November, 2010

Fletcher, Heald & Hildreth
The Law of Communications

FHH Telecom Law

Current Issues in Telecommunications Law and Regulation

Divvying up the "Mobility Fund"

FCC Proposes Distribution Mechanism for USF Windfall

By Donald Evans
evans@fhhlaw.com
703-812-0430

As we have reported, the FCC decided in September that, instead of re-distributing to CETCs the $500 million or so in USF funds which Verizon and Sprint renounced as a condition of getting their mergers approved, it would keep the money in a rainy day fund to support broadband mobility. The FCC's action in that regard was highly suspect on legal grounds (full disclosure: FHH represented the lead proponent of re-distribution of the money to CETCs), but it has nevertheless gone ahead and initiated a rulemaking to try retroactively to justify its unprecedented action. At the same time, it has now initiated another rulemaking to determine where and how the so-called "Mobility Fund" will be distributed.

This proceeding may be a classic case of pre-hatch chicken enumeration, since the Commission's original pocketing of the Verizon/Sprint funds remains very much in contest. A spate of petitions for reconsideration have been filed, and the matter is likely to go to the Court of Appeals if the FCC remains unmoved. That process could take as much as two years. So no matter what happens in the new rulemaking, Mobility Fund dollars are not going to be finding their way into anyone's pockets soon, if ever.

That said, the Commission's proposal for distributing the Mobility Fund is a solid step forward in tailoring the distribution of Universal Service Fund support to those precise areas that most need it without wasteful duplicative support payments. The FCC proposes to distribute $100 - $300 million dollars from the Fund by conducting a reverse auction. Bidders would propose to offer 3G-level service in census tracts around the country that have been

(Continued on page 12)

Checking under sofa cushions, behind cabinets . . .

NTIA Blueprint For Finding Federal Spectrum for Broadband

By Lee Petro
petro@fhhlaw.com
703-812-0430

Those of you awaiting the FCC's November 30 meeting (when the Commission is scheduled to unveil its plan for repurposing of TV spectrum) may want to get warmed up for that experience by leafing through two reports just issued by the National Telecommunications and Information Administration (NTIA). (Nit-picky observation: while the covers of both reports bear an "October 2010" date, both were first posted on the NTIA website on November 15.)

One – titled "Plan and Timetable to Make Available 500 Megahertz of Spectrum for Wireless Broadband" (Ten-Year Plan) – outlines in 23 pages of text (with some dazzling charts and tables) the overall process by which the government plans to jigger with existing spectrum usage in order to wring out 500 MHz for wireless broadband.

The second – with a formal title even more prosaic than the Ten-Year Plan's (we'll just refer to it as the Fast Track Evaluation) – lays out over more than 250 pages of text, tables, lists (and a two-and-a-half page glossary of abbreviation and acronyms) the analytical process through which the Feds have identified 115 MHz of their own spectrum which they would like to feed to the Voracious Broadband Beast within five years.

NTIA has also issued a more digestible five-page "fact sheet" summarizing the two longer items.

The Fast Track Evaluation illustrates a couple of things.

First, it may be seen as a gesture of good faith, an effort by

(Continued on page 13)

Inside this issue

"Bill Shock" On The Docket 2
Telecom in the Next Congress: Who's On First? 3
VoIP Provider Obligations Sharpened 4
E-Rate Program Updated, Upgraded 5
Joint Board Weighs In On USF Lifeline, Link Up 6
Congress: Bringing Digital Eyesight To The Blind? 8
FCC Solves The Curious Case Of The Mystery Fees 11

Goal: no more unhappy surprises

"Bill Shock" On The Docket

Usage alerts, other steps proposed to prevent unexpected phone charges

By Michelle A. McClure
mcclure@fhhlaw.com
703-812-0484

After much public hand-wringing, the FCC has proposed new rules that would require mobile service providers to provide usage alerts and information to assist consumers in avoiding unexpected charges on their bills. The Commission has reviewed data indicating that many mobile consumers experience "bill shock," a medical condition in which a sudden, unexpected increase in one's monthly cellular bill causes massive trauma to a consumer's wallet. Typically the increase results from unintentional usages outside the scope of the consumer's service plan. The Commission conducted a survey which indicated that as many as 30 million Americans have experienced bill shock, a condition which medical professionals believe could be prevented by timely and easily accessible usage information. Unfortunately, this condition does not fall within the new Health Care Law, so millions of consumers have been left unprotected.

The GAO released a report to Congress which estimated that 34 percent of wireless phone users received unexpected charges on their bills. Many of these consumers were not alerted by their provider before they incurred the charges even though the technology to prevent bill shock exists. Despite its availability, such technology is not uniformly utilized by mobile service providers.

The Commission believes that consumers are entitled to baseline information allowing them to control the costs they incur for mobile services. Accordingly, the Commission proposes requirements that will provide timely information to consumers about their usage, such as: (i) voice or text alerts when a customer approaches and reaches monthly limits that will result in overage charges; (ii) notification that international or other roaming charges that are not covered by their monthly plans are about to be incurred; and (iii) disclosure of any tools offered by mobile providers to set usage limits or review usage balances including whether all carriers should be required to offer the option of capping usage based on limits set by the consumer.

The Commission requests further comment regarding the specifics of instituting the proposals such as whether such notifications should be provided in "real time" including any technical limitations or other considerations, how notifications should be provided for multi-line family plans, and what is the most effective way to provide the notification (*e.g.*, via voice or text alerts). Also, the Commission seeks comment as to whether it should establish a precise usage level at which the initial notification message would be triggered. For example, new EU regulations require that wireless providers notify a consumer using a data roaming service when the consumer has reached 80% of an agreed-upon limit. Also to be considered is whether multiple alerts should be provided (either at reaching the trigger amount, upon exceeding the monthly usage amount, or every time the charge is to be incurred) or if there should be a one-time alert. In any scenario, should the exact amount of the imminent charge be provided? The Commission also requests comment on what length of time should be allowed for mobile providers to implement any usage alert requirements that are adopted, what are the best methods to ensure that consumers are made aware of the available tools for monitoring usage balances and limiting usage, and how can consumers access these tools and any applicable charges. Also, should all

(Continued on page 5)

Fletcher, Heald & Hildreth
A Professional Limited Liability Company

1300 N. 17th Street - 11th Floor
Arlington, Virginia 22209
***Tel*: (703) 812-0400**
***Fax*: (703) 812-0486**
***E-Mail*: editor@fhhlaw.com**
***Web Site*: fhhlaw.com**

Editor
Donald J. Evans

Design
Harry F. Cole

Contributing Writers
Paul J. Feldman, Christine Goepp, Frank R. Jazzo, Mitchell Lazarus, Michelle A. McClure, Lee G. Petro, and Davina Sashkin

FHH Telecom Law is intended to provide general information and does not constitute legal advice or solicitation of clients. Distribution of this publication does not create or extend an attorney-client relationship. Fletcher, Heald & Hildreth, P.L.C. may represent clients in proceedings described here.

Copyright © 2010 Fletcher, Heald & Hildreth, P.L.C.
Copying is permitted for internal distribution.
All other rights reserved.

Meet the new Congress . . . same as the old Congress?

Telecom in the Next Congress: Who's On First?

By Catherine McCullough
cmccullough@speakeasy.net
202-236-8141

[*Editor's Note: Ms. McCullough is a guest columnist this month. She is a principal in Meadowbrook Strategic Government Relations, LLC and is a specialist in Congressional relations.*]

Welcome to the 112th Congress. Notice anything missing? Like a third of the House Energy and Commerce Dems? Or a Congressional mandate on net neutrality? Or Chairman Boucher? Me too. So let's take a few minutes to figure out what it all means.

Let's start with the larger picture. This year's midterms have put Members on notice that voters are not afraid to fire them. And each party is looking to 2012 to capture complete control of both houses of Congress and the White House.

Members will be feverishly competing for two things in the next Congress: love and money.

Therefore, there are two things Members will be feverishly competing for in the next Congress: love and money. By this I mean votes (from an unusually angry electorate, eager to hold officials accountable) and the ability to spend on projects that they want to preserve (without looking fiscally irresponsible).

Both love and money can be found in telecom policy, which means that these issues will get unusual attention from Congressional leadership, including precious "floor time" for debate. Here is how I see the 112th being impacted:

When the House and Senate are split between parties, consumer issues come to the fore. This is because neither side has the votes to pass controversial bills, so the House and Senate will try to complete legislation that makes the party in power that passes it look good – and as if voters' love is their priority – and the party in the minority that obstructs it look bad – as if it does not care about protecting constituents.

In the world of telecom, this means issues such as online privacy are some of the first to be considered. The draft bill floated by Rep. Boucher earlier this year will be the starting point. In order to pass a Republican House, the final legislation will not be what consumer groups wish, but in the end I believe there will be a bipartisan White House signing ceremony where all parties will take credit for protecting their beloved voters.

(Fair bet: the signing ceremony will take place during the second year of the 112th Congress, possibly in the late Spring before Members go home to star in their local Fourth of July parades and start their campaigns.)

Besides the love of voters, the other thing Members desperately want is money, and telecom policy is one of the few places it can be found. The government's portion of money from spectrum auctions can be used either to (a) "offset" any spending priorities Members might back in appropriations bills or (b) pay down debt.

Certainly the most politically sticky problem in creating any TV spectrum auction policy is deciding how auction proceeds are split. Right now, politicians on both sides of the aisle, whether in the Administration or in Congress, are unusually motivated to come up with a solution quickly, in order to calculate how much the government can expect to recoup from any such auction. Therefore, look for an unusually high amount of government cooperation – between parties, between the House and Senate, and between Congress and the Administration – when it comes to creating a formula during the next year.

Reform of the Universal Service Fund is another issue that represents both love and money for Congress. Although those in the telecom business often view the issue as one of marketplace structure, reform can be sold to the voting public as a consumer issue since reform could lead to lower bills. (The Democratic-led Senate Commerce Committee's focus on consumer issues could bolster support for this theme.) In addition, USF reform holds attraction for those Members concerned about money – in this case, saving it by eliminating waste and fraud.

Again, look for the work Representative Boucher and his staff did in the 111th Congress to have some influence in the 112th. The Boucher/Terry bill introduced in July

(Continued on page 10)

VoIP Provider Obligations Sharpened

FCC, Court decisions say, "Pay up!"

By Paul J. Feldman
feldman@fhhlaw.com
703-812-0403

Recently, the FCC released the latest chapter in its schizophrenic, zig-zag, approach to regulation of voice-over-Internet protocol telephony (VoIP). In a Declaratory Ruling, the FCC held that going forward, providers of "nomadic" VoIP may be required to contribute to *state* universal service funds (USF) based on their *intrastate* revenues, if the state rules do not conflict with federal laws and policies (or with other states' policies). At the same time, the U.S. Court of Appeals for the Ninth Circuit ruled that VoIP providers must pay reciprocal compensation for the termination of their local calls. Together, these actions may bring at least some temporary stability to important questions regarding the economics of VoIP. However, these answers may just be temporary.

These recent actions may bring at least some temporary stability to important questions regarding the economics of VoIP.

As background, readers may remember that in 2004, the FCC declared that VoIP is an *interstate* service, and thus states were pre-empted from imposing traditional state telephone regulation on VoIP providers. This was based on the theory that it is impossible as a matter of technology to separate the interstate and intrastate traffic in VoIP. The FCC started imposing a variety of federal rules on VoIP, though, and when the Federal USF fund got too big and more contributors were needed, the FCC started to have second thoughts about the impossibility of separating inter- and intra-state VoIP traffic. So, in 2006, the FCC ruled that VoIP providers had to contribute to federal USF based on their interstate revenues. Given the apparent difficulty in separating out interstate and intrastate VoIP traffic and revenues, the FCC allowed VoIP providers to use a "safe harbor" estimate that 64.9% of revenues are interstate.

Predictably, after the FCC ruled that VoIP providers must contribute to federal USF, the states wanted their cut, too. Thus, some of the states started requiring VoIP providers to contribute to state USFs. When VoIP provider Vonage appealed the Nebraska state USF requirement, the U.S. Court of Appeals for the Eighth Circuit ruled in Vonage's favor. The Nebraska and Kansas public utility commissions accordingly sought a declaratory ruling from the FCC on the issue.

In the recent Declaratory Ruling, the FCC gave the states what they wanted, with some minor limits. The FCC ruled that a state's intrastate contribution methodology must be consistent with the FCC's interstate method, suggesting by implication that states could allow a safe harbor 35.1% (*i.e.*, 100% - 64.9% = 35.1%) estimate for intrastate traffic. The FCC also held that state assessments must not result in double assessments of revenue that a VoIP provider has properly allocated to a different state under that state's rules. That could get messy: if there is a conflict among different states' methods, which state rule is the VoIP provider supposed to follow?

It also should be noted that this entire ruling applies to *nomadic* VoIP – where the VoIP subscriber's phone can be moved and thus the originating location of the call is more difficult to ascertain. The FCC's Ruling makes no mention of fixed VoIP – where the originating location of the call can be ascertained. Perhaps the assumption is that there is no problem in separating out traffic for fixed VoIP, so there is no question that it can be subject to state USF. But that is unclear.

The last paragraph of the Ruling warns that the newly declared policy may change as part of future broad USF reform. As if we didn't expect that!

In the economics of supporting a public telephone/telecommunications network, intercarrier compensation (access charges and reciprocal compensation) issues are closely connected to USF. And like USF, intercarrier compensation for VoIP has followed a twisted path. After much debate and conflict between VoIP providers and operators of traditional networks, the FCC previously ruled that VoIP providers need not pay access charges to carriers for the termination of interstate VoIP calls. But that left open the issue of payment of reciprocal compensation to local carriers for interconnection of VoIP traffic within local areas, including local access and transport areas (LATAs). Recently, the U.S. Court of Appeals for the Ninth Circuit issued a ruling

(Continued on page 9)

More flexibility, less waste, fraud and abuse – what's not to like?

E-Rate Program Updated, Upgraded

New and improved universal service support mechanism for schools, libraries

By Frank R. Jazzo
jazzo@fhhlaw.com
703-812-0470

The FCC has adopted a *Sixth Report and Order* (6th R&O) in its Schools and Libraries Universal Service Support Mechanism proceeding (more commonly known as "the E-rate program"). In the 6th R&O, the FCC upgrades and modernizes the E-rate program, consistent with the National Broadband Plan's (NBP's) vision of improving broadband connectivity at the nation's schools and libraries.

The revisions adopted in the 6th R&O fall into three conceptual categories: (1) providing schools and libraries with greater flexibility to select and make available the most cost-effective broadband and other communications services; (2) simplifying the E-rate application process; and (3) improving safeguards against waste, fraud and abuse.

> *The 6th R&O provides schools and libraries with more flexibility.*

In particular, the 6th R&O provides schools and libraries with more flexibility by allowing applicants to lease dark or lit fiber from the most cost-effective provider. The FCC has also changed its rules to allow schools to permit community use of E-rate funded services outside of school hours. With affordable fiber, these "School Spots" are a major step toward the NBP's goal of connecting an anchor institution in every community to affordable 1 gigabit per second broadband. The FCC indexed to the inflation rate E-rate's funding cap in order to maintain purchasing power. Finally, the FCC seeks proposals for a limited pilot program to establish best practices to support off-campus wireless connectivity for portable learning devices, such as digital textbooks, outside of regular school or library operating hours. Applications for the pilot program must be submitted on or before December 17, 2010.

The FCC simplified the E-rate program by streamlining the application process to reduce the administrative burden on applicants. The FCC also removed the technology plan requirement for priority one (telecommunications services and Internet access) services. The FCC is facilitating the disposal and recycling of obsolete equipment that received E-rate support by authorizing schools and libraries to receive consideration for such equipment.

The 6th R&O improves safeguards against waste, fraud and abuse by codifying the requirement that competitive bidding processes be fair and open. Applicants may not solicit or receive gifts from service providers and service providers may not offer or provide gifts to applicants. In addition, the 6th R&O adopts the eligible services list (ESL) for funding year 2011 (July 1, 2011-June 30, 2012). The FCC revisits this list each year based on input as to which services should or should not be deemed eligible for support. The only change of significance in this year's ESL was to include features that facilitate the ability to communicate, such as blogging, e-mailing over a school or library's hosted website, discussion boards, and services that may facilitate real-time interactive communication such as instant messaging or chat, as eligible for funds as part of a web hosting package. The FCC had previously deemed such features as ineligible, presumably because of their potential to devolve into a social networking site.

The FCC noted that the 6th R&O represents the first stage in a multi-stage upgrade of the E-rate program. The changes adopted will be in place for the upcoming funding year; however, the FCC will continue to consider changes to further improve and update the E-rate program.

***(Bill Shock** - Continued from page 2)*

mobile service providers be required to comply with the proposed requirements or should some be excluded such as prepaid services.

Comments are due 30 days after the date of publication in the Federal Register and Reply Comments are due 60 days after the date of publication in the Federal Register. As of the writing of this article, the NPRM had not yet been published in the Federal Register.

Joint Board Weighs In On USF Lifeline, Link Up

But Board balks because big, basic broadband questions left unasked

By Christine E. Goepp
goepp@fhhlaw.com
703-812-0478

Acting in response to a request by the Commission, the Federal-State Joint Board on Universal Service (Joint Board) has adopted a Recommended Decision concerning implementation of the Low Income component of the Universal Service Fund (USF). Not stopping there, the Joint Board took the time to vent a bit about some broader issues about which the FCC didn't ask it to comment.

(The Joint Board is composed of representatives from the FCC, state public utility commissions, and one consumer advocate. It was established in 1996 to provide recommendations on the implementation of the universal service provisions of the Telecommunications Act of 1996.)

The Joint Board suggested that the FCC might explore establishment of uniform minimum eligibility requirements.

Back in May, 2010, the Commission asked the Joint Board to take a look at the Link Up and Lifeline components of the USF's Low Income Program. The Link Up Program helps low income consumers defray the initial hook-up costs for telephone service; the Lifeline Program helps them defray the monthly costs of such service. Both programs are funded through the USF, which in turn is funded by telecom companies paying in a percentage of their interstate end-user revenues (which are in turn paid for by consumers).

In its May Order, the Commission asked the Joint Board to address three particular administrative aspects of the Link Up/Lifeline Programs: eligibility (who should get the money), verification (how to make sure the money is in fact going to the right people), and outreach (telling people the money is available).

In response, the Joint Board offered the following:

Eligibility. Eligibility requirements for the Link Up and Lifeline Programs are currently set either by (a) individual states that have their own mandatory Link Up/ Lifeline programs or (b) the federal government. Federal eligibility is based on participation in certain means-tested programs (*e.g.*, Medicaid, Food Stamps) or income at 135% of the federal poverty guideline (FPG) level. Because of the dual state/federal approach, eligibility can vary from state-to-state. The Commission asked the Joint Board to examine whether changes in the current eligibility arrangements might be in order in the interest of uniformity.

Without offering any specifics, the Joint Board suggested in response that the Commission might want to explore the establishment of uniform minimum eligibility requirements (both income and program-based) to apply to all states. Such uniformity might simplify some administrative aspects of the program and might increase program participation. However, the Joint Board cautioned that taking that approach might impose undue impact on the states, and it advised that uniformity be pursued only if that impact would not be unreasonable.

With respect to federal minimum income level, the Joint Board recommended that the FCC seek comment on raising that floor from 135% of the FPG level (where it currently sits) to 150%.

The Commission also asked the Joint Board whether states should be required to adopt automatic enrollment programs. Such programs electronically link one or another state agency with the carrier, providing an interface that allows low-income individuals to automatically enroll in Lifeline/Link Up once they have enrolled in a qualifying public assistance program. Such systems are already in place in some, but not all, states. The Commission considered making such systems mandatory several years ago, but ultimately decided not to because of various burdens such a requirement might impose on states and carriers. But it held open the possibility of revisiting the issue down the line – and that time has now come.

In response, the Joint Board has again recommended that the FCC hold off on mandating automatic enrollment. The Joint Board believes the record needs to be more fully developed with respect to certain issues, such as the potential cost of implementation and any needed

(Continued on page 7)

(***Joint Board Recommendations -*** *Continued from page 6*)

changes to state law. (While some commenters argued that the increased number of participants would increase fund size, the Joint Board pointed out that increased Lifeline and Link Up participation is a stated program goal.) The Joint Board did recommend that the FCC encourage automatic enrollment as a best practice for states.

Verification. Currently, a variety of approaches – state, federal, or some combination of the two – are used across the nation to ensure that Lifeline recipients continue to meet eligibility requirements. While the verification methods are set by the government, they are implemented by carriers. The Joint Board has recommended that the FCC adopt a "floor" of minimum verification requirements, with carriers providing the data from their verification efforts to both federal (*i.e.*, the FCC and the Universal Service Administrative Company) *and* state authorities. Those data would also be publicly available. The hope is to prevent and combat fraud, waste, and abuse in the Low Income programs. States would still be free to impose additional requirements if they wish. Again, the FCC will need to seek comments on what these minimum requirements will be and who will be responsible for carrying them out.

Given cost, agency coordination, and privacy concerns, the Joint Board recommended that the FCC seek further comment before implementing a national database for certification and verification of Lifeline consumers' eligibility.

Outreach. The Joint Board observed that outreach and penetration remain a problem: in 2009, the nationwide Lifeline participation rate among eligible consumers was only 36%, and in some states less than 10%. "Lifeline participation rates have not significantly improved" since 2004, when the FCC last established outreach guidelines. Therefore, the Joint Board has recommended that the Commission establish specific mandatory outreach requirements for all participating carriers. The FCC requirements would be a minimum, upon which states could impose additional outreach requirements. As with the other areas addressed by the Joint Board, on this point the Joint Board recommended that the FCC seek comment on these mandatory outreach requirements, including potential measures such as requiring Lifeline and Link Up information on carrier's home page, other media requirements, and use of multiple languages.

The Commission will doubtless be seeking comment on these and, probably, a host of related issues. This is to be expected in view of the dramatic changes which have occurred in the telephone industry in just a few short years. But, as the Joint Board was quick to note, the Commission did *not* ask the Joint Board to consider a number of other issues that (in the view of the Joint Board, and probably many others) can and should be addressed now as well. The FCC, presumably with the advice of the Joint Board, may have to take the lead on USF reform as, with Boucher gone and the change in the House, Congress is unlikely to take action this year. (As we previously reported, Representative Lee Terry (R-NE) does plan to reintroduce a USF reform bill next year.)

The Commission did **not** *ask the Joint Board to consider a number of other issues.*

The primary issue here is Broadband. The FCC did ask the Joint Board about applying Lifeline and Link Up to broadband – but only to the extent that it might relate to the narrower issues of eligibility, verification and outreach. That left open a broad range of Big Questions such as "the definition of the broadband services or functionalities to be supported, sources of funding, the funding and contribution rules, and the overall approach to using low-income support to achieve universal broadband service".

The Commission's failure to put such important questions on the table for Joint Board consideration provoked a testy response from the Joint Board, which rattled off the top of its head seven examples of big practical issues relating to broadband and USF that it was *not* asked. The Joint Board also reproached the Commission for recently extending Lifeline funding to prepaid wireless Lifeline-only carriers without advice or consultation from the Joint Board. As the Joint Board griped, "given the lack of a definition for the term 'broadband' as a supported service, and how such service would be calculated and distributed, it would be extremely difficult, if not impossible, to comply with even the Commission's *de minimis* broadband-related requests that were included in the *Referral Order*."

Meet the 21CenComVidAccAct

Congress: Bringing Digital Eyesight To The Blind?

By Christine E. Goepp
goepp@fhhlaw.com
703-812-0478

Get set for a new set of sweeping changes cutting across all components of the communications universe, broadband and broadcast alike. On October 8, President Obama signed the Twenty-First Century Communications and Video Accessibility Act of 2010 (21CenComVidAccAct) into law. The new law dramatically expands mandatory disability access to include accessibility requirements for a wide range of equipment and services, such as VoIP phones, browser-enabled smartphones, email and text messaging services, webcasts of TV programs, video and navigation devices, and others.

While the debate over the FCC's authority to generally regulate broadband rages on, in this area at least the discussion is over. As one FCC official noted during a panel discussion on broadband adoption, the 21CenComVidAccAct "ventures into broadband access like no legislation ever has" by giving the FCC an "enormous mandate" to ensure that various communications are accessible to people with disabilities.

> *The 21CenComVidAccAct "ventures into broadband access like no legislation ever has"*

And the implications of the Act may go beyond communications-for-the-disabled policy.

The Act provides a mandate separate and apart – *and in addition to* – the Commission's general regulatory authority over telecommunications common carriers, broadcasters, and cable services. As a result, the FCC will now be able to regulate many different types of entities and activities, but *only to the extent* that they entail communications for the disabled. Could this trailblazing measure open the door for other types of broadband regulation not necessarily tied to disability? That remains to be seen, but the potential cannot be denied.

Don't look for any changes to happen right away, though – even the changes specifically addressed in the Act. The statute lays out a number of timelines for the Commission, all of which expect the FCC to get started right away, but most of which do not contemplate final action for at least a year (and in many cases, several years).

Virtually every segment of the broadcasting and telecommunications industries that has anything to do with broadband or video programming will be affected. Key provisions include:

- Manufacturers and service providers of "advanced communications services and equipment" – that is, interconnected *and* non-interconnected VoIP, electronic messaging services (e-mail, text messaging), and video conferencing – must ensure that their equipment or service is accessible to individuals with disabilities.
- Internet browsers provided by a manufacturer or provider of mobile phones must be usable by the blind or visually impaired, including the ability to launch the browser.
- TV programs that are re-broadcast over the Internet must retain closed captioning. This provision may be more feasible now that software is becoming available to automatically convert existing closed-captioning for webcast versions of television shows. Internet-only TV shows and user-generated content are *not* required to have closed captioning. As an aside, however, it is getting easier for users to voluntarily provide closed captioning. Google has just introduced a YouTube feature that will enable content creators to add voice-recognition closed-captioning (we note that viewers can also use this feature to translate captions into various languages – extending its usefulness well beyond the disabled community). Google closed-captioning and translation functions are fresh out of beta and amusingly glitchy, but are a glimpse of things to come.
- Hearing aid compatibility requirements are extended to anything that remotely resembles a telephone – that is, equipment "designed to provide 2-way voice communication via a built-in speaker intended to be held to the ear in a manner functionally equivalent to a telephone". (It will be interesting to see how the Commission squares this provision with its own proposed method of extending HAC to VoIP: *i.e.*, defining a "telephone" as "anything that is commonly understood to be a telephone".)
- The Commission is required to reinstate its video description regulations (which were struck down by

(Continued on page 9)

*(**21CenComVidAccAct** - Continued from page 8)*

the D.C. Circuit in 2002). Video description is a service that provides a voice-over description of the visual components of a video program ("as Bambi stands alone in the forest, a light snow starts to fall."). The Commission's initial video description rules, adopted in 2000 and tossed by the Court in 2002, were ginned up by the FCC without Congressional authorization. The lack of such authorization was fatal, according to the Court. That should not be a problem this time around, as the 21CenComVidAcc expressly provides the FCC all the authority it should need.

- The Commission must require video programmers and distributors to convey emergency information to the blind and visually impaired. The FCC is also authorized to promulgate regulations to ensure access by individuals with disabilities to an IP emergency network.
- Video display apparatus must be able to display closed captioning, video description, and emergency information. Devices that record video must enable the pass-through of such information.
- Accessibility functions, including those on navigation devices such as converter boxes, must be easier to activate. Advocates of the legislation cited circumstances in which a blind user, for example, would have to navigate multiple (visual) menus before being able to activate a voice feature.
- Telecommunications Relay Service funding will be available to support programs to distribute equipment designed to make telecommunications service, Internet access service, and advanced communications services accessible by individuals who are deaf-blind.

An ambitious array of administrative errands, to be sure. But don't worry – the FCC will have some help, because Congress has ordered it to establish a couple of "advisory committees" to assist in the development of the regulations mandated by the Act. The FCC's first order of business will be to form the committees, dubbed (ruh roh – Potential Confusion Ahead!) the "Emergency Access Advisory Committee" and the separate and distinct "Video Programming and Emergency Access Advisory Committee". Both must be established by December 8, 2010. They will then proceed to investigate and survey and do the kinds of things that advisory committees do, including especially making recommendations.

As far as substantive rule changes go, 21CenComVidAccAct specifies that the video description rules must be reinstated by October 8, 2011 (although compliance will be phased-in over a period of several years). The closed captioning decoding regs are due within six months of the Advisory Committee report on closed captioning (estimate somewhere between October, 2011 and April, 2012 for those rules). Additional rules will be developed in due course.

With all these irons in the fire, we can expect a slew of documents to come out of the FCC in the relatively near-term as it works its way through the honey-do list that Congress has thoughtfully passed along. Check back on www.CommLawBlog.com for updates.

*(**VoIP** - Continued from page 4)*

which might lead to resolution of that issue. It ruled that intraLATA VoIP traffic *is* subject to reciprocal compensation pursuant to an interconnection agreement.

In this case, the VoIP provider, Global Naps (G-Naps), argued that because VoIP calls are carried over the Internet, they cannot properly be properly classified as intraLATA traffic due to the difficulty of ascertaining the location of the originating phone number. When the connecting carrier, Cox, filed a complaint at the California Public Utilities Commission seeking payment from Global Naps, the CPUC credited Cox's showing that the location of the calls could be verified.

On appeal, the Ninth Circuit rejected all of G-Naps' numerous arguments. Among other things, the court rejected G-Naps' argument that it is technically infeasible to classify VoIP traffic based on the information on the originating area code. Importantly, the court also rejected G-Naps' argument that the payment of reciprocal compensation for VoIP is barred by FCC rules: while FCC policies prohibit application of *access charges* to VoIP traffic, those policies do not apply to reciprocal compensation, since the obligation to pay the latter is based on contract (an interconnection agreement), not on FCC rules.

So together the actions of the FCC and the Court may bring at least some temporary stability to important questions regarding the economics of VoIP. But as the FCC noted, all bets are off if and when the FCC (and/or Congress) takes further action on USF and intercarrier compensation. We will keep you up to date on this as developments occur.

(*The New Congress* - *Continued from page 3)*

2010 likely will serve as a starting point for future debate on the issue. In fact, much work to be done in the 112th Congress will be influenced by the work of the 111th, even though the ranks of House Energy and Commerce Democrats were so decimated by the election.

Telecom policy is somewhat unusual in Congress, in that Committee leadership from each party in charge of writing legislation work reasonably well together. This is not the case in many other Committees. Perhaps because telecom businesses are so dependent on a clear articulation of government policy, those involved in writing bills – staff and Members alike – are under pressure from both inside and outside the Committees to resolve differences. Therefore, changes in leadership and Committee makeup do not impact the creation of telecom legislation as strongly as they do other policy issues.

Changes in leadership and Committee makeup do not impact the creation of telecom legislation as strongly as they do other policy issues.

That being said, there will be changes in the House and Senate Commerce Committees. The changes on the Senate side will be small: the Chair and Ranking members will not change. Because there are now more Republicans in the Senate, the Republican-Democrat balance on the committees (known as the "ratio") will likely shift slightly – there will probably be one more Republican slot on the committee.

On the House side, changes are stark. Representative Barton is waging a campaign to keep his seat as top Republican on the Energy and Commerce Committee. However, Republican conference rules say that a Member cannot take a committee leadership slot for more than three terms – which Barton has used up. Barton is seeking a waiver from this rule, however, arguing that since during a part of that time the Republicans were in the minority, he should be given a chance to head up the committee while it has majority power.

If Barton does not get his waiver, the seat will likely go to Rep. Stearns (R-FL-6th), the current head of the telecom subcommittee, Rep. Upton (R-MI-6th), or Rep. Shimkus (R-IL-19th). If Stearns leaves telecom to head up the full committee, it is possible that Rep. Walden (R-OR-2nd) will take the chair of the telecom subcommittee. Walden has a background in radio broadcasting and has expressed interest in the position.

On the Dem side of the House, Rep. Bobby Rush (D-IL-1st) is campaigning to head the telecom subcommittee now that Rep Markey (D-MA-7th) has declined to take back that subcommittee position. Also said to be interested in the plum position are Rep. Eshoo (D-CA-14th) and Rep. Doyle (D-PA-14th). We should know who will win these leadership posts before Thanksgiving; each conference is scheduled to vote on their leadership shortly.

Certainly the development of telecom policy is being watched closely by one powerful stakeholder: the Obama Administration. Less than 24 hours after polls closed across the country on election night and results began to be known, FCC leadership was summoned to a meeting at the White House. In my view, this underscores the Administration's keen understanding of the role telecom policy plays in buoying our economy – and an understanding of how the new Congress' pursuit of love and money will impact the White House's own chances to be re-elected 2012.

The butler did it . . . no, wait, it was Verizon Wireless

FCC Solves The Curious Case Of The Mystery Fees

Verizon Wireless agrees to cough up $77 million, take steps to avoid recurrence

By Davina Sashkin
sashkin@fhhlaw.com
703-812-0458

Verizon Wireless agreed to pay a record $25 million "voluntary contribution" to the U.S. Treasury and refund $52.8 million to approximately 15 million customers in a settlement over "mystery fees" the wireless carrier had charged customers over several years.

The FCC Enforcement Bureau initiated an investigation in January of this year as to whether Verizon Wireless was in violation of the Communications Act's prohibition on common carriers engaging in unjust and unreasonable practices or of the Commission's truth-in-billing rules. It had received large numbers of consumer complaints and press reports about unexplained data fees charged to wireless phone subscribers who were not also subscribed to a data plan, otherwise known as "pay-as-you-go" or "PayGo" customers. The FCC determined that approximately 15 million of these PayGo customers were or may have been erroneously charged data fees over the course of the past three years.

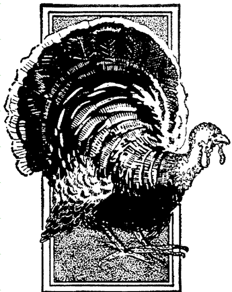
What exactly did Verizon Wireless do wrong, and what were these mystery fees?

By entering a consent decree, Verizon Wireless does not officially admit to any wrongdoing, of course, but a payout in fines and reimbursements totaling more than $75 million does not exactly inspire confidence in the company's innocence. In addition to the payout, the carrier agreed to a host of business practice reforms, new customer service initiatives, and compliance reporting for two years to prevent future erroneous charges.

So what exactly did Verizon Wireless do wrong, and what were these mystery fees?

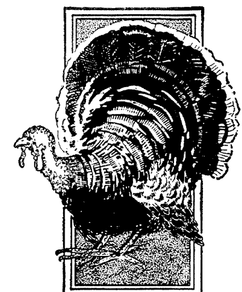
According to the consent decree, millions of PayGo customers were charged data usage fees of $1.99 per megabyte for: unauthorized data transfers caused by third-party applications (like games) built into certain phones; accessing certain web links that should not have incurred charges because they were supposedly free-of-charge (such as Verizon Wireless Mobile Web); unsuccessful access attempts when network coverage was insufficient to complete a requested data transfer; or unwanted data transfers that were initiated by third parties affecting customers with content filters installed on their phones.

The Commission has increased its focus on wireless consumer protection issues over the past year in response to pressure from advocacy groups and Congress about "bill shock" and other alleged abuses by wireless carriers. With this action, more so perhaps than by any proposed new rules, we have no doubt the FCC achieved its goals: faced with the potential for such enormous penalties, other carriers are left with no choice but to reform their own practices.



Holiday Schedule Reminder

**Fletcher, Heald & Hildreth, P.L.C.
will be officially closed on
November 25-26 (Thanksgiving weekend),
December 23-25 and December 31.
We will be open on Thursday, November 11
(the federal holiday in honor of Veterans' Day).**



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

designated by the FCC as underserved. The bidder who proposes to provide the service with the lowest amount of support would be awarded the subsidy at that level. There would be only one recipient in each census tract. More specifically:

- Only Eligible Telecommunications Entities (ETCs) or entities which have applied to be ETCs could participate in the auction. Because this is a "mobility" project, participants would have to demonstrate that they have access to broadband spectrum (either owned or leased) in the areas where they propose to receive support. Before being awarded the grant, the proposed recipient would have to demonstrate its financial ability to construct the build-out necessary to deliver the 3G service.

- Bidders would bid on a per unit basis and be compared against anybody else bidding for the same census tracts. For example, one bidder could bid to provide service with a subsidy of $50 per person over the underserved areas in the whole state of Nevada, while another bidder might propose to offer service to underserved areas of Washoe County for $55 per person. Someone else might propose service to underserved areas in all of the mountain states for $48 per person. The last bidder would get the nod in both the county and the state since he was the low bidder in census tracts where there was overlap with other bidders. This process nicely avoids the problem of trying to compare bids on differing geographic areas. The award would then be the winning bid ($48) times the number of people in the underserved census tracts.

- Winning bidders will likely be required to demonstrate that they will provide the 3G service to a set percentage of the population by a set date (possibly two years), but the FCC seeks input on that. For this purpose, 3G-level service is deemed to be 200 kbps up and 768 kbps down while travelling at 70 MPH over 90% of the designated coverage area. The FCC considers these relatively slow rates to be comparable to HSPA and EV-DO. Both voice and data must be supported.

- Interestingly, towers constructed with support money must be available to competitors, and data roaming must be permitted at reasonable and non-discriminatory rates. These measures are designed to ensure that other carriers are not frozen out of the supported markets.

- The actual money will be doled out in thirds – once right after your grant, once when you are 50% complete, and once when you are finished. Note that these funds are intended to be used for construction of infrastructure – not long term support – so the award is a one-time thing.

- As always, the FCC will require annual status reports and awardees will be subject to audits.

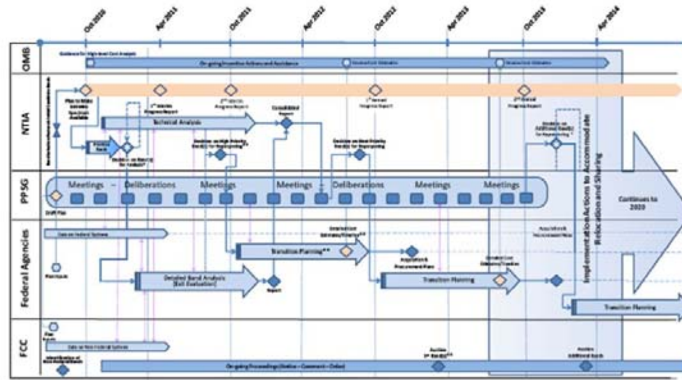
Despite the many uncertainties that still surround this Fund, this rulemaking merits the careful attention of low cost carriers .

None of this is set in stone since the FCC is just beginning the process and seems genuinely interested in getting input as to how to make this process work efficiently and effectively. Earlier efforts to use reverse auctions to award USF funds have always fallen flat, but because this effort leaves wireline LECs unaffected, it may stand a greater chance of success. We notice that in many ways the process mirrors last year's stimulus money program which was designed to shovel out $7 billion to fund broadband in unserved and underserved areas. Surely the stimulus awards and the resulting build-outs should be taken into account in awarding these new funds. Despite the many uncertainties that still surround this Fund (and which may ultimately make it evaporate), this rulemaking merits the careful attention of low cost carriers who cannot otherwise make a business case for serving marginal areas.

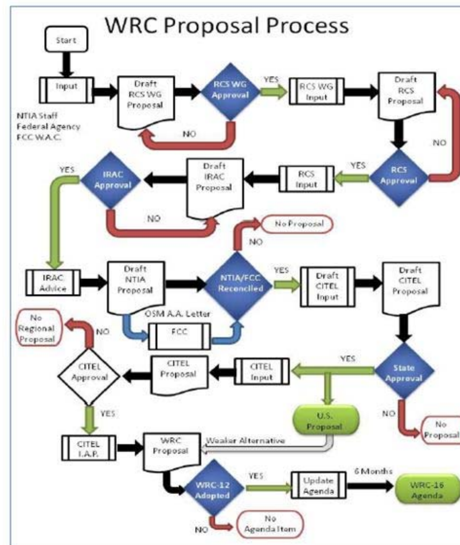
Comments are due no later than December 16, 2010, with replies due on or before January 18, 2011.

(***NTIA Spectrum Re-Purposing*** *- Continued from page 1)*

the government to assure wary private sector spectrum users that the *federales* are indeed committed to contributing their own spectrum to the effort. Yes, the government is planning a major league disruption to TV broadcasters' spectrum for the second time in a decade, the report seems to say, but the government is sharing in the pain by coughing up a bunch of its own spectrum as well – up to 115 MHz in the short-term.



Second, the Fast Track Evaluation underscores the complexities of the spectrum re-purposing task. For instance, the government bands which are proposed to be "fast tracked" over to broadband include spectrum currently used for radio altimeters – which (among other things) guide aircraft and "tactical weapons (missiles)" – and "precision guided munitions". Plainly, caution will need to be exercised when it comes to messing with this spectrum.



Of course, the ability of the government actually to realize the ambitious approach described in the Fast Track Evaluation depends on a number of unknowns – including, perhaps most importantly, the "timely allocation of funds". But NTIA still seems to want us to know that its heart is in the right place.

The Ten-Year Plan lays out in considerable detail the bureaucratic mazes that will have to be negotiated to achieve the desired goal of freeing up 500 MHz over the next ten years. Anyone questioning the use of the term "maze" here should consider the illustrative charts on this page, both of which were taken from the Ten-Year Plan. The top chart depicts on a single time-line the "Legislative, US Regulatory and International Actions" that will need to occur.

The only thing missing is the explanatory notation "And then a miracle occurs" somewhere toward the end.

The lower chart depicts the process which would have to be followed if any spectrum re-purposing would necessitate changes in the international radio regs:

The message is that, even though the Feds are hell-bent to get this spectrum re-purposing process started, and even though they remain absolutely convinced that that process is essential to the future of civilization as we know it, there remain a boatload of possible pitfalls in the way.

None of this should surprise anybody here. We have seen much, if not all, of this coming since the drumbeat of the National Broadband Plan began its extended crescendo a year ago. The NTIA's two recent releases merely underscore that we have a long, and likely hard, way to go before this is all over.

Interested persons may check out the NTIA Reports at the NTIA's website:

http://www.ntia.doc.gov/reports/2010/TenYearPlan_11152010.pdf

http://www.ntia.doc.gov/reports/2010/FastTrackEvaluation_11152010.pdf

http://www.ntia.doc.gov/reports/2010/SpectrumFactSheet_11152010.pdf