

Legal Updates & News

Bulletins

Communications Law Bulletin, October 2009

October 2009

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The Month in Brief

October's biggest news is the adoption by the Federal Communications Commission ("FCC" or "Commission") of a proposed set of Net Neutrality rules. However, October also brought important developments in mass media, wireless, and other areas. These developments are covered here, along with our usual list of deadlines for your calendar.

Commission Starts Promised Net Neutrality Proceeding

Amidst a backdrop of intense lobbying from a wide range of industry and consumer groups and Congress, on October 22nd the FCC adopted its previously announced Notice of Proposed Rulemaking (“NPRM”) on preserving an open Internet (aka “Net Neutrality”). The idea of opening a proceeding to ask questions and gather data was ultimately supported by all five Commissioners, although the two Republican Commissioners dissented in part on the substance of the item, not convinced at this time that there are problems sufficient to warrant new rules.

In short, the NPRM proposes to codify the four principles announced in the Commission’s 2005 Internet Policy Statement. According to those principles, providers of broadband Internet access service would *not* be allowed to: (1) prevent users from sending or receiving lawful content of the user’s choice; (2) prevent users from running lawful applications or using lawful services of the user’s choice; (3) prevent users from connecting and using lawful devices of the user’s choice that do not harm the network; or (4) deprive any users of their entitlement to competition among network providers, application providers, service providers, and content providers.

In addition, the NPRM proposes to codify two new principles. Specifically, providers of broadband Internet access service would be *required* to: (5) treat lawful content, applications, and services in a nondiscriminatory manner; and (6) disclose such information concerning network management practices as is reasonably required for users and other providers to enjoy the protections established in the proceeding.

All six draft proposed rules apply only to broadband Internet access service providers (but not to application or content providers), although the NPRM asks whether other entities should be subject to the rules. All six proposed rules would be subject to certain exceptions.

First, all six rules would be subject to reasonable network management to address congestion and quality-of-service issues, as well as other reasonable steps to manage networks. Second, reasonable network management would also permit broadband Internet access service providers to address harmful or unwanted traffic (such as spam), the transfer of unlawful content (such as child pornography), and the unlawful transfer of content (such as a transfer that would constitute copyright infringement). Finally, the draft rules do not limit the ability of broadband Internet access services providers to deliver emergency communications or address the needs of law enforcement, public safety, or national or Homeland Security authorities.

The NPRM proposes that the new rules apply across *all* service platforms, including mobile wireless broadband Internet access, but specifically recognizes that wireless networks differ from wireline or cable networks in many potentially significant respects. Accordingly, the NPRM asks how, in what time frame, and to what extent the new rules should apply to non-wireline forms of broadband Internet access.

The Commission is also seeking comment on how it should define and address “managed” or “specialized” services (such as certain types of voice, video, and enterprise business services or specialized applications such as telemedicine, smart grid, or eLearning offerings) provided over the same networks used for broadband Internet access services. The NPRM specifically notes that these services may be sufficiently different from plain-vanilla broadband Internet access service that it may be inappropriate to apply the proposed rules to such services.

The proposed rules are intended as “high-level” requirements that would be applied more specifically on a case-by-case basis in adjudications as technology and the marketplace evolve. The Commission asks if it should adopt specific procedural rules to govern complaints alleging violation of any rules adopted in this proceeding. The NPRM also seeks comment on the Commission’s legal authority to adopt the proposed rules.

At the open meeting adopting the item, the Commission noted that its Office of Engineering and Technology would be creating a process for obtaining technical advice and information from a wide range of engineers.

The FCC established a lengthy pleading cycle, with comments due January 14, 2010, and replies due March 5, 2010. Any rules ultimately adopted in this proceeding will almost certainly be appealed to the courts.

Reaction to the FCC’s proposals was mixed, both in predictable and surprising ways. In the days before the proposal was released, more than 70 House Democrats (who are generally supportive of Net Neutrality) sent a letter to the FCC expressing concern regarding such proposals. In addition, some Republicans urged the FCC to initiate a Notice of Inquiry (“NOI”) instead of an NPRM, and some urged the FCC to conduct a market analysis prior

to any action. Immediately after the NPRM was adopted, Senator McCain (R-AZ) introduced a bill, the Internet Freedom Act, that would prohibit the FCC from adopting new Net Neutrality rules.

Meanwhile, across the northern border, the Canadian Radio-television and Telecommunications Commission (“CRTC”) has just adopted a new policy framework to govern the traffic management practices of Internet service providers (“ISPs”). Under the new framework, the CRTC will look at four issues in assessing particular traffic management practices: (1) “transparency” of practices, encouraging economic measures such as tiered pricing; (2) “innovation,” which urges network investment as a primary solution to network congestion, but permits narrowly tailored technical measures (such as “traffic shaping” or “throttling”) as a last resort; (3) “clarity,” meaning that practices must not be unjustly discriminatory or unduly preferential; and (4) “competitive neutrality,” particularly with respect to wholesale services. No prior CRTC approval is needed for retail traffic management practices, but ISPs will be required to give retail customers at least 30 days’ notice of changes in traffic management practices. For wholesale customers, prior CRTC approval will be required and ISPs will be required to give wholesale customers at least 60 days’ notice before implementing changes in such practices.

Information Overload? FCC Continues Amassing Public Comment on National Broadband Plan

In late September and October, the Commission further expanded its data-gathering efforts as part of its development of the National Broadband Plan, which must be submitted to Congress in February. The size of the record continues to grow with a fresh round of comment cycles on myriad broadband issues. The Commission’s September 29, 2009 open meeting featured presentations on the status of the Commission’s processes for development of the National Broadband Plan. The broadband team reported that as of September 29, the Commission’s public input on the National Broadband Plan included testimony from approximately 230 witnesses, nearly 41,000 pages of written comments, and nearly 40 blogs posted on the FCC’s new “Blogband” page.

Field hearings on the National Broadband Plan took place September 21, 2009, in Austin, Texas; October 1, 2009, in the Washington, D.C. area; and October 6, 2009 in Charleston, South Carolina.

“Tailored” Comments Sought on Specific Broadband Issues

As noted in last month’s Bulletin, although the National Broadband Plan NOI comments in June and July sought public input on a wide variety of broadband issues, the Commission has more recently changed its approach and sought comment on targeted issues through individual public notices. Input on these targeted issues supplements the record received in response to the National Broadband Plan NOI and the discussions at the National Broadband Plan staff workshops that have been held to date:

- *Cost Estimates for Connecting Anchor Institutions to Fiber:* October 8, 2009 FCC Public Notice (DA 09-2194, GN Docket Nos. 09-47, 09-51, 09-137) seeks comment on October 5, 2009 Bill and Melinda Gates Foundation filing of a cost model and cost estimates of providing fiber optic connectivity to anchor institutions, such as public schools and libraries, community colleges, and hospitals. Commenters should provide input on, among other things, what other categories of buildings (if any) should be considered anchor institutions; how well the four categories of population density (dense urban, urban, suburban, and rural) segment anchor institutions; accuracy of the assumption that 80% of anchor institutions lack fiber; the extent to which the cost estimates for bringing fiber to individual buildings are accurate; and to what extent providing fiber to these institutions will improve the build-out economics in currently unserved or underserved areas. **All comments should be titled “Comments or Reply Comments—NBP Public Notice # 12.” Comments are due October 28, 2009.**
- *Opportunities for Disadvantaged Businesses in the Age of Broadband:* September 28, 2009 FCC Public Notice (DA 09-2137, GN Docket Nos. 09-47, 09-51, 09-137) seeks comment and data on the current state of usage and penetration of broadband as it applies to Small and Disadvantaged Businesses (“SDBs”) and information about the use of broadband by SDBs. **All comments should be titled “Comments—NBP Public Notice # 9.” Comments are due November 2, 2009.**
- *Impact of Middle and Second Mile Access on Broadband Availability and Deployment:* October 8, 2009 FCC Public Notice (DA 09-2186, GN Docket Nos. 09-47, 09-51, 09-137) seeks further information on the cost and availability of middle- and second-mile transport services and how those services relate to making broadband available to all Americans. Commenters should provide input on, among other things, how much middle- and second-mile access is needed to provide adequate broadband Internet access to end-user connections; availability and pricing of middle- and second-mile connectivity; pricing and availability of

Internet connectivity; economics of deployment; and competition and availability of alternatives for middle- and second-mile access. **All comments should be titled “Comments—NBP Public Notice # 11.” Comments are due November 4, 2009.**

- *Public Safety, Homeland Security, and Cybersecurity Elements of National Broadband Plan*: September 28, 2009 FCC Public Notice (DA 09-2133, GN Docket Nos. 09-47, 09-51, 09-137, PS Docket Nos. 06-229, 07-100, 07-114, WT Docket No. 06-150, CC Docket No. 94-102, WC Docket No. 05-196) seeks comment on how broadband offers a variety of potential benefits to emergency responders and other public safety agencies, and the extent to which broadband networks meet specialized public safety requirements. Commenters may give input on, among other questions, how best to meet the needs of the public safety community for mobile wireless networks; how the American public could use broadband technologies to communicate more effectively with emergency responders when they make 9-1-1 calls; the survivability of broadband networks against computer-based attacks and what cyber security measures could be useful; and how broadband technologies improve the effectiveness of emergency alerts for all Americans, including people with disabilities, people living in rural areas, and people who do not speak English. **All comments should be titled “Comments—NBP Public Notice # 8.” Comments are due November 12, 2009.**
- *Broadband Clearinghouse*: October 2, 2009 FCC Public Notice (DA 09-2167, GN Docket Nos. 09-47, 09-51, 09-137) seeks comment on proposals by several parties that the Commission create a broadband clearinghouse for easy access to broadband best practices. Input is sought on the extent to which a broadband clearinghouse could reduce information barriers for municipalities, agencies, businesses, and nonprofits that want insights into more effectively utilizing broadband infrastructure, or into broadband deployment or adoption projects. **All comments should be titled “Comments – NBP Public Notice # 10.” Comments are due November 16, 2009.**
- *Berkman Center for Internet and Society Broadband Study*: October 14, 2009 FCC Public Notice (DA 09-2217, GN Docket Nos. 09-47, 09-51, 09-137) seeks comment on a survey by Harvard University’s Berkman Center for Internet and Society survey of existing literature and studies about broadband deployment and usage throughout the world. The study is intended to inform the Commission’s development of a National Broadband Plan. Commenters should discuss whether the study accomplishes its intended purposes, the study’s objectivity, how well the study summarizes the broadband experiences of other countries, how much the study should inform the National Broadband Plan, and whether additional studies are needed. **All comments should be titled “Comments – NBP Public Notice # 13.” Comments are due November 16, 2009.**

Wireless Developments

Chairman Genachowski Announces FCC Plans to Spur Wireless Development

Speaking at a recent CTIA-The Wireless Association (“CTIA”) conference, FCC Chairman Julius Genachowski outlined his upcoming agenda to promote wireless broadband services and other related issues. Acknowledging that the wireless industry faces a “spectrum crisis” and that “spectrum is the oxygen of our mobile networks,” Genachowski said that commercial operators need additional spectrum in order to bring competitive wireless broadband services to the market. He did not, however, explain how much additional reallocated spectrum would satisfy future demand or where it would come from, warning instead that “it takes years to reallocate spectrum and put it to use” and “there are no easy pickings on the spectrum chart.”

Genachowski also for the first time announced his intention to act on a 2008 CTIA petition asking that the FCC establish a time limit on zoning decisions by local governments. According to Genachowski, he and the other FCC Commissioners believe that the issue “is ripe for action” and that they will “move forward with a shot-clock proposal designed to speed the [local zoning] process, while taking into account the legitimate concerns of local authorities.”

Applying new Net Neutrality requirements to wireless services also is high on Genachowski’s agenda, which has become highly controversial. The FCC made good on his promise by initiating a rulemaking proceeding at the FCC’s October 22 open meeting (see separate article in this addition of the Bulletin). Other key items on the FCC’s wireless agenda are to address roaming issues “in a broadband world” and to identify ways to accelerate build-out of high-capacity, middle-mile connections in both rural and urban areas.

CTIA Asks That 800 MHz of Spectrum Be Reallocated for Commercial Broadband Use

CTIA called on the federal government to reallocate at least 800 MHz of spectrum for commercial use within the next six years. Although many members of the wireless industry have urged the FCC and the National Telecommunications and Information Administration (“NTIA”) to inventory commercial and government spectrum and reallocate additional spectrum for wireless broadband use, there had been no consensus on how much spectrum actually is required to meet future demand.

According to CTIA, the United States has already allocated almost 410 MHz of spectrum for commercial use, with another 50 MHz potentially available in the future. This amount of spectrum, however, will not be sufficient to satisfy the needs created by mobile broadband services. CTIA noted that watching a video on YouTube on a wireless device used almost a hundred times the capacity of a wireless voice call. In contrast to the United States, many smaller countries are making significantly more spectrum available for broadband services.

New Technologies Allow for More Efficient Tower Monitoring

The FCC continues to waive certain tower lighting inspection requirements in the face of new technological developments. The FCC’s rules require owners of registered antenna structures with Part 17 lighting specifications to inspect quarterly “all automatic or mechanical control devices, indicators, and alarm systems associated with the antenna structure lighting.” However, new state-of-the-art technologies allow tower owners to monitor their systems remotely through robust self-diagnostic functions (e.g., alarm notifications, 24-hour polling).

Since May 2007, the FCC has granted waivers of the quarterly inspection requirement to seven tower companies that use remote monitoring systems. The most recent waiver was given in late September to Mobilite LLC. In the same order, the FCC denied a request by Flash Technology, an independent tower-light monitoring company that uses its Eagle Monitoring System to monitor antenna structures, which sought a waiver of the quarterly inspection requirement on behalf of its clients. Instead, the FCC established an expedited process for granting waivers to tower companies that use Flash Technology’s Eagle Monitoring System.

USF Support Payments to Be Made Electronically

All recipients of universal service support payments, including payments from the high-cost, low-income schools and libraries, and rural health care support mechanisms, will receive disbursements by means of electronic funds transfer. The FCC has submitted a revised FCC Form 498, on which recipients must provide their financial institution and other relevant information to facilitate the electronic payments, to the Office of Management and Budget (“OMB”) for approval. After OMB approval is obtained, the FCC will issue a subsequent public notice announcing the effective date of the electronic payment requirement. Failure to provide the universal service administrator with sufficient bank-routing information will result in non-payment.

FCC Considers Increasing USF Support for Incumbents Losing Access Lines

The FCC rejected a request for clarification filed by the Coalition for Equity in Switching Support, which asked the Commission to find that the FCC’s rules allow incumbent local exchange carrier (“ILEC”) eligible telecommunications carriers (“ETCs”) to increase their universal service local switching support (“LSS”) as the number of their access lines decreases. At the same time, however, the FCC initiated a rulemaking to consider modifying its regulations to address the effect of line loss on ILECs’ LSS amounts.

In rejecting the Coalition’s petition, the FCC concluded that neither its rules nor the record of FCC proceedings supported the conclusion that an ILEC ETC should be able to increase its LSS if its access lines decrease. The FCC concluded instead that public policy considerations support an amendment to the rules to allow ILEC ETCs to increase their LSS. Specifically, under the FCC’s proposal, ILEC ETCs that serve 50,000 or fewer lines in a study area that experience a decrease in access lines below particular thresholds would be able to alter the weighing factor with which they apportion their switching costs, thus allowing them to recover more LSS per access line.

The FCC cautioned that its analysis supporting the rule amendment “applies only to our current consideration of a relatively minor change to an existing rule, and [that] nothing herein is intended to reflect or prejudice our

consideration of LSS as part of any comprehensive universal service reform.” Republican Commissioners Robert McDowell and Meredith Baker offered concurring opinions. McDowell noted that “as a general principle, a Universal Service system should not reward companies for losing customers to competitors” but acknowledged rural companies’ hardship concerns. Baker observed that a comprehensive overhaul of the universal service mechanism is still long overdue.

Comments and reply comments will be due 14 and 21 days, respectively, after the notice of proposed rulemaking is published in the Federal Register.

October 2009 Legislative Developments in Brief

- **Senator Dorgan Mulls Net Neutrality Legislation:** Senator Dorgan (D-ND) and Senator Snowe (R-ME) are reportedly considering introduction of new Net Neutrality legislation. The two senators introduced S. 215, the Internet Freedom Preservation Act, in the last Congress, which prohibited broadband service providers from (1) blocking or degrading access to lawful content, applications, or service available on the Internet; (2) preventing the attachment of non-harmful devices; or (3) imposing charges for prioritizing content, applications, or services. The progress of any new legislation will be informed by the Net Neutrality rulemaking initiated October 22 by the Federal Communications Commission, discussed in this Bulletin.
- **Upcoming Legislation Could Eliminate Telco Retroactive Immunity for Warrantless Surveillance Program:** Senators Dodd (D-CT), Leahy (D-VT), Feingold (D-WIS), and Merkley (D-ORE) plan to introduce the Retroactive Immunity Repeal Act, a bill eliminating telecommunications service providers’ retroactive immunity from prosecution for compliance with wiretapping under the warrantless surveillance program initiated by then President George W. Bush. The new legislation, if enacted, will repeal immunity granted in August of this year pursuant to the FISA Amendments Act of 2008. According to Senator Dodd, granting retroactive immunity violates privacy rights, due process, and civil liberties of U.S. citizens. Eliminating immunity from prosecution will allow individual federal courts to decide whether a telecom carrier should be subject to sanctions for enabling unlawful wiretaps.
- **Senate Cellphone Jamming Bill Raises Department of Commerce Concerns:** In early August, the Senate Commerce Committee approved S. 251, the Safe Prisons Communications Act of 2009, a bill that would allow cellphone jamming equipment in federal prisons. Prisons would have to obtain waivers of the FCC’s rules that generally prohibit all use of such equipment. While the bill initially met with support from several state governors, the bill reportedly is facing new concerns raised by the Department of Commerce regarding the potential for interference to commercial wireless and public safety operations. Changes proposed to the draft legislation could make it more difficult for prisons to obtain FCC waivers to operate the jamming equipment, as well as require prisons to consider all available technological solutions to stop unauthorized use of mobile phones in prisons rather than jamming equipment alone.
- **Cellphone Texting Bans Gaining Support:** Senator Rockefeller (D-WV) plans to introduce legislation banning texting on wireless devices while driving. The Senate Commerce Committee has scheduled a hearing for October 28 to hear testimony on the need for such a measure, with Department Transportation Secretary Ray LaHood and FCC Chairman Julius Genachowski scheduled to appear. The House has already introduced H.R. 3535, a bill to withhold federal highway funds from states that do not pass texting-while-driving bans, and Senator Schumer (D-NY) introduced similar legislation in July. Both of these current bills would direct the Department of Transportation to withhold 25 % of allocated federal highway funds from states that fail to pass texting-while-driving bans within one year of the enactment date of the bill. Verizon Wireless came out in support of the ban, while CTIA has voiced support for state, but not federal, bans.
- **House Committee Approves Satellite Reauthorization Bill:** In mid-October, the House Commerce Committee approved H.R. 2994, a bill to reauthorize Direct Broadcast Satellite (“DBS”) providers to retransmit broadcast television stations and codify provision by Echostar’s Dish Network of local signals in 28 markets that do not currently receive them from any provider. This bill must now be reconciled with similar legislation, H.R. 3570.

Wireline Bureau Declines to Preempt Texas Commission Over Failure to Resolve VoIP Interconnection Issues

On October 9, the FCC's Wireline Competition Bureau ("Bureau") released an order denying a petition filed by UTEX Communications Corp. to preempt the jurisdiction of the Texas Public Utilities Commission ("PUC") over an interconnection dispute between UTEX and Southwestern Bell Telephone Co. d/b/a AT&T Texas. Section 252 of the Communications Act requires a state commission to arbitrate any open issues arising in an interconnection negotiation between an ILEC and a competitive carrier in response to a petition filed by either party to the negotiation. If the state commission "fails to carry out its responsibility" to resolve the issues raised in an arbitration petition within nine months after the ILEC received the interconnection request from the competitive carrier, the FCC must preempt the state commission's jurisdiction over the arbitration.

UTEX filed a petition in 2002 requesting the PUC to arbitrate interconnection terms between UTEX and AT&T Texas. The parties extended the arbitration schedule over the next few years, and in early 2006, the PUC requested the parties to identify any issues that involved voice-over-Internet Protocol ("VoIP") traffic. UTEX stated that the entire agreement involved VoIP. One of the disputed issues involved \$7.5 million in access charges assessed by AT&T Texas for VoIP traffic from UTEX terminating on the public switched telephone network. In response to UTEX's position, the PUC abated the arbitration proceeding pending an FCC decision resolving the regulatory classification of VoIP services. UTEX first challenged the PUC order abating the arbitration in federal district court, which dismissed UTEX's complaint in 2007 due to the absence of a final PUC determination or a PUC order declining jurisdiction.

UTEX filed its preemption petition at the FCC in July 2009, alleging that the PUC failed to carry out its responsibilities under Section 252 to resolve the arbitration issues. Parties commenting on the preemption request urged the FCC to clarify the issue by resolving long-pending intercarrier compensation and regulatory classification issues regarding the status of VoIP traffic. The Bureau denied the preemption request, however, concluding that the PUC "did act to complete its duties in a timely manner, but believed that it was unable to make a final determination" because the FCC has not resolved the regulatory classification of VoIP traffic and related intercarrier compensation obligations. The Bureau noted the PUC's position that it stands ready to complete the arbitration proceeding in the event that the preemption request is denied and the FCC makes clear that the lack of regulatory direction from the FCC is not an obstacle to the PUC's resolution of the arbitration.

The Bureau emphasized that the PUC "should not wait for [FCC] action to move forward" and stated that if the PUC fails to resolve the arbitration within nine months of the Bureau's order, the parties are invited to refile a request for preemption. Presumably, the PUC, and other state commissions addressing similar arbitration issues, may have to resolve VoIP classification issues in the course of arbitration proceedings in ways that are inconsistent with other states and with the treatment of VoIP ultimately adopted by the FCC. The resulting patchwork of inconsistent VoIP rules should increase the pressure on the FCC to resolve these issues.

Justice Department Approves AT&T Acquisition of Centennial

The Department of Justice ("DoJ") approved the purchase of Centennial Communications Corp. ("Centennial") by AT&T. The acquisition, which was approved by Centennial's stockholders in February of this year, is still awaiting approval by the FCC.

Centennial is a wireless carrier with about 1.1 million customers in six states, Puerto Rico, and the Virgin Islands. AT&T serves almost 80 million wireless subscribers nationwide.

DoJ's approval is contingent upon compliance with a consent decree that requires divestiture of Centennial assets in eight markets in Mississippi and Louisiana. AT&T already has agreed to sell Centennial assets in a number of the affected markets to Verizon Wireless.

FCC Launches NOI on Protecting Children and Empowering Parents with Respect to Digital Media

On October 23, the FCC released an NOI asking questions about how to serve and protect children and how to empower parents in today's new digital media landscape. The NOI acknowledges that electronic media offer educational opportunities, easy communications, and the opportunity to build the technological literacy necessary to compete in today's economy. But the NOI also flags potential harms to children, including exposure to exploitative advertising, inappropriate content, and cyberbullying.

The NOI accordingly asks to what extent children are using electronic media today, the benefits and risks of such use, and the ways in which parents and teachers can help reap the benefits while minimizing the risks. The NOI asks commenters to identify relevant data and studies and recommend new topics for study, and seeks comment regarding the effectiveness of media literacy programs. Finally, the NOI recognizes that other agencies are looking at similar issues (such as online safety) and asks what the FCC can do to assist these efforts. The Commission asks commenters to consider the full range of media platforms, including broadcast television and radio, multichannel video programming distributors, audio devices, video games, wireless devices, and the Internet.

Comments are due 60 days after publication in the Federal Register, and replies are due 90 days after publication in the Federal Register.

Traffic-Pumping Issues Receive Attention from the FCC and Congress

“Traffic pumping,” or activities that stimulate access traffic, thereby generating increased access charges, is the focus of a number of proceedings at the FCC and is receiving increased attention from Congress. Driving much of the activity is last month’s Iowa Utilities Board (“IUB”) decision in *Qwest Communications Corp. v. Superior Tel. Cooperative, et al.* (“*Qwest*”), finding that the defendant local exchange carriers (“LECs”) had assessed terminating intrastate access charges improperly on toll calls to free conference and other calling services (discussed in the August-September 2009 Bulletin). Two of the LEC defendants in *Qwest*, Great Lakes Communication Corp. (“Great Lakes”) and Superior Telephone Cooperative (“Superior”), continue to challenge the IUB decision at the FCC in their recent reply comments in support of their petition to preempt the IUB and a new emergency motion to stay the decision. *Qwest Communications Co., LLC*, the plaintiff in the IUB proceeding, and other large carriers have opposed the Great Lakes/Superior petition, arguing that the IUB properly ruled only on intrastate matters. Great Lakes and Superior have also sought rehearing by the IUB of its *Qwest* order and a stay of the order until the FCC rules on their preemption petition.

A related dispute being played out in various forums pits AT&T and other large carriers against Google and other Internet service providers (“ISPs”). In letters dated September 25 and October 14, AT&T complained to the FCC’s Wireline Competition Bureau (“Bureau”) that Google is engaging in impermissible “self-help” by blocking calls from customers using Google’s VoIP service, Google Voice, to telephone numbers in certain rural areas with high terminating access charges. AT&T charges that Google claims that its VoIP service is not a common-carrier service and thus is exempt from the prohibition against call blocking, thereby giving itself a competitive advantage over similarly situated telecommunications services. AT&T argues that Google’s conduct demonstrates that any Net Neutrality rules should apply to application, service, and content providers like Google, which are becoming massive Internet “gatekeepers,” to the same extent as network providers.

Google has responded that it blocks calls to numbers served by certain local carriers that charge exorbitant access fees and engage in traffic-pumping schemes with “adult” chat lines and free conference-calling services and that it could not continue to provide its Google Voice service as a free web application if it paid such “ludicrously high” access charges. AT&T has pointed out that Google blocks calls to a wide variety of legitimate end users. Another VoIP provider, Speakeasy, is reportedly following Google’s policy.

Other service providers have weighed in. Two small rural carriers, Northern Valley Communications and Sancom, claim that both AT&T and Google are engaging in impermissible self-help, and characterize AT&T’s refusal to pay access bills to small rural terminating carriers as similar to Google’s blocking of calls to parties served by such carriers. FreeConferenceCall takes a similar position and points out that long distance carriers complaining about rural local carriers’ access charges more than recoup those costs through their long distance charges. A FreeConferenceCall spokesman pointed to one AT&T bill for hundreds of dollars in long distance charges billed at \$0.30 per minute for calls to FreeConferenceCall.

On October 7, a bipartisan letter signed by 20 members of the House Commerce Committee from mainly rural districts requested FCC Chairman Julius Genachowski to investigate the “nature and function” of Google Voice and Google’s call-blocking practices. The lawmakers noted that Google Voice uses standard 10-digit telephone numbers and connects calls through the public switched network. They characterized Google’s position that its service is not a regulated common-carrier service as “ill conceived and unfair to our rural constituents” and argued that “[i]f Google is allowed to operate its telephone services outside of the rules by which all common carriers operate, we worry that the market and support for universal service will be undermined.” Google condemned the letter, stating that “[f]or AT&T to invoke rural America to seek common carriage regulation of online applications, while rural carriers say AT&T isn’t even paying its bills, is the height of cynicism.”

On October 9, Bureau Chief Sharon Gillett wrote to Google asking a series of questions about its call-blocking practices and requesting a response by October 28. Ms. Gillett explained that the inquiry stems from the Bureau's proceedings regarding traffic pumping as well as the FCC's interest in ensuring broadband networks that are "open, affordable, and accessible to all consumers." The letter asked about Google Voice's functions and requested Google's position as to the regulatory classification of Google Voice and what Google means when it says the service is "by invitation-only." It also asked why Google blocks calls and how Google determines which numbers to block. A Google spokesman charged that AT&T's complaints about Google's call blocking are "hypocritical," given that AT&T has requested permission to block calls to rural areas as well, and charged that AT&T is trying to use the regulatory process to "slow down innovation." One industry analyst noted that the Bureau letter is significant because it raises the issue of the scope of the FCC's authority in the context of the "the continued erosion of lines dividing regulated and unregulated services as the Internet ecosystem continues to multiply and divide."

On October 14, Democratic leaders of the House Commerce Committee – Chairman Henry Waxman (D-CA), Communications Subcommittee Chairman Rick Boucher (D-VA), and Oversight Subcommittee Chairman Bart Stupak (D-MI) -- sent letters to AT&T, Verizon, Qwest, and Sprint Nextel asking about access charge disputes and "abuses" of the access charge system, such as traffic pumping. The letters noted the recent request by 20 Committee members to the FCC to investigate Google Voice, and stated that "any investigation of this matter must also examine the existing access charge regime and purported abuses of that system." The lawmakers requested information about the level of termination charges, the amount of charges at issue in any pending disputes they have with rural carriers over access charges, and whether the carriers have withheld access payments. They requested the carriers to respond by October 27.

Upcoming Deadlines for Your Calendar

Note: Although we try to ensure that the dates listed below are accurate as of the day this edition goes to press, please be aware that these deadlines are subject to frequent change. If there is a proceeding in which you are particularly interested, we suggest that you confirm the applicable deadline. In addition, although we try to list deadlines and proceedings of general interest, the list below does not contain all proceedings in which you may be interested.

October 27, 2009	Auction 86 (Broadband Radio Service or "BRS") begins.
October 28, 2009	Reply comments due on Consumer Information and Disclosure NOI .
October 28, 2009	Comments due on cost estimates for connecting anchor institutions to fiber (NBP Public Notice #12).
October 28, 2009	Comments due on USF policy guidance requested by USAC .
November 1, 2009	Form 499Q (Telecom Reporting Worksheet) due.
November 2, 2009	Comments due on opportunities for disadvantaged businesses (NBP Public Notice #9).
November 4, 2009	Comments due on middle- and second-mile access on broadband (NBP Public Notice #11).
November 5, 2009	Reply comments due on Wireless Innovation and Investment NOI .
November 6, 2009	Comments due on contribution of federal, state, tribal, and local governments to broadband (NBP Public Notice #7).
November 9, 2009	Comments due on barriers to broadband on tribal lands (NBP Public Notice #5).
November 11, 2009	Reply comments due on Medical Body Area Network ("MBAN") NPRM .
November 12, 2009	Additional comments due on public safety, homeland security, and cybersecurity elements of national broadband plan (NBP Public Notice #8).
November 12, 2009	Reply comments due on USF policy guidance requested by USAC .
November 13, 2009	Reply comments due on spectrum for broadband (NBP Public Notice #6).
November 16, 2009	Comments due on broadband study conducted by Berkman Center for Internet and Society (NBP Public Notice #13).
November 16, 2009	Comments due on broadband clearinghouse (NBP Public Notice #10).