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Editorial Information

The **RICA Report** is published semi-monthly exclusively for RICA's CLEC Members and the Vendors/Suppliers that provide products and services to them. With 80+ Carrier Members, RICA is the premier trade association representing the independent rural competitive local exchange carrier industry. The **RICA Report** concisely captures regulatory and legal news, commentary, and insight relevant to rural CLECs.

The **RICA Report** welcomes your input, feedback and commentary. Membership submissions such as opinions, success stories, Q&A, etc. are encouraged. Please contact the editors at:

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FCC Issues Order On QWEST Forbearance Request

On March 9, 2007, the FCC released its Order granting Qwest's request for forbearance from the application of the Commission's dominant carrier rules to Qwest's provision of in-region, interstate, interLATA telecommunications services on an integrated basis. This decision frees Qwest to respond to RICA members and other competitors with service offerings combining local, intraLATA and interLATA long distance services.

As a result of this decision, Qwest will not be required to file tariffs for in-region, interstate, interLATA telecommunications services. Significantly, the Commission did forbear from the application of the other dominant carrier price cap, rate of return, and tariffing rules applicable to Qwest. The Commission will continue to treat the costs and revenues associated with Qwest's provision of in-region, interstate, interLATA telecommunications services as nonregulated for accounting purposes.

The FCC also granted Qwest limited forbearance from certain rules pertaining to streamlined transfers of control and the definitions, rules, and procedures that apply to the discontinuance, reduction, outage, and impairment of services. This forbearance, however only would apply with respect to the transfer control of assets used solely for the purpose of providing in-region, interstate, interLATA telecommunications services. To the extent that Qwest is otherwise treated as a dominant carrier under the FCC's rules, Qwest is still subject to those rules. The Commission specifically noted that Qwest did not obtain any freedom or forbearance from its rules regarding transfer of control or discontinuation of its services.

From the perspective of a competitor, the Qwest forbearance order may provide some opportunities. The grant of forbearance by the FCC was conditional because the Commission found that Qwest had not convinced the Commission that it no longer has the ability to raise competitors' costs by controlling local bottleneck access facilities. The Commission, therefore, conditioned the grant of forbearance, in part, on the imposition of safeguards which may be of interest to RICA members.

Qwest will be required to comply with standards for the provision of special access that are similar to those imposed on AT&T and Verizon under the terms of the SBC/AT&T and Verizon/MCI merger decisions. The standards are designed to ensure that the large carriers do not engage in discrimination in the provisioning of special access service. These standards address order taking, provisioning, and maintenance and repair of Qwest's DS0, DS1, DS3, and OCN services.

Most significantly, the FCC also directed Qwest to impute to itself its tariffed rates for access, including access provided over joint-use facilities, where it sells comparable access to unaffiliated interexchange carriers. As a result, Qwest will be required to ensure that its access rates are not inflated as a result of failure to attribute access usage to its own interexchange services. This may provide competitors with another tool to consider when reviewing whether the incumbent's competitive service prices are potentially subsidized by the services that remain subject to rate regulation.

FCC Finally Releases Video Franchise Order

Although the FCC announced on December 20, 2006, that it had reached a decision regarding video franchise, it took the Commission nearly three months to write the Order which was finally released on March 5, 2007. While the decision is intended to establish rules to prohibit franchising authorities from unreasonably refusing to award competitive franchises for the provision of cable services, the Order has not fully resolved the concerns of potential video franchise entrants.

The Commission determined that it would take several specific steps to encourage video and broadband competition by placing restrictions on the video franchise process:

1. The FCC ruled that franchising negotiations that extend beyond certain time frames amount to an unreasonable refusal to award a competitive franchise. The Commission set a time limit of 90 days for those applicants that have access to rights-of-way; and set a six month time limit for other applicants.

2. The FCC determined that it is unreasonable for a franchise authority to require an applicant to agree to unreasonable build-out requirements. This has been a significant concern to many rural competitive carriers seeking to enter video programming competition.

3. The FCC Chairman noted several examples of instances where the franchising authorities were clearly extracting inordinate benefits from the franchise applicant. The FCC determined that the extraction of such benefits was impermissible unless they counted toward the statutory five percent cap on franchise fees. Accordingly, the Order establishes that attempts to extract such benefits could be deemed an unreasonable refusal to award a competitive franchise.

4. The FCC also noted that franchise authorities in some instances made unreasonable demands on applicants with respect to attempts to impose obligations relating to public, educational, and governmental ("PEG") and institutional networks ("I-Nets") The FCC ruled that it would be unreasonable to refuse to award a competitive franchise if the local franchising authority denied an application based on a new entrant's refusal to undertake these types of unreasonable obligations.

The FCC's Order also clarifies several issues favorably for all LECs, both competitive and incumbent. The FCC stated that if a LEC deploys fiber optic cable that can be used for cable and non-cable services, the deployment alone does not trigger the obligation to obtain a cable franchise. Some franchise authorities have attempted to impose obligations on carriers before they attempted to provide video. In addition, the FCC clarified that a local franchising authority not use its video franchising authority to attempt to regulate a LEC's entire network beyond the provision of cable services.

While the measures undertaken by the FCC to address video franchising issues are helpful, the Order does not eliminate the problems that exist. The FCC Order only pre-empted local laws, regulations, and requirements. The Commission, however, did not take any action to pre-empt franchising decisions made at the state level or in compliance with state statutory directives, such as statewide franchising decisions. Accordingly, the industry efforts to address franchising concerns continues at both the federal Congressional level and at State legislatures.

FCC Opens Rulemaking To Determine Whether It Should Maintain Prohibition On Exclusive Programming Contracts

The FCC has initiated a rulemaking to consider changes to its existing rules that generally prohibit exclusive contracts for satellite delivered cable and broadcast programming between vertically integrated programming vendors and cable operators. In other words, by way of example, current rules don't allow HBO to transmit broadcasts by satellite and refuse to contract with competitors of its owner, Time Warner.

Initially, the restriction on exclusivity was going to be lifted October 5, 2002. The Commission, however, determined that the prohibition remained necessary to preserve competition and it extended the restriction on exclusivity for another 5 years. The new deadline is October 5, 2007 unless the Commission acts again to extend the deadline.

Specifically, the FCC seeks information to help it establish "whether developments in the marketplace since the passage of the 1992 Cable Act and our 2002 sunset review have diminished or increased the need for the exclusivity prohibition." While the Commission focuses in this regard on the impact of large LEC carrier entry into video, there is no emphasis shown for rural area concerns. The Commission, however, does ask "whether competitive MVPDs access to what some refer to as "marquee" or "must have" vertically integrated programming, such as CNN, HBO, TNT, Discovery and others, remains essential to successful implementation of competitive services."

In addition to the absence of any specific identification of consideration of rural market concerns, the Commission also notably omits any reference to the "terrestrial loophole." The existing rules only offer a small amount of assistance if the cable programming is transmitted via satellite. If the content provider elected to change the means of transmission to terrestrial fiber, the existing prohibitions would not be effective.

The new rulemaking, however, provides RICA members with the expected new forum to air the growing concerns regarding access to content through the comment and reply comments as well as through ex parte presentations.

Deadlines Set for Petitions to Deny M2Z Proposal

On March 9, the FCC established March 16, 2007 as the deadline to file petitions to deny M2Z's Application to provide broadband wireless service using the 2155-2175 MHz band. Oppositions to any such petitions to deny are due on March 26, 2007; and replies to oppositions are due on April 3, 2007. Many large wireless carriers have already filed petitions to deny the M2Z proposal.

The M2Z proposal has stirred some controversy in the rural industry. M2Z proposes to obtain a nationwide license without an auction. In return for the license, M2Z promises to cover 95% of the nation's population within 10 years. Most controversial is M2Z's plan to provide two grades of service: the lower grade would be free and supported by advertising revenue. Understandably, rural carriers may view this as a threat to their own provision of broadband service.

To address this concern, principals of M2Z have met with rural associations and groups of rural companies. Last week, M2Z leaders told a large group of rural carriers that they wanted to work with rural companies under arrangements that would enable the rural carrier to use the M2Z network to serve existing and potential customers. M2Z indicated that they would enter arrangements that would assure the rural carrier that "they (and not M2Z) would own the customer." While the M2Z statements sound promising, concerns remain in terms of details. The M2Z effort to seek alliances with rural carriers could also lead to interest from other broadband providers to work with rural telecom providers. At least two additional proposals have surfaced: one led by former FCC Chairman Reed Hundt and another effort developed by Morgan O'Brien, one of the original forces behind Nextel.

While the "fast track" established by the FCC for petitions to deny and comments may suggest otherwise, it does not appear that the FCC will be inclined in the short term to grant the proposed applications.

Vonage Loses Patent Suit To Verizon

Last week, Vonage lost a jury verdict to Verizon in a Virginia Court. If the verdict stands, Vonage will have to pay \$58 million to Verizon Communications in a patent case that may affect all VoIP service providers. Vonage naturally indicated its confidence that it will be successful on appeal.

With the new verdict in hand, Verizon is going to court next week to seek an restraining order to stop Vonage from using the VoIP technology while the case is under appeal. It is not likely that Verizon will succeed in this effort because any additional harm it incurs is at Vonage's monetary risk. Although Verizon sought \$197 million in damages from Vonage, the jury awarded Verizon "only" \$58 million which Vonage attempted to spin as a victory.

In the aftermath of the decision, Verizon naturally stood fast and claimed that service to customers will continue. Verizon clarified that its patent rights should limit Vonage to provision of service between Vonage customers which would eliminate calls to and from the public switched network. RICA members that have initiated the utilization of VoIP Vonage-like services may want to consider review of their service contract arrangements to ensure that risk and liability reside with the service provider and that they have been given proper indemnifications regarding the utilization of intellectual property.

U.S. Senate Commerce Committee Chairman Predicts USF Reform Legislation Will Be Bipartisan Effort

Senator Daniel Inouye (D-HI), the chairman of the U.S. Senate Committee on Commerce, has indicated he will work to craft a bipartisan measure to substantially reform USF. Inouye predicted the measure would be approved by the Committee and eventually be taken up on the Senate floor for passage during this session of Congress.

Inouye did not offer any hints of a timeline for committee action. However, the committee already has held one hearing on the issue that produced fireworks on occasion between some senators and FCC Commissioner Deborah Tate. Convened on March 1, the committee hearing demonstrated that members of the committee already have reached consensus on the need to move with some type of legislation. However, the scope of the legislation seems still to be up in the air.

Two panels of ten witnesses testified at the March 1 hearing. Most of the committee's attention was focused on the first panel which was comprised of members of the Federal-State Joint Board on Universal Service, including Tate and FCC Commissioner Michael Copps. The second panel consisted of industry representatives and included representatives from NTCA, Alltel, Verizon, and the cable industry.

The hearing was intended to focus on legislation introduced by Senator Ted Stevens (R-AK), the ranking member of the committee. That legislation would expand the number of providers paying into USF. But, most of the hearing focused on the distribution side of USF with particular attention on how USF could be used to speed broadband deployment to rural areas. In fact, broadband deployment seemed to be the driving force for many senators intent on stabilizing USF. Several argued the fund had to be stabilized so that rural customers could have the benefit of broadband services.

Committee members, especially Senators Byron Dorgan (D-ND), Olympia Snowe (R-ME), and John Rockefeller (D-WV) stressed that the FCC did not need additional authority from Congress to expand eligibility for USF to include broadband services. Snowe pressed Tate on a timeline for acting on USF reform. Several members of the Joint Board encouraged Congress to pass legislation that would amend Section 254 of the Act to explicitly include broadband among the list of supported services. Billy Jack Gregg, a joint Board member affiliated with the West Virginia Public Service Commission, warned the committee it would take two years for the FCC and Joint Board to resolve the issue unless Congress passes explicit legislation.

The hearing also revealed some friction between the senators and the Joint Board with Dorgan even suggesting he has "minimum regard" for some of the Joint Board's recommendations over the years.

USF Badly In Need Of Reform, Witnesses Conclude

Committee members and witnesses stressed at the hearing that USF was badly in need of reform to reduce the size of the high cost fund. Many of the witnesses blamed the fund's instability on the increasing number of wireless ETCs. Several members of the Joint Board suggested that state commissions should be given a stronger role in USF distribution as a way to control the fund.

But, the wireless industry was not without supporters on the committee. Several senators stressed that USF should fund wireless services with Senator David Pryor (D-AR) going so far as to suggest that wireless was the future of telecom. Senator John Thune (R-SD) also was a strong advocate at the hearing for providing USF to competitive wireless carriers.

Inouye stressed that industry needs to reconsider some of their views in order to work with Congress to stabilize the fund. But, he shied away from recommending radical change.

“Without question, when it comes to universal service reform,” Inouye said, “we face a difficult task in balancing competing equities to promote the goals of universal service in a manner that will achieve a fair result. These issues are complicated, and radical solutions often promise more than they can deliver.”

Clearly, Inouye was referring to some proposals recommended by the witnesses to cap the fund or to move to reverse auctions as a way to distribute USF.

USF Cap and Reverse Auctions Pushed At Senate Hearing

Indiana State Commissioner Larry Landis, a member of the Joint Board, recommended that the high cost fund be capped to stem the growth in the size of the fund. He said a cap would give “breathing room” while the Commission and Joint Board work to a comprehensive USF solution. Tom Tauke, a Verizon lobbyist, also embraced the cap, but he stressed the cap should be seen as part of a transition to a new reverse auction process for distributing funds. Tauke said that reverse auctions could be used to stem the increasing number of competitive ETCs.

Verizon has submitted a proposal to the FCC that calls for reverse auctions in areas where there are already at least two wireless ETCs. The ILEC in the area would continue to receive its existing support, but the level of support would be capped. An auction also would take place in those areas where there is a competitive wireline carrier receiving support.

In presenting his plan to the committee, Tauke indirectly criticized advocates for the rural industry for stressing that USF could be stabilized by ensuring that wireless ETCs are not be reimbursed on the basis of the costs of the rural LEC receiving USF support. “While today’s recipients argue over costing methods or administrative details of the fund,” said Tauke, “our proposal focuses every provider in rural areas on the kinds of transformation that produce benefits for consumers: greater efficiency, creating ways of doing business, and new services.”

The rural industry was highly critical of the Verizon proposal saying that reverse auctions were a “race to the bottom.”

John Burke, a member of the Vermont Public Service Board and the Joint Board, told the committee that the separate designations for rural and non-rural recipients of USF hurt rural consumers. He said many rural consumers are denied the full benefits of USF because they are served by non-rural carriers. He said nearly 20 percent of the customers of non-rural carriers actually live in rural areas. Burke argued the designations no longer make sense and should be reassessed as part of any major USF legislation.

When the hearing concluded, Inouye said it would be difficult to craft a legislative package to please everybody, but that he was committed to taking action. “It will be a challenge,” Inouye said, “but, I can assure you, we will take on that challenge.”

House Committee Oversight Hearing Focuses On USF, Video Franchising, and AT&T-BellSouth Merger

FCC Chairman Kevin Martin was grilled this week by members of the U.S. House of Representatives Subcommittee on Telecommunications and the Internet during a general oversight hearing on the operations and policies of the Commission. This was the first FCC oversight hearing conducted in the House in nearly four years.

Martin was often scolded by some of the committee members, including Representative John Dingell (D-MI), the chairman of the House Committee on Energy and Commerce. Dingell blasted Martin for the decision to relax the rules for video franchising saying the Commission had overstepped its authority. But, Dingell was not alone in his criticism of Martin. Representative Mike Doyle (D-PA) was highly critical of Martin for purging a study by a consultant concluding that wireless consumers might not have full access to E-911 services. Doyle's questions stemmed from an article in *USA Today* saying Martin had cut the funding for the study because he did not want to subject the wireless industry to criticism.

USF was an issue of concern for many members. In his opening statement, Representative Ed Markey (D-MA), the subcommittee chairman, indicated that "modernizing and rationalizing USF" would be a high priority of the subcommittee this year. Representative Greg Walden (R-OR) asked Martin to explain why applications by wireless companies applying for ETC status take so long to be approved. Martin responded the Commission was slowing down approval of applications until the Federal-State Joint Board on Universal Service makes its recommendations in the next four to six weeks to reform USF.

Representative Lee Terry (R-NE) stressed that the fund should be "reformed and loosened up" to facilitate roll out of broadband in rural America.

Martin gave a spirited defense of his plan to move to reverse auctions as a means to distribute USF. He said USF should fund one carrier of last resort and expect that the carrier will provide a full range of services. He added the plan should be phased in to provide enough notice to companies that have "invested and relied on USF to recover their investments."

Representative Barbara Cubin (R-WY) and FCC Commissioner Michael Copps were both critical of Martin's reverse auction proposal. However, the proposal was welcomed by Representative Joe Barton (R-TX) who said this could be the first step in permanently ending USF. Representative Dennis Hastert (R-IL), the former Speaker of the House, echoed Barton's view saying his suburban constituents should not be forced to subsidize consumers in rural areas.

Martin and Commissioner Deborah Tate also were criticized by several members of the subcommittee for the statement they issued when voting to support the AT&T-BellSouth merger. Representative Anna Eshoo (D-CA) was probably the harshest demanding to know first from Tate and then from Martin what authority they could cite in law or the Commission's rules that would authorize them to refuse to implement provisions of the agreement with which they disagreed. This exchange produced sharp differences among the Commissioners on the subject with Martin stressing that the voluntary agreements in the merger do not change overall FCC policy or precedent and Copps and Adelstein suggesting that Martin and Tate should have dissented from the merger agreement if they were so strongly opposed to the merger conditions.

DTV Transition May Be Delayed, Says Dingell

Representative John Dingell (D-MI), chairman of the House Committee on Energy and Commerce, recently indicated he could support a delay in the transition date to digital TV. Currently, the transition is set to occur by February 17, 2009.

Dingell is concerned that a voucher program to reduce consumer costs to purchase converter boxes may be inadequate. He also said it is unclear that enough boxes will even be available. He warned that voters would take out their anger on members of Congress at the polls if television service is disrupted during the transition.

“If the converter box program doesn’t proceed smoothly, a day of reckoning will come,” said Dingell. “A scapegoat will be found. People will be voted off the island.”

U.S. House Leadership Telecom Agenda Includes USF Reform

Representatives John Dingell (D-MI), the chairman of the House Committee on Energy and Commerce and Ed Markey (D-MA), the chairman of the House Subcommittee on Telecommunications and the Internet, have reached agreement with House Speaker Nancy Pelosi (D-CA) on a telecommunications legislative agenda. According to various sources, this agenda includes legislation to foster high-speed broadband deployment, network neutrality, and USF reform.

Markey’s subcommittee is expected to conduct a series of oversight hearings also that will focus on the FCC’s review of media ownership limits, a recent FCC decision to relax local video franchising guidelines. The subcommittee will also convene a special hearing on the digital TV transition.

McCain Pushes Public Safety Legislation

Senator John McCain (R-AZ) has introduced legislation that would establish a national policy for public safety spectrum use. McCain’s measure would carve out spectrum that is now scheduled for auction next January and license it instead to a public safety broadband trust to provide advanced wireless services for first responders. Public safety advocates strongly support the measure. The legislation is similar to a proposal put forward by Cyren Call Communications.

Wireless providers say the plan could sabotage the upcoming auction and even delay the transition to digital TV. The proceeds from the auction are expected to be used to reduce the federal deficit and fund a voucher program to subsidize converter boxes for consumers with analog TV sets.

Meanwhile, a group headed by former FCC Chairman Reed Hundt has filed comments with the FCC proposing a new plan for using some of the 700 MHz spectrum for a national public safety network. The group is called Frontline and the proposal is similar to the one offered earlier by Cyren Call.

Unlike the Cyren Call proposal which already has been rejected by the FCC, Frontline does not ask for a spectrum grant. Instead, Frontline would bid on the spectrum, but wants the Commission to set aside a sliver of the spectrum and mandate that public safety be given priority in the case of an emergency.