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New FCC Ruling Delays Default Bill-and-Keep Compensation Rule for Wireless Traffic; Modifies Universal Service Rules to Force Low Income ETCs to Seek Forbearance

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On Friday, Dec. 23, the FCC changed the rules governing universal service and intercarrier compensation that it had just issued on Nov. 18, 2011. We reported on the earlier order here and here. In a setback for wireless carriers, the FCC pushed out the effective date of "default" bill-and-keep compensation for wireless traffic from Dec. 29, 2011 to July 1, 2012. And the FCC tightened up the new definition of services supported by the universal service fund in a way that will require many carriers focusing on providing service to low income consumers both to seek additional regulatory approvals and (likely) to forgo "Link Up" funding presently used to support the costs of initiating service for a new customer.

Wireless Bill-and-Keep

The FCC's new intercarrier compensation regime includes a large number of different provisions intended to transition current compensation rules to a new unified bill-and-keep regime over a multi-year period, while also providing some relief to incumbent local exchange carriers (LECs) who today rely on high payments from other carriers terminating traffic on their networks. The amount that a carrier can recover via the new relief mechanism (called the "access recovery charge," or "ARC") is to be based in large part on how much intercarrier compensation revenue a carrier loses, starting as of July 1, 2012. But the FCC originally stated in its November 18 order that wireless carriers were entitled to a "default" bill-and-keep regime starting on Dec. 29, 2011.

Landline carriers that receive significant payments from wireless carriers objected, pointing out that revenue losses from Dec. 29, 2011 to June 30, 2012 would not be included in calculating the ARC. CTIA and several wireless providers responded that the financial impact of the new bill-and-keep regime would not be burdensome, and in any event the FCC should not delay implementation of the bill-and-keep rule for carriers without existing interconnection agreements. However, largely siding with the landline carriers, the FCC held that the new rules will not affect existing compensation agreements between landline carriers and wireless carriers until July 1, 2012. (If an existing agreement expires during that time, the new default bill-and-keep regime kicks in.) This preserves at least some payments from wireless to landline carriers until that date. The FCC explained that it expected carriers to use the six-month extension to renegotiate existing agreements to take account of the new (as of July 1, 2012) default bill-and-keep mechanism, and to address interconnection architecture-related issues associated with the change in compensation rules. For landline carriers that did not have agreements in place, no increase in payments from wireless carriers is permitted before July 1, 2012. So, if such carriers are not receiving compensation now, they cannot start charging for call termination; and if compensation is being paid now, that compensation may be maintained, but cannot increase.

This ruling is a victory for those landline carriers (mainly rural LECs) that have relied on intercarrier compensation for a substantial portion of their revenues, and a setback for wireless carriers for whom intercarrier payments to such LECs can, in the aggregate, be substantial.

Redefinition of supported services

The focus of the universal service reforms in the FCC's November 18 order was to shift support now provided by the High Cost program away from traditional landline voice service and towards broadband and mobile services. As part of that reform, the FCC modified its rules to characterize the basic supported service as "voice telephony," defined so as to be technology-neutral (in order to accommodate voice-over-IP using broadband networks and mobile services), while at the same time eliminating certain functions (notably directory assistance and operator assistance) from the list of essential capabilities of the supported service. The new definition, however, was ambiguous in a key respect: while the old definition had been an exhaustive list of functionalities that an eligible telecommunications carrier (ETC) must provide, the new definition simply stated that the supported service (voice telephony) "includes" certain functions (although, again, directory assistance and operator services were not on the list).

While the focus of the Nov. 18 order was on the ***High Cost*** program, this aspect of the order led to controversy with respect to the ***Low Income*** program. In order to be certified as an ETC and therefore qualified to receive funding, a carrier must provide the supported services and functionalities, at least in part, using "its own facilities." There is some controversy over the interpretation of that requirement, but in practical terms many ETCs that have focused on serving low income consumers have met that requirement by virtue of how they provide operator services and directory assistance. Despite language in the FCC's Nov. 18 order indicating that it was not intended to affect low-income-only ETCs, non-facilities-based ETCs (which operate under special regulatory approvals obtained from the FCC) argued that on the effective date of the new rules (Dec. 29, 2011), ETCs whose certification rested on their use of their own facilities to provide operator services and directory assistance should be deemed immediately decertified—and no longer entitled to any payments from the fund. ETCs that were "facilities based" under the old definition countered that, because the FCC chose to phrase the new rule in terms of a broad category (voice telephony) that "includes" certain functions, their designation as facilities-based ETCs should not be affected, either in states where they were already certified, or in new states, because the list of "included" functions was illustrative, not exclusive and exhaustive.

The FCC's Dec. 23 order at least temporarily resolves this controversy by (a) modifying the new definition of supported services to replace the ambiguous language with an exhaustive list of supported functionalities—still not including operator services and directory assistance—but (b) holding that the effective date of this new definition is July 1, 2012, giving existing ETCs time to either reconfigure their network arrangements to conform to the new rule or to seek FCC forbearance (i.e., a waiver) from the application of the newly-narrowed "own facilities" requirement.

Many aspects of this new resolution remain controversial. For example, the division of authority as between the FCC and individual state regulators for determining the meaning of the "own facilities" requirement is far from clear, so it is not entirely certain that the FCC may prevent a state from designating as an ETC a carrier that meets the state's reasonable interpretation of what the "own facilities" requirement means. Moreover, the FCC has a pending proceeding devoted specifically to issues involving the Low Income program, with a ruling expected within the next several months. It is not clear that the FCC followed proper administrative procedures by taking actions that so greatly affect Low-Income-focused ETCs in a proceeding devoted to High Cost and intercarrier compensation issues. And—probably most significant for Low Income-focused ETCs—the FCC has historically denied Link Up funding, which provides support for initial service activation fees, to carriers that obtain a waiver of the "own facilities" requirement, which means that carriers that today obtain Link Up funding on the strength of their directory assistance and operator services arrangements now may find such funding in jeopardy.

Davis Wright Tremaine lawyers are deeply involved in all of these ongoing issues, and we encourage clients with existing or pending ETC certifications, or with an interest in serving low-income consumers under federal universal service programs, to contact us to determine how best to proceed in light of the FCC's new ruling.