THE YEAR IN WIRELINE TELECOMMUNICATIONS REGULATION SEPTEMBER 2010 – SEPTEMBER 2011

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I. INTRODUCTION

This past year has been particularly eventful for wireline regulation. It may become more eventful yet before PLI's annual conference in December.

Any review of wireline regulation must begin with the FCC's release of its landmark "Open Internet" rules. These should become effective by the end of 2011, absent a judicial stay. The FCC also issued additional regulations governing access to utility poles, including new timelines for the completion of "make-ready" work, continued its examination of the special access market, granted approval to the Qwest-CenturyLink and Level 3-Global Crossing transactions, and addressed various consumer protection issues. No issues, however, have received as much FCC time and attention over the last twelve months as (1) reform of the high cost and low income universal service programs and (2) an overhaul of intercarrier compensation mechanisms.

The FCC has also begun implementation of the Twenty-First Century Communications and Video Accessibility Act, which Congress enacted last October. The provisions most relevant to this article established new disabilities access requirements for advanced services and equipment. These requirements both apply to entities previously not covered by disabilities access mandates and differ in substance from prior mandates.

The dispute over the proper classification of Voice over Internet Protocol ("VoIP") also continued to simmer. Over the past twelve months, several states issued comprehensive decisions holding that cable VoIP service is a telecommunications service and not an information service. An earlier DC District Court decision, *PAETEC Communications v. CommPartners, LLC*, had held otherwise. The FCC has shown no inclination to resolve this issue, although it did make clear that states can assess VoIP for intrastate universal service funds. At this writing, the FCC is still considering whether to place all VoIP under interstate jurisdiction with respect to intercarrier compensation.

With respect to interconnection, the FCC upheld the Wireline Competition Bureau's *Time Warner Declaratory Ruling* clarifying that wholesale carriers can interconnect on behalf of their non-carrier customers (such as VoIP customers). In doing so, it also held that rural LECs can be forced to enter into interconnection agreements through the section 252 arbitration process—even if the state has not terminated a rural LEC's section 251(f)(1) exemption. Relatedly, the United States Supreme Court in *Talk America* settled a split among the circuits, holding that entrance facilities can be available for interconnection under section 251(c)(2) at TELRIC rates, even if they are not required to be provisioned as unbundled network elements pursuant to Section 251(c)(3).

On the legislative front, Congress has been relatively inactive since the passage of the Twenty-First Century Act. With its focus almost entirely on budget and spectrum related issues, Congress has moved no major legislation affecting common carrier regulation.

A. Summary

This article proceeds in twelve Parts.

In Part II, we discuss the Commission's *Open Internet Order* and the appellate challenges to that *Order*.

In Part III, we discuss the Commission and courts' most important interconnection decisions, as well as significant changes in the Commission's approach to analyzing requests to forbear from unbundling requirements.

In Part IV, we discuss universal service, including the Commission's expected adoption of high cost reform measures later this year and its effort to reform its low income programs.

In Part V, we discuss intercarrier compensation and the changes that are expected to accompany high cost universal service reform. We also discuss developments in tariffing and key intercarrier compensation proceedings at the Commission and in the courts.

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

In Part VII, we discuss the Commission's approval of the Qwest-CenturyTel and Level 3-Global Crossing transactions.

In Part VIII, we discuss key developments for VoIP and IP-enabled services, including the Commission's declaration that states may impose USF obligations on nomadic interconnected VoIP providers where those obligations do not conflict with federal policy, the ongoing debate at the FCC and in the states over VoIP classification, and the growing regulatory attention to non-interconnected VoIP.

In Part IX, we discuss the Commission's adoption of pole attachment reforms and its effort to improve access to rights of way.

In Part X, we discuss the Twenty-First Century Communications and Video Accessibility Act and the Commission's recent orders implementing the Act.

In Part XI, we discuss consumer protection developments at the FCC and in the courts.

Finally, in Part XII, we provide a brief conclusion.

II. THE OPEN INTERNET ORDER

On December 23, 2010, the Federal Communications Commission released its much-anticipated Report and Order adopting "network neutrality" or "open Internet" rules applicable to broadband Internet access service providers.[2] In a break from past FCC practice, the rules were not published in the Federal Register until after the OMB approved the portions that created information collection requirements.[3] At the time of this writing, the rules were scheduled to take effect on November 20, 2011, unless stayed by judicial action. Petitions for review of this order have been filed in multiple circuits. On October 6, 2011 the Joint Panel on Multidistrict Litigation held a lottery that determined the appeals would be consolidated in the D.C. Circuit. Some may view this as strengthening the position of the petitioners arguing that the FCC lacks statutory authority because of the D.C. Circuit's earlier decision in *Comcast Corp v. FCC*.[4]

The order's key provisions include the following:

Covered Entities. The new rules apply only to retail mass market services that transmit data to and receive data from all or substantially all Internet endpoints, as well as services that the FCC determines are functionally equivalent. The order defines "mass market" as services marketed "on a standardized basis to residential customers, small businesses, and other end-user customers such as schools and libraries."[5] Thus, the order excludes enterprise services (with the exception of E-rate services), as well as wholesale service arrangements. E-rate services are expressly included within the definition of "mass market" services, even if they are individually negotiated or tailored.

A key factor in the FCC's "functional equivalent" analysis is whether the service is a substitute for broadband Internet access service. For this reason, broadband services that connect only to limited endpoints, such as e-readers or heart monitors, are excluded. Nevertheless, the FCC intends to monitor certain business practices involving "specialized services," as discussed below.

The order expressly excludes VPN, CDN, multichannel video programming services, hosting or data storage services and separately provided Internet backbone services (*i.e.*, Internet backbone services that are not provided as part of retail broadband Internet access).

Finally, "premise operators" such as coffee shops and bookstores that obtain service from a broadband provider to allow their customers to access the Internet (such as through a Wi-Fi hotspot) are not subject to the new rules, although the underlying broadband provider would be.

Three New Rules. The Report and Order establishes three new rules for broadband Internet access service providers.

- **Transparency**: Broadband Internet Service Providers ("ISPs") must publicly disclose accurate information regarding network management practices, network performance, and commercial terms governing their broadband Internet access services. The Commission expects such disclosures to include some or all of the following types of information listed in the Order:

- **Network Practices**
  - *Congestion Management*: If applicable, descriptions of congestion management practices; types of traffic subject to practices; purposes served by practices; practices' effects on end users' experience; criteria used in practices, such as indicators of congestion that trigger a practice, and the typical frequency of congestion; usage limits and the consequences of exceeding them; and references to engineering standards, where appropriate.
  - *Application-Specific Behavior*: If applicable, whether and why the provider blocks or rate-controls specific protocols or protocol ports, modifies protocol fields in ways not prescribed by the protocol standard, or otherwise inhibits or favors certain applications or classes of applications.
  - *Device Attachment Rules*: If applicable, any restrictions on the types of devices and any approval procedures for devices to connect to the network.
  - *Security*: If applicable, practices used to ensure end-user security or security of the network (but excluding

information that could reasonably be used to circumvent network security).

- **Performance Characteristics**
  - *Service Description*: A general description of the service, including the service technology, expected and actual access speed and latency, and the suitability of the service for real-time applications.
  - *Impact of Specialized Services*: If applicable, what specialized services, if any, are offered to end users, and whether and how any specialized services may affect the last-mile capacity available for, and the performance of, broadband Internet access service.

- **Commercial Terms**
  - *Pricing*: For example, monthly prices, usage-based fees, and fees for early termination or additional network services.
  - *Privacy Policies*: For example, whether network management practices entail inspection of network traffic, and whether traffic information is stored, provided to third parties, or used by the carrier for non-network management purposes.
  - *Redress Options*: Practices for resolving end-user and edge provider complaints and questions.[6]

- **No Blocking**: Fixed ISPs must not block lawful content, applications, services, or non-harmful devices. Mobile ISPs must not block access to lawful websites or applications that compete with the provider's voice or video telephony services, including services provided by entities in which the provider has an "attributable interest" – a term that the FCC defines differently than in other contexts.[7] Blocking includes degradation that would render content, applications, services, or devices "effectively unusable," as well as charging a fee for unblocking.[8] The ban on blocking is subject to exceptions for actions by the ISP that constitute "reasonable network management," including efforts to address network congestion and ensure network security.

- **<u>No Unreasonable Discrimination</u>**: Fixed ISPs must not "unreasonably discriminate" in transmitting lawful traffic over the service, again subject to exceptions for reasonable network management. Usage-based or tiered pricing does not constitute unreasonable discrimination as long as it is not anticompetitive. ISPs may also prioritize emergency communications. In addition, because the rules protect lawful content, they do not prohibit efforts to address copyright infringement or other illegal activities. If a provider's practice affects both harmful/unwanted traffic and legitimate traffic, however, that practice should be evaluated periodically and customers should be permitted to opt-in or opt-out if possible. Use-agnostic discrimination is "likely reasonable."[9] The FCC does not say that use-specific discrimination is presumptively unreasonable, but rather does not address use-specific discrimination one way or the other.

The order defines "reasonable network management" as "appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service."[10] The FCC contemplates that there can be differences across access platforms. The FCC expressly repudiates the "narrowly or carefully tailored" standard for reasonable network management from the *Comcast Order*.[11] The FCC also expressly declines to import the "strict scrutiny" doctrine from constitutional law,[12] explaining instead that "[b]roadband providers may employ network management practices that are appropriate and tailored to the network management purpose they seek to achieve, but they need not necessarily employ the most narrowly tailored practice theoretically available to them."[13]

Limited Regulations for Mobile Broadband. Although the transparency requirement applies to both fixed and mobile ISPs, the ban on blocking for mobile providers is less stringent, and mobile providers are not subject to the ban on unreasonable discrimination.[14] The FCC determined that these "measured steps" for mobile broadband were appropriate since mobile broadband is an "earlier-stage platform" experiencing rapid change.[15]

Significantly, while the rules distinguish between fixed and mobile broadband, they do not distinguish between wireless and wireline fixed services. Thus, fixed wireless services, including unlicensed services and fixed satellite broadband, are subject to the more stringent requirements. The order acknowledges, however, that "reasonable network management" may be different for those services than for wireline providers. The order does not specify how to draw the line between fixed and mobile wireless, particularly with respect to services that are typically used in a single place, but can be moved from one location to another.[16]

Most "Pay-for-Priority" Arrangements Prohibited. The order does not expressly forbid "pay-for-priority" agreements by which a broadband Internet provider contracts with a third party to favor or disfavor certain traffic. Nevertheless, the order concludes that such arrangements are unlikely to satisfy the ban on the unreasonable discrimination. Broadband Internet access providers may continue to offer "tiered" pricing based on use and/or speed, but the FCC will monitor these practices.[17]

"Specialized Service" Business Practices Will Be Monitored. "Specialized services" offered by broadband providers over their last-mile networks—such as facilities-based VoIP or IPTV—are not subject to the network neutrality rules. Nevertheless, the FCC has pledged to monitor the consumer impact of business practices that involve these services.[18] In addition, the Commission's definition of broadband Internet access services subject to the open Internet rules covers any service that is the "functional equivalent" of broadband Internet access service or that is "used to evade the protections" of those rules, potentially including so-called "Best of the Web" Internet access services or services that allow some uses of the Internet (such as web browsing) but not others (such as email).

No Reclassification of Broadband Services. The Order does not reclassify broadband as a common carrier service under Title II of the Communications Act, but rather relies on its ancillary authority in Title I of the Act and Section 706 of the Telecommunications Act of 1996 ("1996 Act") as a basis for regulation. The FCC cited these statutes in its *Comcast Order* where it sanctioned Comcast for allegedly blocking P2P traffic.[19] The D.C. Circuit subsequently vacated the *Comcast Order*, concluding that the FCC had not adequately justified its exercise of ancillary authority.[20] In the *Open Internet Order*, the FCC concludes that Section 706 provides it with an affirmative grant of regulatory authority, distinguishing its *Advanced Services Order*[21] as pertaining only to forbearance, and disclaiming any interpretation of the *Advanced Services Order* that suggested that Section 706 did not grant the FCC affirmative regulatory authority to promote broadband.[22] The FCC also identified additional provisions of the Communications Act to which the "open Internet" rules are arguably ancillary. Petitions for review of the *Open Internet Order* were filed in multiple circuits and, on October 6, 2011 the Joint Panel on Multidistrict Litigation consolidated the appeals in the D.C. Circuit.

III. INTERCONNECTION AND UNBUNDLED NETWORK ELEMENTS

A. Overview

This year, the FCC and the United States Supreme Court each issued decisions affecting interconnection rights. Following up on a 2007 decision by the Wireline Competition Bureau ("WCB" or "Bureau"),[23] the FCC addressing whether rural ILECs could be compelled, pursuant to sections 251(a) and (b) and 252, to arbitrate interconnection notwithstanding the section 251(f)(1) rural exemption.

The Supreme Court decided a case clarifying that cost-based (*i.e.*, TELRIC) pricing applies to entrance facilities used for interconnection. That case may, however, ultimately be more significant for its discussion of when deference is owed to the FCC. In the absence of definitive guidance from the FCC, courts have also continued to struggle with the question of whether tandem transit is subject to 251(c)(2), including whether it is subject to TELRIC pricing.

With respect to unbundling, last year's landmark *Qwest Phoenix Forbearance Order* continues to move through the appellate process. The Tenth Circuit heard oral arguments on September 15, 2011, and a decision is likely in the first half of 2012.

B. Interconnection

i. Rural LEC Declaratory Ruling

In 2007, the Wireline Competition Bureau granted a petition for a declaratory ruling filed by Time Warner Cable ("TWC") asking the Commission to declare that wholesale telecommunications carriers are entitled to interconnect and exchange traffic with LECs when providing services to other service providers, including VoIP providers, pursuant to sections 251(a) and (b) of the Act.[24] In that order, the Bureau reaffirmed that "wholesale" providers of telecommunications services are telecommunications carriers under sections 251(a) and (b) of the Act, and are entitled to the rights of telecommunications carriers under those sections.[25] The Bureau concluded that "state commission decisions denying wholesale telecommunications service providers the right to interconnect with incumbent LECs pursuant to sections 251(a) and (b) are inconsistent with the Act and Commission precedent."[26]

In July 2010, CRC Communications of Maine, Inc. ("CRC Communications") and TWC filed a petition with the Commission seeking preemption of a decision by the Maine Public Utilities Commission ("PUC") holding that rural incumbent LECs ("RLECs") have no obligation to negotiate in good faith under sections 251(a) and (b), and that until the rural exemption in section 251(f)(a) is lifted, there is "nothing to arbitrate" under section 252.[27] As the FCC pointed out in its order, the Maine PUC decision was one of a number of conflicting state commission decisions on this issue—the New Hampshire, Vermont, and Illinois commissions, for example, had found that the rural exemption did not affect the incumbent LEC's obligations under sections 251(a) and (b), while Texas, North Carolina, and Maine had held to the contrary.[28]

In issuing its *Rural LEC Declaratory Ruling*, the Commission sought to "remove the uncertainty surrounding the proper interpretation of sections 251 and 252 in situations where the rural exemption applies,"[29] and to establish "uniform, national policy concerning the scope of the rural exemption."[30] To that end, the FCC expressly "reaffirm[ed] that all telecommunications carriers, including rural carriers covered by section 251(f)(1), have a basic duty to interconnect their networks under section 251(a) and that all LECs, including rural LECs covered by section 251(f)(1), have the obligation to comply with the requirements set forth in section 251(b)."[31] The FCC emphasized that "[t]o interpret section 251(f)(1) otherwise would undercut sections 251(a) and (b) and significantly impede compliance with these provisions by rural LECs until termination of the section 251(f)(1) exemption by a state commission."[32]

Having concluded that LECs covered by the rural exemption remain subject to sections 251(a) and (b), the FCC went on to "clarify the processes through which those requirements may be implemented."[33] Specifically, the FCC found that "requests made to incumbent LECs for interconnection and services pursuant to sections 251(a) and (b) are subject to state commission arbitration as set forth in section 252," and that "section 251(f)(1) does not exempt rural incumbent LECs."[34]

Finally, the *Rural LEC Declaratory Ruling* also "reaffirm[ed] the Bureau's conclusion in the *TWC Order* that the Act does not differentiate between the provision of telecommunications services on a wholesale or retail basis for the purposes of sections 251(a) and (b)."[35] Like the Bureau, the Commission found that "a contrary decision would impede the important development of wholesale telecommunications and facilities-based VoIP competition, as well as broadband investment and deployment, by limiting the ability of wholesale carriers to offer service."[36]

ii. *Talk America v. Michigan Bell*

In June of this year, the Supreme Court issued this opinion clarifying that cost-based (*i.e.*, TELRIC) pricing applies to entrance facilities used for interconnection.[37] The Commission's own decisions on this issue had not been entirely transparent. In the *Triennial Review Order*,[38] the Commission had ruled that ILECs were not obligated to provide cost-based unbundled access to entrance facilities under § 251(c)(3) because entrance facilities are not network elements at all. In the *Triennial Review Remand Order*,[39] however, the FCC retreated from its view that entrance facilities are not network elements, while adhering to its prior position that cost-based access to such facilities need not be provided under § 251(c)(3). At the same time, the Commission emphasized that its ruling "di[d] not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)."[40] As a practical matter, then, the Commission's orders appear to have indicated that entrance facilities must be provided pursuant to § 251(c)(2) for purposes of interconnection, but that ILECs were not obligated to unbundle such facilities for the purpose of backhauling traffic.

AT&T filed this case in district court to challenge a Michigan Public Service Commission ("PSC") ruling requiring AT&T to provide entrance facilities for interconnection at cost-based rates. The district court ruled for AT&T and the Sixth Circuit affirmed, declining to defer to the FCC's construction of the *Triennial Review* decisions in its *amicus brief*. The Supreme Court reversed the decision of the lower courts, holding that "AT&T must lease its existing entrance facilities for interconnection at cost-based rates."[41]

The most important aspect of the Supreme Court's decision may be its discussion of deference to the FCC. The Court began its analysis by stating that "[i]n the absence of any unambiguous statute or regulation, we turn to the FCC's interpretation of its regulations in its *amicus* brief."[42] The Court explained that it "defer[s] to an agency's interpretation of its regulations, even in a legal brief, unless the interpretation is plainly erroneous or inconsistent with the regulation[s] or there is any other reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question."[43]

Under this relaxed standard of review, the Court had no trouble approving the Commission's construction of its decisions in its *amicus* brief. First, the Court found the Commission's view that entrance facilities are part of an ILEC's network "perfectly sensible" in light of 47 C.F.R. § 51.319(3)(1)'s definition of dedicated transport to include ILEC "transmission facilities . . . between wire centers or switches owned by [ILECs] and switches owned by [competing] carriers."[44] The Court also rejected AT&T's argument that § 51.5's definition of interconnection not to include "transport and termination of traffic" necessarily excludes entrance facilities, agreeing with the Commission that such facilities, "at least when used for the mutual exchange of traffic," actually "fall comfortably within the definition of interconnection.[45] Finally, the Court found that there is no other "reason to suspect that the interpretation does not reflect the agency's fair and considered judgment"—the Commission's *amicus* brief was not, for example, "a *post-hoc* rationalization by Commission counsel of agency action that is under judicial review."[46]

In short, while the *Talk America* Court's decision on the entrance facilities issue is not insignificant, its clarification that the federal courts should generally defer to the views of agencies expressed in *amicus* briefs is likely to have significant import in a variety of future administrative law cases.

iii. SNET v. Perlermino

The district court in Connecticut is the latest court to address the question whether tandem transit is subject to § 251(c)(2), including TELRIC pricing.[47] This case arose from the Connecticut Department of Utility Control's ("DPUC") determination that Southern New England Telephone Company d/b/a AT&T Connecticut ("AT&T Connecticut") was required to provide transit service pursuant to §§ 251 and 252. On appeal to the district court, AT&T Connecticut argued that the FCC has precluded this finding, while the DPUC contended that the FCC has merely declined to make a decision on the issue.[48]

The court agreed with the DPUC. It acknowledged that the FCC has "stated numerous times in dicta that it has not found a duty for an ILEC to provide transit service" but "usually in conjunction with a statement that the specific case is not the occasion to determine whether such a duty exists."[49] Relying on the FCC's 2005 *FNPRM*,[50] the court further concluded that the FCC has "started to reconsider" its earlier statements.[51] The court next considered *Qwest Corp. v. Cox Neb. Telcomm, LLC*[52] and concluded that "the FCC's statements indicate that the FCC's existing rules and decisions do not preclude" the Connecticut DPUC's conclusion that ILECs must provide tandem transit under §§ 251and 252.[53] Because "the 1996 Act and its attendant regulations should be interpreted so as to promote competition," the court found that it "must conclude that interconnection under section 251(c) includes the duties to provide indirect interconnection and to provide transit service."[54]

The district court's decision is now on appeal to the United States Court of Appeals for the Second Circuit.[55]

C. Unbundling

i. Qwest Phoenix Forbearance Order

Last year's *Qwest Phoenix Forbearance Order*[56] represented an important change in the FCC's analytical approach to ILEC petitions for forbearance from core 1996 Act local competition obligations. That decision remains on appeal; the Tenth Circuit heard oral arguments on September 15, 2011, and a decision is likely in the first half of 2012. Because the *Order* was discussed at length in last year's materials, we offer only a brief summary and a discussion of the issues raised on appeal here.[57]

The heart of the *Qwest Phoenix Forbearance Order* was a shift away from the Commission's earlier analytical framework for forbearance and the substitution of 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.[58] 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.[59] The Commission reached this conclusion by first defining relevant markets and conducting a competitive analysis of each of those markets and then applying section 10's three-pronged forbearance criteria. Applying those criteria, the Commission found that 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.[60]

On July 30, 2010, Qwest appealed the *Qwest Phoenix Forbearance Order* to the U.S. Court of Appeals for the Tenth Circuit. Qwest limited the issues on appeal in two significant ways. First, Qwest challenged the Order only insofar as it relates to the mass market and made clear that Qwest was not challenging the Commission's decision insofar as it declined to grant forbearance from any rule relating to enterprise services.[61] Second, Qwest challenged the Commission's decision to use a traditional market power analysis only with respect to issues relating to network elements.[62] That is, Qwest did not contend that a traditional market power analysis is generally inappropriate but argued instead that a traditional market power analysis is inappropriate with respect to unbundling regulations because, Qwest argued, unbundling is not intended to ameliorate abuse by dominant carriers.

Qwest emphasized the argument that, in assessing dominance in the mass market, the Commission erred by failing to consider competition from wireless carriers.[63] Qwest advanced both substantive and procedural arguments on this issue. Substantively, Qwest contended that it was irrational for the Commission to ignore the increasing number of customers who had "cut the cord" and were relying exclusively on wireless service. The Commission and the many intervenors supporting the Commission – including the Arizona Corporation Commission, consumer advocates, and CLECs – argued that it was appropriate not to consider wireless competition in the absence of evidence showing that wireless competition constrained rates for wireline service.[64] Qwest responded to this point in part by advancing its procedural argument that it had not been required to provide any such evidence under prior Commission precedent and it was not given adequate time to present such evidence in the Phoenix proceeding.[65]

Qwest also argued that, assuming the Commission properly declined to consider wireless competition, it nevertheless was appropriate for the Commission to conclude that duopoly competition in the mass market between Qwest and Cox Cable would adequately protect consumers.[66] In that connection, Qwest argued that some economists contend that duopoly competition is sufficient when fixed costs are high and marginal costs are low, and the Commission should have agreed with that approach. The Commission and its supporting intervenors responded that the Commission could appropriately choose the contrary view of other economists, particularly in light of the history of wireless competition, where the introduction of more than two competitors in the 1990s had spurred innovation and led to lower prices for consumers.[67] The CLEC intervenors also pointed out that competition from cable operators did not ensure that they could obtain just and reasonable rates for loops and other network elements because cable operators in Phoenix and elsewhere refuse to lease facilities to competitors.

Oral argument was held on September 15, 2011, and a decision is expected in the first half of 2012.[68]

IV. UNIVERSAL SERVICE REFORM

A. Overview

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. Prior to this year, the last major push for reform occurred in the second half of 2008, as the Martin Commission wound down.

In 2010, the National Broadband Plan ("NBP") restarted reform efforts, as it called for, among other things, a repurposing of the Universal Service Fund ("USF") to expressly support broadband. In April 2010, the Commission issued an Notice of Proposed Rulemaking ("NPRM") on possible short term reforms for the high cost fund, including: placing a cap on incumbent LEC support; shifting all rate of return carriers to incentive regulation; eliminating Interstate Access Support for price cap carriers; and eliminating all high-cost support to non-incumbent LECs (called Competitive Eligible Telecommunications Carriers, or "CETCs").[69] The Commission also issued a Notice of Inquiry ("NOI") on whether to use a model to determine broadband support levels and how best to support deployment in unserved areas.[70]

The FCC returned to these initiatives in late 2010 and the first quarter of 2011, issuing NPRMs proposing a Mobility Fund to further deployment of 3G services and a broadband-focused Connect America Fund. Significantly, the Commission sought comment on moving to a "procurement model" of universal service support and away from supporting CETCs for providing supported services to end users.

The Commission separately proposed broad reforms to its low income support programs, issuing an NPRM to examine (1) how it can tighten its rules to reduce waste, fraud and abuse and (2) whether low income support can be used to promote broadband adoption. The Commission took its first steps to reform low income support by releasing an order on June 21, 2011 that clarified that no individual could receive more than one Lifeline support telephone service, and that ETCs could drop service to consumers that had more than one Lifeline service.

At the time of this writing, the Commission appeared to be poised to adopt major orders restructuring high cost universal service support and, separately, to make further changes to its low-income programs.

B. High Cost Reforms

i. Mobility Fund NPRM.

Included in the NBP was a recommendation to create a Mobility Fund to "promote the national build-out of 3G services."[71] The NBP, however, did not propose a particular size for the Mobility Fund. In its October 2010 NPRM, the FCC "propose[d] to use $100 million to $300 million from the USF to create the Mobility Fund."[72] This was a portion of the reduction in high cost universal service support that the Commission expected as Verizon Wireless and Sprint implemented merger conditions that phased out their receipt of high cost support. The Mobility Fund proposal was aimed at "significantly improv[ing] coverage of current-generation or better mobile voice and Internet service for consumers in areas where such coverage is currently missing."[73]

The proposed Mobility Fund was notable for several reasons. First, the Commission proposed that the Mobility Fund would be focused only on unserved areas, as determined using American Roamer data.[74] Second, the Commission, proposed *one-time* support for assistance with capital costs associated with the upgrade to 3G, rather than as a stream of funding covering capital and operating costs.[75] Third, the Commission proposed that it would support only one 3G provider in each area.[76] Fourth, the Commission proposed using, "market mechanisms – specifically, a reverse auction – to make one-time support available to service providers to cost-effectively extend mobile coverage in specified unserved areas."[77] The Commission proposed a nationwide reverse auction in which providers bid in a single round of bidding with the awards going to the providers that had the lowest per-unit bids, using population, and perhaps characteristics such as road miles, as the relevant units.[78] The Commission stated that it was seeking to cover "the greatest amount of population in the identified unserved areas" with the available funds.[79]

Comments on the NPRM were filed in December of 2010 and January of 2011. Many commenters favored providing support for mobile voice and Internet service, but noted that the Fund, as proposed, would be inadequate to meet the Commission's goals.[80]

The Commission has not taken additional action in this docket; however, it is considering proposals for an ongoing Mobility Fund as part of its overall deliberations on high cost USF reform in the Connect America Fund proceeding described below.

ii. Connect America Fund ("CAF") NPRM.

In February 2010 the FCC issued an NPRM and Further Notice of Proposed Rulemaking ("FNPRM") addressing the creation of a new Connect America Fund ("CAF") to replace existing high cost support. At the same time, the Commission proposed related changes to the intercarrier compensation system, which are summarized in the next section.

With its proposals, the Commission set a goal of "fundamentally moderniz[ing] the Commission's Universal Service Fund . . . and intercarrier compensation (ICC) system . . . by eliminating waste and inefficiency and reorienting USF and ICC to meet the nation's broadband availability challenge, transforming a 20th century program into an integrated program tailored for 21st century needs and opportunities."[81]

The Commission stated that it would follow four principles as it proceeded with reform, consistent with its Joint Statement on Broadband and the National Broadband Plan:

- "*Modernize USF and ICC for Broadband*. Modernize and refocus USF and ICC to make affordable broadband available to all Americans and accelerate the transition from circuit-switched to IP networks, with voice ultimately one of many applications running over fixed and mobile broadband networks. Unserved communities across the nation cannot continue to be left behind.

- *Fiscal Responsibility*. Control the size of USF as it transitions to support broadband, including by reducing waste and inefficiency. We recognize that American consumers and businesses ultimately pay for USF, and that this contribution burden may undermine the benefits of the program by discouraging adoption.

- *Accountability*. Require accountability from companies receiving support, to ensure that public investments are used wisely to deliver intended results. Government must also be accountable for the administration of USF, including through clear goals and performance metrics for the program.

- *Market-Driven Policies*. Transition to market-driven and incentive-based policies that encourage technologies and services that maximize the value of scarce program resources and the benefits to all consumers."[82]

Building upon its 2010 NOI/NPRM, the Commission proposed a two-phase approach to high cost universal service reform. In Phase 1, the Commission proposed a series of reductions to existing high cost support, and the creation of the first phase CAF. Those proposes include:

- Reduce reimbursement rates for incumbent LECs under the High Cost Loop Support (HCLS) mechanism ($1 billion in 2010) from, for incumbent LECs operating 200,000 or fewer loops, 65% (for costs from 115% of Nationwide Average Cost per Loop (NACPL) up to 150% of NACPL) and 75% (for costs at or above 150% of NACPL) to 55% and 65% respectively.[83]

- Phase out Local Switching Support ($276 million for incumbents in 2010 was provided to study areas with 50,000 or fewer lines), or combine that support with HCLS.[84]

- Reduce or eliminate universal service support for corporate operations expenses (*i.e.*, overhead). This was proposed for HCLS, LSS and Interstate Common Line Support (ICLS). The Commission estimated that $117 million in 2011 HCLS support was attributable to corporate operations expenses.[85]

- Establish caps on the amount of both capital expenses (capex) and operating expenses (opex) reimbursable for rate-of-return companies.[86]

- Limit total high cost support per line in a given study area to $3000 per year ($250 per month per line).[87]

- Phase out Interstate Access Support ($545 million to incumbents in 2010) over a "few years." The Commission inquired about a two-year phase out (to 50% of 2011 levels in 2012, and elimination in 2013), as well as an undefined "more gradual" transition.[88]

- Eliminate "identical support" for CETCs ($1.1 billion 2010, excluding IAS support) and phase out all CETC support over five years, with the possible exception of allowing CETCs to make a showing that continued transitional support was necessary to "achieve universal service goals in areas that would otherwise be unserved by mobile voice and/or broadband."[89]

The Commission also proposed to ease consolidation of rural carriers by streamlining the study area waiver process and eliminating the so-called "parent trap" rule that provides that a carrier acquiring exchanges from an unaffiliated carrier receive the same per-line levels of high cost support as prior to the transfer.[90]

The Phase 1 CAF would provide *non-recurring* support for broadband deployment in unserved areas (for this purpose, areas with download speeds under 768 kbps).[91] The Commission did not specify an amount for this funding, although made clear that it was proposing to fund it out of the other reductions proposed.[92] As with its earlier Mobility Fund proposal, the Commission proposed to distribute this support to only one provider in any given geographic area.[93] And the Commission again proposed to award support through a nationwide reverse auction according to price-per-unit served.[94] The Commission also proposed that recipients of Phase 1 CAF support be required to deploy networks of at least 4 Mbps (actual) downstream and 1 Mbps (actual) upstream.[95] Notably, if the winner of the Phase 1 CAF was not the incumbent carrier of last resort, the incumbent carrier would continue to receive its existing support (subject to other proposed reforms).[96]

The Commission's proposals for Phase 2 of the CAF were less specific, although made clear that remaining high-cost support would migrate to the CAF. The Commission, as in Phase 1, proposed that there would be only one supported provider in any given geographic area. The Commission allowed, however, that it might create an Advanced Mobility Fund to provide separate, ongoing support for mobility.[97] For the CAF as a whole, the Commission proposed setting an overall budget at roughly $4.3 billion, the size of 2010 actual and then-anticipated 2011 high cost disbursements.[98] The Commission proposed three possible alternatives for targeting and distributing the CAF:

- Competitive bidding everywhere through a reverse auction mechanism.[99]

- Right of first refusal for the current "carrier of last resort" for voice services (usually the ILEC), with competitive bidding where necessary (such as if the ILEC refused support). In this case, the Commission considered providing support under the right-of-first-refusal pursuant to a cost model.[100]

- Continued rate-of-return for certain areas, with possible reforms including reexamining of the authorized rate of return, capping ICLS support, shifting to incentive-based regulation, and revisiting what assets may be considered used and useful.[101]

Finally, as discussed further in the intercarrier compensation section below, the Commission raised the possibility of creating an access charge revenue recovery mechanism to offset some changes in revenues, at least for ILECs, resulting from intercarrier compensation reform.[102]

The Comment cycle for the *CAF NPRM* has closed, but the Commission encouraged parties to continue to develop and present proposals for universal service and intercarrier compensation reform. Certain of those proposals are under serious consideration at the Commission, as described below.

ABC/RLEC Joint Plan. In July, six large and mid-sized ILECs presented an industry proposal for reforming USF and intercarrier compensation in areas currently served by price cap ILECs: the "America's Broadband Connectivity ("ABC") Plan Framework."[103] In order to support the provision of broadband service in high-cost areas, the ABC Plan proposed two new USF programs – a CAF and an Advanced Mobility/Satellite Fund ("AMF").[104] Simultaneously, this same group of ILECs joined with representatives of smaller RLECs to present a joint framework for universal service and intercarrier compensation that combined the ABC Plan with a modified version of previous RLEC proposals. This section discusses the key universal service aspects of the proposals presented, while the next section discusses intercarrier compensation.

The ABC Plan proposed "to phase out the support that incumbent price cap LEC Eligible Telecommunications Carriers (ETCs) and competitive ETCs (CETCs) receive from the legacy universal service programs . . . once the CAF begins to disburse broadband funding," and would, "eliminate[] those ETCs' support from the legacy universal service programs entirely . . . when the CAF is fully funded."[105] In 2010, price cap ILECs received approximately $1.0 billion in high cost support, while CETCs received approximately $1.2 billion.[106] The plan proposed to commence phasing in CAF support in price cap LEC areas beginning July 1, 2012, while simultaneously beginning a five year phase-out of price cap LEC and competitive ETC high cost support. The ABC Plan proponents projected that, when fully implemented, their proposed CAF would distribute $2.2 billion per year to the areas served by the price cap ILECs. [107]

The CAF as proposed by the ABC Plan would be provided to only one entity in any given geographic area. No support would be provided in any census block served by an unsupported broadband competitor as of January 1, 2012.[108] In all other areas, a cost model would be used to determine the level of support for a given census block, provided that projected costs exceeded a benchmark to be specified by the Commission.[109] The proponents proposed an $80 per month benchmark.[110] Although support is calculated on a census block basis, the ABC Plan proposed that support would be disbursed on a wire-center-by-wire-center basis, with the "supported area" consisting only of the census blocks within that wire center in which there was no unsupported broadband competitor and that had projected costs above the benchmark.[111] Areas with a projected cost per user in a given census block above a specified "alternative technology threshold" would be assumed to be served by satellite broadband, and the CAF recipient would not receive support for that census block.[112]

In return for receiving CAF support, the CAF recipient would be required to buildout broadband service to any unserved areas within five years to the number of above-benchmark service locations in that wire center's supported area, less the number of service locations above the alternative technology benchmark.[113] The CAF recipient would have to provide broadband service to these locations for the remainder of the ten-year term of the CAF.[114] The CAF recipient would be required to provide minimum actual downstream bandwidth of 4 Mbps, and a minimum actual upstream bandwidth of 768 kbps.[115]

The ABC Plan proposed to offer CAF support first to the incumbent LEC serving that wire center, provided that the ILEC had "made high-speed Internet service available to more than 35 percent of the service locations in the wire center."[116] The ILEC would then have the opportunity to accept or decline that offer. If the ILEC did not qualify for this "right of first refusal" or declined the offer of CAF support, then any qualified service provider could receive the CAF support in return for meeting the CAF obligations. If multiple providers applied, then the Commission would use competitive bidding to select the CAF recipient.[117] If no provider sought to be the CAF recipient, the Commission would have the ability to adjust both the broadband obligations and the available support, subject to the plan's overall constraint on high cost support.

The ABC Plan also proposed an Advanced Mobility Fund of not more than $300 million per year targeted to support "high-cost areas that [would] not receive service as a result of planned commercial mobile broadband deployments."[118] As proposed, this fund would include only residual funds not consumed by the other high cost funds, and thus could receive far less than $300 million in any given year.

The ABC Plan proposed to target the total cost of the high cost support at $4.5 billion, but did not address how universal service reform would proceed for rural LECs under rate-of-return regulation. A joint filing by the ABC proponents and four trade associations representing RLECs, made simultaneously with the ABC Plan, filled in these pieces. That filing proposed an annual funding target (not a cap) for areas served by rate-of-return carriers that began at $2 billion and increased by $50 million per year to $2.3 billion in the sixth year,[119] with no specific budget target thereafter.[120]

The Joint Letter also incorporated a previous plan proposed by RLEC trade associations for an RLEC-specific CAF. This CAF, as proposed, would flow only to RLECs, and thus support only one carrier within a specific geographic area.[121] That proposed CAF includes: a current interstate revenue requirement calculated with a 10% instead of an 11.25% rate of return; support for "middle mile" facilities; and gradually increased last-mile interstate cost allocations based on each company's broadband adoption rates. Support would be computed by comparing total company broadband transmission costs, including last, second, middle mile and Internet connection costs, with an urban broadband transmission cost benchmark times broadband lines in service.[122]

The RLEC Plan also proposed some changes to legacy high cost support for rate-of-return carriers, including posing a limitation on recovery of prospective RLEC capital expenditures based on analyses of booked study area costs, and applying the HCLS mechanism's cap on corporate operations expenses to all federal high cost support programs.[123]

Overall, NECA projected that while the proposed RLEC changes would reduce legacy support, the proposed CAF would increase that support so that aggregate RLEC high cost support would remain approximately the same over the course of eight years, with access restructure support associated with intercarrier compensation reforms (see Section V, below) added on top.[124]

Comments on the NPRM were filed in April and May 2011. In early August the Commission issued a Further Inquiry requesting comments on the ABC Plan and RLEC Plan as modified by the Joint ILEC Letter.[125] Comments on the Further Inquiry were filed in August and September 2011. Not surprisingly, CETCs (who are almost exclusively wireless carriers) objected strongly to the shift to a "procurement model" with only one supported provider in a geographic area and to the fact that the ABC and RLEC Proposals provide all virtually all CAF support to incumbent LECs. The Commission is currently considering the extremely large volume of comments and replies that were filed, reflecting vastly divergent interests among USF stakeholders. It is expected that the Commission will act on USF reform before the end of calendar year 2011, and perhaps as soon as the end of October.

iii. Non-Rural High Cost Support - Tenth Circuit Remand Proceeding

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" –to help defray what would otherwise be high costs allocated to intrastate telephone service.[126] 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. Twice, 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.[127]

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 comprehensive reform of the non-rural high-cost support mechanism pending its consideration of broader USF reform in subsequent NBP-related proceedings.[128]

In July 2010, parties appealed the FCC's Order to the U.S. Court of Appeals for the District of Columbia, arguing that the Commission had failed to satisfy the requirements of 47 USC § 254(b)(3) and (2) failed to fully and properly address the findings of the Tenth Circuit Court of Appeals' decision in *Qwest II*.[129]

On September 16, 2011, the Court held oral arguments. During oral argument, the panel "questioned the use of outdated data by the FCC and the states' failure to seek a waiver to request supplemental high-cost support."[130] One judge also wondered whether it was necessary to "fix a system that might disappear" and asked when the FCC intended to enact high cost reform.[131] The D.C. Circuit has not yet issued its decision in the case.

iv. 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.[132]

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 ("*Corr Wireless Order*"). [133]

The Commission in December 2010 adopted a related order to "amend [its] rules to reclaim high-cost universal service support surrendered by a competitive eligible telecommunications carrier (ETC) when it relinquishes ETC status in a particular state,"[134] with the goal of, "rein[ing] in high-cost universal service disbursements for potentially duplicative voice services."[135] Specifically, the Order, "amend[ed] the interim cap rule so that a state's interim cap amount [would] be adjusted if a competitive ETC serving the state relinquishes its ETC status."[136]

Both the Rural Cellular Association ("RCA") and the Universal Service for America Coalition challenged the December order in the U.S. Court of Appeals for the District of Columbia.

The RCA specifically "assert[ed] that the Commission has a 'duty to provide a cogent explanation for how the rule change effected by the *Order* will promote sufficiency (among other statutory objectives,'"[137] arguing that, "high-cost support would be insufficient under the interim cap, in violation of section 254(b)(5)."[138] RCA also challenged the FCC's "finding that reducing the pool of legacy high-cost support in a state 'could enable excess funds from the . . . program to be used more effectively to advance universal service broadband initiatives" under a possible future program,'"[139] and alleged that, "[t]he FCC made no serious effort in the *Order* to justify the reductions in support it effects."[140] Finally, RCA argued that, "the Commission lacked authority to reserve temporarily, for a period of 18 months (*i.e.*, until January 31, 2012), any high-cost support surrendered by competitive ETCs."[141]

The FCC has defended its decision, and the Court will hear oral arguments on November 15, 2011.

C. Low Income Support

The Lifeline and Link Up low-income support programs are in the midst of the Commission's first systematic regulatory review since the passage of the 1996 Act. So far in 2011, that process has included an initial NPRM, a notice of further inquiry seeking more detailed comments on particular issues raised in the initial NPRM, an interim process for resolving potentially duplicative claims for support while the new regulations are being written, and a very recent proposal to revise the nuts and bolts of the process by which the Universal Service Administrative Company ("USAC") reimburses carriers for the discounts the Commission mandates for low-income consumers. Each is summarized in turn in this section of the article.

Unfortunately, the rulemaking process will not be completed until sometime after the publication of this article, so the Lifeline regulatory regime to come will have to be described next year. But the process itself is sufficiently well developed to outline the areas of major change in concept if not in detail. They fall into four categories: 1) provisions addressing potential waste, fraud and abuse, including reforming the system to deal with "duplicate" Lifeline support by subscribers; 2) exploring the extension of Lifeline support to broadband; 3) possibly capping the overall size of annual Lifeline expenditures; and 4) miscellaneous other administrative changes. The Lifeline NPRM provisions on each of these categories of regulatory changes are summarized below, followed by the related secondary regulatory developments.

i. *Lifeline/Link Up NPRM*

On March 4, 2011, the Commission issued a Notice of Proposed Rulemaking regarding Lifeline and Link Up.[142] Before it issued the Lifeline NPRM, the Commission had not systematically reviewed the low-income program since the passage of the 1996 Act.[143] This has been the most important of the Commission's several Lifeline regulatory reform publications this year, and it largely set the framework for the debate over reform.

Waste, Fraud, and Abuse. Noting that "recent technological, market, and regulatory changes have put increasing strain on the program," the Commission proposed a number of new rules designed to "significantly bolster protections against waste, fraud, and abuse; control the size of the program; strengthen program administration and accountability; improve enrollment and outreach efforts; and support pilot projects that would assist the Commission in assessing strategies to increase broadband adoption, while not increasing overall program size."[144]

In particular, the Commission appears intent on enforcing a rule against "duplicative" Lifeline support. It is not yet clear whether that effort will be limited to prohibiting one individual from fraudulently obtaining more than one supported line, or whether it will also include a broader prohibition against residents of a single address or household obtaining support for more than one resident. No matter what regulatory choice emerges, however, the Commission will have to grapple with the complexity caused by the ongoing consumer shift from wireline to wireless, and carriers will be required to implement complex new enforcement regimes.

In the NPRM, the Commission initially proposed to adopt "a one-per-residential address requirement"[145] but sought comment on the proposal that the Lifeline/Link-Up program should provide support for one wireless service per eligible *adult*, rather than one service per residential *address*.[146] Many commenters also suggested a one-per-*household* limitation. The final "duplicates" regulations will likely choose among these variations, and, if one of the latter two are chosen, will have to address a variety of definitional issues related to household/abode structure and composition.

The Commission also proposed subsidiary regulations designed to ease enforcement of an anti-"duplicates" rule. For instance, the Commission proposed to "require that all ETCs obtain a certification when initially enrolling a subscriber in Lifeline that only one Lifeline service will be received at that address" and to "require that all ETCs obtain a certification from every subscriber verified during the annual verification process that the subscriber is receiving Lifeline support for only one line per residence."[147] The Commission also proposed to require ETCs to submit to USAC unique household-identifying information, such as customer names, addresses, social security numbers (either the full number or the last four digits), or birthdates, for every supported household to help determine whether two or more ETCs are providing Lifeline-supported service to the same residential address.[148]

The Commission also proposed to create a national database to verify consumer eligibility, track verification and check for duplicates to ensure greater program accountability.[149] The Commission sought to:

> "develop a robust record on the development and implementation of a centralized database, including comments on who should administer the database; whether there should be one national database or multiple regional or state databases; what functions the database should include; the costs of constructing and maintaining a database and what funding sources

> should be used to defray those costs; and how data security and privacy issues should be addressed."[150]

The Commission proposed changes to address other potential avenues for waste, fraud and abuse aside from the "duplicates" issue. For instance, the Commission proposed to "eliminate the self-certification option and require all consumers in all states to present documents to establish eligibility for the program."[151] The Commission also proposed new regulations for inactive or otherwise problematic accounts. In particular, the Commission proposed to "prohibit ETCs from seeking reimbursement from the Universal Service Fund for any Lifeline customer who has failed to use his or her service for 60 consecutive days."[152] The Commission further proposed to "require ETCs to de-enroll their Lifeline subscribers when: "(1) the subscriber is receiving duplicate support and fails to select one ETC in the allotted time after being notified of a duplicate claim; (2) the subscriber does not use his or her Lifeline-supported service for 60 days and fails to confirm continued desire to maintain the service; or (3) the customer does not respond to the eligibility verification survey."[153]

The Commission proposed changes to the annual verification procedures in three areas. First, the Commission proposed to adopt a uniform federal rule to serve as a minimum threshold for verification sampling.[154] Second, it proposed to require ETCs to de-enroll from the program consumers who decline to respond to an ETC's verification attempts.[155] Third, it proposed uniform procedures for the collection and submission of verification data across all states.[156] The Commission also set forth two alternative proposals for determining how many Lifeline customers an ETC must survey each year. "The first alternative is a sample-and-census proposal, which would allow an ETC to sample its customers so long as the rate of ineligibility among responders to the survey is below a fixed threshold. If that ineligibility rate exceeds the threshold, however, the ETC would be required to take a census of all customers. The second alternative is to modify the current formula used in the federal default states and apply it uniformly to all states."[157]

Capping the Low-Income Program. The NPRM also contained proposals directed at constraining the size of the low-income fund. Specifically, the Commission proposed to cap the size of the low-income program, for example at the 2010 disbursement level of $1.3 billion.[158] The Commission sought comment on whether any cap should be permanent or temporary[159] and what would be an appropriate cap level.[160]

Broadband. Notwithstanding the Commission's concerns about the size of the low-income program and the proposal to cap it, the NPRM contained proposals to extend low-income support for broadband, in recognition of market and technology changes since the 1996 Act.[161] The Commission also proposed to use universal service funds "reclaimed from eliminating inefficiencies and/or waste, fraud, and abuse" to create a broadband pilot program."[162] Despite the potentially large impact of such a change, the Commission did not propose detailed regulations to implement it in the NPRM. Rather, the Commission invited comment on potential pilot programs to test the concept,[163] then revisited it in the Notice of Further Inquiry discussed below.[164]

Miscellaneous Administrative Proposals. The NPRM also contained proposals designed to eliminate waste in the low-income program. For example, the Commission proposed to "codify the rule that all ETCs must report partial or pro rata dollars when claiming reimbursement for Lifeline customers who receive service for less than a month"[165] and to eliminate the reimbursement for toll limitation service.[166]

The Commission also proposed various reforms designed to improve program administration. With respect to eligibility criteria for Lifeline and Link Up, the Commission proposed to "require all states to utilize, at a minimum, the program criteria currently utilized by federal default states" and to "allow states to maintain existing state-specific eligibility criteria that supplement the federal criteria."[167] The Commission sought comment on raising the federal income threshold for program participation from the current 135 percent or below of the Federal Poverty Guidelines to 150 percent.[168]

With respect to Link Up, the Commission proposed to define "customary charge for commencing telecommunications service" as "the ordinary initiation charge that an ETC routinely imposes on all customers within a state."[169] The Commission also proposed to clarify that "activation charges that are waived, reduced, or eliminated when activation is accompanied by purchase of additional products, services, or minutes are not customary charges eligible for universal service support."[170]

ii. Lifeline/Link Up Further Inquiry

On August 5, 2011, the Commission released a Notice of Further Inquiry into Four Issues in the Universal Service Lifeline/Link Up Reform and Modernization Proceeding.[171] The Commission sought additional comment on 1) the broadband pilot program; 2) a one-per-residence limitation; 3) Link Up; and 4) verification of consumer eligibility for Lifeline.[172]

With respect to the broadband pilot program, the Commission sought comment on the scope of permissible funding for the program, consumer eligibility for the program, barriers to consumer participation in the program, and pilot evaluation.[173]

Regarding the one-per-residence limitation, the Commission sought additional comment on "whether a one-per household or one-per-family rule would provide an administratively feasible approach to providing Lifeline/Link Up support, and how the Commission could implement such a rule."[174] The Commission also sought comment on exceptions or waivers from the "one-per-household" or "one-per-residential-address" rule.[175]

With respect to Link Up, the Commission sought comment on the proposal that Link Up support be reduced or eliminated.[176] The Commission also sought "further focused comment on whether the Commission should provide reimbursement for Link Up only for service initiations that involve the physical installation of facilities by the provider at the consumer's residence."[177]

Finally, with respect to verification of consumer eligibility for Lifeline, the Commission invited additional comment on the two proposals for modifying the existing sampling methodology.[178]

iii. Interim Duplicate Resolution Process

On January 21, 2011, before the Commission released the NPRM, the Wireline Competition Bureau had issued a letter to USAC "respond[ing] to informal guidance USAC has sought on how to resolve duplicate Lifeline claims, whereby more than one eligible telecommunications carrier (ETC) seeks support from USAC for the same eligible consumer or household."[179] The guidance letter directed USAC, when a duplicate claim is uncovered, to notify the ETCs involved and direct those ETCs to stop including the duplicate subscribers among the subscribers claimed for Lifeline support on the form 497."[180] The letter further required USAC to "inform the ETCs at issue in writing and direct them to notify the customer by phone, and in writing where possible, that he or she has 30 days to select one

Lifeline provider or face de-enrollment from the program."[181] In addition, the letter directed that "[o]nce the customer selects a Lifeline provider by signing a new certification, the chosen ETC must notify USAC and the ETC who had previously served the customer of the customer's selection."[182] The letter instructed that "[o]nce the chosen ETC notifies USAC and the competing ETC of the customer's choice, the selected ETC may seek reimbursement for the customer, while the other ETC must de-enroll the customer from its Lifeline service and may not seek reimbursement for that customer going forward."[183]

In the Lifeline NPRM, the Commission proposed to codify the guidance in the January 21 Letter.[184] In response to concerns raised by ETCs, the Commission asked ETCs to propose an interim duplicate resolution process. On April 15, 2011, a group of ETCs providing Lifeline service, as well as the United States Telecom Association ("USTA") and CTIA-The Wireless Association®, submitted a proposal for an interim Lifeline duplicate resolution process ("Industry Duplicate Resolution Process").[185]

The Commission adopted the Industry Duplicate Resolution Process on June 21, 2011.[186] The Commission's Report and Order directed the Wireline Competition Bureau to issue a guidance letter to USAC "to implement a process to detect and resolve duplicative claims that is consistent with the ETCs' proposed Industry Duplicate Resolution Process."[187] The Commission "codif[ied] the limitation that an eligible consumer may receive only one Lifeline-supported service."[188] The Commission also amended its rules "to require ETCs to offer Lifeline service only to those qualifying low-income consumers who are not currently receiving another Lifeline service from that ETC or from another ETC."[189]

The Wireline Competition Bureau issued the required guidance letter to USAC on June 21, 2011.[190] In accordance with the Industry Duplicate Resolution Process, the letter established an interim two-track process for resolving duplicate Lifeline claims.[191] The two-track process distinguishes between an *individual* receiving more than one Lifeline-supported service and a *household* receiving more than one Lifeline-supported service -- reflecting the unresolved nature of the Commission's regulatory approach to the "duplicates" issue. Track 1 is comprised of potential duplicates where the same individual at the same address receives two or more Lifeline supported services from two ETCs.[192] Track 2 is comprised of potential duplicates where separate individuals at the same address each receive Lifeline supported services.[193] Track 2 is divided into two categories: Track 2-A contains names of the multiple individuals at the same address who receive Lifeline benefits from the same provider, while Track 2-B contains names of the multiple individuals at the same address who receive Lifeline benefits from different providers.[194] The guidance letter directs USAC to request up-to-date subscriber lists from the ETCs identified by the Commission as part of the IDVs conducted in specific states.[195] USAC must analyze these subscriber lists on a timely basis, and compile two lists within 30 days of receipt of the subscriber lists from all of the identified ETCs.[196]

Under Track 1, USAC will give each ETC its Track 1 list.[197] "To the extent that USAC uncovers bad data in the ETC's subscriber list (e.g., addresses that cannot be validated or incomplete subscriber names), USAC shall provide such data to the ETC to validate."[198] ETCs have five business days to provide USAC with additional identifying information, eliminate non-subscribers, or make other corrections.[199] USAC will identify a tentative "default ETC" using a random allocation that results in a proportional distribution among affected ETCs.[200] Within five days of the allocation, USAC must provide the third-party vendor retained by the ETCs with a file or files showing the default allocation.[201] As soon as possible thereafter, USAC will send a letter to all affected subscribers notifying them that they must choose between the duplicative Lifeline providers or they will receive Lifeline-supported service only from the default provider.[202] Subscribers will have 35 days from the date listed in the letter to contact a toll-free number to select their Lifeline provider.[203] Ten days after the issuance of the subscriber letter, USAC will send a postcard reminding subscribers to make a selection.[204] Thirty days after issuance of the subscriber letter, the ETCs will make automated calls to subscribers who have failed to make a selection.[205] After the 35-day period has expired, the third-party vendor will update the original allocation list to reflect subscriber-generated provider selections and will provide that revised list to USAC.[206] USAC will notify each provider of the names of subscribers who must be de-enrolled from Lifeline.[207]

Under Track 2, USAC will give each affected provider the two Track 2 lists of subscribers.[208] Each ETC has ten business days to analyze the lists to determine whether other information in its possession either validates or refutes the existence of duplicate services and to provide USAC with any corrections.[209] Within ten days of receiving corrections from the ETC, USAC will, if necessary, re-compare the Track 2-B lists and generate updated lists of duplicates with inter-provider address matches.[210] USAC will report the summary results of the Track 2 analysis to the Wireline Competition Bureau.[211]

The guidance letter requires ETCs to continue to provide Lifeline-supported service to both Track 1 and Track 2 subscribers until notified by USAC to de-enroll certain subscribers.[212] ETCs will be reimbursed for the Lifeline benefits provided to subscribers up until the date of de-enrollment.[213] USAC will recover support for any subscriber for which subscriber data cannot be substantiated by the ETC and intra-company duplicative subscribers (same name, same address within one ETC's records).[214]

iv. Public Notice Regarding Disbursement Process for the Low-Income Program

On September 23, 2011, the Commission issued a Public Notice seeking comment on proposals to change the reimbursement system for the low-income program.[215] In particular, under USAC's proposal, low-income support would be disbursed to ETCs based upon claims for reimbursement of actual support payments made, instead of projected claims for support.[216] USAC proposed to establish a monthly due date by which ETCs must submit their FCC Form 497 in order to receive a payment at the end of the following month.[217] Carriers that do not file FCC Form 497 by the monthly deadline in a given month would not receive a payment in the following month.[218] USAC also proposed to allow carriers to continue to file quarterly, but those that do so would no longer be paid monthly.[219] Instead, for the month following the month the forms are filed, ETCs filing on a quarterly basis would receive one payment for all three months filed.[220] Under USAC's proposed plan, new support claims and upward revisions would only be permitted to be filed within an administrative window of six months, as opposed to the current fifteen months.[221] In addition, in order to transition to paying on actual support claims, USAC would true-up all payments against projections for each ETC.[222] A carrier may incur a negative disbursement as a result of the true-up process during the transition month.[223] In the event the negative amount exceeds the carrier's next monthly payment, USAC would invoice the carrier for the full amount of the negative balance.[224]

D. USF Contribution Developments

While the Commission indicated that it intended to issue an NPRM focused on contribution reform in 2010 as part of its Broadband Action Agenda,[225] it has not done so yet. It is not clear when or if it will.

However, in November 2010, the Commission released a significant Declaratory Ruling regarding contributions to state universal service funds in response to a petition by the Nebraska and Kansas state commissions.[226] In that Declaratory Ruling, the Commission ruled "on a prospective basis that states may extend their universal service contribution requirements to future intrastate revenues of nomadic interconnected Voice over Internet Protocol (VoIP) service providers, so long as a state's particular requirements do not conflict with federal law or policies," specifically concluding that "state universal service fund contribution rules for nomadic interconnected VoIP are not preempted if they are consistent with the Commission's contribution rules for interconnected VoIP providers and the state does not enforce intrastate universal service assessments with respect to revenues associated with nomadic interconnected VoIP services provided in another state."[227]

i. Specific USF Contribution Decisions, Appeals, and Requests for Guidance

Carriers subject to USF reporting nonetheless have continuing concerns about collections, audits, and enforcement actions. The Commission has released two significant decisions related to requested reviews of Universal Service Administrative Company ("USAC") decisions regarding universal service contributions since September 2010. In addition, the Commission has requested comment regarding several other notable appeals and USAC requests for guidance.

a. WCB Decisions

In October 2010, the Wireline Competition Bureau granted in part a request filed by Enhanced Network Telecom, LLP ("NetworkIP") for a review of a 2008 USAC audit decision finding that the majority of NetworkIP's revenue was derived from a prepaid calling card service,[228] and that NetworkIP had incorrectly reported revenue from certain customers that did not contribute to the universal service fund.[229]

The WCB disagreed. It explained that "[a] prepaid calling card provider typically resells the toll service of other carriers and determines the price of the service by setting the price of the card and controlling the number of minutes for which the card can be used. NetworkIP does not create or sell calling cards to end users, retailers, or its carrier customers; rather it sells minute-based access to a software platform that allows Network IP's *customers* to create and sell prepaid calling card services to end-users."[230] Thus, the WCB "agree[d] with NetworkIP that its software platform lacks several important characteristics of a prepaid calling card service, and that revenues from this service should not be reported as prepaid calling card revenue on the FCC Form 499-A."[231]

The WCB remanded to USAC the issue of whether NetworkIP incorrectly classified certain revenue as carrier's carrier revenue.[232]

In April 2011, the WCB denied in part a request filed by Clear World Communications Corporation ("Clear World"), a reseller of intrastate, interstate, and international long distance service, for a review of a 2009 contributor audit decision.[233] The WCB found that "USAC appropriately determined that . . . Clear World incorrectly allocated as international all of its revenue from monthly recurring charges, and that once a portion of those revenues were properly allocated to the interstate jurisdiction, Clear World no longer qualified for the limited international revenues exemption (LIRE) and thus understated its contributions to the Universal Service Fund."[234]

The WCB also found that "Clear World assessed universal service pass-through charges in excess of amounts permitted under the Commission's rules and requirements," but that "USAC erred in directing Clear World to remit to USAC any amount of excessive line-item charges that Clear World does not refund to its customers."[235]

The WCB further explained that "Clear World failed to provide sufficient evidence to support its claim that Clear World's monthly recurring charges were assessed on international traffic only."[236] It noted that "although Clear World provides intrastate, interstate, and international telecommunications services, all of the monthly recurring charges associated with its service products were allocated to international revenues," and that "[i]n the absence of evidence supporting the use of a different methodology… Clear World should have allocated at least a portion of its monthly recurring charges to its interstate revenues."[237]

While the WCB concluded that "USAC erred in directing Clear World to remit to USAC any amount of excessive line-item charges that Clear World does not refund to its customers," it did make clear that Clear World faced possible action by the Enforcement Bureau "[t]o the extent that Clear World cannot, or will not, reimburse its customers for the excessive amounts of contribution costs collected."[238]

b. USAC Requests for Guidance

In 2011, USAC submitted two requests for guidance to the FCC with respect to universal service contribution issues.

In March 2011, USAC requested guidance "regarding situations in which USAC determines that a contributor does not have appropriate documentation to justify its reseller classifications as required by the Rules, and in response to such a determination, the contributor attempts to provide post-dated certificates for its resellers."[239] This issue arises when a wholesale carrier involved in an audit does not have resale certificates for the audit period but may be able to demonstrate through other means, such as post-dated certificates, that its revenues were properly classified as revenues from resellers and not as end-user revenues. The WCB requested comments on the request later in March 2011, and the FCC to date has not issued further guidance.

In April 2011, USAC requested guidance regarding the proper reporting of text messaging revenues, and whether text messaging revenues should be reported as telecommunications revenue or non-telecommunications revenue.[240] According to USAC, "[t]he 2008 FCC Form 499-A Instructions appear to support classifying text messaging as either an information service, not subject to USF contribution, or a telecommunications service, which is subject to USF contribution," and carriers have reported using both methods.[241] The WCB requested comments on the request in May 2011, and the FCC to date has not issued further guidance.

c. New Carrier Appeals

Carrier appeals and petitions for declaratory rulings indicate some of the positions that USAC is taking in audits, and thus we summarize below the most notable appeals of USAC decisions filed with the FCC.

In April 2011, The Rural Independent Competitive Alliance ("RICA") filed a request for a Declaratory Ruling "that there is presently no binding legal obligation or mechanism that compels rural CLECs to report on FCC Form

499-A any portion of their end user revenues that are not received by them pursuant to rates explicitly designated as charges for the provision of interstate service and that end user revenues recovered pursuant to rates charged for the provision of telephone exchange service entirely within one state are intrastate revenues."[242]

Several RICA members had not reported any interstate revenue associated with the provision of fixed local exchange services. The RICA members did not assess a federal subscriber line charge pursuant to an interstate tariff. Citing to instructions to Form 499-A stating that "'filers without subscriber line charge revenue must identify the interstate portion of fixed local exchange service revenues,'" USAC took the position that "'an interstate portion of fixed local exchange revenues must be identified because these revenues correspond to the costs associated with allowing customers to originate and terminate interstate calls.'"[243] RICA argued that the Part 36 rule allocating 25% of ILEC common line (*i.e.,* loop) costs to the interstate jurisdiction, does not apply to CLECs,[244] and that a CLEC may determine that "none of the revenues derived from its state tariffed rates for local exchange service are payment compensating it for the costs of providing interstate switched access."[245] RICA asserted: "[t]he local exchange facilities of the RICA members, like ILECs, incur costs to provide origination and termination of interexchange calls, but they do not intend or purport to recover any of these costs other than by means of switched access charges."[246] The WCB requested comments on the request in May 2011.

In July 2011, Blackfoot Communications Inc. ("BCI") requested a similar review and reversal of a decision by the USAC to reclassify as interstate revenue a portion of the fixed local service revenues reported by BCI on its 2010 FCC Form 499-A.[247] BCI stated that it "does not charge a federal Subscriber Line Charge ("SLC"), and treats all of its fixed local service revenues as intrastate revenues," and that it, "reported 100% of its fixed local service revenue as intrastate."[248] Yet "USAC informed BCI that with or without SLC revenue, all carriers 'must identify the interstate portion of fixed local exchange service revenues as those revenues correspond to the costs associated with allowing customers to originate and terminate interstate calls."[249] The WCB requested comments on the appeal in August 2011.

In December 2010, following the completion an extensive USAC audit of more than $1.4 billion in revenues reported by XO Communication Services, Inc. ("XO") on its 2008 FCC Form 499-A, XO sought review of USAC's conclusions that: 1) "with minor exceptions, *all* revenues from a variety of XO and legacy Allegiance private line, telecommunications products should have been reported as interstate;" 2) certain reseller revenue received from other telecommunications carriers should be reclassified; and 3) r XO's MPLS packet-based service should be classified as a telecommunications service instead of an information service or non-telecommunications.[250]

With respect to resellers, XO requested review of USAC's reclassification of reseller revenue from Block 300 (wholesale revenues) to Block 400 (end user telecommunications revenues).[251] XO objected that USAC rejected reseller certificates that were not signed in the same year as the service revenue reported (in one, the certificate had been signed on December 12 of the preceding year), arguing that the form and periodicity of reseller certifications specified in the Form 499-A instructions are "merely guidance," with other forms of proof acceptable, rather than a binding rule specifying the only permissible form of proof.[252] According to XO, USAC also refused to accept as proof listings of the customer as a current USF contributor during the subject year, and confirmatory certifications, executed after the subject year, stating that the entity was a reseller of telecommunications that contributed to federal universal service.[253]

XO also requested "review of USAC findings reclassifying XO's Dedicated Transport Service [*i.e.*, point-to-point] revenues for physically intrastate circuits that XO configured as closed networks."[254] XO stated that the services in question did not connect to circuits provided by other carriers, to CPE that bridged traffic to another location, or to the PSTN or to the Internet, and originated and terminated within the business customers' facilities located within the same state.[255] According to XO, "USAC concluded that Dedicated Transport Services circuits would be presumed to be interstate circuits, unless XO provided evidence that 90% or more of the traffic was intrastate," following the FCC rule on the cost assignment for ILEC private lines.[256] According to XO, USAC wanted XO to provide a circuit-specific "traffic study or some other proof that its private lines carried less than 10% interstate traffic" and, without such a study, classified the traffic as interstate.[257] XO argued that, rather than presuming the revenues to be interstate, the presumption should be that the revenues are intrastate, especially in light of the fact that the lines were configured as a closed system.[258] The WCB requested comments on XO's appeal in January 2011, and the appeal remains pending.

In March 2011, U.S. Satellite Corporation ("USSC") filed a request for a declaratory ruling clarifying that revenues derived from services USSC provides to its commonly-owned affiliate are excluded from its universal service fund contribution base.[259] The WCB requested comments on the appeal in April 2011, and it remains pending.

V. INTERCARRIER COMPENSATION REFORM

A. Overview

Since passage of the Telecommunications Act of 1996, which requires that universal service support be "explicit,"[260] 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. This has led to myriad disputes, including over whether and, if so, at what rates, VoIP traffic is subject to access charges, whether companies providing connections to "free" conference calling services and other large generators of in-bound traffic can levy access charges, and what rates apply to non-traditional networks and when a CLEC provides some, but not all, of the functions performed by the ILEC in originating or completing a long distance call.

In 2011, the largest potential development was still pending at the time of this writing. The FCC once again is considering a comprehensive overhaul of intercarrier compensation, including unifying and substantially reducing charges for call termination.

2011 also saw the FCC require electronic filing and access for CLEC tariffs, which will be a major change for both carriers and their customers. The FCC also handed down a series of tariff interpretation decisions clarifying that end users must be purchasing telecommunications services, raising questions about when a wholesale carrier can charge for end office access elements, and making clear that non-payment of tariffed amounts is not a violation of the Communications Act.

State Commissions and courts were also active in considering the question that the FCC has continued to avoid – whether VoIP is subject to access charges. The state commissions in the past year that have reached the issue have generally held that VoIP traffic is telecommunications service traffic and is thus subject to access charges.

B. FCC's Intercarrier Compensation NPRM

The NBP's Broadband Action Agenda called 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."[261] The FCC kicked off its latest consideration of these issues as part of its *CAF NPRM* issued in February 2011.

The FCC proposed both immediate intercarrier compensation reforms and longer term reforms. In its near-term reforms, the Commission proposed to amend its interstate access rules to address access stimulation (also known as "traffic pumping") arrangements in which a carrier can charge a relatively high-per minute access rate, partner with an entity that attracts a lot of long distance calling (such as a conference call provider), and then share the access revenues paid by interexchange carriers with that entity. The FCC proposed to require LECs to disclose when they entered into revenue sharing agreements and then, for rate of return carriers, to refile their access rates reflecting projected demand, and for CLECs, to benchmark their rates to that of the largest incumbent LEC in the state.[262] Any ILEC that participated in revenue sharing would also have to leave the NECA pools and file its own access tariffs, and would be precluded from including revenue share payments in its revenue requirement.[263] The Commission also proposed to require any carrier refiling tariffs after entering into a revenue sharing agreement to file on at least 16 days' notice, which would deprive those refiled tariffs of "deemed lawful" status (meaning that the LECs would continue to be liable for refunds even if the tariff was not suspended and investigated before becoming effective).[264]

The Commission also proposed to amend its call signaling rules to address "phantom traffic" by requiring originating providers to include the calling party's telephone number in the signaling information accompanying a call, and to prohibit stripping or altering call signaling information.[265] For service providers using SS7, this meant populating the CPN (calling party number) field. The Commission, however, did not propose making additional SS7 fields mandatory. For service providers using MF signaling, the Commission required service providers to pass CPN information or, if different, the Charge Number (CN), in the MF Automatic Numbering Identification (MF ANI) field.[266]

Finally, as part of its near term reforms, the Commission proposed to determine the access obligations for interconnected VoIP traffic. The Commission sought comment on proposals ranging from bill-and-keep to paying a VoIP specific rate to paying all existing access charges at the same rates as TDM traffic.[267]

For the longer term, the Commission sought comment more generally on both its legal authority and how it should structure intercarrier compensation reform. It posited two models, one of cooperative action with states along traditional jurisdictional lines (at least for access charges)[268] and one in which the FCC dictated the changes using authority under, among others, Sections 251(b)(5) and 251(g).[269] For the end point of its reform, the Commission sought comment on bill-and-keep methodologies, flat-rated intercarrier charges, and any other alternatives parties proposed.[270] The Commission made clear, however, that it sought to "transition away from per minute intercarrier compensation rates to facilitate carriers' movement to IP networks."[271]

Recognizing that access charges constitute a significant portion of both ILEC and CLEC revenue today, the Commission sought comment on how LECs might recover revenues foregone through intercarrier compensation reform. The Commission sought comment, among other things, on increased end user charges[272] and recovery through the CAF.[273] For rate-of-return carriers, the Commission sought comment on an alternative recovery framework.[274]

ABC/RLEC Joint Plan and Framework. After the Commission sought and received comments and reply comments, the next major development was in late July 2011, when a group of six price cap carriers submitted the ABC Plan for universal service and intercarrier compensation reform for price cap LECs and CLECs, and those same carriers, along with RLEC trade associations, submitted a Joint Framework that also set forth a timetable for RLEC intercarrier compensation reform.[275]

The ABC Plan's intercarrier compensation provisions begin with changes to the treatment of VoIP traffic and antiarbitrage measures. Effective January 1, 2012, the ABC Plan proposes that all VoIP traffic that is "toll" traffic would be subject to current interstate access rates, irrespective of whether the call was intrastate or interstate in nature.[276] The ABC Plan also proposed (without much specificity) that the Commission adopt phantom traffic rules and rules addressing "arbitrage schemes involving both originating and terminating traffic, including traffic pumping."[277]

The ABC Plan then proposed, for price cap LECs and CLECs, a six-step/ five-year transition from current intercarrier compensation rates to a unified termination rate of $.0007 per minute. The proposed schedule caps both originating and terminating switched access rates and then reduces intrastate reciprocal compensation and terminating access rates, to the interstate levels (to the extent they were above those levels) within one year (50% of the difference at July 1, 2012, and the remaining 50% one year later). As of July 1, 2014, terminating end office switched access rates would begin a three-step (two-year) transition from interstate switched access levels to $.0007 per minute, reaching $.0007 on July 1, 2016. One year later each carrier would unify all terminating traffic under Section 251(b)(5) mechanisms at a rate of $.0007 for transport and termination.[278] No terminating or other intercarrier compensation rates would be permitted to increase.

For rate-of-return carriers, the intercarrier transition timeline proposed in the Joint ILEC Framework was somewhat more elongated, and included opportunities for periodic reevaluation. RLECs would also begin by capping both originating and terminating switched access rates, and then reducing intrastate access to interstate access rate levels by July 1, 2013, the same as for price cap LECs and CLECs. Beginning July 1, 2014, RLECs would undertake a three-step transition to an interim terminating end office switched access rate of $.005 per minute, reaching that rate on July 1,

2016. At that point, the FCC would review to determine whether further rate reductions should occur. If the FCC took no action, then beginning July 1, 2017, RLEC terminating end office switched access rates would be reduced to $.0007 per minute in three annual steps, reaching $.0007 on July 1, 2019.[279]

For both price cap ILECs and RLECs, the ABC Plan and Joint ILEC Framework proposed a combination of increased federal subscriber line charges and universal service support (called the "Access Replacement Mechanism" or "Restructure Mechanism," depending on the proposal) to partly offset decreased intercarrier compensation revenues.

For price cap LECs, the ABC Plan proposed that the monthly SLC rates that a price cap LEC could charge would increase $0.50 each year from July 1, 2012 to July 1, 2016 (for a maximum cumulative increase of $2.50 per month over five years) if the price cap ILEC elected to receive access replacement support from the universal service fund. If the price cap ILEC elected not to receive access replacement support, it would be permitted to increase its monthly SLC by $0.75 each year for five years (for a maximum cumulative increase of $3.75 per month over five years).[280] The ABC Plan also proposed that no SLC increase could cause the sum of the local residential rate, federal SLC, state SLC, mandatory EAS charges and per-line contribution to the state's high cost fund to exceed $30 per month.[281]

To the extent that the full imputed SLC increases (up to the $30 residential rate benchmark) did not offset the reductions in access rates and net reductions in reciprocal compensation rates, then the ABC Plan proposed that price cap LECs could recover 90% of the difference from the universal service fund in a Transitional Access Replacement Mechanism. While price cap LECs could begin receiving this support as early as July 1, 2012, with potential increases during every year of the intercarrier compensation rate transition, the Transitional Access Replacement support would be phased out in three steps beginning July 1, 2018 with support eliminated by July 1, 2020.[282]

For rate of return carriers, the Joint ILEC Framework proposed that Federal SLC monthly caps would increase $0.75 each year for six years, so that the maximum SLC could be as much as $11.00 per month. However, the SLC for rate of return LECs would be subject to a $25 per month residential rate benchmark, and so would not push the total residential rate above that level.[283]

Affected RLECs would also receive access replacement support from the universal service fund. The access replacement mechanism support would be calculated by determining the access shortfall (revenue requirement using a 10% rate of return less local switching support and the revenue produced by capped or targeted terminating access rates applied to actual demand for that year), which is then offset against the imputed maximum SLCs (subject to the $25 residential rate benchmark).[284] Unlike the proposed access replacement support for price cap LECs, RLEC support is not transitional and would not sunset. RLEC proponents have estimated the size for access replacement support at approximately $311 million in the year from July 1, 2019 to June 30, 2020.

As discussed above with respect to high cost universal service reform, the Commission sought and received comments on the ABC Plan, RLEC Plan and Joint ILEC Framework in August and early September 2010. At the time of this writing, an FCC order was anticipated as early as the end of October 2011.

C. Developments with Respect to Federal Tariffs.

i. Electronic Tariffing for CLECs

In June 2011, fourteen years after the FCC introduced electronic tariff filing for ILECs, the Commission finally moved to adopt electronic filing for CLECs. The Commission noted that extending electronic filing to all tariff filers would "facilitat[e] access to tariffs and associated documents by the public," "increas[e] the ease with which interested parties can review all tariffs," and "mak[e] all tariff information available to state and other federal regulators."[285] The new rules will take effect November 17, 2011.

CLECs with tariffs will have to file a base tariff no later than January 16, 2012.[286] CLECs will also now be subject to specific formatting rules.[287] The Commission also made clear that carriers operating under a d/b/a name must file tariffs under their legal name and must note the d/b/a name on the Title Page of the tariff.[288]

These changes, once implemented, will make it much easier for customers to examine the tariff terms under which service is being offered or being incorporated into contracts by reference, as well as for carriers and customers to see – and potentially to challenge – tariff provisions either at the time of filing or in subsequent complaints.

ii. Tariff-Related Decisions

The FCC in 2011 also continued to scrutinize tariff language. In May 2010, the Pricing Policy Division of the Wireline Bureau invalidated a CLEC's proposed rates for inadequately specifying the rates to be charged. In that case, All American Telephone Company had filed a tariff stating that its rates would be set "at or below the rates for equivalent services" offered by the ILEC.[289] Citing 47 C.F.R. § 61.25's requirement that a carrier "specifically identify in its tariff the rates being cross-referenced so as to leave no doubt as to the exact rates that will apply," the Division held that the range of rate provisions referenced by All American did not provide the exact rates.[290]

Next, in a pair of decisions involving tariffs filed by Northern Valley Telephone Company, the Commission addressed access charges levied for delivering calls to entities that paid no fee to the tariffing carrier. Northern Valley's tariff had expressly provided that "[a]n End User need not purchase any service provided by [Northern Valley]."[291] The Commission held that Northern Valley could not do so. Under 47 C.F.R. § 61.26, a CLEC can file a tariff "for services that are 'the functional equivalent' of ILEC interstate switched exchange access services."[292] However, the FCC has also explained that "[w]hen a competitive LEC originates or terminates traffic *to its own end-users*, it is providing the functional equivalent of those [ILEC] services. . . ."[293] The Commission ruled that an entity receiving free services could not be an "end user" because the Commission's access charge rules define an "end user" as "any customer of an interstate or foreign telecommunications service that is not a carrier" and the definition of "telecommunications service" requires that the telecommunications be provided "for a fee."[294]

In *Sprint v. Northern Valley*, the Commission also struck down additional provisions of Northern Valley's tariff as unreasonably vague, including provisions that:

- Permitted Northern Valley "at its sole discretion" to "use a different PIU Factor" than the one submitted by the IXC.[295]
- Permitted Northern Valley to require a deposit "at any time after the provision of service to a Buyer."[296]

The Commission also invalidated a provision that required carriers to dispute bills within 90 days or waive any rights or claims as a violation of the statutory two year statute of limitations in Section 415 of the Communications Act.[297] And it rejected as unreasonable a "fee-shifting" provision that permitted Northern Valley to recover its attorneys' fees even if it did not prevail.[298]

In *AT&T v. Y-Max Communications Corp.*, the FCC faced the question of whether Y-Max could levy access charges on AT&T for calls that were terminated to or originated from customers of its affiliate, MagicJack, LP, an over-the-top VoIP provider.[299] In a decision that turned on the specific language of YMax's tariff's definitions, the FCC ruled that YMax's charges were not authorized by its tariff.

In that decision, the Commission cited as the "fundamental problem" YMax's decision "to model its Tariff on common language in LEC access tariffs, even though the functions YMax performs are very different from the access services typically provided by LECs."[300] YMax had defined an "End User" in its tariff as a person or entity "that uses the service of the Company [YMax] under the terms and conditions of this Tariff."[301] However, the only service that was offered under the tariff was a service called "End User Access" service, which YMax described as "the use of an End User Common Line ('local loop') to originate or terminate interstate long distance calls."[302] But YMax conceded that it had "never provided End User Access service for any End User's 'use' within the meaning of Section 5 of its Tariff" and that "it provides no 'local loops' or any other facilities that physically connect to the premises of a Called/Calling Party."[303] "Loops" (*i.e.*, last mile transmission) were provided by the called/calling party's ISP. Similarly, the Commission ruled that YMax did not provide "End Office Switching" as defined under the tariff, because the tariff defined an "End Office Switch" as a place "where Customer or End User station loops are terminated for purposes of interconnection to other station loops, trunks, or access facilities," and YMax furnished termination of "station loops."[304] The Commission did not opine on how it would rule if presented with different tariff definitions that more accurately described the underlying network architecture and wholesale relationships

In *All American Telephone Co. et al. v. AT&T Corp.*, the Commission, in response to a primary jurisdiction referral from a federal district court, ruled that AT&T had not violated Section 201, 203 or any other provision of the Communications Act when it refused to pay a CLEC's tariffed terminating access charges, even though it had not filed a rate complaint with the FCC.[305] The Commission held that the Communications Act does not bar a customer from refusing to pay a carrier pursuant to a tariff, even if non-payment in violation of the tariff gives rise to a contract claim by the carrier against the customer.[306] In other words, while "self-help" through withholding payment, may violate the terms of the tariff and give rise to contractual damages, it does not violate the Communications Act itself.

One other aspect of the FCC's decision in *Sprint v. Northern Valley* is notable, particularly in combination with the Eastern District of Pennsylvania's decision in *Paetec Communications v. MCI Communications Services d/b/a Verizon Business Services*.[307] In *Sprint v. Northern Valley*, the FCC declined to find Northern Valley's tariff *void ab initio*, even though the tariff had been filed with the requisite notice required to be "deemed lawful" pursuant to Section 204(a)(3). In that case, Sprint conceded that Northern Valley's rates were no higher than the ILEC's rates such that they met the CLEC access benchmark set forth in 47 C.F.R. § 61.26.[308] The Commission found no "furtive concealment or any other deceptive conduct that might justify removing the ["deemed lawful"] protection afforded by section 204(a)(3)."

In *Paetec v. MCI*, however, the Court found that Paetec had charged rates that exceeded the CLEC access charge benchmark. Verizon argued that because the CLEC had exceeded the benchmark, it was subject to mandatory detariffing and was not permitted to file its tariff.[309] The Court, however, held that Section 204(a)(3)'s "deemed lawful" protection nevertheless precluded refunds.[310] Verizon has appealed this issue, among others, to the Third Circuit, where, at the time of writing, briefing was scheduled to be completed October 25, 2011.[311]

D. Other Key Intercarrier Compensation Decisions

While the Commission looks to adopt comprehensive, forward-looking reform of intercarrier compensation, compensation disputes have continued to mount, and appeals of some prior FCC decisions also continue to work their way through the courts. We detail the year's most significant other decisions and pending appeals of FCC orders below.

i. CLEC-CLEC ISP-Bound Traffic

In *AT&T Communications v. Pac-West Telecomm, Inc.*, the United States Court of Appeals for the Ninth Circuit considered the question of whether the FCC's ISP-bound compensation orders and rules applied to the exchange of traffic between LECs of any type, including specifically CLEC to CLEC, or applied only to ILEC to CLEC traffic exchanges.[312] Citing language in the FCC's ISP-bound compensation orders that referred to "carriers" without specifying incumbent or competitive carriers,[313] and also relying on the views expressed by the FCC as *amicus curiae*,[314] the Ninth Circuit held that these rules and orders covered ISP-bound traffic exchanges between CLECs as well as between ILECs and CLECs.

ii. CMRS-CLEC Termination Compensation.

As we summarized in last year's PLI Conference wireline developments outline, in 2009, the Commission issued an Order on Review in *North County Communications Corp. v. MetroPCS California, LLC,* granting in part but otherwise denying an application for review by North County Communications Corp. ("North County") challenging an Enforcement Bureau order[315] 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.[316] 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 appealed the Commission's decision to the U.S. Court of Appeals for the D.C. Circuit.[317] The California PUC, in June 2010, dismissed North County's application to set a rate without prejudice, pending the D.C. Circuit's resolution of MetroPCS' appeal and an indication from the FCC that it would actually "use the results of this [California] Commission's deliberations in resolving the dispute between" North County and Metro PCS.[318] In an opinion issued in May 2011, the D.C Circuit upheld the FCC's decision, holding that the FCC's legal conclusion that it was not required by law to be the instrumentality that set the applicable compensation rate was justified.[319]

iii. 251(g) Forbearance

In 2009, the FCC denied Feature Group IP's petition for forbearance from Section 251(g) to the extent that it permitted LECs to levy exchange access charges on "voice-embedded Internet communications" traffic.[320] Following the path taken in its *Core Section 251(g)/254(g) Forbearance Order*,[321] the Commission ruled that "forbearance from Section 251(g) would not automatically, and by default, mean that Section 251(b)(5) would govern traffic that was previously subject to Section 251(g)."[322] Because the Commission concluded that forbearance from Section 251(g) would result in a "regulatory void," the Commission held that it "cannot conclude that enforcement of the rate regulation preserved by Section 251(g) and related implementing rules is not necessary to ensure that charges and practices are just and reasonable, and not unjustly or unreasonably discriminatory."[323] Accordingly, the Commission declined to grant forbearance.

Feature Group IP appealed to the D.C. Circuit. In an unpublished opinion issued May 27, 2011, the D.C. Circuit upheld the Commission's order.

iv. LEC-to-LEC Compensation for VoIP Pursuant to Interconnection Agreements

Separate from the issue of whether VoIP traffic is subject to access charges pursuant to state and federal access tariffs, two courts addressed the issue of whether an originating LEC could be liable to a terminating LEC for terminating access payments for VoIP- originated traffic pursuant to an interconnection agreement. In *Global NAPs California v. Public Utilities Comm'n of the State of California*, the Ninth Circuit affirmed a District Court's ruling upholding the California PUC's determination that, pursuant to the parties' interconnection agreement, Global NAPs owed Cox termination payments for terminating VoIP-originated intraLATA toll traffic.[324] The 9th Circuit noted that Section 251(b)(5) permits charges for termination pursuant to interconnection agreements.[325]

In *Central Telephone Co. of Virginia v. Sprint Communications Co. of Virginia, Inc.*,[326] a federal district court held that Sprint was required to pay access charges on VoIP-originated traffic pursuant to the terms of its interconnection agreement. In that case, the interconnection agreement stated: "[v]oice calls that are transmitted, in whole or in part, via the public Internet or a private IP network (VoIP) shall be compensated in the same manner as voice traffic (e.g., reciprocal compensation, interstate access and intrastate access)."[327] The agreement also provided: "[c]ompensation for the termination of toll traffic and the origination of 800 traffic between the interconnecting parties shall be based on the applicable access charges in accordance with FCC and Commission Rules and Regulations and consistent with the provisions of Part F of this Agreement [relating to "Interconnection"]."[328] Sprint had also paid access charges pursuant to the interconnection agreement, both while Sprint had been an affiliate of Central Telephone Co. of Virginia, and afterwards.[329] On these facts, the Court concluded that Sprint had a contractual obligation to pay access charges on VoIP-originated traffic.[330]

v. 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").[331] 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."[332]

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.[333] The IUB revisited its order on February 4, 2011, affirming its decision and clarifying that its order applies only to *intra*state access charges.[334]

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 [that] 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."[335] 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.[336]

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.[337] 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.[338]

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.[339] Several of these courts have stayed proceedings and referred the traffic pumping issues to the Commission pursuant to the primary jurisdiction doctrine.[340] The Commission, however, has not yet issued any rulings with respect to these proceedings.

VI. SPECIAL ACCESS

A. Overview

For years, purchasers of special access services have argued that special access rates, terms, and conditions violate Commission rules and should be reformed. ILECs consistently counter that the special access market is competitive and that rates are just and reasonable.

ILEC special access services are subject to price caps, except in areas where the FCC has granted pricing flexibility. Commission rules allow pricing flexibility where certain ILECs meet competitive triggers designed to predict where competition will discipline incumbent behavior. Special access purchasers argue that the current price caps are too high and that the Commission's productivity factor (called the "X Factor"), which is currently set at the rate of inflation, does not adequately update the price cap to account for productivity gains. Purchasers and competitive providers of special access services also argue that ILEC tariffs and contracts include terms and conditions that impede competition.

In response to these arguments, the FCC renewed the process of evaluating whether its current special-access rules are working properly with a notice soliciting public comment on three issues in November 2009.[341] With this round of comments, the Commission sought to develop the record for reform and to create an analytical framework to understand the very complex special access market.

In its 2009 public notice, the Commission first asked whether its "pricing flexibility rules ensure just and reasonable rates."[342] Second, the Commission asked whether its price-cap rules are adequate to ensure that rates are "just and reasonable."[343] Third, the Commission asked whether the pricing flexibility rules "ensure that terms and conditions in special access tariffs and contracts are just and reasonable."[344]

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 to abuse their market power.

The Commission's next step was to begin gathering data needed to judge the validity of these arguments. First, it issued a voluntary request for data in October 2010,[345] in which it asked special access providers and customers to provide detailed information about purchase history and special access facilities in order to explore the state of competition.[346] The Commission issued a second voluntary request in September 2011, requesting data on terms and conditions in special access tariffs and discount plans as well as revenue and pricing data from special access customers and providers.[347] It is significant that the Commission requested data not only on DS1 and DS3 services, but also, for the first time, on Ethernet services.[348]

In another important development, a group of special access customers and competitors filed a writ of mandamus in the D.C. Circuit Court of Appeals in July, 2011 seeking to compel the Commission to issue an appealable order on special access within six months.[349] These parties argued that the Commission, by failing to act on special access, has not fulfilled its responsibilities under the Telecommunication Act.[350] The Court responded in September 2011, requiring the FCC to file a response to the petition by October 4th and permitting the petitioners to file a response by October 20th. As of the submission date of this article, the court had not acted on the writ.

B. Pricing Flexibility

In its 2009 public notice, the Commission also 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.[351] 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.[352] 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.[353] In Phase 2 areas, 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.[354] They argue that in areas in which pricing flexibility has been granted, there are extensive competitive, facilities-based networks.[355] They argue that the Commission should be wary of mandating price reductions because doing 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.[356]

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.[357] Price cap ILECs dispute these claims.[358] The price cap ILECs argue that collocation is also under-inclusive – that it does not consider whether purchasers have actual choices, even though those choices are not routed through an ILEC central office.[359] 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.[360]

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,[361] and some have advocated a market-power analysis focused on Metropolitan Statistical Areas ("MSAs").[362]

Although it has not yet decided whether it will use collocations to measure competition going forward, in its first voluntary data request, the Commission sought data on competitors' collocations at the wire center level (a geographical area much smaller than an MSA centered around the ILEC's central office).[363]

C. Price-Cap Index

The Commission also sought comment on the adequacy of the price cap rules for special access. These rules 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.[364] 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.[365] 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.[366] 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.[367]

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.[368] 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.'[369]

D. 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.[370] 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.[371] They object, among other things, to requirements to convert UNEs to special access.[372] 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.[373] The Commission has requested data on these terms and conditions in its most recent data request, specifically focusing on competitive impact and how such terms and conditions might restrict purchasers from shifting demand to competitors or alternate services.[374]

VII. TRANSACTIONS

A. Overview

While the year was dominated by FCC consideration of media and wireless transactions, wireline transactions were relatively few. Only two were significant enough to be handled through the Office of General Counsel's transaction team, Qwest-CenturyLink and Level 3-Global Crossing.

B. 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.[375] As contemplated, Qwest, a full-service communications provider with approximately 10.3 million access lines in 14 states, and approximately 3 million broadband customers,[376] would become a wholly owned subsidiary of CenturyLink.[377] Legacy CenturyLink, which was formed from CenturyTel's acquisition of Embarq,[378] provides incumbent local exchange services to approximately 7 million telephone access lines, and broadband Internet access services to over 2.2 million customers.[379]

On March 18, 2011, the Federal Communications Commission approved the merger of CenturyLink Inc. ("Legacy CenturyLink") and Qwest Communications International Inc. ("Qwest") (collectively, the "companies").[380] In its Memorandum Opinion and Order approving the deal, the Commission imposed a number of conditions aimed at protecting against harm to competition and ensuring that the combined company ("CenturyLink") significantly expands its networks and launches a broadband adoption program for low-income consumers.[381] The conditions include the following:

- <u>Broadband adoption program for low-income consumers</u>. The companies committed to have CenturyLink launch a major broadband adoption program within six months of the merger closing date focused on connecting low-income customers in its newly expanded territory. The companies agreed that CenturyLink will offer qualifying customers[382]broadband starting at less than $10 per month and a computer for less than $150, while allowing qualifying customers to sign up for the offer for a period of five years. In addition, the companies made commitments to marketing, outreach, and digital literacy training, and promised to provide detailed reporting on outcomes with an independent analysis of the program's effectiveness.[383]

- Broadband deployment. The companies agreed to significantly increase the capacity of the Qwest network in order to bring broadband with actual download speeds of at least 5 Megabits per second ("Mbps") to at least 4 million additional homes and businesses, and at least 200,000 more anchor institutions such as schools and libraries. The companies also agreed to significantly increase the availability of higher-speed broadband by more than doubling the number of homes and businesses that can receive 12 Mbps broadband, and more than tripling the number than can receive 40 Mbps broadband.[384]

- Advancing Universal Service Fund reform. The companies agreed to phase down forms of support which they receive from the federal Universal Service Fund. First, the companies agreed to phase out Local Switching Support ("LSS") over two years beginning in January 2012. Second, they agreed that CenturyLink will forgo future federal safety net additive payments for calendar year 2012 and subsequent years. Finally, the companies agreed that CenturyLink will submit a plan for its three remaining average schedule companies to freeze Interstate Common Line Support ("ICLS") on a per-line basis beginning in January 2012.[385]

- Protection against potential transaction-related harms. The companies made various other commitments to protect against transaction-related harms, including: (1) agreeing not to increase rates for enterprise

> service for seven years in several dozen buildings where the companies compete (in Minnesota and Washington); (2) adding safeguards to ease the transition of operator support systems ("OSS") for wholesale customers; (3) ensuring that the merger does not harm interconnection agreements with competing phone carriers; and (4) maintaining wholesale service quality.[386]

The merger closed on April 1, 2011, creating the nation's third largest telecommunications company.[387] Headquartered in Monroe, Louisiana, it is operating under the CenturyLink name[388] and currently has a 37-state service area.[389]

C. Level 3-Global Crossing

On April 10, 2011, Level 3 Communications, Inc. ("Level 3") and Global Crossing Limited ("GCL") (collectively, "applicants") announced a plan of amalgamation under which Level 3 would acquire GCL. Level 3 offers a variety of communications services throughout North America, Europe, and Asia, and holds numerous Commission authorizations for international telecommunications services, undersea cable facilities, satellite earth stations, and terrestrial wireless facilities, as well as blanket authority to provide domestic telecommunications services. GCL owns and operates a global Internet Protocol (IP)-based fiber optic network directly connecting more than 300 cities in 30 countries, providing telecommunications services and data and IP-based services to corporations, government agencies, and telecommunications carriers. GCL holds Commission authorizations for international telecommunications services, undersea cable facilities, and non-common-carrier satellite earth stations.[390]

On May 11, 2011, the applicants filed applications seeking Commission approval for various transfers of control of GCL licenses and authorizations to Level 3.[391] As contemplated, GCL would become a wholly owned subsidiary of Level 3, returning it to predominantly U.S. control and ownership.

On September 29, 2011, the Commission approved the acquisition.[392] In its Memorandum Opinion and Order and Declaratory Ruling approving the deal, the Commission found that there were no competition concerns warranting rejection of or conditions imposed on the acquisition. After considering the potential public interest harms, the Commission found that the acquisition was unlikely to result in harms in provision of transport by Internet service providers,[393] despite concerns articulated by XO Communications ("XO"). XO had argued that Level 3's acquisition of GCL would create a dominant firm that could "tip" the market.[394] The Commission, however, found that because the vast majority of internet peering, transit, and transport customers of both applicants are "multi-homed" with other providers, the likelihood that the transaction would result in "tipping" was unlikely.[395]

The Commission also found no public interest harms were likely in international transport competition[396] or due to either entity's foreign carrier affiliations.[397] Finally, the Commission also declined to address concerns raised by Pac-West in relation to toll-free tariffing, as those issues are being considered in a pending proceeding.[398]

The Commission also granted Level 3 a declaratory ruling allowing it up to 43.52 percent foreign ownership. That ownership consists of less than 24 percent ownership by STT Crossing and its parents (which held a majority and controlling interest in GCL of approximately 60%), and additional aggregate foreign ownership, as well as a "cushion" for additional foreign ownership of Level 3 shares purchased in the retail market.[399]

Following approval of the transaction by the Commission as well as by the Department of Justice, Antitrust Division, and the Team Telecom agencies, the transaction closed on October 4, 2011.[400]

VIII. VoIP and IP Enabled Services

A. Overview

This year was marked by a number of significant developments for VoIP regulation. First, as discussed above in Part IV.C, the Commission issued a declaratory ruling holding that states could collect state USF contributions from nomadic interconnected VoIP providers if those state requirements do not conflict with federal law or policies. Second, the FCC proposed extending outage reporting requirements to interconnected VoIP and broadband internet service providers. Third, the FCC continued to explore, without resolving, the proper classification of VoIP services. Fourth, Congress and the Commission took steps towards regulation of non-interconnected VoIP services. Finally a number of states concluded that at least some interconnected VoIP services are telecommunications services for the purposes of imposing state regulation.

B. State USF Declaratory Ruling

In November 2010, the Commission ruled on a Petition filed by the Nebraska and Kansas state commissions seeking authority to impose state USF obligations on interconnected VoIP providers.[401] The states initially sought authority to impose retroactive contribution requirements on interconnected VoIP providers, but eventually abandoned that request.[402] Notably, the Commission's *Declaratory Ruling* reaffirmed the supremacy of federal policy in the area of interconnected VoIP regulation, permitting state assessments "on a prospective basis . . . so long as a state's particular requirements do not conflict with federal law or policies." Specifically, the Commission concluded that:

> "state universal service fund contribution rules for nomadic interconnected VoIP are not preempted if they are consistent with the Commission's contribution rules for interconnected VoIP providers and the state does not enforce intrastate universal service assessments with respect to revenues associated with nomadic interconnected VoIP services provided in another state."[403]

This decision thus maintained the core holding of the *Vonage Preemption Order* – that the "Commission, not the state commissions, has the responsibility and obligation to decide whether certain regulations apply" to services like Vonage's.[404]

C. Outage Reporting

On May 13, 2011, the Federal Communications Commission released a Notice of Proposed Rulemaking regarding its outage reporting requirements ("NPRM"). In the NPRM, the Commission proposed extending its outage reporting rules to interconnected VoIP service providers and to broadband Internet Service Providers (ISPs).

Currently, the Commission's rules require communications providers to report all outages that potentially affect communications within a designated amount of time. The existing rules apply only to cable communications providers, IXC or LEC tandem facilities, satellite providers, Signaling System 7 providers, wireless providers, and wireline providers. Those rules define "outage" to include a significant degradation in the ability of an end user to establish and maintain a channel of communication as a result of failure or degradation in the performance of a communications provider's network. The rules also tailor the definition of a reportable significant degradation to the various types of providers and facilities. The proposed rules in the NPRM would extend those requirements to interconnected VoIP providers and broadband ISPs.

In particular, the Commission proposed applying its outage reporting requirements to both facilities-based and non-facilities-based interconnected VoIP service providers. It also proposed defining an outage with respect to interconnected VoIP service providers as a complete loss of the ability to complete calls. The Commission, however, also proposed certain metrics for determining whether a reportable outage has occurred. The new rules would provide that a significant degradation of interconnected VoIP service exists and must be reported when an interconnected VoIP service provider has experienced an outage or service degradation for at least 30 minutes: (a) on any major facility that it owns, operates, leases, or otherwise utilizes; (b) potentially affecting generally-useful availability and connectivity of at least 900,000 user minutes; or (c) otherwise potentially affecting special offices, or special facilities, including
911 PSAPs.

With respect to broadband ISPs, the Commission proposed that an outage should be defined as the loss to the end user of generally-useful availability and Internet connectivity. Like the proposal regarding reporting requirements of interconnected VoIP providers, the Commission proposed requiring an outage report when the provider has experienced an outage or service degradation for at least 30 minutes: (a) on any major facility that it owns, operates, leases, or otherwise utilizes; (b) potentially affecting generally-useful availability and connectivity of at least 900,000 user minutes; or (c) that affects any special offices and facilities.

The Commission also proposed requiring broadband backbone ISPs to report outages whenever the broadband backbone ISP experiences an outage or service degradation affecting other ISPs or end users. The new rules would define an outage in the context of a broadband backbone ISP as the loss of generally-useful availability and Internet connectivity. The Commission proposes requiring a broadband backbone ISP to submit outage reports when it experiences an outage or service degradation for at least 30 minutes: (a) on any major facility that it owns, operates, leases, or otherwise utilizes, (b) potentially affecting generally-useful availability and connectivity for an Internet PoP-to-Internet PoP pair for which they lease, own or operate at least one of the PoPs.

For both interconnected VoIP service providers and broadband ISPs, the rules would require those providers to submit a Notification to the Commission within two hours of discovering a reportable outage. An Initial Report would be due within 72 hours of discovering a reportable outage, and a Final Report would be due within 30 days after discovering the outage. The comment cycle in this proceeding closed on October 7, 2011 and, at the time of this writing, the Commission had not taken further action in the proceeding.

D. VoIP Classification at the FCC

i. USF and Intercarrier Compensation Reform

In February 2011, the Commission issued a NPRM proposing to "fundamentally modernize" the Universal Service Fund ("USF") and intercarrier compensation system by reorienting the USF and intercarrier compensation system away from telephone service and toward more widely available broadband.[405]

In that proceeding, the Commission asks whether it should classify interconnected VoIP service as a "telecommunications service." The Commission suggests that doing so would enable it to use the USF to support broadband networks.[406] Additionally, the Commission sought comment on the application of Title II to interconnected VoIP if the Commission classifies it as a telecommunications service.

ii. tw telecom, inc. ("TWTC") Petition

In July 2011, tw telecom, inc. ("TWTC") filed a petition for a declaratory ruling from the FCC clarifying that TWTC has the right to establish direct IP-to-IP interconnection with incumbent LECs for the transmission and routing of TWTC's facilities-based VoIP services and its IP-in-the-middle voice services. Part of TWTC's request seeks a declaration that its facilities-based VoIP services are telecommunications services. The petition's definition of facilities-based VoIP services includes "interconnected VoIP services that are delivered using facilities (such as unbundled network elements, special access, or other wholesale inputs) leased and operated by the service provider."[407]

TWTC argues that the FCC may classify facilities-based interconnected VoIP services as telecommunications services because these services are, from the end-user's perspective, indistinguishable from traditional telephone service. In addition, TWTC argues that the FCC may conclude that facilities-based VoIP is a telecommunications service despite the presence of a net protocol conversion - under FCC precedent, services that offer net protocol conversion are generally information services - because the protocol conversion is taking place in connection with the introduction of new network technology.

If granted, the petition would facilitate direct IP-to-IP interconnection between competitive and incumbent carriers. Additionally, absent simultaneous FCC action, it could result in the immediate and automatic application of Title II regulation to facilities-based VoIP services. The requested declaration could also create pressure at both the federal and state level to treat all interconnected VoIP services as telecommunications services.

E. Non-Interconnected VoIP

i. The Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA").

On March 3, 2011 the FCC issued three NPRMs addressing provisions of the CVAA. The CVAA amends the Communications Act of 1934 to extend communications and video access to individuals with disabilities, including imposing Telecommunications Relay Service ("TRS") Fund contribution obligations on non-interconnected VoIP service providers – the first imposition of federal communications regulation on non-interconnected VoIP. On October 7, 2011 the FCC issued an *Order* implementing this statutory requirement.[408] The *TRS Fund Order* codifies the current practice of requiring interconnected VoIP providers to contribute to the TRS Fund. It also extends contribution obligation to non-interconnected VoIP providers when those providers' services are offered on a stand-alone basis for a fee. Providers of other, non-VoIP, services who nonetheless bundle VoIP services (again, for a fee) with their non-VoIP services will be required to contribute to the TRS Fund as well.[409] However, only those providers with interstate end-user revenues must contribute.[410] Further, providers of non-interconnected VoIP services that are bundled with other non-VoIP services need only contribute if the provider: "(1) also offer[s] the non-interconnected VoIP service on a stand-alone basis for a fee; or (2) also offer[s] the non-VoIP services without the non-interconnected VoIP services at a different (discounted) price."[411] By structuring the requirement in this way, the Commission recognized the difficulty many providers would face if required to attempt to disaggregate non-interconnected VoIP revenues from tightly integrated bundles of services.

ii. Extending Regulatory Obligations to Non-Interconnected VoIP Providers.

In a number of proceedings the FCC has started to ask if regulatory obligations should be extended to non-interconnected VoIP providers. This would represent a significant change in regulatory approach and would further blur the line between regulated services and unregulated services and applications.

In July 2011, the Commission asked whether the Commission's 911 and E911 rules should apply to non-interconnected VoIP service providers.[412] Under consideration is whether the Commission's 911 rules apply to what the Commission called "outbound-only interconnected VoIP" services. As the new terminology suggests, the Commission proposes "technical modifications to the definition of interconnected VoIP services" contained in section 9.3 of the Commission's rules. The proposal would eliminate the requirement of "receiv[ing] calls." This modification to out-bound calls only appears to be proposed only for the purposes of 911 calling, leaving outbound-only VoIP service classified as "non-interconnected" for all other purposes.

In a February 2011, NPRM the FCC sought comment on extending broadband data collection by revising its definition of "interconnected VoIP" (for the purposes of

Form 477 data collection) to include “services that permit users to receive calls that originate on the public switched telephone network *or* to terminate calls to the public switched network.”[413] Additionally, the Commission continues to ask how to treat IP-enabled traffic for the purposes of intercarrier compensation.[414]

F. State Proceedings

In the absence of classification by the FCC several state agencies have asserted jurisdiction to classify VoIP as a “telecommunications service” under applicable state law. Each of these cases raises important questions of preemption and interpretation of FCC decisions as well as subjecting certain VoIP services to greater state regulation. Expect the trend of states seeking to classify and regulate VoIP services to continue until FCC or federal action fills the void.

i. Maine

In October 2010, Maine’s Public Utilities Commission (“MPUC”) issued an Order that certain VoIP services offered by Time Warner Cable Digital Phone L.L.C. and Comcast IP Phone, L.L.C. are “telephone services” under Maine law.[415] The MPUC found that “the statutory language defining ‘telephone service’ is broad, unambiguous, and readily encompasses VoIP services,” despite VoIP’s use of net protocol conversion.[416] Finding that the services are “telecommunications services” and not “information services,” the MPUC reasoned that its regulatory authority was therefore not preempted by federal law. Additionally, the MPUC interpreted the FCC’s *Vonage Preemption Order*[417] as limited only to “nomadic” VoIP services.

ii. Vermont

Also in October 2010, Phase I of a Vermont Public Service Board investigation found that the state has jurisdiction to regulate VoIP services and that its jurisdiction to do so has not been fully preempted by federal law or the FCC. [418] The decision found that interconnected VoIP is covered by Vermont's definition of "telecommunications services" and can therefore be regulated under Vermont law. Since "the Board ordinarily applies state law until it has been demonstrably preempted," it found that regulation of Comcast IP's "non-nomadic" VoIP Service is not preempted. The decision also notes that though the VoIP service providers focused the inquiry on federal classification of their services, that inquiry was irrelevant because the VoIP services offered in Vermont are telecommunications services as a matter of state law and because the FCC "did not treat this classification as necessary or dispositive to its preemption analysis in the *Vonage Order*."[419] The decision reasoned that because the factual investigation suggests that jurisdictional separation is possible, there is no conflict with the FCC's jurisdiction and therefore no federal preemption.[420]

iii. New Hampshire

In August 2011, the New Hampshire Public Utilities Commission ("NHPUC") issued an order finding jurisdiction over VoIP and requiring regulation. Here, state RLECs requested an inquiry into VoIP services in New Hampshire. The NHPUC found that the VoIP services constitute "the conveyance of telephone messages and thus, the providers of such services are subject to Commission jurisdiction."[421] The NHPUC determined that the VoIP services at issue are not "information services" under federal law.[422] As to FCC preemption, the NHPUC found that the FCC has not addressed the question of whether the state could regulate the services and that the *Vonage Preemption Order* applies only to "nomadic" devices. The NHPUC found that there is no federal explicit or implicit preemption and no conflict between state and federal law that necessitates preemption.

iv. Iowa

The Iowa Utilities Board ("IUB") has indicated that "non-nomadic" VoIP service providers in Iowa may face action if they do not have a certificate of public convenience and necessity.[423] Specifically, the IUB found in a non-rulemaking proceeding that Primecast's VoIP service should be classified as a "public utility" and Primecast treated as a CLEC under Iowa law and a "telecommunications carrier" under federal law. Of chief importance, the IUB indicates that this finding applies to all "non-nomadic" VoIP providers seeking to operate in Iowa, explaining that "[t]he Board will extend a similar grace period to any other non-nomadic VoIP service providers in Iowa, after which the Board may commence proceedings against non-nomadic providers without certificates."[424]

IX. POLE ATTACHMENTS AND RIGHTS OF WAY

A. Overview

The Commission in the last year took significant steps to facilitate access to the physical infrastructure necessary to the deployment of communications facilities by adopting new pole attachment rules and issuing a Notice of Inquiry on how to improve access to rights of way.

B. Pole Attachments.

On April 7, 2011, the Federal Communications Commission released its Pole Attachment Report and Order and Order on Reconsideration (the "Order").[425] The Order adopted several reforms, including access timelines, designed to make it easier for attachers to use poles to deploy service, and adopts a new rate formula for attachments used for telecommunications. In addition, the Order resolved multiple petitions for reconsideration of the Commission's 2010 Pole Order.

Timeline: The Order established a four-stage timeline for attachment to poles, with a maximum timeframe of 148 days for completion of all four stages: survey (45 days), estimate (14 days), attacher acceptance (14 days), and make-ready (60-75 days). The timeline applies to both wireline and wireless requests for attachment in the communications space on a pole. Wireless attachments above the communications space are subject to a modified, 178-day timeline. In addition, the Order adopted longer timelines for requests to attach to a large number of poles.

Self-Effectuating Remedy: The Order provided attachers with the right to use utility-approved contractors to perform survey and make-ready work if the pole owner does not complete survey or make-ready work on time.

Reasons for Rejection: The Order concluded that if an electric utility rejects a request for attachment, it must explain the reasons for such rejection and how those reasons relate to capacity, safety, reliability, or engineering concerns.

Pole Tops: The Order clarified that wireless attachers enjoy the same right to attach to pole tops as to any other communications space on a pole.

ILEC Attachments: The Order allowed ILECs to file pole attachment complaints if they believe a particular rate, term or condition is unjust or unreasonable.

Rates: The Order reinterpreted the telecommunications rate formula for pole attachments and adopts definitions yielding a new telecommunications rate that will, as a general matter, recover the same portion of pole costs as the current cable rate. The Order confirmed, as well, that wireless providers are entitled to the same attachment rate as other telecommunications carriers.

Enforcement: The Order adopted reforms to the enforcement process, including a requirement that the complainant attempt to engage the other party in executive level discussions before filing a complaint, provisions encouraging pre-planning and coordination among parties, and removal of a cap on penalties for unauthorized attachments. Notably, the Commission declined to adopt changes to the "sign and sue" rule, which permits attachers to challenge the lawfulness of terms in an executed pole attachment agreement and declined to adopt compensatory damage rules.

The rules adopted in the Order took effect June 8, 2011, except for §§ 1.1420 (Timeline for Access to Utility Poles), 1.1422 (Contractors for Survey and Make Ready) and 1.1424 (Complaints by Incumbent Local Exchange Carriers), which took effect on July 12, 2011.[426]

A coalition of utility companies, led by American Electric Power, filed a petition for review of the rules in the U.S. Court of Appeals for the D.C. Circuit on May 18, 2011, and sought an administrative stay of the new pole attachment rules on May 25, 2011. The Commission denied their request. The utilities then sought a stay of the rules from the U.S. Court of Appeals for the D.C. Circuit on June 7, 2011. The D.C. Circuit, in a *per curiam* order, rejected the motion for stay on August 5, 2011 on the ground that the utilities "have not satisfied the stringent standards for a stay pending court review." In a September 16, 2011 *per curiam* order, the court rejected the FCC's motion to hold the case in abeyance.

Also in June 2011, Gulf Power Co. sought appellate review of an FCC order[427] holding, in a long-running dispute, that Gulf Power was not entitled to compensation above the regulated rate for an attacher's pole attachments.[428] Gulf Power alleges that the FCC's Order was arbitrary and capricious, an abuse of discretion, and contrary to law.[429] Final briefs are due in December 2011.

C. Rights of Way

In May 2011, the Commission released a comprehensive Notice of Inquiry to identify the "key challenges and best practices" in expanding broadband deployment by "improving government policies for access to rights of way [ROW] and wireless facilities siting."[430] The NOI specifically sought comment from stakeholders, including state and local governments, other Federal agencies, Tribal governments, consumer advocates and the private sector, to "determine whether there is a need for coordinated national action to improve rights of way and wireless siting policies" and what role the FCC should play in such action.[431]

The Commission sought comment on six categories of ROW issues:

Timeliness and Ease of the Permitting Process. The FCC sought comment on the efficacy of using shot clocks in reducing delays in local zoning processes.[432] It sought comment on whether its *Shot Clock Ruling*[433] had reduced the number of collocation applications pending before state and local authorities. It also requested updated information on the timeliness and ease of permit processing for ROW applications.

Reasonableness of Access Charges.[434] The Commission inquired when and to what extent ROW access charges are reasonable. It asked specifically about cost-recovery and market-based rates, and how market-based or other non-cost based rates for public ROWs are determined in the absence of a competitive marketplace. The Commission also sought information about instances when ROW charges are "more likely to be unreasonable," such as, for example, when a provider previously has incurred sunk costs placing facilities in a public ROW. The NOI solicited comment on the impact of ROW fees on providers' deployment decisions, including the impact of uncertainty regarding cost or timing.

Ordinances or Statutes and Current Communications Technologies or Innovative Deployment Practices.[435] The NOI requested information about the extent to which state and local ordinances or statutes had been updated to keep pace with current communications technologies or innovative deployment practices, especially regarding wireless siting devices.

Consistent or Discriminatory/Differential Treatment.[436] The Commission asked how state and local ordinances have addressed differences between ROW users and wireless facilities siting applicants, the difference in how they use the ROW and sites, and the different equipment they deploy. In particular, the FCC asked if differing practices or charges were reasonable and how reasonable should be determined.

Presence or Absence of Uniformity due to Inconsistent or Varying Practices and Rates in Different Jurisdictions or Areas.[437] The Commission asked how inconsistent treatment of infrastructure providers among states and localities affects broadband deployment, and the extent to which ROW government requirements vary between Federal government agencies.

Other ROW concerns.[438] Finally, the Commission inquired about the scope and impact of other ROW issues on broadband deployment and adoption. Specifically, it asked about "third tier" regulation or requirements covering matters not directly related to ROW use, issues relating to private ROWs and tower sites, and the scope of such concerns – *e.g.*, experienced across Federal, state, local, and Tribal lands or under only one jurisdiction. The FCC also asked for comment on prior efforts to resolve ROW concerns, and options for ways to resolve current areas of concern.

Comments were filed on July 18 and reply comments on September 30, 2011. Commenters were generally divided between those favoring a uniform national policy for ROW and wireless facilities siting, and those favoring state and local government autonomy in policy-making. The Commission has not indicated when it might take action on any of the issues raised in the NOI.

In a related proceeding, Level 3 Communications has sought preemption under Section 253 of the Communications Act of the New York State Thruway Association's ("NYSTA") ROW access fees.[439] Level 3 contends that NYSTA's monopoly access fees are exorbitant and unreasonable, and serve to undermine broadband deployment and service provision. NYSTA responds that its practices are reasonable and, in any event, that the FCC lacks authority to consider matters relating to § 253. Level 3's petition garnered support from other infrastructure providers, including Qwest (now CenturyLink), Verizon, AT&T, Time Warner Cable, and COMPTEL. The National Association of Telecommunications Officers and Advisors ("NATOA"), the City of New York and the City of Philadelphia filed comments supporting NYSTA. The Commission has not acted on Level 3's Petition, although it is possible that it may provide some guidance on what constitutes "reasonable" fees for ROW access in an action under the ROW NOI.

X. DISABILITIES ACCESS

Last October, Congress passed the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA").[440] The CVAA expands communications and video access for individuals with disabilities and affects communications providers, video programmers and distributors, and equipment manufacturers. It requires the Commission to implement regulations interpreting the CVAA no later than October 8, 2011. In response, the Commission issued three NPRMs – one addressing the video description requirements (not discussed in this Article), one addressing contribution to the Telecommunications Relay Fund by non-interconnected VoIP discussed in Part VIII.E.i. above, and one addressing "advanced communications services" ("ACS").[441] On October 7, 2011, the Commission released a *Report and Order and Further Notice of Proposed Rulemaking* on ACS ("*ACS Order*").[442]

The CVAA imposes accessibility requirements on manufacturers and service providers of "advanced communications services" ("ACS") which are defined as interconnected VoIP, non-interconnected VoIP, electronic messaging service, and video conferencing service.[443] Manufacturers and service providers of ACS must ensure that their products are "accessible to and usable by individuals with disabilities, unless doing so is not achievable."[444] The *ACS Order* adopted the statutory definition of ACS and rejected any exclusion of products that have "incidental" ACS capabilities. Instead, manufacturers of products or services that are designed primarily for non-ACS purposes may apply for a waiver under Section 716 of the CVAA.[445]

In particular, the *ACS Order* interpreted the definition of "interconnected VoIP" under the CVAA to be the same as the definition in Section 9.3 of the Commission's rules.[446] The *ACS Order* also established that multipurpose devices – those used for both telecommunications and ACS – will be subject to Section 255 as it applies to the components used for telecommunications, and to Section 716 as it applies to the components used for ACS.[447]

Second, the *ACS Order* defined non-interconnected VoIP as set forth in the CVAA.[448] Third, it defined electronic messaging services as in the CVAA, and interpreted that definition to include real or near-real time messaging as well as SMS, instant messenger (IM), and email.[449] The *ACS Order* exempted "messages posted on social networking websites," as indicated in the Senate and House Reports, but did not exempt "two-way interactive services offered through such websites."[450] Fourth, the Commission refused to read the word "interoperable" out of its interpretation of "interoperable videoconferencing services" but deferred a more specific definition of "interoperable" to the *Further Notice of Proposed Rulemaking* included in the *ACS Order*.[451] The *ACS Order* also declined to interpret the statutory provisions to require manufacturers and service providers to ensure their videoconferencing services are "interoperable."[452] Lastly, the *ACS Order* established that "manufacturers and service providers" of ACS do not include "software developers that are neither manufacturers of equipment nor providers of advanced communications services" as including them would significantly expand the Commission's jurisdiction without any clear statement of such an intent by the drafters.[453] Instead, end user equipment manufacturers and service providers will bear the ultimate responsibility for ensuring that all of the components they provide are accessible.[454]

The CVAA requires manufacturers and service providers found to be included in the above definitions to include accessibility features if "achievable,"[455] and established specific factors to be considered in determining achievability. The *ACS Order* construes this requirement broadly.[456] ACS providers will be responsible for ensuring the accessibility of the underlying components of the service being provided, including software applications.[457] However, ACS providers will not be responsible for third party applications and services that are not components of its service.[458] Finally, the *ACS Order* rejects the product-by-product approach it adopted in the Section 255 context. Instead, the Commission will consider the range of products offered by a company when considering whether certain accessibility features are achievable.[459] The *ACS Order* declined to adopt a list of features that are so easy and inexpensive to incorporate that every manufacturer or service provider must include them, and instead encourages manufacturers and service providers to implement such features voluntarily.[460]

The Commission confirmed that the Act does not require a preference for built-in accessibility solutions over third-party solutions.[461] Third party solutions will be considered achievable if they are available at "nominal cost"[462] and the *ACS Order* adopted the definition of "nominal" from the House Report: a cost "small enough so as to generally not be a factor in a consumer's decision" whether to purchase the product.[463] The *ACS Order* also establishes that mass market peripherals may be considered third-party accessibility solutions, but seeks further comment in the *Further Notice*.[464]

Finally, the Commission declined to implement blanket waivers for any class of equipment other than those not offered directly to the public.[465] Manufacturers of equipment or providers of services designed primarily for purposes other than ACS may seek a waiver, and the Commission will review those waiver requests on a case-by-case basis.[466] The Commission will consider whether the equipment or service was designed to be used for ACS by the public[467] and whether the equipment or service is marketed as having ACS capabilities.[468] The Commission may grant waivers individually or to products and services as a class.[469] Class waivers, however, will be limited to clearly defined classes and will only be granted when such a waiver would promote predictability and certainty for all stakeholders.[470]

XI. CONSUMER PROTECTION ISSUES

A. Overview

This year both the Supreme Court and the Commission addressed critical consumer protection issues. In *AT&T Mobility v. Concepcion* ("*Concepcion*"), the Supreme Court ruled that that the Federal Arbitration Act of 1925 ("FAA") preempts California state law and permits contracts that exclude class action arbitration.[471]

Meanwhile, the Commission has taken considerable steps in the area of consumer protection, including unveiling a "Consumer Protection Agenda" centered upon helping consumers make informed decisions in the communications marketplace.[472] A cornerstone of the agenda is the Commission's steps taken to address "cramming," or the placement of unauthorized charges or "mystery fees" on consumers' telephone bills. To date, the Commission has issued both a number of Notices of Apparent Liability ("NALs") as well as a Notice of Proposed Rulemaking regarding cramming concerns. Also this year, the Commission released a Report and Order adopting rules implementing the Truth in Caller ID Act of 2009 to combat the increasing prevalence of VoIP technology and third-party caller ID "spoofing" services, both of which allow callers to alter their caller ID to make their calls appear to come from any phone number. Finally, the Commission issued NALs totaling $20 million against four companies for allegedly using deceptive marketing practices to sell prepaid calling cards in violation of section 201(b) the Communications Act. Viewed together, these actions mark a particularly active year for the Commission in consumer protection.

B. AT&T Mobility v. Concepcion

On April 27, 2011, the United States Supreme Court ruled in *Concepcion* that the FAA preempts California state law, which prohibits class arbitration waivers in certain consumer contracts.[473] As a result, *Concepcion*, decided by a 5-4 margin, permits contracts that exclude class action arbitration.[474]

i. Background

In February 2002, Vincent and Liza Concepcion entered into a cell phone contract with AT&T Mobility LLC ("AT&T").[475] As described by the Court, "[t]he contract provided for arbitration of all disputes between the parties, but required that claims be brought in the parties' 'individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.'"[476] When the Concepcions purchased wireless service from AT&T, which was advertised as including free phones, they were not charged for the phones but were charged $30.22 in sales tax based on the phones' retail value.[477] In response, the Concepcions sued AT&T in the U.S. District Court for the Southern District of California. Their complaint was ultimately consolidated with a class action which alleged, in part, that AT&T had engaged in false advertising and fraud by charging sales tax for cell phones that it advertised as free.[478]

AT&T moved to end the class action by filing a motion to compel individual arbitration, as provided in the Concepcions' contract.[479] The Concepcions opposed the motion, arguing that the arbitration agreement was illegal under California law, because it disallowed classwide procedures.[480] The district court, in a ruling affirmed by the Ninth Circuit, denied AT&T's motion, holding that the class-action waiver in AT&T's consumer contracts was "unconscionable" under the California Supreme Court decision in *Discover Bank v. Superior Court* ("*Discover Bank*")[481] because AT&T had not shown that the individual arbitration adequately substituted for the deterrent effects of class actions.[482] Under *Discover Bank*, a class waiver in an arbitration clause is considered unconscionable if it is a contract of adhesion that governs disputes over small amounts of damages and is alleged to be part of a scheme to deliberately cheat large numbers of consumers out of individually small amounts of money.[483]

ii. Holding

The U.S. Supreme Court reversed the Ninth Circuit's decision, holding that *Discover Bank* was preempted by the Federal Arbitration Act.[484] With Justice Scalia writing for the majority, the Court explained that the overarching purpose of the FAA is to "ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."[485] According to the Court, rules that dictate the procedures for arbitration can compromise the informality of the arbitration process to such an extent that the rules effectively prevent disputes from being arbitrated. In particular, the Court found that requiring the availability of classwide arbitration – or, in the case of *Discover Bank*, allowing a party to a consumer contract to demand classwide arbitration *ex post* – "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[486]

The Court remanded the case to the Ninth Circuit.[487] Although the Ninth Circuit has not yet ruled on remand, a number of courts across the country have already upheld the enforceability of contracts similar to that of AT&T – including contracts of a number of other telecommunications service providers – in the wake of *Concepcion*.[488]

C. Cramming

On July 12, 2011, the Commission released a Notice of Proposed Rulemaking ("*Cramming NPRM*") regarding the placement of unauthorized charges or "mystery fees" on consumers' telephone bills, a practice commonly referred to as "cramming."[489] In particular, the Commission proposed rules that (1) would require wireline companies to notify subscribers "clearly and conspicuously" – at the point of sale, on each bill, and on their websites – of the option to block third-party charges from the subscribers' telephone bills, if the carrier offers that option; and (2) require that charges from non-carrier third-parties be separated on bills from the carrier's charges.[490] In addition, both wireline and Commercial Mobile Radio Service ("CMRS") providers would have to include, on all telephone bills and on their websites, a notice that consumers may file complaints with the Commission and provide the Commission's contact information for the submission of complaints.[491]

The *Cramming NPRM* also sought comment on further potential measures that could assist consumers in preventing, detecting, and remedying cramming.[492] It asked whether wireline companies should be (1) required to offer subscribers the option to block third-party charges from appearing on their telephone bills; (2) required to notify consumers that they do not offer blocking service; (3) prohibited from assessing an additional fee for blocking services; and/or (4) prohibited from including third-party charges on telephone bills altogether.[493] In addition, the *Cramming NPRM* sought comment on whether wireline companies and/or CMRS providers should be required to (1) provide accurate contact information for third-party vendors on their telephone bills;[494] and/or (2) screen third parties for prior rule violations or other violations of law before agreeing to place their charges on telephone bills.[495] The *Cramming NPRM* also sought comment on whether the same rules that apply to landline telephone companies should also apply to CMRS and VoIP service providers.[496]

According to the Commission, its complaint data, as well as that of the Federal Trade Commission ("FTC") and state and local law enforcement and regulatory agencies, indicates that cramming remains a widespread problem for landline telephone service – with an estimated 15 to 20 million American households affected each year – and is an emerging problem for CRMS.[497] The proposed rules are thus an attempt to bolster the Commission's existing *Truth-in-Billing* rules, which were adopted over a decade ago and were designed, in part, to address cramming.[498] The comment cycle for the *Cramming NPRM* is scheduled to close on November 21, 2011.[499]

The *Cramming NPRM* is just one component of a larger recent effort to combat cramming at the FCC as part of its "Consumer Empowerment Agenda," which is focused on helping consumers make informed decisions in the communications marketplace.[500] For instance, one month prior to the *Cramming NPRM*'s release, the Commission issued Notices of Apparent Liability with $11.7 million in proposed penalties against four telecommunications companies that appear to have engaged in widespread cramming.[501] Beyond the Commission, both the FTC and Congress have taken steps to combat cramming as well.[502]

D. Truth in Caller ID Act of 2009

On June 22, 2011, the FCC released a Report and Order[503] adopting rules implementing the Truth in Caller ID Act of 2009 ("Truth in Caller ID Act").[504] Recognizing the increasing prevalence of VoIP technology and third-party caller ID spoofing services, both of which allow callers to alter their caller ID to make their calls appear to come from any phone number,[505] Congress passed the Truth in Caller ID

Act to curtail the harm that can be caused by malicious caller ID spoofing.[506]

In implementing the Truth in Caller ID Act, the FCC adopted the principle rule that "no person or entity in the United States shall, with intent to defraud, cause harm, or wrongfully obtain anything of value, knowingly cause, directly or indirectly, any caller identification service to transmit or display misleading or inaccurate caller identification information."[507] The rule applies to calls made using any telecommunications or interconnected VoIP service.[508]

The Report and Order explains that "an entity subject to liability for violating the Act must knowingly spoof caller identification information and do so with [malicious] intent."[509] The FCC makes clear that carriers and other service providers do not violate the rule when they transmit incorrect caller ID information without malicious intent.[510] A law enforcement agency's authorized activities (including protective and intelligence activities) and court orders that specifically authorize caller ID spoofing are also exempt from the Truth in Caller ID Act.[511]

The Commission has adopted amendments to its forfeiture rule, 47 C.F.R § 1.80, to specify penalties for violations of the Truth in Caller ID Act.[512] The penalty for a violation "shall not exceed $10,000 for each violation, or 3 times that amount for each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $1,000,000 for any single act or failure to act,"[513] in addition to other penalties provided for in the Telecommunications Act of 1996 ("Communications Act"). Unlike the one-year statute of limitations for most violations under the Communications Act, a two-year statute of limitations applies to enforcement against violations of the Truth in Caller ID Act.[514]

The FCC's new rules still allow callers to block their caller identification information (with the exception of telemarketers, who are still obligated to transmit a number which can be placed on a do-not-call-list).[515] And the *Report and Order* does not impose additional obligations on third-party spoofing providers, despite the Commission's recognition that doing so might reduce the incidence of malicious caller ID spoofing.[516]

Concurrent to releasing the *Report and Order*, the Commission submitted a report to Congress detailing the *new rules* and related recommendations, suggesting that Congress consider: 1) increasing the scope of the *Truth in Caller ID Act* to prohibit people outside the U.S. from directing malicious caller ID spoofing against people in the U.S., 2) providing the FCC with guidance as to whether Congress intended to make IP-enabled voice services other than interconnected VoIP services subject to the *Truth in Caller ID Act*, 3) giving the FCC additional authority to regulate third-party providers of spoofing services, and 4) modifying the *Truth in Caller ID Act* to explicitly include text messaging within the its scope.[517]

E. Prepaid Calling Card Enforcement Actions

On September 1, 2011, the Commission issued Notices of Apparent Liability for Forfeiture ("NALs")[518] totaling $20 million against four companies for allegedly using deceptive marketing practices to sell prepaid calling cards, primarily to immigrant communities, in violation of section 201(b) of the Communications Act.[519] The Commission found that the companies – STi Telecom Inc. (formerly Epana Networks, Inc.); Lyca Tel, LLC; Touch-Tel USA, LLC; and Locus Telecommunications, Inc. – had made claims that consumers could use their inexpensive cards to make calls totaling hundreds if not thousands of minutes, when, in fact, consumers could use only a fraction of those minutes due to various fees and surcharges assessed.[520]

The Commission found that the companies apparently did not clearly and conspicuously disclose the fees to consumers.[521] For example, the Commission noted that while an accused company purported to disclose its fees and surcharges, its fine print disclosures contradicted the express – and more prominent – claims on the front of cards and main portions of marketing materials such as posters.[522] In addition, even in instances where disclosure claims were not directly contradictory, the Commission highlighted that the fees and surcharges were in small, difficult-to-read print that was "dwarf[ed]" by the font size of the advertised minutes and rate information.[523] The Commission also pointed to a number of other instances as examples of failure to meet the "clear and conspicuous" standard: (1) a lack of qualifying language in advertisements (*e.g.*, no explanation that the consumer will receive "up to" the specified number of minutes); (2) the placement of disclosures on portions of hang tags that are meant to be torn away from a calling card; (3) a lack of specific rate information in connection with language suggesting that "higher" rates would apply; and (4) failure to disclose rate information for use of non-toll free, 800 access numbers on cards.[524]

Altogether, the Commission did not focus on the specific types of fees and surcharges imposed by the accused companies, but rather the lack of "clear and conspicuous" disclosures of material information that would enable consumers to make informed choices when purchasing prepaid calling cards. The Commission explained that "each card that [was] marketed using deceptive advertising constitutes an independent unjust and unreasonable practice, and thus a separate and distinct apparent violation of section 201(b) of the Act."[525] The proposed forfeiture against each company is $5 million.[526] The companies were given the option to either pay the full forfeiture amount or file a written statement seeking a reduction or cancellation of the forfeiture.[527]

In view of what it considers to be an apparent widespread pattern of deceptive activity, the Commission concurrently issued an Enforcement Advisory to alert consumers and to warn companies that it will continue to take "aggressive action" against those companies engaging in such deceptive marketing.[528]

XII. CONCLUSION

It has a been a busy year for wireline regulation, with regulators and the industry devoting substantial attention to critical issues such as network neutrality and universal service/intercarrier compensation reform. The final resolution of both of these issues remains uncertain, as, at the time of this writing, the Commission is poised to defend its *Open Internet Order* in the D.C. Circuit and to issue its orders restructuring high cost universal service support and intercarrier compensation.

At the same time, the Commission (and, in some cases, the courts) have steadily worked through many lower-profile issues that are nonetheless very significant to the communications industry. These issues include clarifying interconnection rights, adopting electronic tariffing for CLECs, granting approval for the Qwest-CenturyLink and Level 3-Global Crossing transactions, moving forward with pole attachment reform, and moving aggressively to implement and enforce consumer protection measures.

Of course, many difficult questions remain. Implementation of the CVAA is likely to prove challenging for the industry and the Commission alike, and the Commission's first steps towards regulation of non-interconnected VoIP may trigger broad discussions on the need for and scope of regulation of these services. Thus, the year ahead is likely to be dominated by continued efforts to resolve long-standing issues like USF reform and the evolving challenge of regulating communications in a broadband world.

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[1] Mr. Nakahata, Ms. Strandberg, Mr. Wright, Mr. Margie, Mr. Simeone, and Mr. O'Donnell are partners, and Ms. Devine, Ms. Findley, Ms. Franklin, Ms. Lanum, Mr. McElligott, Ms. Petty, and Ms. Wentzel are associates, in the law firm of Wiltshire & Grannis LLP. Mr. Nakahata served as Chief of Staff to FCC Chairman William Kennard, and Senior Legal Adviser to FCC Chairman Reed Hundt.

[2] *See generally Preserving the Open Internet, Broadband Industry Practices*, 25 FCC Rcd. 17905, Report and Order (2010) ("Open Internet Order").

[3] *See Preserving the Open Internet,*76 Fed. Reg. 59192, Rules and Regulations (2011).

[4] *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

[5] *Open Internet Order* ¶ 45.

[6] *Id*. ¶ 56 (internal citations omitted).

[7] Significantly, an attributable interest in this context includes not only ownership or control of the entity by a provider, but also exclusive arrangements for services, including *de facto* exclusive arrangements. *Id.* ¶ 99 & n.305. The ban on blocking, however, does not extend to application stores operated by ISPs. *Id.* ¶102.

[8] *Id*. ¶¶ 66-67.

[9] *Id.* ¶ 73.

[10] *Id*. ¶ 82.

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[11] *Id*. ¶ 85.

[12] *Id*.

[13] *Id*.

[14] *See Id*. ¶ 104.

[15] *Id*. ¶ 94.

[16] In 2007, the FCC vacated its decision providing guidance on this issue. *See In The Matter Of Petition Of The State Indep. Alliance and the Indep. Telecomms. Group For A Declaratory Ruling That the Basic Universal Serv.*

[17] *Open Internet Order* ¶ 76.

[18] *Id*. ¶ 114.

[19] *In re Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, Mem. Op. & Order, 23 FCC Rcd. 13028 (2008), *vacated by* Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

[20] *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, Mem. Op & Order & Notice of Proposed Rulemaking, 13 FCC Rcd. 24012 (1998), *remanded by* U.S. West, Inc. v. FCC, 182 F.3d 1224 (10th Cir. 1999).

[21] *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, Mem. Op & Order & Notice of Proposed Rulemaking, 13 FCC Rcd. 24012 (1998).

[22] *Open Internet Order* ¶¶ 117-123.

[23] *See Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section* 251 *of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP*

Providers, Memorandum Opinion and Order, 22 FCC Rcd. 3513 (2007) ("*2007 TWC Order*").

[24] *Id.* ¶ 1.

[25] *Id.* ¶¶ 8-9.

[26] *Id.* ¶ 1.

[27] *See Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act*, Declaratory Ruling, 26 FCC Rcd. 8259 (2011) ("*Rural LEC Declaratory Ruling*").

[28] *Id.* ¶ 10.

[29] *Id.* ¶ 11.

[30] *Id.* ¶14.

[31] *Id.*

[32] *Id.* ¶ 16.

[33] *Id.* ¶ 18.

[34] *Id.* ¶ 19.

[35] *Id.* ¶ 26.

[36] *Id.*

[37] *TalkAm. Inc. v. Mich. BellTel. Co.*, 131 S.Ct. 2254 (2011).

[38] *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking,18 FCC Rcd. 16978, ¶¶ 365-67 (2003) ("*Triennial Review Order*").

[39] *Unbundling Access to Network Elements*, Order on Remand 20 FCC Rcd. 2533, ¶¶ 137-38 (2005) ("Triennial Review Remand Order").

[40] *Id.* ¶ 140.

[41] *Talk Am., Inc.*131 S.Ct. at 2260.

[42] *Id.* 2260-61.

[43] *Id.* 2261 (internal citation and quotation omitted).

[44] *Id.* 2262.

[45] *Id.* 2262-63.

[46] *Id.* 2263 (internal citation and quotation omitted).

[47] *S. New England Tel. Co. v. Perlermino*, 2011 WL 1750224 (D. Conn. May 6, 2011).

[48] *Id.* 2.

[49] *Id.* 3.

[50] *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd. 4685 (2005).

[51] *S. New England Tel*, 2011 WL 1750224 at 3.

[52] *Qwest Corp. v. Cox Neb. Telecomm., LLC*, 2008 WL 5273687 (D. Neb. Dec. 17, 2008).

[53] *S. New England Tel.*, 2011 WL 1750224 at 4.

[54] *Id.*

[55] *S. New England Tel. Co. v. Perlermino*, Docket No. 11-2332 (2d Cir.).

[56] *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, 25 FCC Rcd. 8622 (2010) ("*Qwest Phoenix Forbearance Order*").

[57] John Nakahata et al. *The Year in Wireline Telecommunications Regulation Sept. 2009- Sept. 2010,* printed in 28th Annual Institute on Telecommunications

Policy and Regulation PLI Coursebook, 113,121-132, Practicing Law Institute 2010.

[58] *See Qwest Phoenix Forbearance Order* ¶ 37.

[59] *See id.* ¶ 2.

[60] *Id*. ¶ 96 (internal quotation omitted).

[61] Opening Brief of Petitioner Qwest Corporation at 4 n.1, *Qwest Corp. v. Fed. Commc'ns Comm'n*, No. 10-9543 (10th Cir. Mar. 25, 2011) ("*Qwest Br.*") ("[t]his appeal challenges the *Order* only as it relates to the mass market").

[62] Reply Brief of Petitioner Qwest Corporation at 3 and 3 n.1, *Qwest Corp. v. Fed. Commc'ns Comm'n*, No. 10-9543 (10th Cir. Mar. 25, 2011) ("*Qwest Reply Br.*") ("Qwest has not challenged the Commission's discretion to consider issues of market power in assessing forbearance from dominant-carrier regulation," but contended that the FCC erred "in conditioning forbearance from *facilities-sharing* requirements on a showing that the petitioner has lost market power").

[63] *Qwest Br*. 32-48.

[64] Final Answer Brief of Respondents at 40-48, *Qwest Corp. v. Fed. Commc'ns Comm'n*, No. 10-9543 (10th Cir. Mar. 18, 2011) ("*FCC Br.*").

[65] *Qwest Reply Br*. 17-19.

[66] *Qwest Br*. 49-56.

[67] *FCC Br*. 48-52.

[68] *See Qwest Corp. v. FCC*, No. 10-9543 (10th Cir. filed July 30, 2010).

[69] *Connect America Fund; A National Broadband Plan for Our Future; High-Cost Universal Service Support,* Notice of Inquiry and Notice of Proposed Rulemaking,

25 FCC Rcd. 6657 ¶¶ 2, 51-52, 55-58, 60 (2010) ("CAF NOI").

[70] *Id*. ¶¶ 2, 19-21, 23-30, 33, 35, 41-48.

[71] *Universal Service Reform Mobility Fund*, Notice of Proposed Rulemaking, WT Docket No. 10-208, 25 FCC Rcd. 14716, ¶ 3 (2010) ("Mobility Fund NPRM").

[72] *Id.* ¶ 5.

[73] *Id.* ¶1.

[74] *See id.* ¶ 22.

[75] *See id.* ¶ 13.

[76] *See id.* ¶15.

[77] *Id*. ¶1.

[78] *See id.* ¶18.

[79] *Id.* ¶ 19.

[80] *See e.g.*, Comments of Rural Cellular Association at iii, WT Docket No. 10-208 (filed Dec. 16, 2010); Comments of CTIA – The Wireless Association at 11-12, WT Docket No. 10-208 (filed Dec.16, 2010).

[81] *Connect America Fund et al*., Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 4554, ¶ 1 (2011) ("CAF NPRM").

[82] *Id.* at ¶ 10.

[83] CAF NPRM at ¶ 180. The Commission also proposed to eliminate HCLS for incumbent LECs with more than 200,000 working loops, although none of those actually received any HCLS support. *See id*. ¶ 181.

[84] *See id.* ¶¶ 190-192.

[85] *See id*. ¶¶ 194-196.

[86] *See id*. ¶¶ 203-204.

[87] *See id*. ¶¶ 210-212.

[88] *Id*. ¶¶ 234-235.

[89] *Id*. ¶ 242.

[90] *Id*. at ¶¶ 218-227. The "parent trap" rule is 47 C.F.R. § 54.305.

[91] *See id*. at ¶ 261.

[92] *Id. at* ¶¶ 274-277.

[93] *See id*. ¶ 281.

[94] *See id*. ¶ 286.

[95] *See id*. ¶ 311.

[96] *See id*. ¶ 25.

[97] *See id*. ¶¶ 404-407.

[98] *See id*. ¶ 414.

[99] *See id.* ¶¶ 418-430.

[100] *See id*. ¶¶ 431-447.

[101] *See id*. ¶¶ 448-456.

[102] *See id*. ¶¶ 585-594.

[103] *See* Joint Letter from Kathleen Grillo, Verizon, et al., to Marlene H. Dortch, FCC, WC Docket Nos. 10-90 et al. (filed July 29, 2011) ("ABC Plan").

[104] *See id.* Attachment 1.

[105] *Id*.

[106] *See CAF NPRM* at ¶ 166 (Figure 7); ¶ 20 (Figure 2).

[107] *See* ABC Plan, Attachment 1 at 2-3.

[108] *See id.* 3.

[109] *See id.* 3-5.

[110] *See* ABC Plan, Attachment 2 at 2.

[111] ABC Plan, Attachment 1 at 4.

[112] *See id.* 5.

[113] *See id.* 7.

[114] *See id.* 7-8.

[115] *See id.* 2.

[116] *Id.* 6.

[117] *See id.* 6.

[118] *Id.* 8.

[119] Joint letter from Walter B. McCormick, Jr., United States Telecom Association, et al., to Marlene H. Dortch, FCC, WC Docket No. 10-90 et al., at 2(filed July 29, 2011) ("Joint ILEC Framework Letter").

[120] Comments of the National Exchange Carrier Association, et al., WC Docket Nos. 10-90, et al., at 27 (filed April 18, 2011) ("Joint RLEC Filing").

[121] *See id.* 27.

[122] Notice of Ex Parte from Michael R. Romano, National Telecommunications Cooperative Association, to Marlene H. Dortch, FCC, WC Docket Nos. 10-90, et al., Attachment at 2(filed Sept. 12, 2011).

[123] *See id.* 1.

[124] Joint Letter from Jeffrey E. Dupree, National Exchange Carrier Association, et al., to Marlene H. Dortch, FCC, WC Dockets Nos. 10-90, et al., at attached chart "Preliminary RLEC CAF + RM Computation" (filed Aug. 29, 2011).

[125] *Further Inquiry into Certain Issues in the Universal Service – Intercarrier Compensation Transformation*

Proceeding, Public Notice, WC Docket Nos. 10-90, et al. 2011 WL 3350648 (2011) ("*Further Inquiry*").

[126] 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.

[127] *Qwest Corp. v. FCC*, 258 F.3d 1191, 1201-02 (10th Cir. 2001) ("*Qwest I*"); *Qwest Commc'ns Int'l, Inc. v. FCC*, 398 F.3d 1222, 1233-37 (10th Cir. 2005) ("*Qwest II*").

[128] *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, 25 FCC Rcd. 4072 ¶¶ 1, 4 (2010).

[129] Petition for Review at 2-3, Vt. Pub. Serv. Bd., v. FCC, No. 10-1184 (D.C. Cir. July 12, 2010).

[130] Yu-Ting Wang, *Judges Question Timing of States' Request to Revamp Non-Rural Support, Old Data, Failure to File Waiver*, Communications Daily (Sept. 19, 2011).

[131] *Id*.

[132] *See* CAF NOI, 147.

[133] *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, 25 FCC Rcd. 12854 ¶¶ 1, 10 (2010).

[134] *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, Order, 25 FCC Rcd 18146, ¶ 1 (2010).

[135] *Id.* ¶ 5.

[136] *Id*.

[137] *Id.* 31.

[138] *Id*. 33.

[139] *Id.* 34.

[140] *Id.* 36.

[141] *Id.* 44.

[142] *Lifeline and Link Up Reform and Modernization; Federal-State Joint Board on Universal Service; Lifeline and Link-Up*, Notice of Proposed Rulemaking, 26 FCC Rcd. 2770 (2011) ("Lifeline NPRM").

[143] *See id.* ¶ 3.

[144] *Id.* ¶ 1.

[145] *Id.* ¶ 106.

[146] *See id.* ¶ 110.

[147] *Id.* ¶ 167.

[148] *See id.* ¶¶ 54, 56.

[149] *See id.* ¶ 207.

[150] *Id.*

[151] *Id.* ¶ 170.

[152] *Id.* ¶ 82.

[153] *Id.* ¶ 93.

[154] *See id.* ¶ 174.

[155] *See id.*

[156] *See id.*

[157] *Id.* ¶ 182.

[158] *See id.* ¶ 145.

[159] *See id.*

[160] *See id.* ¶ 146.

[161] *See id.* ¶ 275.

[162] *Id.* ¶ 279.

[163] *See id.* ¶¶ 279-302.

[164] *See infra.*

[165] Lifeline NPRM ¶ 67.

[166] *See id.* ¶ 70.

[167] *Id.* ¶ 154.

[168] *See id.* ¶ 157.

[169] *Id.* ¶ 73.

[170] *Id.* ¶ 74.

[171] *See Further Inquiry Into Four Issues in the Universal Service Lifeline/Link Up Reform and Modernization Proceeding*, Public Notice, WC Docket Nos. 11-42, 03-109, CC Docket No. 96-45 (rel. Aug. 5, 2011).

[172] *See id.* 1.

[173] *See id.* 2-3.

[174] *Id.* 4.

[175] *Id.* 4-5.

[176] *See id.* 6.

[177] *Id.* 7.

[178] *See id.*

[179] Letter from Sharon Gillett, Chief, Wireline Competition Bureau, FCC, to Richard Belden, Chief Operating Officer, Universal Service Administration Company, DA 11-110, at 1 (Jan. 21, 2011), *available at* http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0209/DA-11-110A1.pdf (the "January 21 Letter").

[180] *Id.* 3.

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *See* Lifeline NPRM ¶ 58.

[185] *See* Letter from United States Telecom Association, et. al. to Marlene Dortch, Secretary, FCC, WC Docket No. 11-42, 03-109, CC Docket No. 96-45 (filed Apr. 15, 2011).

[186] *Lifeline and Link Up Reform and Modernization; Federal-State Joint Board on Universal Service; Lifeline and Link Up*; Report and Order, 26 FCC 9022 (2011).

[187] *Id.* ¶ 7.

[188] *Id.* ¶ 8.

[189] *Id.*

[190] *See* Letter from Sharon Gillett, Chief, Wireline Competition Bureau, FCC, to D. Scott Barash, Acting Chief Executive Officer, Universal Service Administration Company, DA 11-1082 (June 21, 2011).

[191] *See id.* 3.

[192] *See id.*

[193] *See id.*

[194] *See id.*

[195] *See id.*

[196] *See id.*

[197] *See id.*

[198] *Id.*

[199] *See id.*

[200] *Id.*

[201] *See id.* 3.

[202] *See id.* 4.

[203] *See id.*

[204] *See id.*

[205] *See id.*

[206] *See id.*

[207] *See id.*

[208] *See id.* 5.

[209] *See id.*

[210] *See id.*

[211] *See id.*

[212] *See id.*

[213] *See id.*

[214] *See id.*

[215] *See Inquiry Into Disbursement Process for the Universal Service Fund Low Income Program*, Public Notice, WC Docket Nos. 11-42, 03-109 (rel. Sept. 23, 2011).

[216] *See id.* ¶ 1.

[217] *See id.* ¶ 7.

[218] *See id.*

[219] *See id.* ¶ 8.

[220] *See id.*

[221] *See id.* ¶ 9.

[222] *See id.* ¶ 10.

[223] *See id.* ¶ 11.

[224] *See id.*

[225] *See* Broadband Action Agenda, (2010), available at www.broadband.gov/plan/national-broadband-plan-action-agenda.pdf.

[226] *See Universal Service Contribution Methodology; Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues*, 25 FCC Rcd. 15651(2010).

[227] *Id*. ¶1.

[228] *Universal Service Contribution Methodology; Request for Review of Decision of the Universal Service Administrator by Network Enhanced Telecom, LLP*, Order on Reconsideration, 25 FCC Rcd. 6169 ¶ 1 (2010).

[229] *See id*.

[230] *Id.* ¶ 12.

[231] *Id.* ¶ 13.

[232] *See id.* ¶ 14.

[233] *Universal Service Contribution Methodology; Request for Review of Decision of the Universal Service Administrator by Clear World Communications Corporation*, Order, 26FCC Rcd. 6234, ¶ 1 (2011).

[234] *Id.* ¶ 2.

[235] *Id.*

[236] *Id* ¶11.

[237] *Id.* ¶¶ 13, 10.

[238] *Id.* ¶ 2.

[239] Letter from Richard A. Belden, Chief Operating Officer, Universal Service Administrative Company, to Sharon Gillett, Chief, Wireline Competition Bureau, WC Docket No. 06-122, at 1-2 (March 1, 2011).

[240] *See* Letter from Richard A. Belden, Chief Operating Officer, Universal Service Administrative Company, to Sharon Gillett, Chief, Wireline Competition Bureau, WC Docket No. 06-122 (April 26, 2011).

[241] *Id*. 1, 2.

[242] *Rural Independent Competitive Alliance Petition for Declaratory Ruling*, Federal-State Joint Board on Universal Service, et al., CC Docket Nos. 96-45, 98-171; WC Docket No. 06-122, at 1 (filed Apr. 26, 2011).

[243] *Id.* 2.

[244] *See id*. 5-6.

[245] *Id*. 7.

[246] *Id.* 3.

[247] *See Request for Review by Blackfoot Communications, Inc. of a decision of the Universal Service Administrator*, WC Docket No. 06-122 at 2 (filed July 22, 2011).

[248] *Id.* 2.

[249] *Id.* 2-3.

[250] *XO Communication Services, Inc. Request for Review of Decision of the Universal Service Administrator*, WC

Docket No. 06-122 at v, vi, vii (filed Dec. 29, 2010) ("XO Request for Review"). XOCS also sought reversal of USAC's denial of credits it took for reporting errors discovered in 2008, but which relate to revenues reported in Form 499-As for prior years. *See id*. at viii.

[251] Under the universal service contribution mechanism, only end user interstate and international telecommunications revenues are subject to federal USF contribution obligations. 47 C.F.R. §§ 706. 709.

[252] *See* XO Request for Review at vi.

[253] *See id*. 40-41.

[254] *Id*. 7.

[255] *See id*. at 10.

[256] *Id*. 11.

[257] *Id*. 12, 13

[258] *See id* at 13, 24-26.

[259] *See U.S. Satellite Corporation Petition for Declaratory Ruling or, in the Alternative for Waiver*, WC Docket No. 06-122 (filed Mar. 17, 2011).

[260] *See* 47 U.S.C. § 254(e).

[261] Broadband Action Agenda at 3.

[262] *Connect America Fund et al.*, WC Docket No. 10-90 *et al.*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 4554 ¶¶ 36, 659-61, 663-665 (2011) ("CAF NPRM").

[263] *See id.* ¶¶ 661-662.

[264] *See id.* ¶ 666.

[265] *See id.* ¶ 626.

[266] *See id.* ¶ 630.

[267] *See id.* ¶¶ 38, 615-618.

[268] *See id.* ¶¶ 537-549.

[269] *See id.* ¶¶ 550-555.

[270] *See id.*¶¶ 530-532.

[271] *See id.* ¶ 533.

[272] *See id.* ¶¶ 573-584.

[273] *See id.* ¶ 585 *et seq.*

[274] *See id.* ¶ 599 and Appendix D.

[275] *See* Joint Letter from Kathleen Grillo, Verizon, et al., to Marlene H. Dortch, FCC, WC Docket Nos. 10-90 et al., Attachment 1, at 1 n.1 (filed July 29, 2011) ("ABC Plan").

[276] *Id.* 10.

[277] *Id.*

[278] *See id.*11.

[279] *See* Joint letter from Walter B. McCormick, Jr., United States Telecom Association, et al., to Marlene H. Dortch, FCC, WC Docket No. 10-90 et al., at 3 n.1 (filed July 29, 2011) ("Joint ILEC Framework Letter").

[280] *See* ABC Plan at 12.

[281] *See id.*

[282] *See id.* 12-13.

[283] *See* Joint ILEC Framework Letter at 3 n.1. The residential rate benchmark would be calculated in a similar manner to the $30 residential rate benchmark for price cap LECs under the ABC Plan. *See* Comments of the National Exchange Carrier Association, Inc. et al., WC Docket Nos. 10-90 et al. (filed Apr. 18, 2011) ("RLEC Joint Comments").

[284] National Exchange Carrier Association, *Intercarrier Compensation Reform Plan,* Attachment “RLEC Restructure Mechanism Calculation,” Ex Parte, CC Docket Nos. 01-92 et al. (filed Aug. 29, 2011). The description in text here is a simplification.

[285] *Electronic Tariff Filing System*, WC Docket No. 10-141, Report and Order, 26 FCC Rcd. 8884, 8886 ¶ 6 (2011) (“ETFS Order”).

[286] *See id.* ¶ 16.

[287] *See id.* ¶ 11.

[288] *See id.* ¶ 14.

[289] *All American Tel. Co., Inc. Tariff FCC No. 3*, 25 FCC Rcd. 5661 (Pricing Policy Div. 2010).

[290] *Id*. ¶ 5.

[291] *Qwest Communications Co., LLC v. Northern Valley Communications, LLC*, 26 FCC Rcd 8332, 8333 ¶ 4 (2011) (“*Qwest v. Northern Valley*”).

[292] *Qwest v. Northern Valley*, ¶ 8 (2011).

[293] *Id*. (emphasis in original) *quoting Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers,* Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9114 ¶13 (2004).

[294] *Qwest v. Northern Valley*, ¶¶ 5, 9-10 (citing 47 C.F.R.§ 69.2(m) (definition of “end user”) and 47 U.S.C. § 153(53) (definition of “telecommunications service”)). *See also Sprint Communications Co., LP v. Northern Valley Communications, LLC*, Memorandum Opinion and Order, 26 FCC Rcd 10780,10783 ¶ 7 (2011).

[295] *Sprint v. Northern Valley*, ¶ 12.

[296] *Id*. ¶ 13.

[297] *See id*. ¶ 14.

[298] *See id*. ¶ 16.

[299] *See AT&T Corp. v. YMax Communications Corp.*, Memorandum Opinion and Order, 26 FCC Rcd 5742 (2011).

[300] *Id*. ¶ 14.

[301] *Id*. ¶ 17, quoting YMax's tariff.

[302] *Id*. ¶ 18.

[303] *Id*. ¶ 19.

[304] *Id*. ¶¶ 37-40.

[305] *See All American Telephone Co., e-Pinnacle Communications, Inc. and ChaseCom v. AT&T Corp.*, 26 FCC Rcd 723 (2011).

[306] *See id*. ¶¶ 13-14.

[307] *See Paetec Commc'ns v. MCI Commc'ns Services d/b/a Verizon Business Services*, 712 F.Supp.2d 405 (E.D. Pa. 2011) ("*Paetec v. MCI*").

[308] *See Sprint v. Northern Valley*, 26 FCC Rcd. at 10788 ¶ 18.

[309] *Paetec v. MCI*, 712 F.Supp.2d at 410.

[310] *Id*. at 420.

[311] Docket No. 11-2268, Cross-Appeal Briefing and Scheduling Order (July 18, 2011)

[312] *AT & T Commc'ns of Cal., Inc. v. Pac-W. Telecomm, Inc.*, 651 F.3d 980, 2011 WL 2450986 (9th Cir. June 21, 2011).

[313] *Id*. at *12-13.

[314] *Id*. at *16.

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

[316] *See North County Commc'ns Corp. v. MetroPCS California*, *LLC*, Order on Review, 24 FCC Rcd. 14036 (2009) ("Order on Review").

[317] *MetroPCS California, LLC. v. FCC*, 644 F.3d 410 (D.C. Cir. 2010).

[318] *Application of North County Commc'ns Corp. of California for Approval of Default Rate for Termination of Intrastate, IntraMTA Traffic Originated by CMRS Carriers*, 2010 WL 2543043 (Cal. PUC June 10, 2010).

[319] *MetroPCS California, LLC. v. FCC*, Case No. 10-1003 slip op. at 5.

[320] *In re Feature Group IP Petition for Forbearance*, 24 FCC Rcd. 1571, 1573 ¶ 4& n.13 (2009) (*Feature Group IP Order*).

[321] *Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules*, Memorandum Opinion and Order, 22 FCC Rcd. 14118 (2007) (*Core Section 251(g)/254(g) Forbearance Order*), pet. for review dismissed, *Core Communications, Inc. v. FCC*, 545 F.3d 1 (D.C. Cir. 2008)(dismissing for lack of standing).

[322] *Feature Group IP Order* at ¶ 8.

[323] *Id*. ¶ 10.

[324] *Global NAPs California v. Public Utilities Comm'n of the State of California* 624 F.3d 1225 (9th Cir. 2010).

[325] *Id*. 1234.

[326] *Central Telephone Co. of Virginia v. Sprint Communications Co. of Virginia, Inc.*, 759 F.Supp.2d 789 (E.D. Va. 2011).

[327] *Id*. 793.

[328] *Id*. 794.

[329] *See id.* 795.

[330] *See id*. 798-799.

[331] *See Qwest Commc'ns Corp. v. Superior Tel. Coop*., Opinion: Final Order, Iowa Utilities Board Docket No. FCU-07-2, 2009 WL 3052208 (Sept. 21, 2009) ("*IUB Order*").

[332] *Id.* 1.

[333] *See id.* 2-3, 10.

[334] *See Qwest Commc'ns Corp. v. Superior Tel. Coop*., Order Denying Requests for Reconsideration, Iowa Utilities Board Docket No. FCU-07-2, 2011 WL 459685, at *45, 46 (Feb. 4, 2011) ("To the limited extent the Board's decision involved discussion of interstate evidence, it was for background purposes, as described in the previous section of this order, and the application of that evidence was strictly intrastate in nature or was for the purpose of understanding the overall circumstances and illuminating the intrastate consequences."). The IUB also amended Order Clause No. 7 of the IUB Order to request that "the FCC initiate an audit of Great Lakes' use of telephone numbering resources pursuant to 47 C.F.R. § 52.15(k)" rather than order the North American Numbering Plan Administrator (NANPA) to reclaim the telephone number blocks from Great Lakes. *Qwest Commc'ns Corp. v. Superior Tel. Coop*., Order Granting Motion and Granting Application for Rehearing, in Part, Iowa Utilities Board Docket No. FCU-07-2, 2009 WL 4571832 (Dec. 3, 2011).

[335] *Aventure Commc'ns Tech., L.L.C. v. Iowa Utilities Board*, 734 F.Supp.2d 636, 641 (N.D. Iowa 2010) (internal citation omitted).

[336] *See id.* 645.

[337] *See id.* 647.

[338] *See id.* 668.

[339] *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.*, 2010 WL 1329634, at 2 (D.S.D. Mar. 30, 2010) (*Splitrock Props., Inc. v. Sprint Commc'ns Co*.) ("[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.").

[340] *Splitrock Props., Inc. v. Sprint Commc'ns Co*., at 1.

[341] *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).

[342] *Id.* 2 .

[343] *Id.* 2.

[344] *Id.* 2.

[345] *Data Requested in Special Access NPRM*, Public Notice, WC Docket No. 05-25, 25 FCC Rcd 15146 (2010); *as clarified by Clarification of Data Requested in Special Access NPRM*, Public Notice, WC Docket No. 05-25, 25 FCC Rcd. 17693 (2010) ("*First Voluntary Data Request*").

[346] *Id*.

[347] *Competition Data Requested in Special Access NPRM*, Public Notice, WC Docket No. 05-25 (rel. September 19, 2011) ("*Second Voluntary Data Request*").

[348] *Id.* 12-13.

[349] Petition for Writ of Mandamus, *In re COMPTEL*, No. 11-1262 (D.C. Cir. Jul. 15, 2011).

[350] *Id.* 3.

[351] 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 C.F.R. § 69.707(b).

[352] *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers, Petition of US West Commc'ns, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, AZ MSA*, Fifth Report and Order and Proposed Notice of Rulemaking, CC Docket Nos. 94-1, 96-262, 98-63, 98-157; 14 FCC Rcd. 14221 ¶ 81 (1999) ("*Pricing Flexibility Order*").

[353] *See id.* ¶ 4.

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

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

[356] *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").

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

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

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

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

[361] *See generally* USTA Reply Comments.

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

[363] First Voluntary Data Request at 9.

[364] *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. 96-262, 94-1, 99-249, 96-45, 18 FCC Rcd. 14976 ¶ 35 (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.

[365] *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 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."). Decision reversed in part in *Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313 (2001).

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

[367] *See* 47 C.F.R. § 61.45(b)(1)(iv).

[368] *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").

[369] *See e.g.*, AT&T Reply Comments at 56.

[370] *See e.g.*, Comments of Sprint Nextel Corporation, WC Docket No. 05-25, at 38-39 (filed Jan. 19, 2010).

[371] *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").

[372] *See e.g.* Comments of PAETEC Holdings Inc., WC Docket No. 05-25, at vii-viii, 80-84 (filed Jan. 19, 2010).

[373] *See e.g.* AT&T Reply Comments at 63.

[374] *See* Second Voluntary Data Request at 18.

[375] *See generally* 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.

[376] *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, 25 FCC Rcd 9557, at 1 (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. *Id.* 1 n. 3.

[377] *See id.*

[378] *See generally CenturyTel-Embarq Order*.

[379] *See Qwest-CenturyLink Public Notice* at 2. 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. *Id.* 2 n. 5.

[380] *See Applications filed by Qwest Communications International Inc. and CenturyTel, Inc. d/b/a CenturyLink for Consent to Transfer of Control, Memorandum Opinion and Order*, WC Docket No. 10-110, 26 FCC Rcd. 4194 (rel. Mar. 18, 2011) ("*Qwest-CenturyLink Approval Order*").

[381] *See generally Qwest-CenturyLink Approval Order* at App. C.

[382] A "'qualifying customer' is defined as a customer who (i) is eligible for Lifeline telephone service in CenturyLink or Qwest ILEC service territory: (ii) is not a CenturyLink

or Qwest broadband subscriber at the time of enrollment; and (iii) is not the subject of CenturyLink or Qwest collections activity. The [companies] believe that approximately 2.3 million households are currently eligible for Lifeline service throughout the combined CenturyLink and Quest service territory." *See Qwest-CenturyLink Approval Order* at 27.

[383] *See id.* 27-30; *see also FCC Conditionally Approves CenturyLink/Qwest Merger*, News Release, WC Docket No. 10-110, at 1 (Mar. 18, 2010) ("Qwest-CenturyLink News Release").

[384] *See* Qwest-CenturyLink Approval Order at 25-27; *see also* Qwest-CenturyLink News Release at 1.

[385] *See* Qwest-CenturyLink Approval Order at 33-34; *see also* Qwest-CenturyLink News Release at 2.

[386] *See* Qwest-CenturyLink Approval Order at 30-33; *see also* Qwest-CenturyLink News Release at 2.

[387] *See* "Century Link and Qwest Complete Merger," Press Release (Apr. 1, 2011), available at http://ir.centurylink.com/phoenix.zhtml?c=112635&p=irol-newsArticle_Print&ID=1545034&highlight= (last accessed Sept. 29, 2011) ("CenturyLink Press Release").

[388] *See* CenturyLink Press Release.

[389] CenturyLink's service territories are in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming. *See* http://www.centurylinkqwestmerger.com/index.php?page=regulatory-information (last accessed Sept. 29, 2011).

[390] *Applications Filed for the Transfer of Control of Global Crossing Limited to Level 3 Communications, Inc.*, Public Notice, IB Docket No. 11-78 (June 9, 2011).

[391] Application for Consent to Transfer Control of Authority to Provide Global Facilities-Based and Global Resale International Telecommunications Services and of Domestic Common Carrier Transmission Lines, Pursuant to Section 214 of the Communications Act of 1934, as Amended, IB Docket No. 11-78 (filed May 13, 2011).

[392] *Applications filed by Global Crossing Limited and Level 3 Communications, Inc. for Consent to Transfer Control*, Memorandum Opinion and Order and Declaratory Ruling, IB Docket No. 11-78 (Sept. 29, 2011) ("Level 3-Global Crossing Order").

[393] Level 3-Global Crossing Order ¶ 16.

[394] *Id.* ¶ 17. (citing Comments of XO Communications at ii, IB Docket No. 11-78 (filed July 11, 2011).)

[395] *Id.* ¶ 27.

[396] *See id.* ¶ 32.

[397] *See id.* ¶ 39.

[398] *See id.* ¶ 47.

[399] *Id.* ¶¶ 45-61.

[400] *See* Press Release, *Level 3 Completes Acquisition of Global Crossing* (Oct. 4, 2011) http://level3.mediaroom.com/index.php?s=23600&item=66513 (last accessed Oct. 4, 2011).

[401] *See Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring State Universal Service Funds May Assess Nomadic VoIP*

Intrastate Revenues, WC Docket No. 06-122 (filed July 16, 2009).

[402] *See In the Matter of Universal Serv. Contribution Methodology, Petition of Nebraska Public Service Commission and Kansas Corporation Commission*, 25 F.C.C.R. 15651 (2010)

[403] *Id.* 1.

[404] *See Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404, ¶1 (2004) ("Vonage Preemption Order").

[405] *See Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13, ¶¶ 1-6 (rel. Feb. 9, 2011) ("*ICC/USF Reform NPRM*").

[406] *See id.* ¶ 73.

[407] *Petition for Declaratory Ruling That tw telecom inc. Has the Right to Direct IP-to-IP Interconnection Pursuant to Section 251(c)(2) of the Communications Act, as Amended, for the Transmission and Routing of tw telecom's Facilities-Based VoIP Services and IP-in-the-Middle Voice Services*, WC Docket No. 11-119, n.3 (filed June 30, 2011).

[408] *See Contributions to the Telecommunications Relay Services Fund*, Report and Order, FCC 11-150 (rel. Oct. 7, 2011) ("*TRS Fund Order*").

[409] *See id.*¶ 15.

[410] *See id.* ¶ 14.

[411] *Id.* ¶ 1.

[412] *Amending the Definition of Interconnected VoIP Service in Section 9.3 of the Commission's Rules*, Notice of Proposed Rulemaking, Third Report and Order, and Second Further Notice of Proposed Rulemaking, GN Docket No. 11-117, PS Docket No. 07-114, WC Docket No. 05-196, FCC 11-107 (rel. Jul. 13, 2011) .

[413] *Modernizing the FCC Form 477 Data Program Dev. of Nationwide Broadband Data to Evaluate Reasonable & Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, & Dev. of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership Serv. Quality, Customer Satisfaction, Infrastructure & Operating Data Gathering Review of Wireline Competition Bureau Data Practices*, Notice of Proposed Rulemaking, FCC 11-14, ¶ 45 (rel. Feb. 8, 2011).

[414] *See LEC-to-LEC Compensation for VoIP Pursuant to Interconnection Agreements*, part V, D, xii.

[415] *See Order, Pub. Utils. Comm'n Investigation into Whether Providers of Time Warner "Digital Phone" Serv. And Comcast "Digital Voice" Serv. Must Obtain Certificate of Pub. Convenience and Necessity to Offer Tel. Serv.*, Docket No. 2008-421 (Me. Pub. Utils. Comm'n Oct. 27, 2010).

[416] *Id*. 10.

[417] *See* Vonage Preemption Order.

[418] Vermont has bifurcated its investigation. Phase I queries whether jurisdiction exists. Phase II will examine the prudence of applying Vermont law to VoIP services.

[419] Order Re Phase I, *Investigation into regulation of Voice over Internet Protocol ("VoIP") servs.*, Docket No. 7316 (Vt. Pub. Serv. Bd. Oct. 28, 2010).

[420] *See id*. 28.

[421] *Order*, *Pub*. *Utils*. *Comm'n*. *Investigation into the Regulatory Status of IP Enabled Voice Telecommunications Services*, DT 09-044, Order no. 25, 262 (Nh. Pub. Utils. Comm'n Aug. 11, 2011).

[422] *Id*. 49.

[423] Order on Motions to Dismiss, Finding Violations and Providing Notice of Possible Civil Penalties, *MCC Telephony of Iowa, LLC, and MCC Iowa LLC v. Capitol Infrastructure LLC d/b/a Connexion Technologies and Broadstar, LLC d/b/a Primecast*, Docket No. FCU-2010-0015 (Iowa Util. Bd. Mar. 30, 2011).

[424] *Id*. n.2.

[425] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 26 FCC Rcd. 5240 (2011).

[426] Public Notice, *Pole Attachments Timelines Rules Take Effect*, 26 FCC Rcd. 9638 (2011).

[427] *See Florida Cable Telecomms. Ass'n v. Gulf Power Co.*, Decision, 26 FCC Rcd. 6452, (2011).

[428] *See Gulf Power Co. v. FCC*, Petition for Review, No. 11-1215 (D.C. Cir 2011).

[429] *See id*.

[430] *Acceleration of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, Notice of Inquiry, 76 FR 28397, ¶ 1 (2011).

[431] *Id*. ¶3.

[432] *See id*. ¶ 7.

[433] *See Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) To Ensure Timely Siting Review and To Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals as Requiring a Variance*, Declaratory Ruling, 74 FR 67,871-03 (2009).

[434] *See* Acceleration of Broadband Deployment at ¶¶ 10-14.

[435] *See id*. ¶¶18-19.

[436] *See id*. ¶ 20.

[437] *See id*. ¶¶21-22.

[438] *See id*. ¶¶ 23-27.

[439] *See* Level 3 Commc'ns, LLC Petition for Declaratory Ruling that Certain Rights-of-Way Rents Imposed by the New York State Thruway Authority Are Preempted Under Section 253, Docket No. 09-153, at i (filed July 23, 2009) ("Level 3 Petition").

[440] Twenty-First Century Communications and Video Accessibility

[441] *Implementation of Section 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010, Amendments to the Commission's Rules Implementing Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996, and Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision*, 26 FCC Rcd. 3133 (2011).

[442] *Implementation of Section 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010, Amendments to the Commission's Rules*

Implementing Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996, and Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-151 (rel. Oct. 7, 2011) ("*ACS Order*").

[443] New Section 101(53).

[444] *Id.* at § 716(a)(1)

[445] *ACS Order*, ¶¶ 31-32.

[446] *ACS Order*, ¶ 35.

[447] *Id.* ¶ 37.

[448] *Id.* ¶ 41.

[449] *Id.* ¶ 43.

[450] *Id.*

[451] *Id.* ¶ 47.

[452] *Id.* ¶ 48.

[453] *Id.* ¶ 63.

[454] *Id.* ¶ 69.

[455] New Section 716(a)(1).

[456] *ACS Order*, ¶ 84.

[457] *Id.* ¶ 87.

[458] *Id.* ¶ 88.

[459] *Id.* ¶ 142.

[460] *Id.* ¶ 148.

[461] *Id.* ¶ 150.

[462] *Id.*

[463] *Id.* ¶ 152.

[464] *Id.* ¶ 162.

[465] *Id.* ¶ 174.

[466] *Id.* ¶ 182.

[467] *Id.* ¶ 183.

[468] *Id.* ¶ 185.

[469] *Id.* ¶ 192.

[470] *Id.* ¶ 193.

[471] *See AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011) ("AT&T v. Concepcion").

[472] *See generally The FCC's Consumer Empowerment Agenda*, Prepared Remarks of Chairman Julius Genachowski, Center for American Progress, Washington, D.C. (Oct. 13, 2011), available at http://reboot.fcc.gov/fcc-s-consumer-empowerment-agenda (last accessed October 7, 2011).

[473] *See AT&T v. Concepcion*.

[474] *See id.*

[475] *See id.* 1744.

[476] *Id.* (internal citation omitted).

[477] *See id.*

[478] *See id.*

[479] *See id.* 1744-45.

[480] *See id.* 1745.

[481] *Discover Bank v. Super. Ct.*, 113 P.3d 1100 (Cal. Sup. Ct. 2005).

[482] *See AT&T v. Concepcion* at 1745 (internal citations omitted).

[483] *See id.* at 1746. Federal circuit courts have applied other states' unconcionability laws to hold class waiver arbitration clauses unconscionable. *See, e.g., Homa v. Am. Express Co.*, 558 F.3d 225, 231 (3d. Cir. 2009); *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 57-59 (1st Cir. 2007).

[484] *See AT&T v. Concepcion* at 1753.

[485] *Id.* 1748.

[486] *Id.*

[487] *See id.* 1753.

[488] *See, e.g., Litman v. Cellco P'ship*, No. 08-4103, 2011 WL 3689015, at 1 (3d. Cir. Aug. 24, 2011); *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1206 (11th Cir. Aug. 11, 2011); *Alvarez v. T-Mobile USA, Inc.*, No. CIV S-10-2373, 2011 WL 4566440, at *4 (E.D. Cal. Sept. 29, 2011).

[489] *See Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming")*, Notice of Proposed Rulemaking, 26 FCC Rcd. 10021 (2011) ("*Cramming NPRM*").

[490] *See id.* ¶ 3.

[491] *See id.*

[492] *See id.* ¶ 1; *see also FCC Proposes Rules to Help Consumers Identify and Prevent 'Mystery Fees' on Phone Bills, Known as 'Cramming'*, Public Notice, CG Docket No. 11-116, 2011 WL 2722540, at *1 ("*Cramming Public Notice*").

[493] *See id.* ¶¶ 59-62.

[494] *See id.* ¶¶ 55-58.

[495] *See id.* ¶¶ 63-65.

[496] *See id.* ¶¶ 52-53, 69.

[497] *See Cramming Public Notice* at *2.

[498] *See id.*; *see also Cramming NPRM* ¶¶ 3, 82.

[499] *See Consumer & Governmental Affairs Bureau Announces Comment Deadlines for "Cramming" Notice of Proposed Rulemaking*, Public Notice, DA 11-1449, 2011 WL 3702196 (2011).

[500] *See Cramming Public Notice* at 2.

[501] *See Norristown Telephone Company, LLC Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd. 8844 (2011); *Main Street Telephone Company Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd. 8853 (2011); *Cheap2Dial Telephone, LLC Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd. 8863 (2011); *VoiceNet Telephone, LLC Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd. 8874 (2011). *See also Cramming Public Notice at 2* (additionally noting that the FCC recently approved a settlement with Verizon Wireless over "mystery fees" totaling over $50 million that were placed on bills by Verizon itself, as opposed to by a third party).

[502] *See Cramming Public Notice* at *2 (noting that (1) the FTC has won several judgments in court against third parties who engage in cramming; and (2) the Senate Committee on Commerce, Science, and Transportation has been investigating cramming). *See also Cramming NPRM* ¶¶ 22-24; 35-36.

[503] *See Rules and Regulations Implementing the Truth in Caller ID Act of 2009*, Report and Order, 26 FCC Rcd. 9114 (2011) ("*Truth in Caller ID Report and Order*").

[504] Truth in Caller ID Act of 2009, Pub. L. No. 11-331, codified at 47 U.S.C. § 227(e).

[505] *See Truth in Caller ID Report and Order* ¶ 8.

[506] *See id.* ¶¶ 1-2.

[507] *See id.* ¶ 14.

[508] *See id.* ¶ 15.

[509] *See id.* ¶ 17.

[510] *See id.* ¶ 25.

[511] *See id.* ¶ 23.

[512] *See id.* ¶ 44.

[513] *See id.* ¶ 45.

[514] *See id.* ¶ 49.

[515] *See id.* ¶ 36.

[516] *See id.* ¶¶ 40-42. The Commission adds, however, that its "decision not to impose additional obligations on third-party caller ID spoofers in no way immunizes them from the obligation to comply with the Act. Where a caller ID spoofing service causes, directly or indirectly, the transmission or display of false or misleading caller ID information with the intent to defraud, cause harm, or wrongfully obtain anything of value, such service will be in violation of the Truth in Caller ID Act and our rules. . . . . Likewise, although we do not decide the matter here, liability questions would arise if the totality of the circumstances demonstrated that a third-party spoofing provider had promoted its services to others as a means to defraud, cause harm, or wrongfully obtain anything of value."

[517] *See generally, Caller Identification Information in Successor or Replacement Technologies,* Report, 26 FCC Rcd. 8643 (2011).

[518] *See STi Telecom Inc. (formerly Epana Networks, Inc.) Apparent Liability for Forfeiture*, Notice of Apparent

Liability for Forfeiture, File No. EB 10-TC-394, 2011 WL 3873929 (rel. Sept. 1, 2011) (“*STi NAL*”); *Locus Telecommunications, Inc. Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, File No. EB-10-TC-395, 2011 WL 3873933 (rel. Sept. 1, 2011) (“*Locus NAL*”); *Lyca Tel, LLC Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, File No. EB-10-TC-396, 2011 WL 3873934 (rel. Sept. 1, 2011) (“*Lyca Tel NAL*”); *Touch-Tel USA, LLC Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, File No. EB-10-TC-401, 2011 WL 3873935 (rel. Sept. 1, 2011) (“*Touch-Tel NAL*”) (collectively, “*NALs*”). *See also* Press Release, Federal Communications Commission, FCC Announces $20 Million in Proposed Penalties Against Companies Believed to be Involved in Deceptive Marketing of Prepaid Calling Cards (Sept. 1, 2011), *avail. at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0901/DOC-309410A1.pdf (“*Prepaid Calling Card Press Release*”).

[519] Section 201(b) states, in pertinent part, that “[a]ll charges, practices, classifications, and regulations for and in connection with [interstate or foreign] communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful.” 47 U.S.C. § 201(b).

[520] *See Prepaid Calling Card Press Release* at 1.

[521] *See id.*

[522] *See Locus NAL* ¶ 8.

[523] *See id.* ¶¶ 8, 10.

[524] *See Locus NAL* ¶¶ 10-11.

[525] *See, e.g. id.* ¶ 18.

[526] *See NALs* ¶ 1.

[527] *See STi NAL, Locus NAL, and Lyca Tel NAL* ¶ 21; *Touch-Tel NAL* ¶ 20.

[528] *Enforcement Bureau Proposes Significant Penalties for Deceptive Marketing of Prepaid Calling Cards; Consumers Advised to Carefully Review Card Advertisements*, Public Notice, DA 11-1494, 2011 WL 3873881 (2011).