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RICA Report is published semi-monthly by RICA, exclusively for RICA's CLEC members. With 80+ carrier members, RICA is the premier trade association representing the independent rural competitive local exchange carrier industry. *RICA Report* concisely captures regulatory and legal news, commentary, and insight relevant to rural CLECs.

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SENATE AND HOUSE PROCEEDINGS RAISE CONCERNS FOR USF

The perceived wisdom during the current Congressional efforts to rewrite the Communication Act has been that rural carriers' interest in a strong and vital Universal Service Support Mechanism would be protected in the Senate. The outright hostility to the USF of House Energy and Commerce Committee Joe Barton (R-TX) has been well known, but there was at least a hope that the House would agree in Conference Committee to a strong Senate bill in exchange for agreement with the House provision providing nationwide video franchise for the Bell companies. That understanding was severely questioned last week when Senate Commerce, Science and Transportation Committee Chairman Ted Stevens (R-AK) stated he would support a properly drawn statutory cap on the USF. Stevens' statement came a day after a House hearing on the USF in which Barton and others blasted the USF as "bloated," and named two Texas ILECs allegedly abusing the system by paying excessive dividends. This week, the Coalition to keep America Connected wrote to Stevens reminding him that he had previously sponsored legislation to eliminate the FCC imposed partial cap, and stating its "absolute opposition" to a legislatively imposed cap.

The House hearing, entitled "What are we subsidizing and why?" was focused on review of a Congressional Budget Office report on the USF released the day before. The CBO report generally accurately described the growth in high cost support in the USF as being attributable to the shifts of what were access revenues to USF by the FCC's

CALLS and MAG orders and by the rapid growth in USF payments to Wireless ETCs. The CBO data showed that five percent of the growth in support of competitive ETCs, (0.8% of the total) was attributable to wireline ETCs (which are mostly RICA members).

The CBO report went on to advise Congress that there could be further substantial growth in the size of the USF as a result of continued increases to wireless carriers, offsets to current intercarrier compensation charges, and direct support for broadband. The options for controlling growth identified by the CBO included limiting support to a single line per household, basing support on a competitive entrant's own costs, or expanding the current cap to cover all parts of the high cost program. At the House hearing, Barton endorsed these measures, and also agreed with the position of the CTIA witness that support should be limited to "what is necessary for the lowest-cost provider in the area to provide basic, voice-grade service."

During the hearing, Congressmen Terry and Boucher attempted to promote their USF reform bill (RICA Report, April 12, 2006) as being an appropriate solution to the alleged problems, but it became clear that the leadership was not interested.

For RICA members interested in obtaining or retaining USF support, these developments represent a mixed bag. On the plus side, both the CBO report and several House members indicated agreement with RICA's long stated position that USF support should be based on a carrier's own costs. On the negative side, a cap would mean that despite demonstrated cost, at least some carriers would not recover their cost. Further, the single line per household, previously known as "primary line," would, at a minimum, make it more difficult for RICA members to obtain support in an area where the incumbent is receiving support. The FCC record on the issue also identified the substantial administrative problems with determining which subscribers constitute a household and whether they have services from multiple carriers.

The difficult decision for rural carriers may boil down to whether any of the potential improvements are worth the risk of harm form forces in both houses that would like to eliminate the USF. With the FCC now ordering VOIP carriers to contribute to USF, and increasing the wireline contribution (see below), it may be better to have USF removed from consideration by Congress. The one area which the FCC cannot itself (in consultation with the Joint Board) solve is probably that of expanding the USF contribution base to include intrastate revenue. Further discussion and analysis of this issue will appear in the next RICA Report, following conclusion of the markup of Senator Stevens' bill, which is ongoing as this issue goes to press.

HOUSE PASSES COPE BILL

On June 8th the House passed the COPE bill by a substantial majority of 321 to 101. Assuming the Senate eventually passes its quite dissimilar bill, there will be major areas of compromise required to produce a single piece of legislation, with multiple opportunities for interested parties to seek provisions agreed to by neither house. The House Bill, H. R., 5252, provides video service providers with an option to obtain a national cable franchise; grants the FCC authority to enforce its broadband policy statement with fines up to $500,000, but prohibits it from adopting rules other than procedures for adjudication of complaints; requires VOIP providers to provide subscribers with access to 911 and E911 services; provides interconnection rights to VOIP service providers and clarifies that such providers are not exempt from intercarrier compensation or disability access requirements.

The bill also requires states to allow municipalities to offer broadband services; prohibits broadband service providers from requiring subscribers to take either telephone or cable service as a condition of receipt of service; requires an FCC study of the interference potential of broadband-over-power line; and requires the FCC to promote "seamless mobility."

HOUSE PASSES COPE BILL (continued)

Seamless mobility is defined as "the ability of a communications device to select between and utilize multiple Internet-protocol enabled technology platforms, facilities and networks in a real-time manner to provide a unified service."

FCC REQUIRES VOIP USF CONTRIBUTION, INCREASES WIRELINE SAFE HARBOR

At its Open Meeting last week, the FCC adopted modified USF contribution rules affecting interconnected VOIP services and wireless services. For the former the FCC made clear that interconnected VOIP service providers are obligated to contribute to the USF, and established an interim "safe harbor" rule that 64.9% of gross revenues can be considered interstate and thus subject to contribution. Service providers have the option to use actual revenues or conduct traffic studies if they don't want to use the safe harbor. Chairman Martin noted that since VOIP providers contend they offer an "inherently" interstate service, the Commission could have set at 100% contribution. The FCC also increased the existing 28.5% safe harbor for wireless carriers to 37.1 %. The Commission adopted a Further Notice of Proposed Rulemaking to seek comment on a more permanent rule. A *Wall Street Journal* editorial criticized the FCC for "expanding a subsidy that should have been phased out long ago." Other observers questioned whether the increased revenue from VOIP and wireless would offset the losses from the FCC's previous decision to exempt DSL services from contribution.

FCC SKIPS DIGITAL MUST-CARRY

To the surprise of many observers, the FCC dropped digital must-carry from its meeting agenda last week. The removal of the item was seen as a result of Chairman Martin being unable to find a majority in favor of extending must carry obligations to the multiple signals broadcasters will be able to send out as they convert to digital. The lack of a majority occurred even though with the confirmation of Robert McDowell there is now a 3-2 Republican majority of members of the Commission. The FCC did, however, open what could be a major proceeding on media ownership. The action follows a remand of earlier rules by a Court of Appeals, and is also intended to meet a statutory requirement to review all media rules every four years. Democratic Commissioners Copps and Adelstein dissented in part, arguing that the proceeding was incomplete. The central issue involves whether further industry concentration should be permitted.

COURT FINDS FOURTH TRY THE CHARM FOR FCC UNBUNDLED NETWORK ELEMENT DECISION

One of the most painful experiences for the FCC in recent years has been its attempts to implement the "unbundling" provisions of the 1996 Communications Act. On June 16th the U. S. Court of Appeals for the District of Columbia Circuit concluded that after 10 years the FCC has finally gotten the rules right. The Court, in a "Goldilocks" analysis, denied both the appeals of CLECs that the FCC's latest unbundling rules went too far and the appeals of the BOCs that the rules did not go far enough. The Court specifically upheld the FCC decision to find that CLECs were "impaired" and thus entitled to unbundling of an element where it would be uneconomic for a reasonably efficient CLEC to compete without UNEs. The Court also rejected BOC arguments that UNEs should not be available where CLECs could compete in the local exchange market using special access, noting that contrary holdings relating to long distance and wireless services were not applicable.

COURT SLAMS FCC DENIAL OF SBC (NOW AT&T) FORBEARANCE PETITION

The FCC's support from the Court of Appeals in the UNE case wasn't good enough to carry it through an appeal of its 2005 decision rejecting a forbearance petition of then SBC from "economic" regulation of "IP Platform Services." The Court found that the FCC's conclusion that the SBC petition was too vague as to the relief requested was not consistent with the Communications Act. The Court emphasized that it was not precluding the FCC from ultimately finding that the hypothetical nature of a petition makes it impossible to determine whether the substantive requirements of the Act are met, but held that the Commission cannot refuse to consider the merits merely because the petition seeks forbearance from uncertain or hypothetical regulatory obligations.

The Court then took the unusual step of remanding the case back to the FCC to explain inconsistencies with subsequent decisions, or address the SBC petition in light of the standards developed in those cases. The Court noted it was making an exception from its usual practice because in this case there was a pattern of inconsistent decision making that began before the challenged orders.