THE YEAR IN WIRELINE TELECOMMUNICATIONS REGULATION SEPTEMBER 2009 – SEPTEMBER 2010

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I. INTRODUCTION

The past year in wireline regulation has been shaped by two distinct Federal Communications Commission goals: implementing the large-scale reforms recommended in the National Broadband Plan ("NBP") and continuing day-to-day oversight and regulation of common carriers.

First, the Commission has begun the process of implementing the recommendations of the NBP, which was released earlier this year. The NBP laid out an ambitious and far-ranging set of goals and recommendations aimed at improving national access to and use of broadband service. The NBP includes recommendations for comprehensive review and reform of such central areas of wireline regulation as the Universal Service Fund, intercarrier compensation, and pole attachments. During 2010, the Commission has steadily marched through the NBP Action Agenda, which lays out a quarter-by-quarter plan for the Commission to implement the NBP's recommendations. The result has been the initiation of many new proceedings, particularly in the area of USF reform, but, as yet, little final action on the NBP recommendations, other than with respect to some aspects of pole access.

Of course, the Commission has long sought to reform both universal service and intercarrier compensation.

Because these two systems dictate the distribution of hundreds of millions of dollars in universal service support and intercarrier payments, consensus on appropriate reforms remains elusive. It remains to be seen whether the latest approach, as outlined by the NBP, will succeed. In the meantime, the various proceedings triggered by the NBP will continue to consume much of the attention of the industry and regulators. We detail below the major steps taken towards implementation of the wireline goals and recommendations in the NBP.

Second, while working to implement the ambitious, large-scale reforms outlined in the NBP, the Commission has at the same time devoted substantial energy to its continued day-to-day oversight of wireline services. In what may have been the most significant wireline order in 2010, the Commission substantially revised the approach to UNE and dominant carrier forbearance, repudiating the approach it had developed in the *Qwest Omaha Order* and its progeny, and outlining a market power analysis drawn from the DOJ/FTC Horizontal Merger Guidelines and competition analyses used by the FCC in mergers and other areas. The Commission's market definitions may have an impact outside of forbearance cases, such as special access regulation.

During the past year, the Commission or, in some cases, the Wireline Competition Bureau, has also: considered changes to the regulation of special access; implemented shorter number porting intervals; continued its oversight of existing USF programs; asked questions about the regulation of IP enabled services; issued its annual Section 706 Report on the deployment of broadband, including changing the baseline to meet the NBP's deployment goals; and adopted significant changes to video relay service regulation. Below, we discuss the major wireline regulatory actions taken by the FCC during the past year, along with key court decisions and actions by state regulators.

Finally, we briefly discuss those legislative developments during the past year that have particular significance for wireline regulation.

A. Summary

This article proceeds in thirteen Parts. In Part II, we discuss the Commission's recent UNE and dominant carrier forbearance decisions and their implications for future requests for relief from UNE obligations.

In Part III, we discuss universal service, covering the many new proceedings spurred by the NBP, the Commission's response to the most recent remand from the 10th Circuit asking the Commission to address fundamental USF definitional questions, and key Commission USF oversight decisions.

In Part IV, we discuss intercarrier compensation, covering the Notice of Proposed Rulemaking expected later this year and major court and regulatory decisions on intercarrier compensation.

In Part V, we discuss the Commission's ongoing evaluation of its existing special access regulatory regime.

In Part VI, we discuss the Commission's approval of the Verizon-Frontier transaction and its consideration of the proposed Qwest-CenturyTel transaction.

In Part VII, we discuss the Commission's implementation of the one-day porting interval for simple port requests.

In Part VIII, we discuss key developments for IP enabled services, including the implications for these services should the FCC reclassify broadband Internet connectivity as

a telecommunications service, questions posed by the Commission to Google Voice, and proposals to impose additional regulation on VoIP services.

In Part IX, we discuss the Commission's adoption of pole attachment reforms and its consideration of additional reforms.

In Part X, we discuss the Commission's annual Section 706 Report.

In Part XI, we discuss the Commission's reform of VRS.

In Part XII, we discuss key wireline legislative developments.

In Part XII, we provide a brief conclusion.

II. FORBEARANCE

A. Overview

In June 2010, the Commission substantially revised its approach to ILEC forbearance requests under section 10 of the Communications Act, making future forbearance from core ILEC regulatory requirements such as unbundling less likely. This revised approach, which hews more closely to traditional antitrust market analysis, is significant because it represents a break from tests that had been developed and applied in four previous FCC decisions – which themselves had split between two grants of forbearance and two denials (with the denials then remanded by the D.C. Circuit). This decision could have implications for other proceedings, such as special access regulation, in which the Commission faces questions that implicate ILEC market power. Qwest, however, has appealed the FCC's decision, and, as with any

test, application to specific facts can change over time or with changes in Commission membership.

B. Qwest Phoenix Forbearance

The *Qwest Phoenix Forbearance Order*[2] marked a clear and deliberate change in the FCC's analytical approach to ILEC petitions for forbearance from core 1996 Act local competition obligations. Qwest had, in 2005, been granted forbearance from certain mass-market dominant carrier and all UNE unbundling obligations for portions of the Omaha Metropolitan Statistical Area ("MSA")[3] in a decision that was upheld by the D.C. Circuit.[4] Following the *Qwest Omaha Forbearance Order*, Qwest sought similar forbearance in four other MSAs – Denver, Phoenix, Seattle, and Minneapolis-St. Paul. The Commission, however, denied those requests in its *Qwest 4-MSA Forbearance Order*,[5] ostensibly applying the *Omaha* analytical framework, but reaching a different conclusion in the application of that framework to the facts. In the wake of having forbearance from dominant carrier and UNE unbundling obligations denied in the Phoenix MSA as part of the *Qwest 4-MSA Forbearance Order* in 2008, Qwest both appealed that denial of forbearance to the D.C. Circuit and, in March 2009, filed a new petition for forbearance from dominant carrier and UNE unbundling obligations in the Phoenix MSA. In June 2009, the D.C. Circuit rejected the FCC's reasoning denying a parallel petition by Verizon for forbearance from dominant carrier and UNE unbundling requirements under the *Omaha* framework, finding that the FCC had applied a market share test which had not been a basis of the *Omaha* decision and which the FCC had not adequately justified.[6] As a result, the FCC sought and obtained a remand of its *Qwest 4-MSA Forbearance Order* for further consideration in light of the D.C. Circuit's *Verizon Remand Order*.[7]

In June 2010, with the remand of the *Qwest 4-MSA Forbearance Order* still pending, the FCC again denied Qwest's petition for forbearance from dominant carrier and UNE unbundling obligations in the Phoenix MSA.[8] However, in this Order, the FCC substantially revised its analytical framework, substituting a framework drawn from the competition analysis found in the Department of Justice and Federal Trade Commission Horizontal Merger Guidelines and that the Commission had regularly deployed in its own merger proceedings.[9] Applying its reworked framework, the Commission held that Qwest had failed to demonstrate that there was sufficient competition to ensure that, if forbearance was provided, Qwest would be unable to raise prices, discriminate unreasonably, or harm consumers as required under section 10 of the Communications Act.[10]

The *Qwest Phoenix Forbearance Order* can be best understood in light of the Commission's *Omaha* framework, as it evolved through the *ACS Anchorage UNE*,[11] *Verizon 6-MSA*, and *Qwest 4-MSA Forbearance Orders*. Although the Commission in *Omaha* (and in subsequent orders) disclaimed that it was adopting a generally applicable standard for review of requests for forbearance from ILEC dominant carrier and unbundling obligations, the Commission's three subsequent decisions had treated *Omaha* as establishing a generally applicable framework. With respect to UNE unbundling, the Commission in *Omaha* applied a threshold test for relief of whether the ILEC had a facilities-based competitor capable of serving at least 75 percent of the customer locations within a wire center. Notably, this was 75 percent of all customer locations, and was not divided between mass market and enterprise or residential and business locations. In fact, the Commission specifically eschewed defining product markets according to a market power analysis for the purposes of its UNE forbearance analysis.[12]

Next, the Commission made predictive judgments, based on the extent of an incumbent cable company's deployment, that the cable company would continue to make investments, including in the enterprise market, and that Qwest would have sufficient incentives to maintain wholesale offerings at reasonable prices.[13] In the *Verizon 6-MSA Forbearance Order* and the *Qwest 4-MSA Forbearance Order*, the Commission elaborated that for both its dominant carrier and UNE unbundling forbearance analyses, the ILEC's market share was a significant factor in the *Omaha* framework. For dominant carrier regulation, the Commission noted that where it had found an incumbent carrier to be non-dominant, it had a retail market share of less than 50 percent in addition to facing significant facilities-based competition.[14] For both dominant carrier and UNE unbundling forbearance, the Commission found Verizon's and Qwest's market shares to be too high MSA-wide to justify forbearance, but without specifying the level which would be adequate.[15]

The *Qwest Phoenix Forbearance Order* repudiated the somewhat amorphous *Omaha* framework. Upon further consideration, the Commission argued that the *Omaha* framework:

- Used "different analytical frameworks for evaluating the marketplace competitiveness underlying requests for relief from different obligations – *e.g.,* unbundling obligations, certain dominant carrier regulations, and certain other section 251(c) and section 271 obligations, respectively."[16]
- Conducted a "higher-level analysis" that did not "formally define product markets pursuant to a market power analysis" and thus, "led to certain conclusions that were not adequately justified as a matter of economics," including its reliance on

predictive judgments about wholesale markets that were not borne out.[17]

- Employed a two-part test (petitioner's retail market share for mass market services and the incumbent cable company's geographic reach), neither of which "adequately assesses the presence or absence of market power."[18]
- In its cable reach test (75 percent of customer locations served by a facilities-based competitor), "inappropriately assumed that a duopoly always constitutes effective competition and is necessarily sufficient to ensure just, reasonable, and nondiscriminatory rates and practices, and to protect consumers."[19]

Instead, the Commission analyzed Qwest's forbearance requests according a market power analysis drawn from the Department of Justice and FTC's Horizontal Merger Guidelines, and consistent with the FCC's own prior merger analysis.[20] As described below, the Commission defined the relevant wholesale and retail product markets, geographic markets, and market competitors, and then engaged in its competitive analysis.

Product Markets – Wholesale. In defining product markets, the Commission first examined wholesale product markets. The Commission began by defining wholesale loops and dedicated local transport as distinct wholesale product markets.[21] The Commission found that a wholesale customer, faced with a small but significant and nontransitory increase in price (or "SSNIP") of a loop, would be unlikely to switch to dedicated local transport as an alternative, and vice versa.[22] The Commission further found circuits of differing capacities, *e.g.*, DS0, DS1 and higher capacity circuits, are likely to constitute separate product markets.[23] The Commission also found that originating and terminating switched access charges – *i.e.*, charges that LECs

impose on interexchange carriers for originating and terminating interexchange calls – constitute separate, relevant wholesale product markets.[24]

Product Markets – Retail. The Commission defined retail product markets separately from wholesale. In particular, it explained that with regard to retail residential/mass market services, its determination of the relevant product market hinged upon the "demand for access."[25] The Commission reviewed, for example, "the extent to which Qwest's residential voice customers would switch from Qwest's service to Cox's residential voice services or to mobile wireless voice service in response to an increase in Qwest's monthly price for voice service."[26] Outlined below are the Commission's product market determinations for retail residential/mass market services.

- Wireline Services: The Commission, adhering to precedent, found that wireline "services offered to mass market customers fall into several separate product markets, including local voice service, bundled local and long distance voice service, [and] broadband Internet access service."[27] The Commission's discussion of bundled voice and broadband Internet access service is a little confusing: although the Commission in text appears to say that it has used voice and broadband Internet access service bundles as a relevant product market, in footnotes the Commission states that there was "insufficient evidence in this record to define a separate relevant market for voice and broadband Internet service bundles, or other bundles such as those including video."[28] The Commission also noted that it did not consider standalone long distance as a potential separate product market because it was not implicated in this case.

- VoIP: Explaining that "the degree to which particular VoIP services are viewed as close substitutes for other local services varies depending upon the characteristics of the particular VoIP offering[,]" the Commission divided VoIP providers into two general types: (1) facilities-based; and (2) "over-the-top."[29] The Commission found that "mass market consumers view facilities-based VoIP services, such as those offered by cable providers, as sufficiently close substitutes for local service to include them in the relevant product market."[30] With regard to over-the-top VoIP, however, the Commission concluded that the record was insufficient to determine whether such services should be included in the relevant product market.[31]
- Mobile Wireless Services: In examining whether mobile wireless services should be included in the same relevant product markets as fixed wireline service, the Commission described the issue as a "complicated… one that is evolving over time."[32] Significantly, the Commission distinguished "usage substitution," in which a consumer with both wireless and wireline services shifts calling from one platform to another, from "access substitution," in which a consumer uses wireless to displace wireline service, or vice versa. The Commission observed, "[t]he issue of *access* substitution is critical for purposes of market definition, since, given [the] trend toward flat-rated prices for wireline services, it is the degree of access substitution that will affect most directly whether mobile wireless services constrain the price of wireline services."[33]

The Commission concluded that Qwest had not demonstrated that wireless services materially constrain the

price of residential wireline voice service under the test of a hypothetical SSNIP.[34] In reaching its conclusion, the Commission emphasized that Qwest did not produce (1) "econometric analyses that estimate the cross-elasticity of demand between mobile wireless and wireline access services"; (2) evidence that Qwest has "reduced prices for its wireline services or otherwise adjusted its marketing for wireline service in response to changes in the price of mobile wireless service"; or (3) "marketing studies that show the extent to which consumers view wireless and wireline access services as close substitutes."[35] The Commission explained that the evidence submitted by Qwest – which estimated the percentage of households in the Phoenix area which rely exclusively upon mobile wireless services – was insufficient to determine whether mobile wireless services have a "price-constraining effect on wireline access services."[36] The Commission stressed, however, that it was not making an affirmative finding that "mobile wireless services do not currently, or may not soon, belong in the same product market as residential wireline voice services."[37]

The Commission turned next to retail enterprise services, finding that local voice, long distance voice, and data services each constituted distinct product markets. The Commission further observed that different transmission capacities may constitute distinct product markets, although it did not precisely define the boundaries of various transmission capacity markets.[38] The Commission also defined separate relevant product markets based on the class of customer (*i.e.*, small, medium or large enterprise), adopting for the purposes of this proceeding the line-size classification used by the Arizona Corporation Commission ("ACC") to delineate small, medium, and large businesses in lieu of a more precise definition.[39] The ACC defined small business customers as less than 4 lines, medium as 4 to 100 lines, and large as more than 100 lines.[40]

Geographic Markets. With regard to geographic markets, the Commission explained that "each customer location constitutes a separate relevant geographic market" and that it "aggregate[s] customers facing similar competitive choices."[41] The Commission added, however, that to the extent that forbearance could have "effects in broader geographic areas, such as for wholesale loops and dedicated transport," it considered those broader areas as well in its competitive analysis, rather than as a matter of geographic market definition.[42]

Marketplace Competitors. The Commission next, in abbreviated form, examined the extent to which Qwest had competitors in each of the relevant product markets. The Commission noted that Qwest faced only minimal competition in any of the relevant wholesale markets.[43] With respect to retail residential services, the Commission highlighted that Qwest faced competition from the incumbent cable operator as well as a small number of competitive LECs in the Phoenix MSA. According to the Commission, those competitors – other than the incumbent cable operator – rely almost exclusively upon Qwest's facilities, including UNEs and other wholesale services, to provide their services.[44]

Second, with regard to retail enterprise service markets, the Commission stated that, in addition to the incumbent cable operator, Qwest faces competition from more than a dozen competitive LECs in the Phoenix MSA.[45] The Commission noted, however, that these competitors, other than the incumbent cable operator, rely predominately upon Qwest's facilities, including UNEs and other wholesale services, to provide service.[46]

Third, in the markets for wholesale services, the Commission stated that while the incumbent cable provider offers some wholesale services in the Phoenix MSA, its non-

cable plant facilities are not widely deployed, and its cable plant provides little wholesale service.[47] The Commission added that the other potential wholesale suppliers have "comparatively few network facilities in the Phoenix MSA and rely primarily upon Qwest's facilities to provide services."[48] Moreover, the Commission explained that there did not appear to be significant fixed wireless wholesale service offerings in the Phoenix MSA.[49]

Competitive Analysis. Having defined the relevant product markets, geographic markets, and marketplace competitors, the Commission next provided the following competitive analysis:

- Wholesale Loops: The Commission explained that, with the exception of Qwest, "there are no significant suppliers of relevant wholesale loops with coverage throughout the Phoenix MSA, either individually or in the aggregate."[50] It added that there are no "wholesale suppliers of last-mile connections to mass market end users in the Phoenix MSA other than Qwest."[51] The Commission also considered potential entry "via supply side substitution (*i.e.*, whether an existing provider of services is likely to construct new loop facilities to expand its service offerings) and *de novo* entry (*i.e.*, whether an entrant is likely to construct its own last-mile network)," finding "potential competition from either supply-side substitution or from *de novo* entry to be unlikely in the Phoenix MSA."[52] Noting that "competitors generally make entry and exit decisions based on an evaluation of broader geographic areas than individual buildings," and that "if a competitor seeks to serve a multi-location business customer, it must have access to facilities that reach all of

the customer's locations," the Commission found that "in addition to evaluating the extent of competitive facilities deployment to particular buildings, we must also evaluate appropriate broader geographic areas."[53] The Commission concluded that there was "inadequate facilities-based wholesale competition in broader geographic areas to support a finding that Qwest lacks market power with respect to wholesale loops."[54] Finally, the Commission emphasized that Qwest's special access services, section 271 access arrangements, Qwest Local Services Platform wholesale service, and section 251(c)(4) resale did not constitute "adequate alternatives to section 251(c)(3) unbundled loops for competitive LECs."[55]

- Wholesale Dedicated Local Transport: While the Commission stated that "there appears to be a limited amount of competitive deployment of transport facilities in Phoenix," it explained that the record was insufficient to find Qwest "subject to effective competition for its transport services" in the Phoenix MSA.[56] Consistent with its geographic market definition, the Commission used a route-specific analysis, *i.e.*, between specific Qwest wire centers.[57] With regard to existing competition, the Commission highlighted that "the only competitive transport facilities deployed in the Phoenix MSA are on routes where Qwest already has obtained relief from UNE transport obligations by virtue of the Commission's unbundling rules[.]"[58] With regard to potential entry of competitors, the Commission noted that "there is no evidence that competition via capacity expansion by

existing facilities-based providers or *de novo* entry is likely[,]" and emphasized that "[e]vidence that present competitors have deployed limited amounts of fiber in a larger geographic area does not support a conclusion that those providers readily could offer wholesale services on a particular route, or that a potential entrant economically could deploy its own fiber on a particular route in a timely manner in response to a small but significant and nontransitory increase in the price of wholesale transport services."[59]

- Originating and Terminating Switched Access: Citing to its previous *CLEC Access Charge Reform Order*, the Commission explained that IXCs, which must pay switched access charges, face a bottleneck monopoly from both the incumbent and competitive LECs that provide access to their end users.[60] The Commission also noted that "as long as switched access charges may be imposed by tariff, the market for these services is not structured in a way to allow competition to discipline rates for carriers' carrier charges[.]"[61] Accordingly, the Commission concluded that Qwest "possesses market power over originating and terminating switched access."[62]
- Retail Residential/Mass Market: Examining market share data, the Commission found the retail mass market for wireline services in Phoenix to be "highly concentrated with two dominant providers," Qwest and the incumbent cable provider,[63] and concluded that there was no evidence here that a market that appeared to be a duopoly resulted in effective competition, although the

Commission noted that in some circumstances (which it found were not present on the existing record) duopoly can provide sufficient competition.[64] Specifically, in terms of existing competition, the Commission generally considered "whether there are competitors in the market with spare capacity that readily could serve Qwest's customers if Qwest, or Qwest in conjunction with Cox, sought to raise prices above competitive levels."[65] The Commission explained that "facilities-based coverage should be a leading factor in the Commission's analysis of whether . . . forbearance is warranted[,]" and emphasized that Qwest's wireline competitors – other than the incumbent cable operator – did not have extensive last-mile network facilities deployment and are "dependent on Qwest's last[-]mile facilities, including UNE loops, to serve mass market customers" in the Phoenix MSA.[66] Turning to the potential for competition, the Commission stated that it was "unable to identify any . . . potential facilities-based competitors [other than from the incumbent cable operator] for mass market services in Phoenix," adding that "[a]lthough the leading mobile wireless providers have ubiquitous networks, . . . we cannot conclude on the basis of this record that residential mobile voice services fall within the same relevant product markets as wireline services."[67] While recognizing that cable over-builders have begun entering a small number of geographic markets, the Commission found that there was no record evidence that any such cable over-builder was

considering expanding into the Phoenix MSA.[68] Thus, the Commission concluded that there was not sufficient evidence to show that Qwest, either unilaterally or through coordinated interactions with Cox, could not sustain a SSNIP in the retail residential/mass markets. It is notable that this portion of the Commission's decision turns on the potential for market power in a duopoly.

- Retail Enterprise Services: The Commission determined that "competitors offering retail enterprise services in the Phoenix MSA primarily rely upon Qwest's wholesale services, and that Qwest has not demonstrated that there exists significant actual or potential competition for enterprise services by competitors that rely on their own last-mile connections to serve customers."[69] In reaching its conclusion, the Commission explained that while there were mobile wireless and satellite providers operating in the relevant geographic market, there was no persuasive evidence that those providers' services were "in the same relevant product markets as those at issue[.]"[70] The Commission also rejected fixed mobile wireless as a possible means of competitive entry in the near future.[71] Moreover, the Commission emphasized that it was unwilling to predict that the incumbent cable operator's competitive success in the retail mass market subjected, or would in the future subject, Qwest to effective competition in the enterprise market.[72]

Application of Section 10 Forbearance Criteria. Having defined relevant markets and conducted a

competitive analysis of each of those markets that concluded that Qwest continued to have the ability to exercise market power, the Commission then applied section 10's three-pronged forbearance criteria, and found that unbundling, dominant carrier and *Computer III* rules remained necessary to ensure that Qwest's "charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory" in Phoenix, that they remained necessary for the protection of consumers, and that they remained in the public interest.[73] One particularly interesting point was the Commission's discussion of forbearance from price and rate structure regulation of switched access end user charges (*i.e.*, the federal End User Common Line Charge, also known as the Subscriber Line Charge or "SLC"). In a statement with potential relevance to intercarrier compensation reform, the Commission said, "[i]f the Commission granted a carrier the right to increase its SLC revenues, corresponding reductions in intercarrier revenues might be appropriate."[74]

McDowell/Baker Critiques. In separate concurrences, Commissioners McDowell and Baker expressed concerns regarding the rigor of the *Qwest Phoenix Forbearance Order*'s competitive analysis. Commissioner McDowell cautioned; "i]t appears that this analysis may set too high a bar – a test so stringent that *no* requesting carrier will ever satisfy it."[75] He added that he was skeptical that "a 25 percent rate of mobile wireless-only households does not have any effect on the market for access to telecommunications services" and encouraged the Commission to "maintain the necessary flexibility to make adjustments when circumstances warrant."[76]

Commissioner Baker, meanwhile, expressed hope that the "application of the statutory test using the analytic framework in this Order will not become an insurmountable hurdle for petitioners, which in turn would undermine the

will of Congress[.]"[77] If the bar is set too high, she explained, "the regulatory response will not be narrow enough, and infrastructure investment will suffer."[78] Commissioner Baker similarly urged the Commission to "take the opportunity to consider in more depth the competitive effect of mobile wireless competition in the rapidly changing marketplace."[79]

While both Commissioner McDowell's and Commissioner Baker's concurrences raise concerns that the test established under the *Qwest Phoenix Forbearance Order* may be insurmountable, neither critique provides a clear or well-defined attack on the actual methodology of the test or specific market definitions.

* * *

On July 30, 2010, Qwest appealed the Commission's *Qwest Phoenix Forbearance Order* to the U.S. Court of Appeals for the Tenth Circuit, where the case is currently pending.[80]

C. 10 MSA Remand

Simultaneous with its release of the *Qwest Phoenix Forbearance Order*, the Commission issued a public notice seeking comment on the application of the analytical framework used in that Order to the Verizon 6-MSA and Qwest 4-MSA forbearance petitions remanded from the D.C. Circuit, as well as future petitions.[81] On August 23, 2010, however, Verizon withdrew its six forbearance petitions before the Commission had an opportunity to rule upon them on remand.[82] In its letter of withdrawal, Verizon noted the Commission's issuance of its *Qwest Phoenix Forbearance Public Notice* and criticized the Commission's newly-adopted standard, concluding that it made little sense to proceed with the petitions in light of the Commission's current approach to requests for forbearance.[83]

Qwest similarly withdrew its four petitions in August 2010.[84] In so doing, however, Qwest clarified that its withdrawal applies only to the four petitions and has no effect on its pending appeal to the Tenth Circuit regarding the *Qwest Phoenix Forbearance Order*.[85]

III. UNIVERSAL SERVICE REFORM

The Commission has long struggled with how to reform its universal service support mechanisms, both in terms of how it raises the funds that it distributes (termed "contribution") and how it distributes support, particularly in rural and high cost areas. Universal service reform for rural and high cost areas has also been inextricably intertwined with intercarrier compensation reform, as intercarrier payments, particularly intrastate access charges, remain a significant source of implicit universal service support. The last major push for reform occurred in the second half of 2008, as the Martin Commission wound down. This year, the NBP re-catalyzed reform efforts, as it calls for, among other things, a repurposing of the fund to support broadband expressly, rather than as an implicit adjunct of high cost support for rural voice services. Consistent with the recommendations contained in the NBP, the Commission has again taken steps towards comprehensive reform. 2010 has been a year largely of setting the stage for these reforms. By the end of 2010, it is anticipated that the Commission will have issued Notices of Proposed Rulemaking covering all of the major components of its current universal service reform effort.

At the same time that it has launched new proceedings designed to implement NBP USF recommendations, the Commission has tangled with long-standing concerns, including a remand by the Tenth Circuit asking the Commission to address fundamental USF definitional questions and to justify its current High Cost Model support mechanism for "non-rural" LECs in light of

those definitions. The Commission has likewise been faced with thorny contribution compliance questions that highlight the difficulties providers face under the existing universal service regime.

A. Tenth Circuit Remand

In the wake of the 1996 Act, the FCC set out to create explicit mechanisms to support universal service in rural and high cost areas. Among the support mechanisms it created was the High Cost Model support mechanism, which provides support to "non-rural" LECs – those not meeting the Communications Act's definition of a "rural telephone company" – with support to help defray what would otherwise be high costs allocated to intrastate telephone service.[86] There are many rural areas served by "non-rural" LECs.

Although the Commission first adopted the High Cost Model support mechanism in 1999, it has been controversial since its adoption and has never been upheld by the courts. The High Cost Model mechanism provides per line support based on computations in a forward- looking cost model, with support determined by whether statewide average costs in the non-rural areas, as determined by the model, exceed two standard deviations above the national average cost for non-rural areas, also as determined by the model. Twice, both following the initial promulgation of the High Cost Model support mechanism and then after the FCC completed its first remand, the United States Court of Appeals for the Tenth Circuit found the Commission had failed to adequately define key terms of the 1996 Act's universal service provisions, including what it meant for rates to be "reasonably comparable" and for support to be "sufficient" in light of all of the principles that Congress set in Section 254 of the Communications Act for the federal universal service program.[87] In its second remand in 2005, the Tenth Circuit therefore directed the Commission to: "articulate a definition

of 'sufficient' [universal service support] that appropriately considers the range of principles" that Congress established in section 254(b)[88]; "define the term 'reasonably comparable' [rural and urban rates] in a manner that comports with its concurrent duties to preserve and advance universal service"[89]; and "craft a support mechanism taking into account all the factors that Congress identified in drafting the Act and its statutory obligation to preserve *and* advance universal service."[90]

In April 2010, after parties had filed a mandamus petition to force action, the Commission issued an order responding to the Tenth Circuit's remand. Rather than considering comprehensive universal service reform, the Commission intentionally limited the scope of its order, declining to undertake broad reform of the non-rural high-cost support mechanism, pending its consideration of broader USF reform in subsequent NBP-related proceedings.[91]

In its order, the Commission defined "sufficient" as "an affordable and sustainable amount of support that is adequate, but no greater than necessary, to achieve the goals of the universal service program," including all the principles enumerated in Section 254(b).[92] The Commission pointed out that it has several universal service programs, all of which work together to fulfill Section 254(b)'s objective, rather than having each program support all objectives.[93] The Commission thus "conclude[d] that the current non-rural high-cost support mechanism, in conjunction with the Commission's other universal service programs, provides sufficient support to achieve the universal service principles set forth in section 254(b)."[94] The Commission noted that proposals to increase the amount of support under the High Cost Model program would increase the contribution substantially, with no showing that consumers in rural areas would be harmed absent the increase in funding.[95] The Commission also found "that rural rates are 'reasonably

comparable' to urban rates if they fall within a reasonable range of the national average urban rate," and "conclude[d] that the current non-rural support mechanism produces rates that preserve and advance universal service."[96] The Commission found that average rates are similar in urban and rural areas, that the standard deviation among rates is similar between rural and urban areas, and that, to the extent rates within the same state are different, urban rates are usually higher.[97] Finally, the Commission concluded "that the current non-rural high-cost support mechanism comports with the requirements of section 254."[98]

The Commission also provided additional support to Qwest in Wyoming. The Wyoming Public Service Commission and Office of Consumer Advocate had petitioned the Commission under its 2003 High Cost Model Remand Order to provide additional support to achieve reasonably comparable rates. Qwest's rural residential rate in Wyoming was $42.28 per month, or approximately 124 percent of the nationwide urban rate benchmark (set at two standard deviations above the nationwide average).[99] The Wyoming Commission had stated that it had required cost-based pricing for all retail telecommunications services, prohibited cross subsidies and implicit subsidies, and established an explicit Wyoming Universal Service Fund.[100] Qwest had also geographically deaveraged its rates.[101] Rather than supporting 100 percent of the difference between rural local rates and the comparability benchmark, however, the Commission supported 76 percent of the difference, consistent with the High Cost Model support mechanism's percentage of support of statewide average costs above the national benchmark.[102] This resulted in an addition $2.37 million in additional annualized support to Qwest in Wyoming.[103]

B. Local Switching Support Modification

In an order of particular interest to small, rural LECs, the Commission in March 2010 issued an order that allowed incumbent LECs that receive local switching support to have that support increase when line counts fall below particular thresholds.[104] Prior to that order, an incumbent LEC could see its support fall as its lines served grew, but the reverse would not be true if it lost lines. Because many incumbent LECs have been losing lines, either to competition or because of local economic changes, NECA estimated that the change would result in an additional $27 million per year in local switching support for small ILECs. Local switching support generally has not been available in incumbent LEC study areas exceeding 50,000 access lines. The FCC made this change effective for the full 2010 funding year, but declined to apply it to 2008 and 2009 support.[105]

C. USF NOI & NPRM

The Commission in April 2010 also issued a Notice of Inquiry and a Notice of Proposed Rulemaking as the first step in substantially reforming the USF. As set forth in the NBP, the overall intention of the reform initiative is to support broadband service by converting existing subsidy mechanisms from "POTS" (plain old telephone service) to broadband, without increasing the size of the USF beyond the Commission's baseline projection.[106]

Specifically, the proceeding is intended to "develop the detailed analytic foundation necessary for the Commission to distribute funds in an efficient, targeted manner that avoids waste and minimizes burdens on American consumers."[107] Among other things, the NOI sought comment on (1) whether the Commission should use a model to help determine universal service support levels in areas where there is no private sector business case to provide broadband and voice services; and (2) the best way

to create an accelerated process to target funding toward new deployment of broadband networks in unserved areas prior to implementing a new Connect America Fund ("CAF") funding mechanism to ensure universal access to broadband and voice services. The Commission sought comment on a model developed by the NBP for estimating the costs of broadband deployment, and on the potential use of such a model for a broadband support mechanism. It noted that the Commission had previously tentatively concluded that reverse auctions could provide some advantages in determining high cost support, and thus asked whether a model could be used to determine a "reserve price" for a reverse auction.[108] The Commission also asked whether the model should estimate forward-looking economic costs, whether it should focus on total costs or just the incremental costs of upgrade, and whether it should consider just costs, or costs as well as expected incremental revenues from new services and customers.[109] The Commission also asked about the geographic areas for computing support, and renewed its inquiry into reverse auctions.[110]

The accompanying NPRM sought comment on specific reforms to cap growth and to cut funding in the legacy high-cost USF support mechanisms, and to shift the savings toward broadband.[111] The Commission sought comment on capping high cost disbursements to incumbent LECs at 2010 levels, and how such a cap could operate.[112] The Commission also sought comment on shifting all rate-of-return carriers to incentive regulation, eliminating Interstate Access Support and redirecting that support to the new Connect America Fund, and eliminating high-cost support to competitive (non-incumbent LEC) carriers within five years.[113]

Comments on the NOI and accompanying NPRM were filed in July and August 2010. The Commission is currently considering the large volume of comments and

replies that were filed. The comments and replies reflected vastly divergent interests among USF stakeholders, although there was widespread consensus that the Commission should not cut legacy voice funding before establishing a new broadband USF funding mechanism.

D. Verizon Wireless/Sprint Nextel USF Phase Out

Under the terms of the Commission's 2008 approvals of Verizon Wireless' merger with Alltel and Sprint/Nextel's merger with Clearwire, Verizon and Sprint committed to reduce the high-cost USF funding they receive as competitive ETCs to zero over a five-year period. Verizon and Sprint received roughly $530 million in annual competitive ETC funding at the time of their respective transactions. The NBP recommended that their recaptured competitive ETC funding – representing up to $3.9 billion over a decade – be used to implement the recommendations set forth in the NBP.[114]

In September 2010, the Commission adopted an order providing clear instructions for implementing Verizon and Sprint's commitments, stating that their surrendered support did not have to be redistributed to other competitive ETCs provided that those carriers did not surrender their ETC designations but simply forewent the distribution of support, and directing that the surrendered support be reserved as a potential "down payment" on proposed broadband universal service reforms, as recommended by the NBP.[115] However, to the extent that Verizon Wireless or Sprint Nextel relinquished its ETC status in one or more service areas, the support that Verizon Wireless or Sprint Nextel had received would be redistributed to other competitive eligible telecommunications carriers pursuant to the operation of the CETC cap for that state.[116] The Commission directed the Universal Service Administrative Company ("USAC") to reserve any reclaimed funds towards indexing the E-Rate funding cap to inflation, creating a Mobility Fund to improve 3G wireless broadband coverage, improving utilization of the

Rural Health Care program in rural areas including Tribal lands, and directly supporting broadband Internet access services for all Americans.[117]

Because of the oddity of reclamation of support turning on whether Verizon Wireless or Sprint Nextel retained its ETC designation or relinquished it, the Commission also issued a Notice of Proposed Rulemaking asking whether a state's interim cap amount should be reduced by the amount of foregone support when a competitive ETC relinquishes its ETC status.[118] The Commission also proposed to give itself the permanent authority to reserve reclaimed funds.[119]

E. E-Rate

As contemplated in the NBP, in May the Commission issued an NPRM to reform the Schools and Libraries, or "E-Rate," program.[120] Proposed reforms included: streamlining the application and competitive bidding processes for telecommunications and internet access; codifying the requirement that competitive bidding processes be "fair and open"; allowing the leasing of low-cost fiber from municipalities and other entities that are not telecommunications carriers; creating a new, predictable funding mechanism for internal connections; and indexing the current $2.25 billion cap on E-Rate disbursements to inflation.[121]

Comments and reply comments were due in July. On September 23, 2010 the Commission adopted a report and order adopting E-Rate reform. Specifically, the E-Rate Order indexes the cap on E-Rate funding to inflation; bolsters protections against waste, fraud, and abuse by codifying competitive bidding requirements and clarifying ethics obligations; allows participants to use E-Rate funds to connect to the Internet via unused, or "dark," fiber optic lines already in place across the country and through existing state,

regional and local networks; permits "School Spots" where schools have the option to provide Internet access to the local community; launches a pilot program that supports off-campus wireless Internet connectivity for mobile learning devices; and streamlines the E-Rate application process for educators and librarians.[122]

F. Rural Health Care

In July, the Commission issued an NPRM concerning the Rural Health Care ("RHC") program.[123] As set forth in the NBP, the intention of this proceeding is to reform and upgrade the RHC program to connect more public health facilities to high speed Internet facilities, to foster telemedicine applications and services, and to create a Health Care Infrastructure Fund to support the deployment of dedicated health care networks to underserved areas.[124]

Specific proposed reforms in the NPRM included: creating a health infrastructure program to support up to 85 percent of the construction costs of new regional or statewide networks to serve public and non-profit health care providers in areas of the country where broadband is unavailable or insufficient; establishing a health broadband services program that would subsidize 50 percent of the monthly recurring costs for access to broadband services for eligible public or non-profit rural health care providers; expanding the Commission's interpretation of "eligible health care provider" to include acute care facilities that provide services traditionally provided at hospitals; and eliminating the requirement that funding be offset against universal service contributions owed by participating service providers.[125] The Commission also sought comment on how to prioritize funding requests to the extent that demand exceeds the annual $400 million funding cap.[126]

Comments and reply comments were due in September 2010.

G. Proceedings on the Horizon

The Commission has indicated its intention to initiate several additional proceedings before the end of 2010, as indicated in its Broadband Action Agenda.

Contributions NPRM. The Commission intends to issue in the fourth quarter of 2010 an NPRM focused on contribution reform to broaden the USF contribution base and to stabilize support mechanisms for universal service programs.[127] Stakeholders have advocated for such reform even before the issuance of the NBP, particularly in the face of the historic highs in the USF contribution factor. The Commission is likely to focus on four general approaches to contribution reform: a numbers-based system (which would assess USF on phone numbers); a connections-based system (which would assess physical connections to the PSTN and/or the Internet); a hybrid numbers-and-connections-based system; and modifications to the existing revenue-based system. Consistent with the NBP, the Commission is also expected to propose broadening the USF contribution base,[128] a reform that has the potential to substantially reduce the USF contribution factor.

CAF NPRM. The NBP specifically recommended the creation of a Connect America Fund to extend broadband service to unserved areas of the nation and to ensure affordable broadband service in high-cost areas where support is necessary. To that end, and as a continuation of the process of reforming the USF High-Cost fund, in the fourth quarter of 2010, the Commission intends to propose rules to expedite the deployment of broadband to unserved areas and to establish the framework of the CAF. These new rules would likely shift USF High-Cost support from supporting phone service to advancing access to broadband as well as voice.[129]

Mobility Fund NPRM. Finally, also included in the NBP was a recommendation to create a Mobility Fund to bring all states to a baseline level of 3G (or better) wireless coverage. The Commission intends to issue an NPRM early in the fourth quarter of 2010 to propose rules that would create such a fund to provide for one-time support for deployment of 3G (or better) networks in states that significantly lag behind the national average.[130]

H. Concerns about Collections, Audits and Enforcement

The NBP highlighted the importance of USF performance and accountability, and noted changes already underway at the Commission to improve both.[131] Many beneficiaries have noted the disproportionate cost and burden sometimes associated with USF audits, and the Commission's changes are directed at these concerns. In particular, the Commission has moved oversight of the USF audit program to the Office of Managing director and has directed USAC to revise its approach to audits.[132] The Commission has likewise implemented a new compliance audit program that is designed both to be conducted at a reasonable cost in relation to program disbursements and to reduce burdens on USF beneficiaries.[133]

Carriers subject to USF reporting nonetheless have continuing concerns about collections, audits, and enforcement actions. One, involving TelePacific Communications, has drawn particular Commission and industry attention.

TelePacific. On its 2008 Form 499-A, TelePacific, a competitive carrier in California and Nevada, reported its revenues from its Internet access service as intrastate telecommunications revenues exempt from universal service contribution. However, USAC rejected its filing, finding that TelePacific's service provided over T-1 lines was a basic

transmission service classified as a telecommunications service subject to universal service fund reporting and contribution obligations.

TelePacific requested that the Commission review USAC's decision, and the Commission concurred with TelePacific that its Internet access service is not currently subject to universal service contribution requirements. However, it also directed TelePacific to provide to the Commission a detailed explanation of the methodology by which it apportions revenues derived from its sale to end users of voice telephony and other services utilizing leased T-1 lines, and how it reports such revenues on Commission Form 499-A.[134]

In June, AT&T Inc., CenturyLink, SureWest Communications, and Verizon ("the Petitioners") filed a joint petition asking the Commission to clarify or reconsider certain aspects of that order, and the Commission has since sought comment on this petition.[135] In particular, the Petitioners requested that the Commission, "confirm that under the Commission's existing orders and rules TelePacific's underlying wholesale carriers cannot be forced to restate prior year revenues and make additional contributions to the Universal Service Fund (USF)."[136]

The Petitioners argued that wholesale providers should not be forced to restate revenues because: (i) doing so would impermissibly "make TelePacific's wholesale carriers liable for additional contributions on revenues associated with TelePacific transactions"; (ii) "the underlying TelePacific wholesale providers have no legal obligation to police TelePacific's reseller status"; and (iii) it would be "improper to require wholesale carriers that obtained a contribution certification from a reseller customer to make additional contributions to the fund without any realistic prospect that the carrier could recover both those

contributions and its associated administrative costs from its customer."[137]

In its response, TelePacific argued among other things that "assessing USF on the T-1s used in TelePacific's broadband Internet access service but not on T-1 s used in broadband Internet access service offered by an ILEC over its own T-1 loop…violates the policy of competitive neutrality by creating a cascading effect that imposes USF on providers of broadband Internet access services utilizing certain leased local loop facilities ."[138] The Commission has not yet acted on the joint petition.

IV. INTERCARRIER COMPENSATION REFORM

Since passage of the Telecommunications Act of 1996, which requires that universal service support be "explicit,"[139] the Commission has wrestled with the challenge of replacing the implicit subsidies provided through a web of intercarrier compensation payments with explicit universal service support. Because of the historical link with implicit subsidies, intercarrier compensation has usually been considered as twinned with universal service reform. In addition, the current collection of intercarrier compensation mechanisms results in essentially the same service – termination or, in some cases, origination across the terminating or originating carrier's network – being priced dramatically differently depending on the classification of the interconnecting entity, the technology used, and the geographic endpoints of the call. This creates arbitrage and uncertainty, both for originators/terminators and for the entities that interconnect with them, as to intercarrier compensation payments. While late 2009 and 2010 saw some developments in intercarrier compensation, 2010 was largely a year of setting the FCC's future agenda. The NBP detailed the need for comprehensive intercarrier compensation reform, explaining that the "fundamental problems" in the existing intercarrier compensation system

"create inefficient incentives" and may "stall[] the development of the broadband ecosystem."[140] Perhaps most significantly, the NBP positioned intercarrier compensation and universal service reform as cornerstones of the Commission's broadband agenda, calling for the FCC to adopt a framework for long-term intercarrier compensation reform."[141]

A. Upcoming NPRM

The NPB's Broadband Action Agenda therefore calls for the Commission to issue a notice of proposed rulemaking ("NPRM") on intercarrier compensation in the fourth quarter of 2010 to "propose rules for long-term intercarrier compensation reform, including implementation of a glide path for reducing per-minute charges, establishment of appropriate cost-recovery mechanisms, and implementation of interim solutions to address arbitrage."[142]

The NBP recommends that reforms adopted in response to the NPRM form the first stage in a ten year program of intercarrier compensation reform, and that during this stage the Commission move intrastate terminating switched access rates to interstate terminating switched access rate levels in equal increments over a period of two to four years.[143] As conceptualized by the NBP, during the second stage, the FCC would begin a staged transition of reducing per minute rates for intercarrier compensation,[144] and in the third stage, would continue this process by phasing out per-minute rates for the origination and termination of telecommunications traffic.[145]

The NBP likewise recommends that, in the interim, the Commission take steps to reduce opportunities for arbitrage through targeted action on intercarrier compensation. Despite this recommendation, the Commission has not yet moved to address access discrete intercarrier compensation disputes. Chief among these is

access stimulation, or "traffic pumping" – the practice of using free conference calling or other services to drive communications traffic to certain phone numbers with high terminating access charges. The industry continues to press for the Commission to address this practice, which imposes significant costs that cannot be recovered directly from end users because of the Communications Act's requirement that long distance rates be averaged and integrated.[146] The Commission has likewise not yet addressed "phantom traffic" – traffic that is routed with insufficient information for terminating carriers to determine what intercarrier compensation charges are due. Finally, the Commission has not addressed the appropriate intercarrier compensation for VoIP traffic, which is an area of significant controversy. Many ILECs argue that interconnected VoIP traffic should be subject to access charges just as traditional wireline telephony is, while many VoIP providers (and their CLEC partners) argue that interconnected VoIP traffic is exempt from access charges. It is possible that the Commission will act to address one or more of these disputes before launching its comprehensive effort to reform the intercarrier compensation regime as a whole.

B. Key Intercarrier Compensation Disputes and Decisions

While the Commission looks to adopt comprehensive, forward-looking reform of intercarrier compensation, compensation disputes have continued to mount. In some cases, parties seeking relief have looked to federal courts or state commissions to resolve their disputes. We detail the year's most significant disputes and decisions below.

i. Core v. FCC

The D.C. Circuit's decision in *Core v. FCC* is less significant for its impact on compensation for the declining universe of dial-up Internet access traffic, than for the fact

that it affirms that the FCC has broad authority to set intercarrier compensation rates for traffic within its jurisdiction. The rationale of *Core* would give the FCC the authority to set intercarrier compensation rates for, for example, VoIP traffic that the Commission has ruled cannot be segregated into intrastate and interstate traffic.

As detailed in last year's article for this conference, the Commission's policy concerning the proper intercarrier compensation arrangements for dial-up Internet-bound telecommunications traffic has had a "tortuous" history, which began in early 1999.[147] The most recent developments involve the Commission's ISP-bound compensation rules, which were adopted in 2001, but which the D.C. Circuit had remanded (without vacating) in 2002 after it overturned the FCC's legal rationale for the decision.[148] Among other things, the FCC's 2001 rules established a cap of $0.0007 per minute on intercarrier compensation for ISP-bound traffic exchanged between LECs.[149] In November 2008, the Commission issued an order on remand reaffirming that section 251(b)(5) – which imposes a duty on local exchange carriers to "establish reciprocal compensation arrangements for the transport and termination of telecommunications"[150] – is not limited to local traffic, contrary to the Commission's previous interpretation. The Commission also concluded that, because ISP-bound traffic is interstate in nature when the endpoints of the full communication are considered, it had the authority to adopt rules setting a cap on termination compensation for ISP-bound traffic pursuant to section 201(b) of the Communications Act, even though states pursuant to section 252 otherwise set the intercarrier compensation rates for traffic exchanged pursuant to section 251(b)(5) of the Act.[151] The Commission opted to keep in place its pricing rules that had not been forborne until adopting "more comprehensive inter-carrier compensation reform."[152]

Core appealed the Commission's 2008 order to the D.C. Circuit, and in January 2010, the court affirmed the Commission's order.[153] In its ruling, the D.C. Circuit explained that "[d]ial-up internet traffic is special because it involves interstate communications that are delivered through local calls; it thus simultaneously implicates the regimes of both § 201 and of §§ 251-252."[154] It rejected Core's argument that because the call to an ISP terminates locally, the FCC's authority over interstate communications is inapplicable: "[g]iven that ISP-bound traffic lies at the intersection of the § 201 and §§ 251-252 regime, it has no significance for the FCC's § 201 jurisdiction over interstate communications that these telecommunications might be deemed to 'terminat[e]' at a LEC for purposes of § 251(b)(5)."[155] The D.C. Circuit also rejected Core's argument that it was "arbitrary and capricious for the FCC to discriminate against dial-up internet traffic by requiring that LECs be compensated pursuant to the rate cap regime when terminating such traffic, but otherwise [be compensated for other 251(b)(5) traffic] in accordance with state commissions' application of the FCC's TELRIC methodology."[156] The court found that the Commission had provided "a solid grounding for the differences between the treatment of inter-LEC compensation for delivery of dial-up internet traffic and the regime generally applicable to inter-LEC compensation under § 251(b)(5)," including that reciprocal compensation for non-ISP-bound traffic generally had outgoing costs balanced by incoming ones and the potential for non-dial-up customers to subsidize dial-up users.[157]

ii. PAETEC Communications, Inc. v. CommPartners, LLC

On February 18, 2010, the United States District Court for the District of Columbia held that the transmission and net protocol conversion of VoIP-originated calls is an information service not subject to access charges, and that a

tariff imposing such charges lacks legal force.[158] The decision, rendered in the case of *PAETEC Communications, Inc. v. CommPartners, LLC*, answered, at least for the litigants, the years-old question of the appropriate intercarrier compensation for VoIP traffic, a question that the FCC has specifically declined to address.

PAETEC Communications, Inc. ("PAETEC") urged in a summary judgment motion that under the terms of its tariff, it was entitled to payment of access charges by CommPartners, LLC ("CommPartners") for VoIP-originated calls that CommPartners delivered to PAETEC for termination on its network. CommPartners claimed that PAETEC's termination of VoIP-originated calls constituted an information service exempt from access charges and subject instead to reciprocal compensation. In ruling against PAETEC, the district court concluded that "the access charge regime is inapplicable to VoIP-originated [traffic]" because such transmissions involve net protocol conversion (from VoIP to TDM), thereby qualifying as information services subject to the enhanced service provider ("ESP") exemption to switched access charges. The court emphasized that it was of no consequence that the Commission allowed PAETEC's tariff to go into effect – it held that the filed-rate doctrine, which precludes courts from deciding whether a tariff is reasonable, could not trump the deregulated character of information services.[159]

The court also relied on section 251(g) of the Telecommunications Act, which preserves the pre-Act access charge regime "where there was a 'pre-Act obligation relating to inter-carrier compensation.'"[160] The court reasoned that there could be no pre-Act access charge obligation for VoIP traffic because VoIP was not developed before passage of the 1996 Act.[161]

The case is currently on an interlocutory appeal before the United States Court of Appeals for the District of Columbia. The appeal is being held in abeyance, however, pending an automatic stay under 11 U.S.C. § 362(a) entered in the United States Bankruptcy Court for the District of Nevada with respect to CommPartners, LLC.

iii. North County Communications Corp. v. MetroPCS California, LLC

On November 19, 2009, the Commission issued an Order on Review granting in part but otherwise denying an application for review by North County Communications Corp. ("North County") challenging an Enforcement Bureau order[162] which found that under Commission rules, the California PUC is the more appropriate forum for determining a reasonable rate for North County's termination of intrastate, intraMTA traffic (hereinafter "intrastate traffic") originated by MetroPCS California, LLC ("MetroPCS"), and that North County should seek to obtain such a determination from the California PUC before seeking to enforce whatever right to compensation it may have at the Commission.[163] North County, a CLEC, had alleged that MetroPCS, a California-based CMRS carrier, violated 47 C.F.R. § 20.11(b) by failing to pay reasonable compensation for North County's termination of intrastate traffic originated by MetroPCS. In its Order on Review, the Commission affirmed the Enforcement Bureau's finding that the reasonable rate should be determined by the California PUC, but reversed the Bureau's dismissal of North County's claim, instead holding the claim in abeyance pending the California PUC's determination.

MetroPCS has appealed the Commission's decision to the U.S. Court of Appeals for the D.C. Circuit.[164] It urges that in a previous ruling (known as the "T-Mobile Declaratory Ruling"), the Commission expressed a strong preference that voluntarily negotiated contractual

arrangements, rather than unilaterally imposed tariff charges, govern the obligations of CMRS carriers to pay termination fees to local exchange carriers.[165] Because North County commenced billing MetroPCS for the termination of intrastate traffic in the absence of a written interconnection agreement between the two parties, MetroPCS argues that under the T-Mobile Declaratory Ruling, a *de facto* bill-and-keep arrangement existed between the parties (whereby neither party pays the other for traffic termination). It insists that by deferring the reasonable rate determination to the California PUC, the Commission wrongfully abdicated its responsibility to make such a determination under Rule 20.11, and failed to square its decision with its previous T-Mobile Declaratory Ruling. The FCC insists, on the other hand, that its Order on Review was based on Commission precedent holding that the FCC has not preempted the states' traditional power to set compensation rates between a CMRS provider and a LEC for intrastate traffic.[166] Oral argument is currently scheduled for October 14, 2010.

iv. IUB Traffic Pumping Proceedings

As noted above, access stimulation, or "traffic pumping," is currently a center-stage intercarrier compensation issue. While traffic pumping disputes are ensuing across the country, one of the most notable proceedings of the past year took place before the Iowa Utilities Board ("IUB").[167] In the IUB proceedings, Qwest alleged that it did not owe eight local exchange carriers the terminating access charges for which it had been billed and that, to the extent that Qwest had paid any of those charges, it was entitled to a refund. According to Qwest (along with intervenors Sprint and AT&T), the eight LECs engaged in "a deliberate plan to dramatically increase the amount of terminating access traffic delivered to their exchanges via agreements with conference calling companies."[168]

On September 21, 2009, the IUB, pursuant to its "authority to interpret the LECs' intrastate access service tariffs," found that because the conference-calling service providers did not "order, purchase, get billed for, or pay for" services provided by the LECs pursuant to their tariffs – *i.e.*, they were not "end users" under those tariffs – Qwest did not owe access charges to the LECs for traffic delivered to the conference call service providers.[169] Following issuance of its order, the IUB initiated formal rulemaking proceedings and eventually amended its rules on June 7, 2010 in light of allegations by Qwest that LECs had adopted "rates for intrastate access services are based, indirectly, on relatively low traffic volumes, but the LEC then experiences a relatively large and rapid increase in those volumes, resulting in a substantial increase in revenues without a matching increase in the total cost for providing access service."[170] These high volume access service ("HVAS") rule amendments – which enable the IUB to revoke the certificate of public convenience and necessity of a LEC engaged in a "generalized pattern" of traffic pumping – became effective on August 4, 2010.[171]

One of the LECs involved in the Qwest IUB proceedings, Aventure Communications Technology, L.L.C., filed a complaint against the IUB several days before the HVAS amendments were to take effect, arguing that "the IUB has created state law that has the effect of prohibiting interstate telecommunications services" in violation of the Supremacy Clause and Commerce Clause, along with a litany of other claims.[172] Aventure unsuccessfully sought a preliminary injunction to enjoin enforcement of the IUB's HVAS amendments, and the case is currently pending before the Northern District of Iowa. AT&T, Qwest, Sprint, and Verizon have all intervened in the case.[173]

Similar cases challenging traffic pumping are currently pending in courts throughout the United States,

including federal courts in California, Kentucky, Minnesota, New York, Ohio, and South Dakota.[174] Several of these courts have stayed proceedings and referred the traffic pumping issues to the Commission pursuant to the primary jurisdiction doctrine.[175] The Commission, however, has not yet issued any rulings with respect to these proceedings.

V. SPECIAL ACCESS

Over the last year, the FCC has renewed the process of evaluating whether its current special-access rules are working properly. For years, critics have been complaining that the rules, which allow ILECs that are subject to price caps to have pricing flexibility in markets that meet certain competitive triggers, do not adequately reflect or control ILEC market power, and that ILECs are also able to use contractual flexibility to "lock-up" substantial demand in ways that prevent customers from migrating to alternative suppliers along routes with competition. In November 2009, the Commission began its formal look at the issue, soliciting public comment on three issues.[176]

First, the Commission asked whether its "pricing flexibility rules ensure just and reasonable rates."[177] Second, the Commission asked whether its price-cap rules are adequate to ensure that rates are "just and reasonable."[178] Third, the Commission asked whether the pricing flexibility rules "ensure that terms and conditions in special access tariffs and contracts are just and reasonable."[179]

The Commission's request drew numerous responses divided predictably along industry lines. Price-cap ILECs opposed changes to the current special access regulatory regime – arguing that the rules are working properly and that special access markets are largely competitive. Large corporate purchasers of special access, rural carriers, alternative sellers of special access, and public interest groups supported changes – arguing that the markets are not

competitive and that the rules allow price cap ILECs, and particularly the largest companies, to abuse their market power.

A. Price Flexibility Rules

First, the Commission sought comment on its special access pricing flexibility rules, specifically focusing on its "pricing flexibility triggers," which are the criteria that determine whether a Metropolitan Statistical Area ("MSA") is sufficiently competitive to allow reduced regulation of prices within that MSA.[180] The current rules focus on whether competitors have collocated equipment in the ILEC's end office, a proxy the Commission adopted in the belief that it would provide "a reliable indication of sunk investment by competitors" and thus of actual or potential competition.[181] Notably, the Commission uses collocation as the test both for pricing flexibility with respect to interoffice transport, and for pricing flexibility with respect to loop facilities (usually called "channel terminations"). The Commission has two levels of pricing flexibility. Phase 1 pricing flexibility allows a price cap carrier to enter into customer-specific contract tariff arrangements, but it must also maintain a generally available service offering that is regulated under price caps. Phase 2 pricing flexibility exempts all services for which pricing flexibility has been granted from the operation of the price cap mechanism.[182] In Phase 2 areas, those rates can be raised or lowered as the market allows.

Price cap ILECs argue that these pricing triggers are working properly as predictors of areas with sufficient competition such that contract pricing should be permissible or, for Phase 2, that price cap regulation is unnecessary.[183] They argue that in areas in which pricing flexibility has been granted, there are extensive competitive, facilities-based networks.[184] They argue that the Commission should be wary of mandating price reductions because to do so reduces

the incentive for both ILECs and their competitors to invest in building or expanding high capacity facilities – in tension with the objectives of the NBP.[185]

But critics charge that collocation is not a good proxy for actual competition, especially for channel terminations (*i.e.*, loops) for which competition depends not on whether competitors have equipment in an end office but whether they can economically obtain access to the buildings where customers need service. For example, some critics argue that collocation at the wire center cannot be an adequate proxy for competition because collocation in the wire center does not indicate whether there is actually an alternative to the ILEC for the communications path from an aggregation point (such as a central office or carrier hotel) to the customer's premise. These parties argue that duplicate loop facilities do not exist for the vast majority of buildings, and it is often not economical for competitors extend loop facilities to provide service even when they have facilities as close as 1/10th of a mile away.[186] Price cap ILECs dispute these claims.[187] The price cap ILECs argue that collocation is also underinclusive – that it does not consider whether purchasers have actual choices, even though those choices are not routed through an ILEC central office.[188] They also claim that a building-by-building, circuit-type-by-circuit-type analysis would be unadministrable, and consequently would deny relief where it is warranted and reduce facility investment incentives.[189]

Instead of collocation, critics have asked the FCC to use other data to determine whether a market is sufficiently competitive to merit pricing flexibility. For example, some groups have advocated using measures of market share, the relationship between special access prices and UNE prices, and the relationship of prices to cost. Price cap ILECs have advocated examining emerging enterprise competition from cable networks, fixed wireless and other intermodal

competitors,[190] and some have advocated a market-power analysis focused on Metropolitan Statistical Areas.[191]

B. Price-Cap Index Rules

The Commission also sought comment on the adequacy of the price cap rules for special access, which are supposed to ensure that special-access prices are reasonable. As a result of the Commission's *CALLS Order* in 2000, special access services were segregated into a separate price cap basket from switched access services. This price cap basket includes not only traditional special access transport and channel terminations, but also includes broadband services to the extent that the carrier elects to offer its broadband services as a tariffed telecommunications service. The price cap calculation also includes an X-Factor (or Productivity Factor). As originally conceived in the Commission's Local Exchange Carrier price cap rules, the X-factor was supposed to measure the extent to which productivity in the telecommunications industry was increasing faster than in the economy as a whole.[192] The Commission's price cap formula, as originally designed, adjusted a carrier's price cap index for a basket by, among other things, increasing the index for inflation and reducing it by the Productivity (or X) Factor. In its 2000 *CALLS Order*, however, the Commission altered the operation of the price cap formula, with the statement that it could reexamine its changes after five years.[193] Under that formula, the X-Factor for the special access basket was set at specified levels until 2004, with the Commission expressly stating that the X-Factor no longer reflected productivity but was a rate transition device.[194] Since 2004, the X-Factor in the special access basket has been pegged to exactly offset the price index increases that would otherwise be made for inflation.[195]

Critics argue that this regime is irrational and that price-cap LECs' generally available tariffed prices exceed those that should be considered just and reasonable, and thus

an X-factor exceeding inflation should be used to drive these prices down.[196] Price-cap ILECs argue, however, that the X-Factor is close enough and that it would be "enormously expensive and time-consuming" to try to "develop a more 'accurate'" approach.'[197]

C. Terms and Conditions

Finally, the Commission sought comment on whether the current rules are adequately policing the terms and conditions that price-cap LECs impose on their customers. In response, competitors of the ILECs asked the Commission to place limits on the use of volume and term discounts and other alternative pricing plans in a manner that, they argue, use a purchaser's continued need to buy ILEC services in areas in which there are no special access alternatives to prevent special access purchasers from migrating to more cost-effective sources of supply in areas where there are alternative providers.[198] Competitors particularly complain that ILECs aggregate these minimum volumes over large geographic areas — allegedly shutting them out of whole areas – and that these minimum volumes are set at such a large percentage of a customer's total special access need that the customer's ability to shift among special access suppliers is severely restricted.[199] They object, among other things, to requirements to convert UNEs to special access.[200] The ILECs have responded that these provisions are actually pro-competitive because they decrease the price of special access services and that they are necessary because they reduce risk.[201]

VI. TRANSACTIONS

A. Overview

While there were a number of telecommunications transactions over the past year, two in particular – between Verizon and Frontier, and Qwest and CenturyLink – are

especially relevant in the wireline regulatory arena. The former deal is instructive given the nature of the conditions that the Commission placed on its approval of the transaction. And, while the latter deal is still awaiting consent from the Commission, the result will similarly be a key bellwether of the wireline regulatory landscape. Each transaction is discussed in detail below.

B. Verizon-Frontier

On May 21, 2010, the Commission approved the transfer of 4.8 million access lines in primarily rural and smaller-city areas to Frontier Communications Corp. ("Frontier") from Verizon Communications Inc. ("Verizon") in fourteen states in the West, Midwest, and South.[202] In approving transfer of the lines – which are used primarily for local residential and business telephone service, long-distance telephone service, wholesale service, and broadband Internet service – the Commission emphasized that the transaction held "promise for the future of broadband in certain areas of rural America."[203] The Commission noted that of the 4.8 million lines Frontier acquired, only approximately 62 percent were "capable of providing broadband at any speed, and only approximately 50 percent at speeds of at least 3 Mbps."[204] Frontier, a mid-sized carrier that serves primarily rural areas and smaller cities, committed to building out broadband to at least 85 percent of the transferred lines within a few years of the Commission's approval.[205]

In its competitive analysis of the transaction, just as it had done in its *CenturyTel-Embarq Order*,[206] the Commission continued the ritualized incantation of the "Big Footprint" theory of potential competitive harm to justify approval conditions.[207] Without much analysis and with no empirical basis in the record, the Commission concluded, "that the increase in the size of Frontier's study area resulting from the transaction could, in theory, increase its incentive to

engage in anticompetitive activity, although we think it is likely to have a lesser effect in the instant case than in the prior [Bell Operating Company] mergers."[208] The Commission's recitation of the "Big Footprint" theory was particularly remarkable because the transaction also shrunk the size of Verizon – presumably reducing any Verizon "Big Footprint" incentives to discriminate. What the decision suggests is that virtually any ILEC transaction that is not a pure spin-off – *i.e.*, that results in an ILEC increasing its number of lines served – faces the prospect of being subject to competitive or other public interest conditions on "Big Footprint" grounds.

The Commission conditioned its approval of the transaction on compliance with a number of commitments, including the following:

- Extend faster broadband to more Americans: Frontier will "significantly increase broadband deployment for the lines involved in the transaction, only 62 percent of which are broadband-capable today." In particular, "Frontier will deploy broadband with actual speeds of at least 3 Mbps downstream to at least 85 percent of transferred lines by the end of 2013, and actual speeds of at least 4 Mbps downstream to at least 85 percent of the transferred lines by the end of 2015, with all new broadband deployment offering actual speeds of at least 1 Mbps upstream."[209]
- Deploy fiber to libraries, hospitals, and other anchor institutions: Frontier will "launch an anchor institution initiative to deploy fiber to libraries, hospitals, and government buildings, particularly in unserved and underserved communities."[210] The initiative includes proactively contacting anchor institutions as target customers in the acquired service areas, and providing training to its local and regional general managers with respect to the E-Rate and Rural Health Care support mechanisms.[211]

- Promote competition: Both carriers "have made a series of commitments to protect wholesale customers, including honoring all obligations under Verizon's current wholesale arrangements that are in effect at closing."[212]
- Improve data quality and collection: Frontier will "make available to the Commission data on its broadband deployment progress… to enable effective monitoring of Frontier's compliance with its commitments."[213] Specifically, Frontier will provide the Wireline Competition Bureau with a biannual report through 2016 of the percentage of housing units within the areas being transferred from Verizon to which Frontier offers broadband services capable of delivering at least 3 Mbps (download), and broadband services capable of delivering at least 4 Mbps (download). Frontier will also provide annual reports through 2016, for the areas transferred from Verizon, on the number of housing units by state to which Frontier has extended broadband service of at least 3 Mbps (download) and 1 Mbps (upload) and of at least 4 Mbps (download) and 1 Mbps (upload) that are located in wire centers that lacked a terrestrial broadband service as of the transaction closing date. Moreover, Frontier will also, upon request, provide periodic reports on its broadband adoption initiatives.[214]

In light of the agreed-to conditions set forth above, the Commission concluded that "the likely public interest benefits of the transaction outweigh the potential public interest harms, and that the transaction therefore serves the public interest."[215] These broad-ranging commitments suggest that the Commission will use transactions to promote its broadband objectives where it can find a plausible connection to the transaction.

C. Qwest-CenturyLink

On May 10, 2010, Qwest Communications International Inc. ("Qwest") and CenturyTel, Inc. d/b/a CenturyLink ("CenturyLink") (collectively, "applicants") filed applications seeking Commission approval for various transfers of control of certain Qwest licenses and authorizations to CenturyLink.[216] If the transaction is consummated, Qwest, a full-service communications provider with approximately 10.3 million access lines in 14 states, and approximately 3 million broadband customers,[217] would become a wholly owned subsidiary of CenturyLink.[218] Legacy CenturyLink, which was formed from CenturyTel's acquisition of Embarq,[219] provides incumbent local exchange services to approximately 7 million telephone access lines, and broadband Internet access services to over 2.2 million customers.[220] Following the transaction, CenturyLink shareholders are expected to own approximately 50.5 percent of the combined company, while Qwest shareholders are expected to own approximately 49.5 percent of the combined company.[221]

By mid-September of 2010, the Department of Justice, Federal Trade Commission, and nine of twenty-two states requiring approval had cleared the transaction.[222] Meanwhile, the FCC pleading cycle for the transaction closed on July 27, 2010.[223] While many commenters have predicted that the $10.6 billion deal could hurt broader wireline competition, particularly in the special access and switched access markets,[224] the applicants insist that the transaction will provide extensive benefits to consumers, including expanded IPTV opportunities and broadband services, as well as the creation of a stronger service provider to the enterprise market.[225] The Commission not yet decided whether to grant consent to the transaction.

VII. NUMBER PORTABILITY PORTING INTERVAL AND VALIDATION REQUIREMENTS

One year after it ordered telephone service providers to cut down the time it takes them to transfer a customer's telephone number to another service provider from four business days to one,[226] the Commission adopted the recommendations of industry working groups it had directed to hash out the specifics and mechanics of implementing the new rule.[227]

While all local exchange carriers are required to provide local number portability ("LNP") under Section 251(b)(2) of the Communications Act of 1934, as amended,[228] the shortened porting interval applies only to simple[229] port requests between two wireline providers; a wireline and wireless provider; or an interconnected VoIP provider and any other service provider.[230] The rule does not apply to transfers between two wireless providers.[231] The deadline for implementing one-business-day porting was August 2, 2010 for all but small providers, which must comply by February 2, 2011.[232]

When it initially adopted the shortened porting interval in May 2009, the FCC decided to "leave it to the industry to work through the mechanics of this new interval."[233] It directed the North American Numbering Council ("NANC"), a Federal Advisory Committee, to develop new LNP provisioning process flows and to address how the concepts of porting time and a business day should be construed and measured.[234]

NANC submitted a non-consensus recommendation of its Local Number Portability Administration ("LNPA") Working Group to the FCC on November 2, 2009.[235] Consensus had not been reached on whether different or additional information fields would be necessary for

completing simple ports. The LNPA Working Group proposed that the FCC mandate that service providers use 14 information fields to accomplish a simple port.[236] Members of the cable industry – NCTA, Cox Communications, Inc., and Comcast Corporation – submitted an alternative proposal recommending a set of eight standard fields that should be required to accomplish simple ports.[237] On December 8, 2009, the Wireline Competition Bureau issued a Public Notice seeking comment on these two proposals.[238] Specifically, the FCC requested comment on the "minimum amount of information" that would be necessary to complete simple reports because entities subject to the LNP rules "may not demand information beyond what is required to validate a port request and accomplish a port."[239]

In the end, although consensus had not been reached among industry participants, the Commission adopted the recommendations of the LNPA Working Group. In doing so, it cited the need for uniformity and standardization in the exchange of information fields in order to strike a balance between the competitive and consumer benefits of prompt phone number transfers and the industry burden of implementing the new requirements.[240]

Citing special circumstances that would make meeting the August 2, 2010 deadline unduly burdensome, CenturyLink, in the process of integrating two separate operational systems in connection with the merger of CenturyTel (the former name of CenturyLink) and Embarq, filed a petition for limited waiver of the implementation deadline. "Modifying systems that CenturyLink is already in the process of replacing," the company asserted, "would waste resources and effort that would benefit consumers and other carriers far more if used to advance the merger integration and hasten the deployment of the ultimate systems that comply with the one-day porting requirement."[241]

The Wireline Competition Bureau agreed that it would be unduly burdensome for CenturyLink to modify legacy operational systems that would be replaced only months later, and in an order released August 2, 2010, granted CenturyLink's request for waiver of the deadline until February 2, 2011.[242]

Also on August 2, 2010, the Commission released a public notice seeking comment on a petition for clarification or limited reconsideration filed by Qwest Communications International Inc. ("Qwest").[243] Qwest asked that the Commission clarify whether the non-simple ports must be completed within four business days or started within four business days. Qwest also requested that the FCC allow current service providers more than 24 hours to return a Customer Service Record (CSR) to new service providers, "in the case of voluminous or highly complex ports," where a provider has publicly posted information about its capabilities with respect to large porting requests.[244] Oppositions to the petition were due September 2, 2010, and replies to oppositions due 10 days later.

VIII. IP ENABLED SERVICES

Since the fall of 2009, the Commission has considered whether it should reclassify the transmission component of broadband Internet access service as a telecommunications service, has asked a series of hard questions of Google that highlighted the regulatory uncertainties surrounding emerging IP voice services, and has continued to explore the extension of core wireline regulatory obligations to interconnected VoIP.

A. Regulatory Framework for Broadband Internet Service

In response to the D.C. Circuit's decision in *Comcast Corp. v. FCC*,[245] which held that the Commission had not identified a statutory basis for its assertion of ancillary jurisdiction sufficient to justify enforcement of its Internet Policy Statement[246] against Comcast, the Commission issued a Notice of Inquiry asking for comment on three possible approaches to its legal framework for broadband Internet access service.[247] The Commission asked first whether it could effectively perform its responsibilities while maintaining its classification of broadband Internet access service as an information service. Second, the Commission asked whether it should classify broadband "Internet connectivity service" as a telecommunications service to which all of the requirements of Title II of the Communications Act would apply. Finally, the Commission solicited inquiry on a "third way" under which the Commission would reclassify broadband Internet connectivity but forbear from applying most Title II obligations to Internet connectivity service.

If the Commission does reclassify Internet connectivity service as a telecommunications service, that decision potentially will have significant implications for a range of IP enabled services because classification decisions interpret fundamental statutory terms that are not limited to a specific service or portion of the network. A reclassification decision would necessarily call key Commission precedents classifying broadband Internet access services as information services into doubt. In those precedents, the Commission relied on the access to stored databases that Internet access services provide, as well as functionalities such as use of the Domain Name Server to resolve web URLs into specific IP addresses, as the basis for categorizing broadband Internet access as an information service.[248] Providers that have

relied on those decisions would likely revisit their conclusions about the classification of certain services.

Renewed classification questions are likely to have particular impact on providers of IP enabled services that use a transmission component as part of an overall service, as a conclusion that broadband Internet access includes a severable transmission component could further muddy the already ill-defined standard for when a transmission component is severable, and could suggest that the transmission components of many other services should be separated and regulated as telecommunications services. This, in turn, could subject a number of entities that currently view themselves as information services providers to common carrier regulation.

Providers of IP transport services would likewise face uncertainty. The Commission has explained that its inquiry into the appropriate framework for broadband Internet service will not address the regulatory treatment of the Internet backbone.[249] Nonetheless, the Commission's decision to regulate the transport of bits necessary for broadband Internet access could suggest that Title II regulation should extend to other forms of IP transport, and it may be difficult for the Commission to maintain a clear line between regulated and unregulated IP transport services. This is particularly true because the regulatory status of some forms of packet services, such as MPLS, has already been questioned by the Commission.[250]

Providers will also wonder if existing and future classification decisions could be subject to similar modification. This concern will be heightened if the Commission successfully defends a reclassification decision in the courts. Similarly, if the Commission does successfully extend its reach under Title II, pressure would likely increase for the Commission to conclude that interconnected VoIP

(which remains unclassified, but which already is subject to a number of Title II obligations) is a telecommunications service.

B. Google Voice Letter

In October of 2009, spurred by press reports that Google Voice was restricting calls to certain rural phone numbers, the FCC's Wireline Competition Bureau sent a letter to Google asking a series of questions focused on the functions and features of Google Voice service, its regulatory classification, and the reported calling restrictions.[251]

Google responded by explaining that it had restricted calling to a small set of phone numbers in response to the practice, commonly known as traffic pumping,[252] of setting up services (such as free conferencing or chat lines) designed to drive substantial traffic to certain high cost rural exchanges. According to Google, the restrictions it adopted were necessary to preserve the free Google Voice service.

Google also explained its position that Google Voice is an information service. Google described its service as a web-based software application and argued that the service falls within the statutory definition of an information service because it provides capabilities for generating, acquiring, storing, and transforming information. Google also maintained that Google Voice does not satisfy the statutory definition of telecommunications service[253] both because it is free and because it is an invitation-only service. Because it is not a telecommunications carrier, Google explained, its calling restrictions were permitted.

While the Bureau's inquiry and Google's response were initially perceived as a potential first step in Bureau or Commission action to address the appropriate regulatory treatment of Google Voice and similar services, there have been no further steps in this direction. The Bureau's letter

and Google's response nonetheless illustrate the difficulties traffic pumping presents for information and telecommunications service providers. Carriers have also weighed in at the Commission to highlight the competitive inequities they see in Google's freedom to block high cost calls that traditional carriers must deliver. This disparity in regulatory treatment – which extends beyond traffic pumping to universal service, regulatory fees, disability access, CPNI, and other core common carrier obligations – may create additional pressure on the FCC to address traffic pumping and, possibly, to address the appropriate classification of services like Google Voice.

C. Additional VoIP Regulation

Since adopting 911 requirements for interconnected VoIP in 2005, the Commission has steadily extended core common carrier obligations to interconnected VoIP while continuing to decline to classify interconnected VoIP as a telecommunications or an information service. During the past year, the Commission has invited comment in two areas where it is considering additional interconnected VoIP regulation.

First, in July of this year, the Public Safety and Homeland Security Bureau solicited comment "in advance of a potential Commission proceeding"[254] on whether the Commission's outage reporting requirements, which require providers to report major service outages to the Commission, should be extended to providers of interconnected VoIP service and broadband ISPs. The comment cycle in response to the Bureau's request for comment is closed.

Second, as part of its continuing examination of its 911 rules, the Commission issued a Notice of Inquiry that asked whether it should impose an automatic location requirement on interconnected VoIP providers and whether it should impose 911 requirements on VoIP services that are

not interconnected.[255] Under the Commission's existing 911 rules, interconnected VoIP providers are required to collect and transmit to the appropriate PSAP a customer's registered location. VoIP providers that do not provide interconnected VoIP service are not subject to the Commission's 911 requirements.

If the Commission does extend 911 obligations to non-interconnected VoIP providers, this would mark a significant expansion of VoIP regulation. The Commission to date has consistently drawn a line between interconnected VoIP services, which are capable of making calls to and receiving calls from the Public Switched Telephone Network, and non-interconnected VoIP services, which include VoIP services that can only exchange calls with the PSTN in one direction or that do not interconnect with the PSTN at all. And, just as the Commission has steadily extended core wireline regulatory obligations to interconnected VoIP, it is possible that it would follow a 911 obligation for non-interconnected VoIP with the steady extension of interconnected VoIP obligations to non-interconnected VoIP. At the time of publication, deadlines for comment and reply comments in response to the Notice of Inquiry had not been set.

IX. POLE ATTACHMENTS

The NBP recognized the crucial role that rights-of-way, including pole attachments, play in the deployment of broadband, and recommended that the Commission adopt reforms to speed the attachment process and reduce the cost to attachers.[256] These recommendations drew on an extensive record assembled by the Commission in response to reform proposals advanced by attachers beginning in 2005, as well as proposals to alter or limit pole attachment rates, especially for ILECs.[257] In May, the Commission released an *Order and Further Notice of Proposed Rulemaking* that began to reform the Commission's pole attachment rules as

recommended by the NBP.[258] The *Order* addressed the use of space and cost saving techniques to attach to poles and timely access to poles.

First, the Commission clarified in the *Order* that the requirement of nondiscriminatory access in Section 224 of the Communications Act[259] means that "utilities must allow attachers to use the same [pole] attachment techniques that the utility itself uses . . . or allows to be used."[260] For example, if a utility allows a pole to be boxed (meaning attachments are placed on both sides of the pole) or bracketed (meaning attaching an "arm" that extends away from the pole to hold additional telecommunications lines), a presumption is established that it is appropriate for attachers to use the same techniques on the utility's poles under "comparable circumstances."[261] A utility may rebut such a presumption with regard to any single pole or any class of poles based on concerns about safety, reliability, or other engineering purposes.[262] But for the utility to permit boxing and bracketing only in some circumstances and not others, it must have clear and objective guidelines for the difference and must apply those guidelines equally to itself and to the attacher.[263]

Second, the Commission clarified in the *Order* that the statutory right of just and reasonable access to poles includes the right of timely access to poles[264] and encompasses the timely preparation of poles for attachment (commonly known as "make-ready").[265] The Commission did not, in the Order, articulate a definition of "timely" access, but sought comment in the *Further Notice* on that issue.

The *Further Notice* proposed and sought comment about a comprehensive timeline for all stages of wired pole attachment requests, including timelines for the pole owner to survey the poles[266] and to estimate charges for make-ready

work,[267] for the applicant to accept the estimate,[268] for the pole owner and existing attachers to complete the make ready work,[269] and, if necessary, for multiparty coordination should existing attachers not move their facilities as directed by the pole owner.[270]

The Commission sought comment, as well, on the applicability of any timeline to wireless attachments.[271] The Commission noted that utilities had asserted that wireless attachments "present different safety, reliability, and engineering concerns" and sought comment on "considerations that would affect a timeline tailored to suit requests for attachment of wireless equipment."[272] The Commission explained that its goal is "to bring regularity and predictability to attachment of wireless facilities while acknowledging that the attachment of wireless telecommunications equipment in or near the electric space may raise different safety, reliability, and engineering concerns."[273]

The *Further Notice* also sought comment about reforming the annual rental rate paid by attachers to pole owners for use of space on the pole.[274] Historically, one rate formula has been used to calculate the rental rate for attachments used solely to provide cable television service or to provide cable service and Internet access service, with a different rate formula to determine the rental rate for attachments used to provide competitive telecommunications services.[275] The Commission announced a goal, as also proposed by the NBP,[276] to establish rates for attachments that are as low and as close to uniform as possible[277] and sought comment on a variety of proposed rate reform methods.[278] The Commission also requested comment about regulation of ILEC pole attachment rates, which historically have not been governed under the same statutory requirements, and about how to best pursue competitively

neutral policies given the statutory and policy complexities regarding ILEC rates.[279]

In addition, the *Further Notice* proposed rules to allow attachers to hire certain independent contractors to perform make-ready work when the pole owner has not met the make-ready timeline.[280] The Commission also requested comment about reforming the existing dispute resolution process for pole access, including whether the Commission should: attempt to encourage local dispute resolution by adopting "best practices" or eliminating the requirement that complaints regarding denial of access to poles be filed within 30 days[281]; create specialized forums to handle pole attachment disputes[282]; codify existing precedent by amending its rules to provide that a Commission order directing that pole access be granted pursuant to specified conditions be available as a remedy to denial or delay of pole access[283]; use more substantial penalties to prevent unauthorized attachments[284]; and require that attachers provide notice to pole owners of disputed terms in an attachment contract before challenging the lawfulness of that agreement.[285]

A number of parties have sought reconsideration of the Commission's *Order* and the Commission has invited comment on those petitions.[286]

X. SECTION 706 REPORT

On July 20, 2010, the Commission issued its *Sixth Broadband Deployment Report* under Section 706 of the Telecommunications Act of 1996, as amended by the Broadband Data Improvement Act.[287] Section 706 requires the FCC to report annually on whether broadband "is being deployed to all Americans in a reasonable and timely fashion."[288] If the FCC concludes that it is not, Section 706 requires that the FCC "take immediate action to accelerate deployment of [advanced telecommunications] capability by

removing barriers to infrastructure investment and by promoting competition in the telecommunications market."[289] In a marked departure from past reports, the FCC's determination was negative.

Previous reports had concluded that broadband deployment was "reasonable and timely" despite the finding that "certain groups of Americans were not receiving timely access to broadband."[290] This year's broadband deployment report declared that "broadband deployment to *all* Americans is not reasonable and timely,"[291] and that "market forces alone" were not sufficient to meet the statutory goal of "universal broadband availability."[292] Accordingly, the FCC concluded that policy changes would be necessary, including addressing key recommendations from the NBP, such as universal service reform, spectrum reallocation, and access to pole attachments and public rights of way.[293]

The report also differed from previous broadband deployment reports because the FCC increased its benchmark broadband speed from the basic broadband definition of 200 kilobits per second adopted in the *First Broadband Deployment Report*[294] to 4 Mbps downstream and 1 Mbps upstream.[295] The Commission adopted this speed threshold after analyzing user behavior, and determined that this threshold was the minimum speed necessary for users to be able to stream high quality video with enough bandwidth left for browsing and email.[296]

In another departure from past reports, the Commission based its conclusions on a broader set of data. The FCC principally relied on two sources of data: subscribership data collected through FCC Form 477, and the model adopted by FCC staff as part of the parallel effort to develop the NBP.[297] In addition, for the first time, the Commission incorporated Census Bureau demographic data and a consumer use survey into its findings.[298] Based on this

data, the FCC found that "approximately 14 million Americans, living in 7 million housing units, cannot get residential broadband service that meets the benchmark."[299]

To determine what counties are unserved, the Commission applied a *de minimis* threshold for availability: broadband was deemed available in a county if 1 percent of households in that county subscribe to broadband.[300] By that standard, the Commission estimated that 1,024 out of 3,230 counties in the U.S. and its territories are unserved.[301] These counties, on average, have lower populations, population densities, and income levels than a typical U.S. census area.[302]

The National Cable & Telecommunications Association (NCTA) filed a Petition for Reconsideration of the order on August 19, 2010.[303] NCTA challenged the dataset the Commission had relied on as well as its conclusion that broadband deployment was not "reasonable and timely."[304] NCTA claimed that the Commission had applied "a new, forward-looking definition of broadband to out-of-date Form 477 data," asserting that more current data, including data concerning anticipated projects made possible by state and federal broadband funding mechanisms, would have led the FCC to a different conclusion. As of September 27, 2010, the FCC had not put the petition out for public comment and the Report has not yet been published in the Federal Register.

XI. VRS

Section 225 of the Communications Act directs the FCC to "ensure" to the "extent possible" the "availab[ility]" of telecommunications relay service ("TRS") for the deaf that is "functionally equivalent" to the service received by hearing Americans.[305] Video Relay Service ("VRS"), one form of TRS, allows individuals with hearing or speech disabilities to use American Sign Language ("ASL") to

communicate in near real time using special "videophones." VRS providers are compensated per-minute of service through the Interstate TRS Fund ("TRS Fund") established by the FCC and administered by the National Exchange Carrier Association ("NECA"), to which all users of interstate communications contribute.[306]

In 2010 the FCC took several actions to reform VRS and, in particular, to combat waste, fraud, and abuse that, the FCC believes "plague the current program and threaten its long-term viability."[307]

First, in February it issued a Declaratory Ruling, addressing the compensability from the TRS Fund of certain types of VRS calls. The Declaratory Ruling emphasized that: (1) VRS calls made by or to a VRS provider's employee, or the employee of a provider's subcontractor, are not eligible for compensation from the TRS Fund on a per-minute basis from the TRS Fund, but rather as business expenses; (2) VRS calls placed for the purpose of generating compensable minutes are not, and never have been, compensable from the TRS Fund; and (3) neither VRS Voice Carry Over used to connect two hearing users, nor VRS calls used to connect two users that are both outside the United States meet the definition of TRS or are otherwise compensable from the TRS Fund.[308]

Second, in May the FCC issued a Declaratory Ruling reiterating that TRS Fund payments may be suspended to VRS providers that do not submit to audits. In an accompanying Order, the FCC adopted an interim rule addressing the certification of provider information for VRS calls. Finally, in an accompanying Notice of Proposed Rulemaking, the FCC sought comment on ways to amend its rules to detect and prevent fraud and misuse in the provision of VRS.[309]

Third, in a June Notice of Inquiry the FCC stated its intention to take a "fresh look" at the VRS rules to ensure that the program is effective, efficient, and sustainable in the future. The FCC stated its intention to improve the VRS program to ensure that it is available to and used by the full spectrum of eligible users, encourages innovation, and is provided efficiently so as to be less susceptible to waste, fraud, and abuse.[310]

Fourth, in June the FCC adopted an Order that modified the pre-existing VRS compensation regime in two ways. First, it abandoned a price cap approach in favor of a regime based in part on cost-of-service data, and it set rates for a single year by reference, in part, to providers' costs that the FCC found to be allowable. Second, the Order dramatically lowered the compensation rate for Tier 3 minutes (*i.e.*, minutes provided above and beyond 500,000 minutes per month), while making only modest adjustments to Tier 1 and Tier 2 rates.[311] Sorenson Communications, Inc., the leading provider of VRS services, has appealed this Order to the Tenth Circuit Court of Appeals.[312]

Finally, in September the FCC issued a Notice of Proposed Rulemaking seeking comment on the assignment of telephone numbers to VRS users (and users of other Internet-based TRS services). In particular, the FCC has requested comment on the prevalence of toll-free numbers assigned to VRS users and also on proposed rules designed to ensure that geographically appropriate local numbers are used as VRS users' primary telephone numbers.[313]

The FCC also engaged in a significant enforcement action in September 2010, releasing a consent decree with Purple Communications, Inc. ("Purple") which requires Purple to make a repayment of $18.5 million to the TRS Fund, and an additional payment of $3.1 million in interest and penalties. Purple must also make a $550,000 payment to

the U.S. Treasury. In addition to the monetary terms of the settlement, Purple must adopt a detailed compliance plan designed to ensure that the company strictly adheres to the Commission's TRS rules.

The Consent Decree followed Enforcement Bureau investigations into whether Purple overbilled the TRS Fund. Specifically, the Enforcement Bureau was investigating whether Purple unlawfully offered financial incentives or rewards to inflate TRS usage and billables, and whether it double-recovered for certain business-related calls. The settlement resolved the Enforcement Bureau's investigation.[314]

XII. CONGRESSIONAL DEVELOPMENTS

There were relatively few Congressional developments of note during the past year, as the Committees with main jurisdiction over wireline issues – the House Energy and Commerce Committee and the Senate Commerce, Science, and Transportation Committee – were largely focused on other priorities, notably energy, health care, and transportation. However, both Committees did hold numerous oversight hearings regarding various aspects of the FCC's NBP. In addition, the House Energy and Commerce Committee took some steps towards enacting Universal Service Fund ("USF") and/or net neutrality reform measures. Even without the prospect of near-term passage of legislation, these Congressional actions sent important signals to the FCC and the industry about the Hill's current views on critical wireline policy debates.

A. USF Reform Bill

One bill received significant Energy and Commerce Committee attention, although it is unlikely to pass during this Session of Congress. Subcommittee on Communications, Technology, and the Internet Chairman

Rick Boucher (D-VA) introduced H.R. 5828, the Universal Service Reform Act of 2010, in July 2010. The legislation, if passed, would enact comprehensive reform of the Universal Service High Cost Fund (the "Fund"). According to Chairman Boucher, "comprehensive reform to ensure [the Fund's] continued stability is urgently needed."[315] The legislation generally would extend the USF program to broadband and grant the FCC the statutory authority it needs to carry out its universal service goals.

Among its notable provisions, the legislation would: (1) expand the Fund's contribution base by assessing intrastate, as well as interstate and international, revenues and requiring that providers of broadband connections pay into the Fund; (2) grant the FCC the authority to implement competitive bidding for distributions to wireless carriers; (3) direct the FCC to adopt a new cost model for USF support based on the provision of both voice and broadband service, while also limiting growth of the Fund by providing that the contribution burden on consumers may not unreasonably increase; (4) mandate that all recipients of USF support offer broadband throughout their service areas at minimum speeds established by the FCC; (5) require carriers to pass through call identification information, eliminating traffic pumping by prohibiting carriers from sharing access charge revenue with third parties that offer free or reduced-cost services; (6) make permanent the Anti-Deficiency Act exemption for USF, so that an annual appropriations rider is no longer required for that purpose; and (7) deny USF support in areas where there is competition in voice telephone service.[316]

While USF reform has garnered significant attention, including two Subcommittee hearings on the subject during the past year, one of which specifically addressed Chairman Boucher's bill, the Subcommittee has not yet voted to send it to the full Committee for its consideration.

B. Net Neutrality

The House Energy and Commerce Committee has also been working to introduce legislation addressing net neutrality. Proposed draft legislation reportedly would codify for two years the FCC's four network neutrality principles, while also barring the FCC from classifying broadband Internet access or transmission as a telecommunications service under Title II of the Communications Act.[317] It is unclear whether the bill will be introduced in the House during this Session of Congress, and it appears unlikely that would be passed by the House or the Senate. The Senate Communications, Technology, and the Internet Subcommittee has also considered the matter, but it is unlikely that legislation will be introduced in this Session in the Senate.

Congress' apparent reluctance to provide a legislative resolution to net neutrality has necessarily impacted the Commission and industry's approach to the contentious net neutrality debate. Faced with Congressional inaction, the Commission will feel greater pressure and greater discretion to resolve the net neutrality debate. This, in turn, creates incentives for industry players opposed to net neutrality to negotiate a solution that they find acceptable. To date, however, the Commission has not acted and no broad consensus solution has emerged.

C. Other Legislation

It is likely that some form of disability legislation will be enacted into law during this Session. In July, the House passed H.R. 3101, the Twenty-first Century Communications and Video Accessibility Act of 2009. In August, the Senate passed a companion bill, S.3304, the Equal Access to 21st Century Communications Act. Since that time, the House and Senate have worked to reconcile and pass a final bill. The legislation would update portions of the 1996

Telecommunications Act addressing disability access to communications services.

Legislation related to the protection of consumer's private data has been introduced in both the House and Senate, and both House and Senate Committees have held hearings on the subject. Legislation regarding cybersecurity was also introduced in both the House and the Senate. It is unlikely that privacy or cybersecurity legislation will pass during this Session of Congress, but Congress will likely continue to pay close attention to these two issues.

XIII. CONCLUSION

While the Commission has taken some significant steps in wireline regulation this year, including revising its approach to forbearance petitions to reflect an analysis of market power, implementing significant pole attachment reforms, implementing number portability reforms, and reforming VRS, much of 2010 has been, and will continue to be, devoted to setting the stage for future developments. As this article goes to press, in September 2010, even setting aside the headline-grabbing topics of network neutrality and the proper legal classification of broadband services, the Commission is working to tee up multi-faceted universal service and intercarrier compensation reform. If the Commission successfully fleshes out and adopts the NBP's USF and intercarrier compensation recommendations, it will substantially reshape the wireline revenue model and explicitly support broadband deployment for the first time. These reforms would also eliminate many inefficiencies in the current intercarrier compensation system. But success in this area has been elusive for many Commissions, and it is too early to tell whether this Commission will succeed where others have failed.

The industry waits as well to see if the Commission's look at special access will result in reforms, and whether it

will adopt further pole attachment reforms. So, as we end a busy year in wireline regulation, we look forward to even busier times ahead.

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[1] Mr. Nakahata and Ms. Strandberg are partners, and Mr. Davis, Ms. McReynolds, Ms. Smith, and Ms. Wentzel are associates, in the law firm of Wiltshire & Grannis LLP. Ms. Shields was formerly an associate with Wiltshire & Grannis LLP and is currently Director of Government and Industry Relations for Ericsson, Inc. Mr. Nakahata served as Chief of Staff to FCC Chairman William Kennard, and Senior Legal Adviser to FCC Chairman Reed Hundt.

[2] *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, WC Docket No. 09-135, 25 FCC Rcd 8622 (2010) ("*Qwest Phoenix Forbearance Order*").

[3] *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, WC Docket No. 04-223, 20 FCC Rcd 19415 (2005) ("*Qwest Omaha Forbearance Order*").

[4] *See Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007) ("*Qwest v. FCC*").

[5] *See Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, Memorandum Opinion and Order, WC Docket No. 07-97, 23 FCC Rcd 11729 ¶ 1 (2008) ("*Qwest 4-MSA Forbearance Order*").

[6] *See Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 106(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion

and Order, WC Docket No. 06-172, 22 FCC Rcd 21293 (2007) ("*Verizon 6-MSA Forbearance Order*"), *remanded*, *Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 296 (D.C. Cir. 2009) ("*Verizon Remand Order*").

[7] *Qwest Corp. v. FCC*, No. 08-1257 (D.C. Cir. remanded Aug. 5, 2009) ("*Qwest Remand Order*").

[8] *See Qwest Phoenix Forbearance Order* ¶ 2.

[9] *See id.* ¶ 37.

[10] *See id.* ¶ 2.

[11] *See Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, WC Docket No. 05-281, 22 FCC Rcd 1958 (2007) ("*ACS Anchorage UNE Forbearance Order*").

[12] *See id.* ¶ 12 ("The Commission did not define product markets for the purpose of its UNE forbearance analysis in the *Qwest Omaha Order*, and nothing in the language of section 10 leads us to depart from this precedent and undertake this aspect of dominant carrier analysis here.").

[13] *See Qwest Omaha Forbearance Order* ¶¶ 71, 79.

[14] *See Verizon 6-MSA Forbearance Order* ¶ 30; *see also Qwest 4-MSA Forbearance Order* ¶ 28.

[15] *See Verizon 6-MSA Forbearance Order* ¶¶ 30, 37; *see also Qwest 4-MSA Forbearance Order* ¶¶ 27-28, 35.

[16] *Qwest Phoenix Forbearance Order* ¶ 25.

[17] *See id.* ¶¶ 26, 33-36.

[18] *Id.* ¶ 28.

[19] *Id.* ¶ 29.

[20] *See id.* ¶¶ 37-38 (describing its approach as "comparable to the analysis used by the DOJ, FTC, and telecom regulators in other countries" and "designed to identify when competition is sufficient to constrain carriers from imposing unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, and conditions, or from acting in an anticompetitive manner"); *see also Wireline Competition*

Bureau Seeks Comment on Applying the Qwest Phoenix Forbearance Order Analytic Framework in Similar Proceedings, Public Notice, WC Docket Nos. 06-172, 07-97, at 1 (rel. June 22, 2010), ("*Qwest Phoenix Forbearance Public Notice*") (noting that the Commission's approach is "similar to the analysis the Commission has used many times in the past to determine whether competition has increased sufficiently to render certain regulatory protections no longer necessary") (citation omitted).

[21] *Qwest Phoenix Forbearance Order* ¶ 48.

[22] *See id.* ¶¶ 48-49.

[23] *Id.* ¶ 49. It is not entirely clear from the Commission's discussion whether it was declaring different capacities to be separate product markets within wholesale dedicated transport as well as wholesale loop markets.

[24] *Id.* ¶ 50.

[25] *Id.* ¶ 52.

[26] *Id.*

[27] *Id.* ¶ 53.

[28] *Compare id*. *with* n.159.

[29] *Id.* ¶ 54.

[30] *Id.*

[31] *Id.*

[32] *Id.* ¶ 55.

[33] *Id*.

[34] *Id.* ¶ 56.

[35] *Id.* ¶ 58.

[36] *Id.* ¶ 59.

[37] *Id.* ¶ 60.

[38] *Id*. ¶ 62.

[39] *Id.* ¶ 63.

[40] *Id.* ¶ 63 n.194.

[41] *Id.* ¶ 64.

[42] *Id.* ¶ 65.

[43] *Id*. ¶ 66.

[44] *See id.* ¶ 67.

[45] *Id.* ¶ 68.
[46] *Id.*
[47] *See id.* ¶ 69.
[48] *Id.*
[49] *See id.*
[50] *Id.* ¶ 71.
[51] *Id.*
[52] *Id.* ¶¶ 72-73.
[53] *Id.* ¶ 74.
[54] *Id.*
[55] *Id.* ¶ 75.
[56] *See id.* ¶ 76.
[57] *Id.* ¶ 77.
[58] *Id.*
[59] *Id.* ¶ 78.
[60] *See id.* ¶ 79 (citing *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262, 16 FCC Rcd 9923 at ¶ 38 (2001) ("*CLEC Access Charge Reform Order*")).
[61] *Qwest Phoenix Forbearance Order* ¶ 79.
[62] *Id.*
[63] *See id.*¶ 80.
[64] *See id.* ¶ 86.
[65] *Id.* ¶ 82.
[66] *Id.*
[67] *Id.* ¶ 83.
[68] *Id.* ¶ 85.
[69] *Id.* ¶ 87.
[70] *Id.* ¶ 89.
[71] *See id.* ¶¶ 89-90.
[72] *See id.* ¶ 91.
[73] *Id.* ¶ 96 (internal quotation omitted).
[74] *Id.* ¶ 116.

[75] *Id.* at Concurring Statement of Commissioner Robert McDowell.
[76] *Id.*
[77] *Id.* at Concurring Statement of Commissioner Meredith Baker Statement.
[78] *Id.*
[79] *Id.*
[80] *See Qwest Corp. v. FCC*, No. 10-9543 (10th Cir. filed July 30, 2010).
[81] *See Qwest Phoenix Forbearance Public Notice.*
[82] *See* Letter from Kathleen Grillo, Senior Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-172, at 1 (filed Aug. 23, 2010).
[83] *See id.* at 1-2.
[84] *See Qwest 4-MSA Forbearance Petitions Withdrawn, Proceeding Terminated*, Public Notice, WC Docket No. 07-97 (rel. Aug. 20, 2010).
[85] *See id.* at 2 n.6 (citing Letter from Harisha J. Bastiampillai, Senior Attorney, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, at 3-4 (filed Aug. 19, 2010)).
[86] Interstate allocated loop costs are supported through the Interstate Access Support mechanism and the Interstate Common Line Support mechanism, depending upon whether the incumbent LEC for a particular area was historically regulated under price-cap or rate-of-return regulation.
[87] *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001) ("*Qwest I*"); *Qwest Commc'ns Int'l, Inc. v. FCC*, 398 F.3d 1222, 1233-1237 (10th Cir. 2005) ("*Qwest II"*).
[88] *Qwest II* at 1234.
[89] *Id.* at 1237.
[90] *Id.*
[91] *See High-Cost Universal Service Support; Federal-State Joint Board on Universal Service; Joint Petition of the*

Wyoming Public Service Commission and the Wyoming Office of Consumer Advocate for Supplemental Federal Universal Service Funds for Customers of Wyoming's Non-Rural Incumbent Local Exchange Carrier, Order on Remand and Memorandum Opinion and Order, WC Docket No. 05-337, CC Docket No. 96-45, 25 FCC Rcd 4072 ¶¶ 1, 4 (2010).

[92] *Id*. ¶ 30.

[93] *Id*. ¶¶ 26-27.

[94] *Id*. ¶ 3.

[95] *Id*. ¶ 38.

[96] *Id.* ¶ 3.

[97] *Id*. ¶ 43.

[98] *Id.* ¶ 3.

[99] *Id*. ¶ 86.

[100] *Id.* ¶ 86.

[101] *Id*. ¶ 86.

[102] *Id.* ¶ 89.

[103] *Id.* ¶ 90.

[104] *High-Cost Universal Service Support; Jurisdictional Separations; Coalition for Equity in Switching Support Petition for Reconsideration*, Report and Order and Memorandum Opinion and Order, WC Docket No. 05-337, CC Docket No. 80-286, 25 FCC Rcd 3430 ¶ 1 (2010).

[105] *Id*. ¶11.

[106] *See* Federal Communications Commission's National Broadband Action Agenda (2010), *available at* http://www.broadband.gov/plan/broadband-action-agenda.html ("Broadband Action Agenda").

[107] *See Connect America Fund; A National Broadband Plan for Our Future; High-Cost Universal Service Support*, Notice of Inquiry and Notice of Proposed Rulemaking, WC Docket Nos. 10-90, 05-337, GN Docket No. 09-51, 25 FCC Rcd 6657 ¶ 2 (2010).

[108] *Id*. ¶¶ 19-21.

[109] *Id*. ¶¶ 23-30, 33, 35.

[110] *Id.* ¶¶ 41-48.

[111] *Id*. ¶ 2.
[112] *Id*. ¶ 51-52.
[113] *Id.* ¶¶ 55-58, 60.
[114] Federal Communications Commission, *Connecting America: The National Broadband Plan*, 147 (2010) ("NBP").
[115] *See High-Cost Universal Service Support; Federal-State Joint Board on Universal Service; Request for Review of Decision of Universal Service Administrator by Corr Wireless Communications, LLC*, Order and Notice of Proposed Rulemaking, WC Docket No. 05-337; CC Docket No. 96-45, 2010 FCC LEXIS 5406 ¶¶ 1, 10 (2010) ("*Verizon/Sprint Order*").
[116] *Id*. ¶ 12.
[117] *Id*. ¶ 20.
[118] *Id.* ¶ 23.
[119] *Id.* ¶¶ 25-26.
[120] *See Schools and Libraries Universal Service Support Mechanism; A National Broadband Plan for Our Future*, Notice of Proposed Rulemaking, CC Docket No. 02-6; GN Docket No. 09-51, 25 FCC Rcd 6872 (2010) ("*E-Rate NPRM*").
[121] *Id*. ¶ 9.
[122] *See* News Release, FCC, *FCC Enables High-Speed, Affordable Broadband for Schools and Libraries* (rel. Sept. 23, 2010).
[123] *See Rural Health Care Support Mechanism*, Notice of Proposed Rulemaking, WC Docket No. 02-60, 25 FCC Rcd 9371 (2010) ("*Rural Healthcare NPRM*").
[124] Broadband Action Agenda.
[125] *See Rural Healthcare NPRM* ¶ 3.
[126] *Id*.
[127] Broadband Action Agenda.
[128] NBP at 149.
[129] Broadband Action Agenda.
[130] Broadband Action Agenda.

[131] NBP at 143-44.
[132] *Id.*
[133] *Id.*
[134] *See Universal Service Contribution Methodology; Request for Review of the Decision of the Universal Service Administrator and Emergency Petition for Stay by U.S. TelePacific Corp. d/b/a TelePacific Communications*, Order, WC Docket No. 06-122, 25 FCC Rcd 4652 (2010).
[135] *See Comment Sought on Petition for Clarification and Reconsideration of the Wireline Competition Bureau's TelePacific Order*, Public Notice, WC Docket No. 06-122, 25 FCC Rcd 7168 (2010).
[136] *See AT&T Inc., CenturyLink, SureWest Communications, and Verizon Petition for Clarification or in the Alternative for Partial Reconsideration*, WC Docket No. 06-122 (filed June 1, 2010).
[137] *Id.* at 2, 3, 5.
[138] *Opposition of U.S. TelePacific Corp. D/B/A/ TelePacific Communications to Petition for Clarification or in the Alternative for Partial Reconsideration*, WC Docket No. 06-122 (filed July 6, 2010).
[139] 47 U.S.C. § 254(e).
[140] NBP at 142.
[141] NBP at 148, Recommendation 8.7.
[142] Broadband Action Agenda at 3.
[143] NBP at 148.
[144] NBP at 136.
[145] *Id.*
[146] 47 U.S.C. § 254(g).
[147] *See* Karen Brinkman, Richard R. Cameron, Elizabeth R. Park & Jarrett S. Taubman, *The Year in Wireline Telecommunications Regulation, October 2008-September 2009*, 27th Annual Institute on Telecommunications Policy & Regulation, 71 (2009) (citing *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*,

Declaratory Ruling and Notice of Proposed Rulemaking, CC Docket Nos. 96-98 and 99-68, 14 FCC Rcd 3689 (1999)).

[148] *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

[149] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, CC Docket Nos. 96-98 and 99-68, 16 FCC Rcd 9151 ¶ 8 (2001).

[150] 47 U.S.C. § 251(b)(5).

[151] *See High-Cost Universal Service Support; Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Contribution Methodology; Numbering Resource Optimization; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Developing a Unified Intercarrier Compensation Regime; Intercarrier Compensation for ISP-Bound Traffic; IP enabled Services*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, WC Docket Nos. 03-109, 04-36, 05-337, and 06-122; CC Docket Nos. 96-45, 96-98, 99-68, 99-200, and 01-92, 24 FCC Rcd 6475 ¶¶ 6-7 (2008).

[152] *See id.* ¶ 29.

[153] *See Core Commc'ns, Inc. v. FCC*, 592 F.3d 139, 141 (D.C. Cir. 2010).

[154] *Id.* at 144.

[155] *Id.*

[156] *Id.* at 145 (internal quotations omitted).

[157] *Id.*

[158] *PAETEC Commc'ns, Inc. v. CommPartners, LLC*, 2010 U.S. Dist. LEXIS 51926, at *13 (D.D.C. Feb. 18, 2010).

[159] *Id*.

[160] *Id.* at *9.

[161] *Id.*

[162] *See North County Commc'ns Corp. v. MetroPCS California, LLC*, Memorandum Opinion and Order, 24 FCC Rcd 3807 (2009) ("Bureau Order").

[163] *See North County Commc'ns Corp. v. MetroPCS California, LLC*, Order on Review, 24 FCC Rcd 14036 (2009) ("Order on Review").
[164] *MetroPCS California, LLC. v. FCC*, Case No. 10-1003 (D.C. Cir. filed Jan. 8, 2010).
[165] *See id.*, Final Initial Brief of Petitioner MetroPCS California, LLC at 5-6 (filed July 8, 2010) (citing *Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling and Report and Order, 20 FCC Rcd 4855 ¶¶ 15-16 (Feb. 24, 2005) ("T-Mobile Declaratory Ruling")).
[166] *MetroPCS California, LLC. v. FCC*, Case No. 10-1003 (D.C. Cir. filed July 8, 2010), Final Brief of Respondents at 2.
[167] *See Qwest Commc'ns Corp. v. Superior Tel. Coop*., Opinion: Final Order, Iowa Utilities Board Docket No. FCU-07-2, 2009 Iowa PUC LEXIS 428 (Sept. 21, 2009) ("*IUB Order*").
[168] *Id.* at *1.
[169] *See id.* at *2-3, *13.
[170] *See Aventure Commc'ns Tech., L.L.C. v. Iowa Utilities Board*, 2010 U.S. Dist. LEXIS 87250, at *8 (N.D. Iowa Aug. 17, 2010) (internal citation omitted).
[171] *See id.* at *19-20.
[172] *See id.* at *23-25.
[173] *See id.* at *88.
[174] *See, e.g., North County Commc'ns Corp. v. Verizon Global Networks, Inc.*, Case No. 08-cv-01518 (S.D. Cal. filed Aug. 18. 2008); *Bluegrass Tel. Co. v. Qwest Commc'ns Co*., Case No. 4:09-cv-70 (W.D. Ky. filed Aug. 18, 2009); *Tekstar Commc'ns v. Sprint Commc'ns Co*., Case No. 08-cv-1130 (D. Minn. filed Apr. 23, 2008); *Splitrock Props. Inc. v. Sprint Commc'ns Co.*, Case No. 09-cv-4075, 2010 U.S. Dist. LEXIS 30787, at *6-7 (D.S.D. Mar. 30, 2010) ("[B]ased on information available to the court, there are nine similar cases pending the United States District Court for the Southern

District of Iowa, three cases pending in the United States District Court for the Northern District of Iowa, two cases pending in the United States District Court for the Southern District of New York, and one case each pending in the United States District Court for the District of Minnesota and the United States District Court for the Western District of Kentucky.").

[175] *Splitrock Props., Inc. v. Sprint Commc'ns Co*., 2010 U.S. Dist. LEXIS at *1-2, *7.

[176] *Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM***,** Public Notice, WC Docket No. 05-25, 24 FCC Rcd 13638 (2009).

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] Areas outside of an MSA can also qualify for pricing flexibility provided that they meet the standards for pricing flexibility as if the geographic area within a particular ILEC study area were an MSA. *See* 47 CFR § 69.707(b).

[181] *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers*, Fifth Report and Order and Proposed Notice of Rulemaking, CC Docket Nos. 94-1, 96-262, 98-157; 14 FCC Rcd 14221 ¶ 81 (1999) ("*Pricing Flexibility Order*").

[182] *See id.* ¶ 4.

[183] Comments of AT&T Inc., WC Docket No. 05-25, at 21 (filed Jan. 19, 2010).

[184] *See e.g.* Reply Comments of AT&T Inc., WC Docket No. 05-25, at 17 (filed Feb. 24, 2010) ("AT&T Reply Comments").

[185] *See e.g.* AT&T Reply Comments at 17; *see generally* Reply Comments of the United States Telecom Association, WC Docket No. 05-25 (filed Feb. 24, 2010) ("USTA Reply

Comments"); *see also* Reply Comments of Qwest Communications International Inc., WC Docket No. 05-25 (filed Feb. 24, 2010) ("Qwest Reply Comments").

[186] *See* Comments of NoChokePoints Coalition, WC Docket No. 05-25, at 16 (filed Jan 19, 2010) ("NoChokePoints Comments").

[187] *See, e.g.*, Qwest Reply Comments at 16-19.

[188] *See* AT&T Reply Comments at 18-22; Qwest Reply Comments at 7-8; USTA Reply Comments at 14-15.

[189] *See, e.g.* AT&T Reply Comments at 18, 30-32.

[190] *See generally* USTA Reply Comments.

[191] *See e.g.*, Qwest Reply Comments at 5-6.

[192] *See Access Charge Reform; Price Cap Performance Review for LECs; Low-Volume Long Distance Users; Federal-State Joint Board on Universal Service*, Order on Remand, CC Docket Nos. 94-1, 96-45, 96-262, 99-249, 18 FCC Rcd 14976 ¶ 35 (rel. July 10, 2003) ("*CALLS Remand Order*") (citing *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, CC Docket No. 87-313, 5 FCC Rcd 6786 ¶ 74 (1990)). Paragraphs 35 and 36 of the *CALLS Remand Order* provide a brief synopsis of the history of the X-factor and related appellate review.

[193] *See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long-Distance Users; Federal-State Joint Board On Universal Service*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 ¶ 166 (2000) ("[A]fter the five-year term we can re-examine the issue to determine whether competition has emerged to constrain rates effectively.").

[194] *See id.* ¶ 160. The X-factor for switched access was also specified, but in a different manner than for special access.

[195] *See* 47 CFR § 61.45(b)(1)(iv).

[196] *See, e.g.*, Reply Comments of NoChokePoints Coalition, WC Docket No. 05-25, at 1-2, 23-28 (filed Feb. 24, 2010) ("NoChokePoints Reply Comments").
[197] *See e.g.*, AT&T Reply Comments at 56.
[198] *See e.g.*, Comments of Sprint Nextel Corporation, WC Docket No. 05-25, at 38-39 (filed Jan. 19, 2010).
[199] *See e.g.* NoChokePoints Reply Comments at 41-43; Reply Comments of PAETEC Holdings Inc., WC Docket No. 05-25, at 73-74 (filed Feb. 24, 2010) ("PAETEC Reply Comments").
[200] *See e.g.* Comments of PAETEC Holdings Inc., WC Docket No. 05-25, at vii-viii, 80-84 (filed Jan. 19, 2010).
[201] *See e.g.* AT&T Reply Comments at 63.
[202] *See Applications Filed by Frontier Communications Corporation and Verizon Communications Inc. for Assignment or Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 09-95, 25 FCC Rcd 5972 ¶¶ 1-3 (2010) ("*Verizon-Frontier Order*"). Both the Federal Trade Commission and the Department of Justice Antitrust Division completed their review of the transaction and determined not to take any enforcement action during the Hart-Scott-Rodino waiting period. *See id*. ¶ 11 n.38.
[203] *Id.* ¶ 2.
[204] *Id.*
[205] *See id.*
[206] *See Applications Filed for the Transfer of Control of Embarq Corporation to CenturyTel, Inc.*, Memorandum Opinion and Order, WC Docket No. 08-238, 24 FCC Rcd 8741 (2009) ("*CenturyTel-Embarq Order*").
[207] *Verizon-Frontier Order* ¶ 44.
[208] *Id*.
[209] *FCC Approves Frontier-Verizon Transaction to Significantly Expand Broadband in Rural America*, at 1 (May 21, 2010) ("*Verizon-Frontier Public Notice*"); *see also Verizon-Frontier Order*, app. C at 6001.
[210] *Verizon-Frontier Public Notice* at 1.

[211] *See Verizon-Frontier Order*, app. C at 6002.
[212] *Verizon-Frontier Public Notice* at 1; s*ee also Verizon-Frontier Order*, app. C at 6004-07.
[213] *Verizon-Frontier Public Notice* at 1.
[214] *See Verizon-Frontier Order*, app. C at 6002-03.
[215] *Id.* ¶ 3.
[216] *See* Qwest Communications International Inc., Transferor, and CenturyTel, Inc. d/b/a CenturyLink, Transferee, Application for Transfer of Control Under Section 214 of the Communications Act, as Amended, WC Docket No. 10-110 (filed May 10, 2010). On May 20, 2010, the transferee's company name changed to CenturyLink, Inc. *Id.* at 38 n.63.
[217] *Applications Filed by Qwest Communications International Inc. and CenturyTel, Inc., d/b/a/ CenturyLink for Consent to Transfer of Control, Pleading Cycle Established*, Public Notice, WC Docket No. 10-110, 25 FCC Rcd 9557 (2010) ("*Qwest-CenturyLink Public Notice*"). Qwest's service territories are in Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.
[218] *See id.*
[219] *See generally CenturyTel-Embarq Order*.
[220] *See Qwest-CenturyLink Public Notice.* CenturyLink's service territories are in Alabama, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Washington, Wisconsin, and Wyoming.
[221] *Id.*
[222] *See* Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules, 75 Fed. Reg. 47810, 47811 (2010); *see also* Letter from Karen

Brinkmann, Counsel for CenturyLink, Inc., to Marlene Dortch, Secretary, FCC, WC Docket No. 10-110, at 1 (filed Sept. 16, 2010) ("*Qwest-CenturyLink Ex Parte*").

[223] *Qwest-CenturyLink Public Notice* at 1.

[224] *See* Howard Buskirk, *NASUCA: Consensus is CenturyTel's Purchase of Qwest an Anticompetitive Move*, COMMUNICATIONS DAILY, July 29, 2010.

[225] *Qwest-CenturyLink Ex Parte* at 1.

[226] *Local Number Portability Porting Interval and Validation Requirements; Telephone Number Portability*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 07-244; CC Docket No. 95-116, 24 FCC Rcd 6084 (rel. May 13, 2009) ("*2009 Porting Interval Order and Further Notice*").

[227] *Local Number Portability Porting Interval and Validation Requirements; Telephone Number Portability*, Report and Order, WC Docket No. 07-244; CC Docket No. 95-116, 25 FCC Rcd 6953 (2010) ("*2010 Porting Interval Order*").

[228] *See* 47 U.S.C. § 251(b)(2).

[229] The FCC adopted the definition of "simple ports" set forth in 2000 by the North American Numbering Council (NANC) Local Number Portability Administration (LNPA) Working Group as follows: "Simple ports are those ports that: (1) do not involve unbundled network elements; (2) involve an account only for a single line; (3) do not include complex switch translations (e.g., Centrex, ISDN, AIN services, remote call forwarding, or multiple services on the loop); and (4) do not include a reseller." *2010 Porting Interval Order* at 6954 n.3 (citations omitted). Whether the definition of a simple port should be modified remains pending from the 2009 Further Notice. *See 2009 Porting Interval Order and Further Notice* ¶ 19.

[230] *See 2010 Porting Interval Order* ¶ 1.

[231] *See id*. n.3.

[232] *See id*. ¶ 1.

[233] *2009 Porting Interval Order and Further Notice* ¶ 10.
[234] *See id.*
[235] *See* Letter from Betty Ann Kane, Chairman, North American Numbering Council, to Sharon Gillett, Chief, Wireline Competition Bureau, FCC, WC Docket No. 07-244, at 2 and Att. 4 (filed Nov. 2, 2009).
[236] *See id*. at Att. 4. The LNPA Working Group proposed that the following fields be required for simple ports: Customer Carrier Name Abbreviation (CCNA), Purchase Order Number (PON), Account Number (AN), Desired Due Date (DDD), Requisition Type and Status (REQTYP), Activity (ACT), Company Code (CC), New Network Service Provider (NNSP), Agency Authority Status (AGAUTH), Number Portability Direction Indicator (NPDI), Telephone Number (Initiator) (TEL NO(INIT)), Zip Code (ZIP), Ported Telephone Number (PORTED NBR), and Version (VER). *See 2010 Porting Interval Order* ¶ 6.
[237] *See* Letter from Cindy Sheehan, Senior Director, National Customer Activation & Repair, Comcast Corporation, Jose Jimenez, Executive Director, Regulatory Affairs-Policy, Cox Communications, Inc., Jerome F. Candelaria, NANC Representative, NCTA, to Sharon Gillett, Chief, Wireline Competition Bureau, FCC, WC Docket No. 07-244; CC Docket No. 95-116 (Nov. 19, 2009) (proposing that the following fields would "provide sufficient information to validate and effectuate a simple port within the Commission's mandated one business day interval": Purchase Order Number (PON), Account Number (AN), Desired Due Date (DDD), Company Code (CC), New Network Service Provider Identifier (NNSP), Zip Code (ZIP), Ported Telephone Number (PORTED NBR), and Version Number (VER)).
[238] *See Comment Sought on Proposals for Standardized Data Fields for Simple Port Requests*, WC Docket No. 07-244, 24 FCC Rcd 14423 (rel. Dec. 8, 2009).
[239] *Id*. at 14423-24.

[240] *2010 Porting Interval Order* ¶¶ 8, 9.
[241] CenturyLink Petition for Waiver of Deadline, WC Docket No. 07-244, CC Docket No. 95-116 (filed June 7, 2010) (requesting a waiver until May 1, 2011). *See also* Letter from Jeffrey S. Lanning, Director – Federal Regulatory Affairs, CenturyLink, to Ms. Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-244; CC Docket No. 95-116 (July 30, 2010) (modifying the petition to seek a waiver until February 2, 2011, the deadline for small companies).
[242] *See Local Number Portability Porting Interval and Validation Requirements; Telephone Number Portability; CenturyLink's Petition for Waiver of Deadline*, Order, WC Docket No. 07-244; CC Docket No. 95-116; DA 10-1439, ¶ 8 (rel. Aug. 2, 2010).
[243] *See* Petition for Clarification and/or Reconsideration of Qwest Communications International Inc., WC Docket No. 07-244; CC Docket No. 95-116 (filed July 22, 2010).
[244] *Id*. at 6-7.
[245] *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).
[246] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, CC Docket No. 02-33; CC Docket No. 01-337; CC Docket Nos. 95-20, 98-10; GN Docket No. 00-185; CS Docket No. 02-52, 20 FCC Rcd 14986 (2005) ("*Internet Policy Statement*").
[247] *Framework for Broadband Internet Service,* Notice of Inquiry, GN Docket No. 10-127, 25 FCC Rcd 7866 (2010) ("*Framework for Broadband Internet Service*").
[248] *See, e.g., Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, CC Docket No. 02-33; CC Docket No. 01-337; CC Docket Nos. 95-20, 98-10; GN Docket No. 00-185; CS Docket No. 02-52, 20 FCC Rcd 14853 (2005).
[249] *Framework for Broadband Internet Service* ¶10.
[250] *Comment Sought on Masergy Communications Inc. Petition for Clarification, or, in the alternative, Application*

for Review, Public Notice, WC Docket No. 06-122, 24 FCC Rcd 5353 (2009).

[251] Letter from Sharon E. Gillett, Chief, Wireline Competition Bureau, Federal Communications Commission to Richard S. Whitt, Washington Telecom and Media Counsel, Google Inc., DA 09-2210 (Oct. 9, 2009).

[252] *See supra* Part IV.B.iv.

[253] Telecommunications service is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46).

[254] *Public Safety and Homeland Security Bureau Seeks Comment on Whether the Commission's Rules Concerning Disruptions to Communications Should Apply to Broadband Internet Service Providers and Interconnected Voice Over Internet Protocol Service Providers*, Public Notice, ET Docket No. 04-35; WC Docket No. 05-271; GN Docket Nos. 09-47, 09-51, 09-137 (rel. July 2, 2010)

[255] *Wireless E911 Location Accuracy Requirements; E911 Requirements for IP enabled Service Providers,* Further Notice of Proposed Rulemaking and Notice of Inquiry, PS Docket No. 07-114; WC Docket No. 05-196 (rel. Sept. 23, 2010).

[256] NBP at 127.

[257] *See Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Notice of Proposed Rulemaking, WC Docket No. 07-245, 22 FCC Rcd 20195 (2007); *see also* Petition of the United States Telecom Association For a Rulemaking and to Amend Pole Attachment Rate Regulation and Complaint Procedures, RM-11293 (filed Oct. 11, 2005); *Petition for Rulemaking of Fibertech Networks, LLC*, RM-11303 (filed Dec. 7, 2005).

[258] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order and Further Notice of

Proposed Rulemaking, WC Docket No. 07-245; GN Docket No. 09-51 (rel. May 20, 2010) ("*Pole Attachment Order*").
[259] 47 U.S.C. § 224(f)(1).
[260] *Pole Attachment Order* ¶¶ 8, 10.
[261] *Id*. ¶ 10.
[262] *Id*. ¶ 11.
[263] *Id*. ¶ 13.
[264] *Id*. ¶ 7.
[265] *Id*. ¶ 17.
[266] *Id*. ¶¶ 35-37.
[267] *Id*. ¶ 38.
[268] *Id*. ¶ 39.
[269] *Id*. ¶¶ 40-41.
[270] *Id*. ¶ 43.
[271] *Id*. ¶¶ 52-53.
[272] *Id.*
[273] *Id*. ¶ 53.
[274] *Id*. ¶¶ 111-118.
[275] *Id*. ¶¶ 111-114.
[276] NBP at 127, Recommendation 6.1.
[277] *Pole Attachment Order* ¶ 20.
[278] *Id*. ¶¶ 119-148.
[279] *Id*. ¶¶ 143-148.
[280] *Id*. ¶¶ 55-69.
[281] *Id*. ¶¶ 81- 82.
[282] *Id*. ¶ 80.
[283] *Id*. ¶ 85.
[284] *Id*. ¶¶ 89-98.
[285] *Id*. ¶¶ 99-109.
[286] *Comment Sought on Petitions for Reconsideration of Pole Attachments Order*, Public Notice, WC Docket No. 07-245; GN Docket No. 09-51 (rel. Sept. 16, 2010).
[287] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the*

Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, Sixth Broadband Deployment Report, 25 FCC Rcd 9556 (2010) ("*Sixth Broadband Deployment Report*").

[288] 47 U.S.C. § 1302(b) (2010).

[289] *Id*.

[290] *Sixth Broadband Deployment Report* ¶ 2 n.8 (citing previous reports).

[291] *Id*. ¶ 2.

[292] *Id*. ¶ 28.

[293] *See id*. ¶ 3 n.10 (citing FCC, Omnibus Broadband Initiative (OBI), Connecting America: The National Broadband Plan, GN Docket No. 09-51, at xi-xv (2010)).

[294] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Report, CC Docket No. 98-146, 14 FCC Rcd 2398 ¶ 20 (1999).

[295] *Sixth Broadband Deployment Report* ¶ 11.

[296] *See id*. ¶¶ 5, 11.

[297] *See id*. ¶ 16 n.4.

[298] *See id*. ¶¶ 16, 26.

[299] *Id*. ¶ 18.

[300] *See id*. ¶ 21.

[301] *See id*. ¶ 22.

[302] *See id*.

[303] *See* NCTA Petition for Reconsideration, GN Docket Nos. 09-137, 09-51 (filed Aug. 19, 2010).

[304] *See id*. at 2-3.

[305] 47 U.S.C. § 225(b)(1), (a)(3).

[306] *See* 47 C.F.R. § 64.604(c)(5)(ii).

[307] *See Structure and Practices of the Video Relay Service,* Notice of Inquiry, CG Docket No. 10-51, 25 FCC Rcd 8591 ¶ 1 (2010) ("*VRS NOI*").

[308] *See Structure and Practices of the Video Relay Service*

Program, Declaratory Ruling, CG Docket No. 10-51, 25 FCC Rcd 1868 ¶ 1 (2010).

[309] *See Structure and Practices of the Video Relay Service Program*, Declaratory Ruling, Order and Notice of Proposed Rulemaking, CG Docket No. 10-51, 25 FCC Rcd 6012 ¶ 1 (2010).

[310] *See VRS NOI* ¶ 1.

[311] *See Telecommunications Relay Services and Speech-to Speech Services for Individuals with Hearing and Speech Disabilities*, Order, CG Docket No. 03-123, 25 FCC Rcd 8689 (2010).

[312] *Sorensen Communications, Inc. v. FCC*, Case Nos. 10-9536 and 10-9560 (10th Cir. filed June 18, 2010)

[313] *See Telecommunications Relay Services and Speech-to Speech Services for Individuals with Hearing and Speech Disabilities; E911 Requirements for IP enabled Service Providers; Internet-Based Telecommunications Relay Service Numbering*, Notice of Proposed Rulemaking, CG Docket No. 03-123; WC Docket Nos. 05-196, 10-191 (rel. Sept. 17, 2010).

[314] *See* News Release, Federal Communications Commission, *Enforcement Bureau Settles Investigations of Purple Communications, Inc.* (rel. Sept. 20, 2010).

[315] Statement of Congressman Rick Boucher, Subcommittee on Communications, Technology and the Internet Hearing, H.R. 5828, the Universal Service Reform Act of 2010 (Sept. 16, 2010), *available at* http://energycommerce.house.gov/documents/20100916/cti/Boucher.Statement.cti.09.16.2010.pdf.

[316] *See id*.

[317] *See* Lynn Stanton, *FCC Enforcement, Reclassification Ban Reportedly in Net Neutrality Bill*, TR Daily (September 20, 2010).