



## Regulatory Review

*The Miller Isar, Inc. Regulatory Review is a monthly report designed to provide clients with information regarding regulatory and policy matters that may impact their business operations. The Regulatory Review is provided for informational purposes only and does not constitute legal opinion or legal counsel.*

### FEDERAL NEWS



#### 4Q USF CONTRIBUTION FACTOR SET

On September 12, 2018, the Office of Managing Director issued a [Public Notice](#) announcing that the proposed fourth quarter universal service fund contribution factor will be 0.201 or 20.1 percent. The proposed contribution factor was based on projected collected interstate and international end user telecommunications revenues of \$12.4B in the fourth quarter. On August 31, 2018, the Universal Service Administrative Company submitted its [Universal Service Support Mechanisms Quarterly Contribution Base for Fourth Quarter 2018](#), reflecting a reduction in projected revenues from \$12.9B. The third quarter contribution factor is 17.9 percent. (Docket No 96-45)

#### COMMISSION SECOND FNPRM CONCLUSION WOULD PREEMPT MUNICIPAL BROADBAND REGULATION

On September 25, 2018, the Commission adopted its [Second Further Notice of Proposed Rulemaking](#), addressing challenges to Commission rules regarding local franchising authorities' (LFA) regulation of incumbent cable operators and cable television services. Both issues arose on remand from a U.S. Court of Appeals for the Sixth Circuit (Cincinnati, Ohio) case, *Montgomery County, MD, et al. v. FCC*, where the Sixth Circuit vacated the Commission's ruling that obligations under franchise agreements, should be considered in-kind payments that count against franchise fees as "arbitrary and capricious." The Court found that the Commission had failed to provide a detailed basis for its rules, but left open the opportunity for the Commission to substantiate its rules. In its Second FNPRM, the Commission proposes retaining its rule regarding treatment of "in kind" contributions required by a LFA franchise agreement. The Commission also tentatively concludes that it should apply its "mixed-use network ruling to incumbent cable operators, prohibiting LFAs from using their video franchise authority to regulate the provision of most non-cable services, such as broadband Internet access service, offered over a cable system by an incumbent cable operator. According to the Commission, it believes that adoption of its tentative conclusions will "promote competition by fostering parity between incumbents and new entrants and helping to ensure that local franchising requirements do not discourage cable operators from investing in new facilities. " The tentative conclusions have implications for other broadband providers in potentially preempting LFAs from imposing restrictive broadband deployment requirements on new entrants generally. Comments are due 30 days following publication in the *Federal Register*; Reply Comments are due 60 days following publication. (FCC 18-131)(MB Docket No. 05-311)

#### INFRASTRUCTURE DEPLOYMENT ORDER RECONSIDERATION PETITION RESPONSE DEADLINES ANNOUNCED

On September 10, 2018, the Commission's Wireline Competition Bureau issued [Public Notice](#), establishing uniform deadlines for filing oppositions and replies on the petitions for reconsideration of the Commission's [Report and Order and Declaratory Ruling](#) on wireline and wireless infrastructure deployment. Because filing deadlines for oppositions to petitions for reconsideration differ between rulemaking and non-rulemaking proceedings, the Bureau set uniform filing deadlines for oppositions to all petitions for reconsideration in the proceeding., to avoid confusion. Opposition to petitions filed by the [County Road Association of Michigan](#), the [Smart Communities and Special Districts Coalition](#) and the [City of New York](#).

are due 15 days after publication in the *Federal Register*. Reply comments are due 10 days after oppositions are due. (DA No. 18-932). (WC Docket No. 17-84)

## **5G ORDER APPROVED**

On September 27, 2018, the Commission released a [Declaratory Ruling and Third Report and Order](#) to promote next generation – 5G – network deployment, in its proceedings to accelerate wireless and wireline broadband deployment. In the Declaratory Ruling, the Commission cites to several court cases in finding that state and local fees, other charges, and additional requirements associated with wireless infrastructure “can unlawfully prohibit the provision of service.” The Report and Order adopts “shot clocks” for municipal review of wireless infrastructure deployment, and finds that a municipality’s failure to act on applications for Small Wireless Facilities deployments within a 60 day review period will be cause for the Commission to constitute a presumptive prohibition subject to Commission preemption. (FCC 18-133)(WT Docket No. 17-79 and WC Docket No. 17-84).

## **POLE ATTACHMENT RULES EFFECTIVE OCTOBER 15**

On September 14, 2018, the Commission issued a [Notice](#) in the *Federal Register* publishing the August 3, 2018 [Third Report and Order and Declaratory Ruling](#) in its proceedings to accelerate broadband deployment. The Order adopted, among other things, a one-touch make-ready (OTMR) policy for attaching telecom and cable facilities to utility poles. The policy applies in the 30 states that do not regulate pole attachments. Under the Commission’s OTMR, a new attacher will be authorized to perform all functions needed to attach facilities to poles, rather than relying on multiple entities to complete work. The Commission also adopted additional improvements to its pole attachment rules including provisions governing overlashing and relieving new attachers from responsibility of the costs of repairing preexisting violations of safety or other codes or utility construction standards discovered during the pole attachment process. Additionally, the Commission concluded that state and local moratoria on telecommunications services and facilities deployment are barred from Section 253(a) of the 1996 Telecommunications Act, as amended, because they prohibit the ability of entities to provide interstate and intrastate telecommunications services. And the Commission made clear that it will preempt state and local laws that inhibit the rebuilding or restoration of broadband infrastructure after a disaster on a case-by-case basis. The new rules are effective October 15, 2018, except for sections III.A–E of the order, which become effective on February 3, 2019, or 30 days after Office of Management and Budget approval, whichever comes later.

## **KARI’S LAW – RAY BAUM’S ACT 911 MTLTS RULES PROPOSED**

On September 26, 2018, the Commission released a [Notice of Proposed Rulemaking](#) (NPRM) proposing rules to implement the Kari’s Law Act and RAY BAUM’s Act. The Kari’s Law Act, enacted in February, is named after Kari Dunn, who was murdered by her estranged husband in 2013 in a Texas motel room as her daughter was unable to reach 911 because she didn’t dial “9” first. Under the Act, Multi-Line Telephone Systems (MLTS) must provide notification, such as to a front desk or security office, when a 911 call is made to facilitate building entry by first responders. Section 506 of the RAY BAUM’s Act requires the Commission to conclude a proceeding to consider rules that ensure that 911 calls transmit a dispatchable location, regardless of technological platform including calls placed from MLTS. The NPRM proposes to require that a dispatchable location be provided with 911 calls from MLTS and other platforms. The requirement would apply to wireline, wireless, voice over Internet protocol, and Internet Telecommunications Relay Service providers. The Commission also consolidates its existing 911 rules, incorporating the proposed rules once adopted. Commissioner O’Rielly, while supportive of the NPRM, expressed concern over how the requirements would work using IP technology. (FCC No. 18-132) (Docket No 18-261 17-239)

## **COMMISSION PROPOSES TOLL FREE NUMBER AUCTION**

On September 27, 2018, the Commission released a [Report and Order](#) implementing a trial to auction off toll free numbers. The trial will begin with deployment of the 833 NPA toll free number block. An auction will be established to assign more than 17,000 mutually exclusive numbers in the 833 NPA. Somos, Inc. is to serve as Toll Free Numbering Administrator and auctioneer and establish a pre-auction process and procedures following additional notice and public comment. Section 52.11 of the Commission’s rules is amended to allow an alternative assignment process, although currently available number assignment options are retained. Following the 833 NPA auction, the Wireline Competition Bureau will issue a report outlining the outcomes of the auction. The Commission will evaluate the results for consideration in adopting the auction process on a going forward basis. According to the Commission the trial is intended to “increase fairness” over the current

first-come, first-served number assignment process, noting that the current process “does not consider the need for, or the value of, particular numbers” and allows the current system to be gamed by entities having the fastest connectivity to toll free numbering databases. (FCC 18-137)(WC Docket 17-192 and CC Docket 95-155)

#### **FORMAL COMPLAINTS REPORT AND ORDER EFFECTIVE OCTOBER 4**

On September 4, 2018, the Commission [published](#) in the *Federal Register* a [Report and Order](#) creating a uniform set of procedural rules for formal complaint proceedings. The order streamlines and consolidates procedural rules governing formal complaints against common carriers, formal complaints regarding pole attachments and formal complaints concerning advanced communications services and equipment. Responsibility for formal complaint resolution is delegated to the Enforcement Bureau. Formal complaints had been processed by the Market Disputes Resolution Division and Telecommunications Consumers Division. The order is effective October 4, 2018.

#### **FCC FORM 498 PAPERWORK REDUCTION ACT COMMENTS DUE OCTOBER 5**

On September 5, 2018, the Commission issued a [Notice](#) in the *Federal Register* requesting Paperwork Reduction Act (PRA) comments regarding the proposed extension of a currently approved information collection associated with FCC Form 498 service provider and billed entity identification number and contact information. FCC Form 498 authorizes the Universal Service Administrative Company to collect service provider name and address, telephone number, federal employer identification number, contact names, contact telephone numbers and remittance information to make payments to participants in the universal service support mechanisms. PRA comments are due October 5, 2018.

#### **RESTORING INTERNET FREEDOM SMALL ENTITY COMPLIANCE GUIDE RELEASED**

On September 5, 2018, the Commission issued a [Small Entity Compliance Guide](#) intended to help small companies comply with amended rules adopted in the January 4, 2018 Restoring Internet Freedom [Order](#). The guide addresses changes to the rules, compliance requirements, and recordkeeping and reporting requirements.

#### **INTERMEDIATE PROVIDER DIRECTORY RULES EFFECTIVE OCTOBER 19 - PAPERWORK REDUCTION ACT COMMENTS DUE NOVEMBER 19**

On September 19, 2018, the Commission issued a [Notice](#) in the *Federal Register*, publishing the Commission’s August 15, 2018 [Rural Call Completion Order](#). The Order, among other things, adopted rules establishing an intermediate provider registry for as required under the [Improving Rural Call Quality and Reliability Act of 2017](#). An “Intermediate provider” is defined in new Section 64.2101 of the Commission’s rules as an entity that “enters into a business arrangement with a covered provider - also defined in the rule as an entity that selects the initial long distance route for a large number of lines - or other intermediate provider for the specific purpose of carrying, routing, or transmitting voice traffic that is generated ... from an end user connection using a North American Numbering Plan resource; or to an end user... and does not itself... serve as a covered provider in the context of originating or terminating a given call.” (*See August 2018 Regulatory Review*). The Order also requires Intermediate Providers to register with the Commission before offering to transmit covered voice communications; requires covered providers to use only registered intermediate providers to transmit covered voice communications; and requires covered providers to maintain the capability to disclose the identities of any intermediate providers relied on in the call path to the Commission. The adopted rules become effective on October 19, 2018 with the exception of Section 64.2115, which requires Office of Management and Budget approval.

On September 18, 2018, the Commission published a [Notice](#) in the *Federal Register* to request Paperwork Reduction Act (PRA) comments on new information to be collected under the Rural Call Completion Order pertaining to the intermediate provider registry. PRA comments are due November 19, 2018.

#### **WIRELINE COMPETITION BUREAU RELEASES FEE FILING GUIDE**

On September 4, 2018 the Wireline Competition Bureau issued a [fee filing guide](#). The guide serves as a reference, identifying and describing the fee filing requirements for Wireline Competition Bureau filings. Part A of the guide provides instructions on how to pay a fee and identifies other processing services available. Part B provides specific information pertaining to the Wireline Competition Bureau’s section 8 (application) fees.

## FCC FORM 477 DATA RELEASED

On September 10, 2018 the Wireline Competition and Wireless Telecommunications Bureaus issued a [Public Notice](#) announcing release of updated fixed broadband deployment and mobile voice and broadband deployment data as of June 30, 2017. The consolidated data is based on individual filer data reported on FCC Form 477 through June 14, 2018. Fixed deployment data are available at this [link](#). Mobile deployment data are available at this [link](#). (DA No. 18-918). (Docket No. 11-10)

## WIRELINE COMPETITION BUREAU UPDATES NATIONAL BROADBAND MAP

On September 10, 2018, the Commission's Wireline Competition Bureau issued a [Public Notice](#) announcing that its National Broadband Map has been updated. The Map now includes data collected from FCC Form 477 as of June 30, 2017. (DA No. 18-917). (Docket No. 11-10)

## IN THE COURTS

### EIGHTH CIRCUIT FINDS VOIP IS AN INFORMATION SERVICE

On September 7, 2018, the U.S. Court of Appeals for the Eighth Circuit (St. Louis) issued a [decision](#) affirming a District Court of Minnesota's ruling that Charter Advanced Services LLC's interconnected voice over Internet protocol (VoIP) "Spectrum Voice" service is an information service under the federal Telecommunications Act and that state regulation of the service is preempted. The Minnesota Public Utilities Commission maintained that Charter's VoIP service was subject to Commission jurisdiction under state law. Charter argued that VoIP services were jurisdictionally interstate and preempted from state regulation. In an *amicus curiae* brief filed with the Eighth Circuit the Federal Communications Commission argued that the Minnesota Commission had exceeded its authority and that its "sweeping assertion of regulatory authority over VoIP service threatens to disrupt the national voice services market and to address how relevant FCC orders provide more measured and appropriate mechanisms for regulating VoIP service." The Eighth Circuit agreed with the District Court's ruling that for Charter's VoIP calls, "because information enters Charter's network in one format (either IP or TDM, depending on who originated the call) and leaves in another, Charter's system offers net protocol conversion, which the FCC has defined as occurring when 'an end-user [can] send information into a network in one protocol and have it exit the network in a different protocol.'" According to the Eighth Circuit ruling, "We conclude that the VoIP technology used by Charter Spectrum is an 'information service' under the Act. As the district court put it, 'the touchstone of the information services inquiry is whether Spectrum Voice acts on the consumer's information - here a phone call - in such a way as to "transform" that information' ... IP-TDM [Internet protocol-time division multiplex] calls involve just such a transformation. For those calls, because information enters Charter's network 'in one format (either IP or TDM, depending on who originated the call) and leaves in another, its system offers "net" protocol conversion, which the FCC has defined as occurring when 'an end-user [can] send information into a network in one protocol and have it exit the network in a different protocol.'" Chairman Pai issued a [statement](#) saying the Eighth Circuit's decision is important for reaffirming the well-established principle that '[A]ny state regulation of an information service conflicts with the federal policy of non-regulation' and is therefore preempted. In his dissenting statement, Circuit Judge L. Steven Graszc said, "Because I do not believe net protocol conversions qualify as information services under the federal Communications Act, I would reverse the district court's conclusion that federal law preempts state regulation of Charter's Spectrum Voice service." adding "The Telecommunications Act of 1996, which amended the Communications Act, largely adopted the FCC's basic service and enhanced service categories in its definitions of telecommunications service and information service, respectively, with a very important change that is relevant here: it did not include protocol conversions in the definition of information service..." (*Charter Advanced Services (MN) LLC; Charter Advanced Services VIII (MN) LLC, v. Nancy Lange, in her official capacity as Chair of the Minnesota Public Utilities Commission, et al.* (case 17-2290))



### D.C. COURT ORDERS COMMISSION TO PROVIDE RESTORING INTERNET FREEDOM COMMENT EMAIL ADDRESSES

On September 13, 2018, U.S. District Court for the District of Columbia issued a [Memorandum Opinion](#) granting in part a motion for summary judgment in a [lawsuit](#) against the Federal Communications Commission that sought to compel the Commission to release data regarding potential fraudulent comments received in the Restoring Internet Freedom proceeding. The Court [ordered](#) the parties to meet, confer and file a joint status report on or before October 15, 2018, and include: a proposed briefing and document production schedule regarding constructive denial of the plaintiff's Freedom of Information

Act (FOIA) requests; the adequacy of the Commission's search for documents responsive to plaintiff's FOIA request for Application Programming Interface keys that allowed the public to comment on proposals without going through the Commission's Electronic Comment Filing System, and associated information; and the FCC's response to plaintiff's request for .CSV, comma-separated value files.

#### **OPENING BRIEFS FILED IN COMMISSION SERVICE DISCONTINUANCE ORDER APPEAL**

On September 26, 2018, the Greenlining Institute, Public Knowledge, The Utility Reform Network and NASUCA submitted an [opening brief](#) with the U.S. Court of Appeals for the Ninth Circuit in their [petition for review](#) of the Commission's November 2017 [Order and Declaratory Ruling](#) amending pole attachment rules, network change disclosure processes and section 214(a) service discontinuance processes. Petitioners argued that the Court should vacate the 2017 order and restore the [2015 order](#) with regard to the functional test, notice requirements and *de facto* retirements.

#### **STATE REGULATORY NEWS**



#### **CALIFORNIA – Net Neutrality Bill Enacted**

Governor Jerry Brown (D) has signed California's net neutrality bill into law. The new California Internet Consumer Protection and Net Neutrality Act of 2018, SB 822, is characterized as implementing "the strongest net neutrality protections in the country." The new law prohibits fixed and mobile Internet service providers, as defined, from "blocking lawful content, applications, services, or non-harmful devices, impairing or degrading lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, and specified practices relating to zero-rating." Fixed and mobile Internet service providers are prohibited from "offering or providing services other than broadband Internet access service that are delivered over the same last-mile connection as the broadband Internet access service, if those services have the purpose or effect of evading the above-described prohibitions or negatively affect the performance of broadband Internet access service." U.S. Representatives Anna G. Eshoo (D., CA) and Mike Thompson (D., CA) and eleven other Democratic House members from California had sent a letter to Governor Brown urging enactment of the law. FCC Chairman Ajit Pai while speaking at the Maine Heritage Policy Center in Portland about the California bill said the legislation "poses a risk to the rest of the country." U.S. Telecom, the industry group representing incumbent local exchange carriers, had opposed the measure, citing the need for a single national requirement. Revelations that Verizon had throttled data on firefighter networks while firefighters battled the State's wildfires in August, heightened concern over the need for the new law. According to Tom O'Connor, president of San Francisco Firefighters, said that public safety workers were especially concerned about net neutrality given the recent controversy in which Verizon Communications slowed down service to California firefighters as they fought one of the worst fires in the state's history.

#### **OREGON – Commission Sets Annual Regulatory Fees**

On September 26, 2018, the Public Utility Commission of Oregon issued an [Order](#) adopting Commission staff's recommendations to set 0.30 percent as the percentage rate for the annual PUC fees due from telecommunications providers for calendar year 2019. The fee is set at the maximum percentage authorized under Oregon law, ORS 756.310. A drop in the contribution base from 2017 was cited as the basis for increasing the fee. (UM940)

#### **COMPLIANCE REPORTING OCTOBER**

The following report listing has been compiled from past reporting requirements and is provided exclusively for informational purposes. Reporting requirements are subject to change and should be verified by filers.

#### **FEDERAL REPORTS DUE IN OCTOBER**

#### **FCC Form 499-Q due November 1.**

**The following articles are reprinted with the expressed consent of the author and CCMI. The author and CCMI have authorized reprinting of these and future articles by Mr. Regitsky as a regular *Regulatory Review* feature.**



**Eighth Circuit Opinion is a Severe Blow to Competition** By Andrew Regitsky I was flat out wrong! I thought the Eighth Circuit Court of Appeals would conclude that the FCC acted in an “arbitrary and capricious” manner when it used “potential competition” as a measurement to determine the competitiveness of a given market in its Order to deregulate ILEC DS1 and DS3 special access rates. Unfortunately, its Opinion, which largely denied the appeals of the FCC’s Business Data Services (BDS) Order has great implications for the future of telecom competition in too many areas.

**Eighth Circuit Court is a Pai’s Best Friend** By Andrew Regitsky For the second straight week the FCC and Chairman Ajit Pai are celebrating. The Eighth Circuit Court of Appeals has once again given the Commission an early Christmas present. Last week, it ratified the agency’s dubious competitive market test in the Business Data Services (BDS) Order although it is based on potential competition, a measure that has failed spectacularly in the past to constrain ILEC special access prices. Using that decision as a model, a similar competitive market test will almost certainly be used to eliminate ILEC unbundled network elements (UNEs) in most counties in the country.

**FCC Expected to Challenge Pending California Net Neutrality Law** By Andrew Regitsky A court battle may soon be looming between California and the FCC over the state’s proposed bill to restore net neutrality rules that were approved within the last month by the legislature but not yet signed into law by Governor Jerry Brown. The bill is all encompassing, forbidding Internet blocking, throttling and paid prioritization, but also banning popular services such as zero rating of some traffic as part of customer data caps.

**Did the Russians Help End Net Neutrality?** By Andrew Regitsky When it comes to self-promotion, this FCC is as good as any. For example, despite considerable evidence that rural customers have few, if any, choices in their broadband service, the Commission declared in February that thanks to its actions, such as eliminating Title II broadband regulation and deregulating ILEC special access services, broadband deployment was better than ever. Therefore, no one should be surprised when early in 2019, the Commission eliminates most ILEC unbundled network element requirements, viewing them as no longer necessary.

#### **LIGHT READING FROM CORPORATE COUNSEL DAILY UPDATE**

**[Is Your Website ADA Compliant and Should It Be?](#)** By Shepard Davidson When George H.W. Bush signed into law the Americans With Disabilities Act (ADA), which prohibits discrimination in “any... [Read More](#)

**[The Big Idea for Ethics and Compliance](#)** By Ryan McConnell and Stephanie Bustamante Compliance programs have to aim to help the business shake the world by helping shape the culture of the business. And... [Read More](#)

**[An American GDPR? Companies' Privacy Gurus Discuss Future Federal Data Law in DC](#)** By Caroline Spiezio Privacy experts from Google, Twitter, AT&T and other companies gathered on Capitol Hill today to talk about what a federal... [Read More](#)