

FCC Issues Order In Response to *In re Core* Mandamus on ISP-bound Traffic

Seeks comment on overhaul of Intercarrier Compensation and High Cost Universal Service Fund

On Wednesday, November 5, the Federal Communications FCC (“FCC”) issued a multi-part item addressing intercarrier compensation for ISP-bound traffic and lengthy proposals concerning broad intercarrier compensation and universal service reform. The item was published in the Federal Register on November 12, 2008, announcing deadlines for comments.

Comments on the FCC’s proposals are due on November 26, 2008 and Reply Comments are due on December 3, 2008.

If you have any questions or would like to participate in this rulemaking proceeding, please contact [Mike Hazzard](mailto:mhazzard@wcsr.com) (mhazzard@wcsr.com; (202) 857-4540).

Intercarrier Compensation for ISP-bound Traffic

In response to the D.C. Circuit’s mandamus order in *In re Core*, the FCC held that all telecommunications traffic exchanged between local exchange carriers is subject to section 251(b)(5) and state FCC-set pricing under section 252(d)(2). ¶15.

The implications of this finding for ISP-bound traffic are unclear, as the FCC’s decision is subject to at least two competing interpretations.

First, and the more persuasive, the FCC concluded that ISP-bound traffic that transits a third-party network is subject to the FCC’s section 201 jurisdiction because a “gap” exists in the statute. ¶12. Section 252(d)(2) “does not address what happens when carriers exchange traffic that originates on a third carrier’s network.” *Id.*

Second, and contrary to the above, the FCC concluded that its generic rulemaking authority allows it to “regulate charges for traffic and services subject to the federal jurisdiction, even when it is within the sections 251(b)(5) and 252(d)(2) framework.” ¶21. This assertion of authority overwrites section 252(d)(2) on grounds that telecommunications to ISPs is “interstate.” *Id.* This finding conflicts with a number of FCC determinations, including finding that section 252(d)(2) applies to all section 251(b)(5) traffic.

These and other issues will likely get sorted out through appellate review of the FCC’s order.

Report and Order and Further Notice and Global Intercarrier Compensation Reform

The FCC separately declined to adopt recommendations of the Universal Service Joint Board for reform of the High Cost fund. The Joint Board had recommended six actions:

- (1) deliver high-cost support through a provider of last resort fund, a mobility fund, and a broadband fund;
- (2) cap the high-cost fund at \$4.5 billion, the approximate level of 2007 high-cost support;

- (3) reduce the existing funding mechanisms during a transition period;
- (4) add broadband and mobility to the list of services eligible for support under section 254 of the Act;
- (5) eliminate the identical support rule; and
- (6) “explore the most appropriate auction mechanisms to determine high-cost universal service support.”

Although the FCC declined to adopt these proposals as draft, they have largely been incorporated into draft items upon which the FCC is seeking comment.

Specifically, the FCC is seeking comment on three specific proposals. The first, attached as Appendix A, is the Chairman’s Draft Proposal circulated to the FCC on October 15, 2008, which was placed on the FCC’s agenda for a vote on November 4, 2008. This item subsequently was removed from the Agenda on November 3, 2008. The second, attached as Appendix B, is a Narrow Universal Service Reform Proposal circulated to the FCC on October 31, 2008. The third, attached as Appendix C, is a draft Alternative Proposal first circulated by the Chairman on the evening of November 5, 2008. Appendix C incorporates changes proposed in the *ex parte* presentations of parties representing rural, rate-of-retune carriers. Detailed summaries of each of these items are attached hereto as well.

The FCC is seeking comment on two particular questions. First, should the additional cost standard utilized under § 252(d)(2) of the Act: (i) continue to be the existing TELRIC standard; or (ii) a new, incremental cost standard? Second, should the terminating rate for all § 251(b)(5) traffic be set as: (i) a single, statewide rate; or (ii) a single rate per operating company?

Attachments

For those interested in additional detail on these items, the following attachments are provided:

- [FCC Jurisdictional Theory for ISP-bound Traffic](#)
- [Analytical summary of Appendix A and Appendix C](#)
- [Summary of Appendix C Modifications of Appendix A](#)
- [Analytical Summary of Appendix B](#)

Womble Carlyle client alerts are intended to provide general information about significant legal developments and should not be construed as legal advice regarding any specific facts and circumstances, nor should they be construed as advertisements for legal services.

IRS CIRCULAR 230 NOTICE: *To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this communication (or in any attachment) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed in this communication (or in any attachment).*