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A Brave New World for Universal Service Support and Intercarrier Compensation

On November 18, 2011, the Federal Communications Commission ("FCC") released their long awaited Universal Service Fund and Intercarrier Compensation Order (view order here). The FCC released the Executive Summary when it approved the Order on October 27, 2011, but industry is finally getting the opportunity to delve into the details and contemplate the implications of the Order and Proposed Rules.

As anticipated, the FCC will officially transition high cost support from traditional voice networks to broadband capable networks, which will incidentally carry voice traffic. This represents a fundamental shift in focus for high cost support. Although many rural consumers welcome the introduction of broadband into their communities, rural telecommunications carriers worry about stranded legacy investment and meeting the significant broadband benchmarks the Order requires to receive funding.

In our opinion, the Order provokes almost as many questions as answers, so we intend to continue to update this eUpdate with additional material. If you'd like to us consider answering one of your questions regarding the USF/ICC Order, please do not hesitate to email Shannon Heim.

Dorsey offers a broad range of expertise on Universal Service and Intercarrier Compensation. If you need legal assistance or you have a question you'd like us to consider, please email a member of our team.

I'm a rate-of-return carrier, how will the broadband benchmarks affect me if I don't have access to reliable middle mile transport?

The FCC introduced "Public Interest Obligations" that require rate-of-return carriers that continue to receive HCLS or ICLS or receive ICC-related CAF funding to meet broadband benchmarks. A carrier must provide broadband service at speed of at least 4 Mbps downstream and 1 Mbps upstream with latency suitable for real time applications and with usage capacity comparable to residential terrestrial fixed broadband offerings in urban areas. Rather than making this broadband benchmark a firm requirement, the FCC directs that rate-of-return carriers must only meet this benchmark "upon reasonable request." ¶ 206. The intent is to provide greater flexibility in stretching broadband-capable networks further into rural areas based on consumer demand. The FCC's definition and application of "upon reasonable request" will determine how flexible this concession is for small, rural carriers.

Reliable middle mile transport will play a significant role in the deployment of broadband services in the highest cost areas of the nation. In remote areas, like Alaska, the only middle mile is unreliable and expensive satellite facilities. The FCC's requirement to provide broadband allows carriers to recoup costs under the applicable state line extension rules, focusing on extending facilities to a customer upon reasonable request, rather than connecting a community to the internet backbone. ¶ 209.

Carriers lacking access to terrestrial backhaul will be subject to a relaxed public interest obligation. ¶ 101, 47 C.F.R. § 54.313(g). After certifying that no terrestrial backhaul exists, a carrier will be obligated to offer broadband service at actual speeds of 1 Mbps downstream and 256 kps upstream within the supported areas served by satellite middle mile facilities. The cost of terrestrial backhaul will not trigger this exception, although there are other remedies to address fair and reasonable pricing. FN 162. A carrier has 12 months from terrestrial backhaul

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becoming commercially available to provide the faster broadband service.

What are the requirements to receive funding under the Mobility Fund Phase I?

The goal of Mobility Fund Phase I is use $300M to extend the availability of 4G wireless networks. ¶ 322. Mobility Fund Phase I is not intended to generate new infrastructure builds or direct funds to the highest cost areas. ¶ 323. The FCC will not permit more than one carrier to receive funds to extend broadband service per area unless there is a small overlap that will materially increase the units served. ¶ 320.

Mobility Fund Phase I will be awarded through a reverse auction process described generally in the Order and delegated to the Wireless Bureau. ¶¶ 321-480, ¶ 329 (delegated authority). To participate in the reverse auction, a carrier must be a designated ETC, have access to spectrum, provide a detailed description of the network design including whether the project will qualify as 3G or 4G, and provide an irrevocable letter of credit in an amount equal to the amount of support in case of default. See 47 C.F.R. §§ 54.1005-007.

Although Mobility Fund Phase I is unlikely to extend service in the highest cost areas, the FCC allocated an additional $50M from the universal service reserves to create a Tribal Mobility Fund Phase I. ¶ 482. The FCC acknowledged the special challenges involved in deploying mobile broadband on tribal lands. The two Mobility Fund Phase I programs are not mutually exclusive. Carriers that meet the qualifications, may apply under either program. The funds will be awarded through a similar reverse auction process, but there are additional tribal engagement obligations. ¶ 489.

My company participates in the e-rate program. Does the Order address any issues related to schools and libraries?

The primary focus of the Order is on the distribution of high cost support, but it does discuss application of the 4 Mbps/1 Mbps standard to community anchor institutions. The Order reiterates the definition of anchor institutions contained in the American Recovery and Reinvestment Act, which included schools, libraries, medical and healthcare providers, public safety entities, community colleges and other community support organizations and agencies. ¶ 102. Since ETCs typically offer broadband at greater speeds to anchor institutions, the Order does not set a required speed. It notes, however, that the greater bandwidth and speed ETCs provide to anchor institutions should be priced at a level reasonably comparable to a similar offer in urban areas. FN 163.

Given the FCC's emphasis on greater accountability within the universal service system, we would not be surprised to see an increase in enforcement actions related to the pricing of broadband service to community anchor institutions. Prompt response remains critical to a positive outcome. If you receive a Notice of Apparent Liability, contact George Foote at Dorsey for immediate assistance.

Do the ICC reforms require me to renegotiate all of my existing contracts?

The Order does not require that existing contracts be reopened, but does make clear that the ICC reforms constitute a "change in law." ¶ 816. Therefore, to the extent that any agreement may contain a "change in law" provision, the agreement may need to be renegotiated or revisited to implement the new regulations. If the change in law provision is not sufficient to address the changes in the Order, the dispute resolution provisions in the interconnection agreement should be utilized.

Virtually all interconnection agreements, SGATs and other state sanctioned agreements will have to be changed to reflect the new rules. However, since the rules are clearly spelled out in the Order and don't implicate service issues, we don't anticipate the required negotiations will demand substantial time to complete.

How will the transition of high cost support from voice services to broadband affect a carrier's obligation to provide voice service under 47 U. S.C. § 214(e)(1)?

The obligation to provide voice service will not change in the short term, even though the Order transitions high cost support to broadband and imposes broadband benchmarks as a requirement of receiving support,. "The universal service challenge of our time is to ensure that all Americans are served by networks that support high-speed Internet access—in addition to basic voice service—where they live, work, and travel." ¶¶ 76-79. Absent Congressional action, the FCC cannot alter a carrier's obligation to provide basic voice service. *See* 47 U.S.C. § 254(b) and ¶ 78.

The FCC characterized its change in focus to broadband as an update of the definition of voice service in light of the broadband needs in high cost areas. ¶ 82. The FCC declined to alter any existing Carrier of Last Resort ("COLR") obligations established by individual states. ¶ 82. As a result, current ETCs will continue to be subject to state COLR obligations with the additional broadband benchmarks

established in the Order.

Voice service plays an important role in the waiver process. ¶¶ 539-40. The Order establishes a waiver process for carriers whose support under the new regime is inadequate to maintain basic voice service. This standard is extreme in light of all of the additional administrative and broadband-related obligations the Order imposes on carriers. The FCC will apply "a rigorous, thorough and searching review" to any waiver petition. ¶ 540. A waiver petition will subject a carrier to close scrutiny of total company revenues, both regulated and unregulated. ¶ 540.

What are a carrier's responsibilities during ICC transition?

The interstate switched access rates, reciprocal compensation rates, all intrastate access rates for Price Cap carriers, and terminating intrastate access rates for rate-of-return carriers will be capped on December 29, 2011 (30 days after the rules were published in the Federal Register). The capped rates will then be reduced on a schedule created in the "Intercarrier Compensation Reform Timeline" until they go to bill-and-keep on July 1, 2020.

During the transition, LECs are to continue to file tariffs for their intrastate toll traffic with the state PUC, and tariffs for their interstate traffic with the FCC. ¶ 812. The Order states that the FCC and state PUCs will work in partnership to "monitor" tariff filings to ensure that carriers do not try to shift costs to other rate elements that are not specifically covered (such as special access or common line charges) or otherwise try to "game" the system. ¶ 813.

During the transition, state PUC's will continue to establish rates for non-access traffic per the FCC Rules, but can use bill-and-keep to do so. These rates will then be subject to the transitions set forth in the Order. ¶ 812, fn. 1524.

How does the establishment of a carrier's additional recovery "Baseline" differ between Price Cap and Rate-of-Return Carriers?

For price cap carriers, recovery will be based on Fiscal Year 2011 (October 1, 2010 through September 30, 2011) total switched access revenues that: (1) are being reduced as part of the reform; (2) in which the payment was for service billed in FY2011; and (3) for which payment was received by March 31, 2012. It will also include FY2011 net reciprocal compensation revenues based on net payments as of March 31, 2012. Recovery will then be reduced on a straight-line basis at a rate of ten percent annually starting in 2012. ¶ 880. The Order states that this method will allow Price Cap carriers to determine at the outset exactly how much their Eligible Recovery will be each year.

Price cap carriers must file the required data to establish their "Base Minutes" for the ICC additional recovery. Price cap carriers will be required to submit their switched access MOU and rates, broken down into categories and subcategories corresponding to relevant categories to the rates being reduced, to the states and to USAC for the purposes of administering the CAF ICC support. ¶880. The Order does not address questions as to the possible sensitive nature of this data or create any presumptions as to the public or confidential status of the data.

For rate-of-return carriers, the starting point will be the carrier's 2011 interstate switched access revenue requirement, plus FY2011 (October 1, 2010 through September 30, 2011) intrastate switched access revenues and FY2011 net reciprocal compensation revenues. This baseline will be decreased by 5% on an annual basis. ¶ 899.

Unlike a price cap carrier, a rate-of-return carrier can "true-up" its MOUs when it determines its additional ICC eligibility for that year. After year 1, when the rate-of-return carrier must use its estimated MOU to determine its eligible recovery, it can adjust the next year's eligible recovery based in the prior year's actual MOUs. True-ups will not be conducted based on rate-of-return carriers' switched access costs. ¶ 900.

If I am eligible for and elect to receive additional recovery for ICC through the CAF, am I then subject to additional obligations under the Order?

For rate-of-return carriers, the same obligations for *high-cost funding* will apply to the *additional recovery* that they elect to receive through the CAF, including latency, speed and usage levels (regardless whether the carrier is a current recipient of the high-cost-fund). For price cap carriers, the support must be used for building and operating broadband capable networks used to offer their own retail service in areas substantially unserved by an unsubsidized competitor. Because these obligations will be placed on carriers that elect to receive additional recovery through the CAF, carriers can elect *not to* receive ICC replacement CAF support. ¶ 918.

How does the Access Recovery Charge ("ARC") work, and what restrictions does the Order place on the ARC?

The ARC can only be charged to end-users in order to recover a LEC's eligible recovery; it cannot be charged consistently on an annual basis. The ARC is calculated independently from, and has no bearing on, the existing SLC, although for administrative and billing efficiencies the Commission permits carriers to combine the charges as a single line item on the bill. ¶ 906. The ARC is expected to phase down over time as carriers' eligible revenue decreases.

There are additional restrictions on the ARC. The ARC cannot be charged to any Lifeline customers. It is restricted to an annual $.50 increase for consumers and small businesses, and $1.00 per line for muli-line businesses. The ARC cannot be imposed on any consumer paying an inclusive monthly phone rate of $30 or more. The ARC cannot be charged to a multi-line business where the SLC plus the ARC would exceed $12.20 per line. Further, carriers that *do not* receive CAF funding have additional limitations. ¶ 908.

The Order provides carriers the flexibility to spread the ARC among their incumbent LECs on the holding company level. This allows a LEC to recover the ARC from a broader set of customers, and to more fully recover the ARC by having access to a larger number of end-users with rates below the $30 Residential Rate Ceiling. ¶ 910.

Will the additional recovery mechanisms require additional filings from LECs?

Yes. The Order requires that all LECs that participate in the additional recovery mechanisms, including by charging an end-user ARC, to file data on an annual basis regarding their ICC rates, revenues, expenses, and demand for the preceding fiscal year. This filing *can* be made under confidential seal. The Wireline Bureau is tasked with establishing a template for such data that can also be used to file the necessary information with USAC to receive CAF ICC support. ¶¶ 921-22.

Should I update the tariffs I have on-file with the FCC and the state PUCs to reflect the toll VoIP-PSTN traffic findings in the Order?

In the absence of an agreement, the Order determined that tariffs for toll VoIP-PSTN traffic will be equal to interstate access rates. Therefore, in order for a carrier to benefit from the legal benefits and predictability of a tariff, carriers will likely want to add this language to their tariff on file with the Commission and with the state PUCs. Tariffing will also allow carriers to incorporate a specific provision in their tariffs to address jurisdiction of traffic, such as requiring carriers to certify the percentage of traffic that is VoIP and thus subject to auditing requirements. ¶ 963.

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