth may be in short supply and some data applications are bandwidth-hungry, it might well make sense for carriers to favor their own subscribers over mere roamers – a situation which rarely arises in the pure voice context.

Also of interest is the question of whether automatic roaming should be required where one or both of the providers involved are not actual CMRS providers, *i.e.*, are not common carriers. The assumption underlying the original automatic roaming proposal was that the participants in the roaming process would themselves be CMRS carriers. But since wireless internet service is (at least for the moment) classified as an information service rather than a telecommunications service, there are many wireless data providers in the broadband landscape who would not be covered one way or another by a rule on automatic data roaming. If automatic roaming for data providers is to be meaningful, the FCC's inquiry needs to encompass those types of providers, too.

Comments on this aspect of the roaming proceeding are due June 14, with Reply Comments due July 12.


***(EAS Overhaul** - Continued from page 11)*

position until FEMA gets the ball rolling by formally adopting CAP standards. Once FEMA's standards are in place, the FCC (and other agencies) will have to hustle to overhaul their systems to assure that they can interact and interconnect with the CAP system. That's when we can expect to see an extensive and detailed NPRM.

And when that happens, we can expect the rulemaking to be expedited to the max. The new CAP-friendly EAS system is targeted to be in place – with all industry participants able to accept CAP-based alerts – within 180 days of the formal publication of FEMA's CAP technical standards. And for the FCC – an agency not known for its ability to make quick decisions – the 180-day deadline can be expected to be a challenge, especially since the precise starting date won't be known until FEMA gets around to publishing its standards. But since FEMA has indicated that that could happen sometime from July-September, the FCC can at least start pulling together some preliminary thoughts now. And that's the process the PSHSB invitation is designed to get rolling.

Comments are due ***May 17, 2010***; reply comments are due ***June 14, 2010***. Please contact us if you would like assistance in submitting comments.


***(Comcast and VoIP** - Continued from page 9)*
didn't stop the FCC from imposing Section 251(b) number porting obligations on interconnected VoIP providers and their carrier intermediaries The FCC claimed authority to do so through direct statutory authority and ancillary jurisdiction. The direct authority supposedly derived from Section 251(e)(1)'s grant of plenary telephone number administration authority. As the FCC sees it, if you get numbers for your customers, you have to play by the FCC's rules. Additionally, the Section 251( b)(2) porting obligation was cited, even though that provision, by its own terms, applies only to "local exchange carriers". And the FCC cited as well to Section 1 and Section 251(e) as sources of ancillary jurisdiction. Again, the notion of ancillary jurisdiction through Section 1 is a non-starter. As to the FCC's claimed direct Section 251(b) jurisdiction, this observer has a hard time reconciling Congress's express imposition of porting requirements on "local exchange carriers" with the FCC's extension of the requirement to entities that are not "local exchange carriers" and that cannot even obtain telephone numbers without going to carrier intermediaries. As for the FCC's Section 251(e) authority over telephone numbers, that at least might provide some ancillary authority for laying some number-related burdens on VoIP providers, since there is just one system of telephone numbers available to all phone service providers. Still, this observer questions how that might be a legitimate basis for imposing the full range of porting obligations onto VoIP providers. The FCC is correct that VoIP providers will have a competitive advantage if they are not subject to porting requirements, but such concerns are not a ground for ancillary jurisdiction. Score: VoIP providers 4, FCC 0.

***Emergency Dialing Requirements***. The FCC imposed its 911 emergency calling regulations on interconnected VoIP. While the FCC invoked the now-discredited ancillary jurisdiction through Sections 1 and 706, it also relied on its authority over the assignment of numbers granted by Section 251 (e) *and* Section 251(e)(3)'s specification of 911 as the emergency number for all "wireless and wireline telephone service." This writer sees no nexus between imposing 911 access requirements and the FCC's authority over the assignment of telephone numbers. But I *can* see some nexus between this access requirement and the mandate Section 251(e)(3). Chalk one up for the FCC. Score: VoIP providers 4, FCC 1.

Does all of this mean that interconnected VoIP will be suddenly freed from the oppressive yoke with which the FCC has burdened it over the years? No. But it does mean that VoIP regulation may be vulnerable to effective attack, now that *Comcast* is on the books.

***(Title II Approach** - Continued from page 7)*
niqué from Commissioners Baker and McDowell decrying the Chairman's approach. At this point the press release balloting was even. Much later in the afternoon, Commissioner Clyburn weighed in with *her* press release supporting the Title II approach of the Chairman. By a 3-2 straw vote, the FCC's policy is now set.

While governing by press release is unusual, it did have the salutary effect of calming everybody down, stopping the rampant speculation, and pointing the way that the FCC intends to go. The one small problem is that the Administrative Procedure Act requires the FCC to at least go through the motions of proposing rules and letting the public comment before it adopts a regulation. So we presume that the Commission will open a rulemaking proceeding post-haste using the framework set out in the Schlick Memo to justify re-classifying broadband Internet.

Some important details will need to be filled in, and the rulemaking proceeding can serve that function. And at some point the Commissioners need to go through the formality of actually voting one way or the other on the matter after having kept an open mind during the course of the proceeding. Having been given a full, free and fair trial, ancillary jurisdiction will then be hanged.

*(**Part 17** - Continued from page 2)*

Sections 17.2 and 1.907 both purport to define "antenna structure," but they use slightly different language. The Commission asks whether the two should be "harmonized." And the FCC's definition of "antenna structure owner" – *i.e.*, the guy who bears ultimate responsibility for compliance with lighting/marking/etc. requirements – could be read to include not only the structure's owner, but also the owners of any antennas that happen to be located on the structure. Since that reading would be inconsistent with longstanding Commission precedent, the FCC suggests that the definition should be clarified some.

Similarly, FCC rules currently require that each structure's Antenna Structure Registration number be displayed "in a conspicuous place so that it is readily visible near the base" of the structure. But elsewhere the Commission has suggested that the number be displayed "along a perimeter fence" or "at the point of entry of the gate" – places not necessarily "near the base" by any means. Since the purpose of the display is to provide the public with information, the latter approach seems to make more sense than the one in the rules. The FCC proposes to resolve this by requiring the display to be visible from "the closest publicly accessible location[s]" near the base.

*One of the more intriguing aspects of the FAA/FCC relationship may be out of the FCC's hands for now.*

And if you're looking for further evidence of the need for a regulatory overhaul, look no farther than Section 17.58, which requires compliance with Section 1.70 of the FCC's rules. But check this out – Section 1.70 was deleted from the FCC's rules in 1977! Not surprisingly (but without a hint of obvious embarrassment), the Commission proposes to delete Section 17.58.

The Commission also proposes to streamline requirements regarding inspection and maintenance of marking and lighting by, *e.g.*, eliminating the separate inspection component entirely while retaining the obligation to assure proper lighting at all times. Timely notification of outages would still have to be made to the FAA. As an alternative, if inspection requirements are retained, the FCC may consider exempting certain network operations control center-based monitoring systems.

Another proposal: defining what alterations to a structure would require a new FAA study. The Commission's rules currently contain no such definition, even though the FCC has, since 1995, applied the informal standard that any change in height of one foot or more, or any change in location of one second or more, would trigger a new FAA study. The Commission now proposes to codify that standard.

And another: structure owners would have to keep records of observed or known lighting outages/improper functioning for two years.

Despite the Commission's historical inclination to let the FAA call the shots vis-à-vis the substantive standards for antenna structure lighting/marking, a number of the *NPRM*'s proposals suggest a curious independence of spirit on the FCC's part.

For example, to determine the coordinates of a structure, the FCC suggests that it might insist on specific accuracy standards or survey methods. But the FAA has declined to impose such a requirement, and conflicts with the FAA's process could arise if the FCC insists on specific standards/methods.

Along the same lines, the FAA requires structure owners to notify it of the structure's construction or dismantlement within five days. The FCC, by contrast, provides only 24 hours for such notice and, without explanation, the Commission proposes to stick by that limit.

Since the *NPRM* is intended to "update and modernize" all of Part 17, there are more specific proposals, as well as broad invitations for comments and suggestions. This presents an excellent opportunity for anyone with an antenna structure to weigh in.

But one of the more intriguing aspects of the FAA/FCC relationship may be out of the FCC's hands for now. The FAA has on occasion asserted authority

*(Continued on page 15)*

*Two Internet sales = $25K fine*

# Jammer Jammed

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We have written elsewhere about the irritations of other people using cell phones in public places. Technology, having caused this problem, also offers a solution: widely available on the Internet are jammers that silence phones nearby, and sometimes at a considerable distance. We Googled "cell phone jammer" and found dozens of places selling them.

Some outfit calling itself the "Federal Communications Commission" has declared jammers to be illegal. Recently it levied a fine of $25,000 against a company with the unwisely chosen name of "phonejammers.com" that offers them on the Internet. (This is like putting a license plate on your car that says SPEEDER.) The company denied marketing in the United States, but the FCC found two in use that the company had sold. Both were relatively high power, as jammers go – five and eight watts respectively. The five-watter, used by a Texas cosmetology school, resulted in a local cell phone provider lodging interference complaints; the other interfered with calls to and from a sheriff's office in Florida. One suspects the users had these cranked up a lot higher than was needed to protect the immediate premises.

Ironically, in some states it is legal to openly carry firearms into a Starbucks, say. But not a phone jammer. So when the cell phone at the next table erupts into *The William Tell Overture* and its owner bellows, "HELLO? HEY! YEAH, IN A STARBUCKS! IT'S RAINING HERE! SO WHERE'RE YOU?" pulling out the jammer is not an option. It's the firearm or nothing. This may not be good public policy.

Yet the FCC runs roughshod over citizens' inalienable right to enjoy a cup of coffee in peace. Phone your congressional representative to complain. But please, step outside to make the call. Especially in open-carry states.

***(Part 17** - Continued from page 14)*

over not only the physical nature of antenna structures, but also their RF characteristics as well. (The FAA's approach is understandable in view of the fact that the FCC defines "antenna structure" to include not only the physical structure, but also any radiating and/or receive systems and related gear.) In particular, at times the FAA has withheld "no hazard" determinations based on the particular frequencies to be transmitted from the structure – for example, where operation of a proposed FM station would interfere with navigation frequencies used at a nearby airport. Since 2006 the FAA has been considering its own *NPRM* which would expand its own notification requirement to include a range of frequency-specific limits. In its *NPRM* the FCC now inquires whether the FCC's rules or policies should be altered in the event the FAA adopts the proposals pending in *its* 2006 *NPRM*. It is not at all clear whether the Commission sees a possible inter-agency impasse here and, if so, what the prospects for resolution might be.

While we may welcome the opportunity to chip in our respective two cents' worth to the FCC, all concerned might be better off if the Commission and the FAA were to commit themselves to ironing out, once and for all, all aspects of their shared responsibilities. Unilateral action by either agency creates the possibility of conflict with the other, with resulting confusion for the regulated masses. Of course, the FCC and FAA have been unable to resolve their relationship to date – as is evident throughout the FCC's *NPRM* – so it may be idle to suggest that they should do so now. But there's no harm in asking.

The deadlines for comments and reply comments have not yet been set. Check back here for updates.

*(**Reforming USF** -Continued from page 1)*

***The NBP Principles on Funding Broadband***

As a refresher, recall that the NBP recommended that the Commission create a new fund to support Broadband services – the Connect America Fund (CAF) – and that the CAF should adhere to the following principles:

- "CAF should only provide funding in geographic areas where there is no private sector business case to provide broadband and high-quality voice-grade service";
- "There should be at most one subsidized provider of broadband per geographic area";
- "The eligibility criteria for obtaining broadband support from CAF should be company- and technology agnostic so long as the service provided meets the specifications set by the FCC";
- "The FCC should identify ways to drive funding to efficient levels, including market-based mechanisms where appropriate, to determine the firms that will receive CAF support and the amount of support they will receive; and
- "Recipients of CAF support must be accountable for its use and subject to enforceable timelines for achieving universal access."

*Should support be provided on the basis of* counties *rather than census blocks?*

***NOI: Do You Like This Year's "Model"?***

As part of the NBP, the FCC's staff developed an economic model to estimate the level of additional funding that would be required to extend broadband service to all unserved households in the United States (the $24 billion "Broadband Availability Gap"). This obviously had to rely on numerous ***assumptions*** regarding terrain, infrastructure of both wireline and wireless networks, service costs, uptake rates, etc. The staff analysis runs to some 150 pages but is well worth a look since it covers a wide range of issues affecting the broadband industry including identifying unserved areas, projected costs and projected revenues for broadband providers.

In the NOI, the FCC seeks comments on specific issues regarding the model, including:

? Would use of a ***generic federal model*** provide a "more uniform and equitable result" than use of individual carrier cost studies based on individual local factors and the provider's regulatory classification? [Answer sought by the FCC: "Yes"]

? Should the FCC use a market-based mechanism (***reverse auction***) to select the provider to receive federal funding? If so, should there be a "reserve price" (maximum level for bid)? [Answers sought by FCC: "Yes"]

? Should the FCC use a ***forward-looking cost model*** rather than one that uses incremental costs of upgrading or expanding existing networks? Their proposed model is different from the one currently used in connection with USF for non-rural carriers. [Answers . . . well, you know . . .]

Interestingly, while the focus on ***geographic areas*** for some time has been on census blocks, the FCC asks whether it should instead provide support on the basis of ***counties***, as it tentatively concludes that providers make decisions on areas larger than census blocks, and funding on the census block level could lead to an "unrealistic patchwork quilt of different technologies" in a small area.

Also of note are the suggestions that while the proposal is to be "technology agnostic", satellite services probably will not be considered because it is assumed that satellites do not have the capacity to serve all unserved households.

***NOI: Expedited Interim Funding – Going Once, Going Twice?***

The FCC also seeks comment on the best way to create an accelerated process to distribute funding to support new deployment of broadband-capable networks in unserved areas during the period they are considering final rules to implement fully the new CAF funding

*(Continued on page 17)*

*(**Reforming USF** - Continued from page 16)*
mechanism. The NOI floats the idea of using a ***reverse auction*** to distribute such interim funding (that is, potential service providers bid ***down*** the amount of support they will take to provide service to a particular area).

***NPRM – Holding on to the Fort Until the Cavalry Comes***

While the NOI looks forward, the NPRM seeks comments on a number of proposals to cut legacy universal service spending in high-cost areas while the CAF is developed. Of note, the FCC seeks comments on:

- ? Should the current USF be ***capped at 2010 level***? If so, do you cap each USF mechanism and/or the amount of support received by each carrier?
- ? What would the ***impact of capping be on carrier rates***, especially on intercarrier compensation? What would be the impact on carriers in the NECA pool?
- ? Should ***rate-of-return (ROR) carriers be required to shift to price caps*** or other incentive regulation? The FCC is trying to build the case that rate-of-return regulation does not make sense in an increasingly competitive marketplace, where carriers offer numerous non-regulated services. Given that there are over 1,000 small rural ROR carriers, a mandatory shift to price cap regulation would be a radical change for the industry.
- ? Should the FCC ***eliminate high cost support to more than one carrier in an area (i.e., to competitive carriers or "CETCs")***? CETCs are primarily wireless carriers, though this would apply to wireline CLECs as well. The proposal is to ramp down support equally over a five-year period.

***Are You Ready to Solve Rubik's Cube?***

In recognition of the difficulty ahead, FCC Chairman Julius Genachowski called USF reform a "complex Rubik's cube project." Notably, industry response to the NOI/NPRM has been almost non-existent, so far. Perhaps everyone is just overwhelmed with the breadth of the task. Or maybe they're just digging through their attics to find copies of the rules to "Rubik's Cube." Given the billions of dollars at issue in this proceeding, though, we are certain that there will be major clashes among the players. Stay tuned.

*(**CableCARD NPRM/NOI** - Continued from page 10)*
The Commission envisions that this device could be installed either on the back-end of a television, or as a device to which multiple devices would be attached. But, as with most "concepts", the Commission is seeking comment on almost all elements of how this device will operate, including communications protocols, content protection requirements, and whether the consumer market demands that these devices should be developed by the Commission. One potentially sticky aspect of the proposal is that the Commission envisions that there would be a uniform channel guide and navigational features across all devices. While the Commission notes that there is an inherent conflict between standardization and innovation, it does appear to favor a standardized user interface that would improve customer service and ease of use.

Since this proceeding is at the Notice of Inquiry stage, there is very little meat on the proposals offered by the Commission. Instead, much like the National Broadband Plan, the Commission has teed up the subject matter, and is interested in receiving comments on all aspects of the proposal. On the other hand, combined with the adoption of the Notice in the CableCARD proceeding, it is clear that the Commission believes both that (a) the MVPDs and manufacturers have not fully met the goals set forth in Section 629 of the Communications Act, and (b) some sort of Commission-directed nudge is necessary.

Whether or not the final result is the adoption of the equivalent of the MVPD phone-jack is unknown, but we will keep you up-to-date as the proceedings move forward.