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FEDERAL COMMUNICATIONS LAW COMPLIANCE OVERVIEW FOR 2015

January 2015

Baller Herbst Stokes & Lide, P.C. has prepared this document for providers of cable television, telecommunications, interconnected VoIP, Internet access, and other communications and information services. We have summarized below, by service, the main federal regulatory requirements that apply to such providers. At the end of the memorandum, we have provided a chart setting forth the deadlines for various filings and other time-sensitive activities.

Disclaimers

This memorandum is not intended to be exhaustive. It only addresses federal requirements that apply to communications or information service providers when acting as such, and not when acting in other capacities – e.g., as pole owners. It does not cover tax, environmental, corporate, employment, or other requirements of general applicability. It does not deal with state or local franchising, right-of-way, tower siting, and other requirements. It discusses the matters covered only as they existed on January 1, 2015, and only in sufficient detail to make readers aware of potential compliance issues and of the main considerations involved. Whether and how a particular requirement may apply will depend on a provider's particular circumstances.

We are providing this memorandum solely for general educational purposes. It is not intended to be legal advice and should not be treated or cited as such. For legal advice, please consult your own legal counsel or contact us.

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DISCUSSION

I. CABLE SERVICE

Providers of “cable service” over a “cable system,” as defined in the federal Communications Act and FCC rules, may be subject to the following requirements.¹

A. Cable Service – Reporting, Filing, and Other Requirements

1. Form 325 – Annual Cable Operator Report

- Cable systems serving 20,000 or more subscribers must file Form 325 – Annual Cable Operator Report. For cable systems serving fewer than 20,000 subscribers, the FCC selects a random sample who must file Form 325.
- Form 325 collects basic information on:
 - number of subscribers
 - number of potential subscribers
 - number of cable modem subscribers
 - equipment information (leased cable modems and set-top boxes)
 - plant information (type of system, length of coaxial/fiber optic plant, etc.
 - frequency and signal distribution information
 - video channel capacity
 - channel lineup
 - See 47 CFR § 76.403
- Deadlines:
 - If the operator has 20,000 or more subscribers, the deadline is the end of the calendar year.

¹ A “cable service” is defined in Section 602(6) of the Communications Act, 47 U.S.C. § 522(6), as: “((A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.” Section 602(7) of the Act, 47 U.S.C. §522(7), defines a “cable system” as “a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include [various specified exceptions].”

- If the operator has less than 20,000 subscribers “within 60 days after the Commission notifies the operator that the form is due.” According to the FCC Media Bureau, the Commission sends out notification letters to affected cable operators near the end of the calendar year. Form 325 may only be submitted electronically, via COALS <https://apps.fcc.gov/coals/>

2. Form 396-C: MVPD EEO Program Annual Report

- Cable operators with six or more full-time employees must complete the brief [Form 396-C](#), affirming their compliance with the FCC’s EEO program, 47 CFR 76.71, *et seq.* Form 396-C must be filed electronically.
- Deadline: **September 30, 2015.**

3. Performance Testing

- Under 47 CFR § 76.601, each cable system with more than 1,000 subscribers must conduct complete technical performance tests at least twice each calendar year, to determine the extent to which the system complies with technical standards set forth in § 76.605(a).
- No form submission is required, but affected cable operators must maintain proof-of-performance testing records in the public file.
- All-digital systems may not need to conduct performance testing described above. In 2009, the FCC granted RCN a complete waiver from performance testing requirements for its all-digital systems, finding that the technical standards set forth in § 76.605 are designed to test analog systems, and have little relevance for digital systems.² While the FCC has *not* issued a blanket waiver relieving every all-digital system from compliance, in August 2012 the Commission initiated a rulemaking³ to modernize its technical standards as they apply to digital cable systems, but as of yet has not followed through with the adoption of any rules pertaining to performance testing for digital systems.

² *In the Matter of RCN Corporation Petition for Special Relief*, CSR-8166, Order, DA 09-2260 rel. October 9, 2009.

³ *In the Matter of Cable Television Technical and Operational Requirements*, MB Docket No. 12-217, Notice of Proposed Rulemaking, FCC 12-86, rel. August 3, 2012.

4. Signal Leakage and Aeronautical Frequency Monitoring

- Cable systems operating in frequency bands 108-137 and 225-400 MHz must perform certain signal leakage tests, as set forth in 47 CFR § 76.1803 and § 76.614.
- Affected providers must file Form 320 – “Basic Signal Leakage Performance Report - on an annual basis, “at least once each calendar year, with no more than 12 months between successive tests thereafter” (§76.611). Form 320 must be filed electronically via COALS <https://apps.fcc.gov/coals/>.
- In the event a cable system signal leakage impacts certain aeronautical frequencies, cable systems must also file Form 321, Aeronautical Frequency Notification.

5. Annual FCC Regulatory User Fees

- Pursuant to 47 C.F.R. § 1.1155, cable operators operating on October 1, 2014 must pay an annual regulatory fee in 2015 on a per-subscriber basis, based on the number of basic cable subscribers served on December 31, 2014. The regulatory fee applicable to fiscal year 2014 was set at \$0.99 per subscriber, based on the number of basic cable subscribers served on December 31, 2013. If the Commission remains consistent with past practice, it will issue a fact sheet in early 2015 addressing what providers owe for fiscal year 2014, and when the fee is due. Regulatory fees are typically due in late August or September. In 2014, the regulatory fee was due September 23, 2014.
- Government entities⁴ and non-profit entities⁵ that are exempt from taxation under section 501(c) of the IRS Code are exempt from regulatory fees and need not submit payment. See 47 CFR § 1.1162.

⁴ “For purposes of this exemption, a government entity is defined as any state, possession, city, county, town, village, municipal corporation, or similar political organization or subpart thereof controlled by publicly elected or duly appointed public officials exercising sovereign direction and control over their respective communities or programs.” 47 CFR § 1.1162(b).

⁵ See 47 CFR § 1.1162(c). Such non-profit entities must provide proof of status to the Commission within “60 days of its coming under the regulatory jurisdiction of the Commission or at the time its fee payment would otherwise be due, whichever is sooner.”

- Entities must file any annual regulatory fee obligation using the Commission’s Fee Filer system, with Form 159-E. Use of the Fee Filer system is mandatory, and payments in the form of checks, money orders, and cashier’s checks are no longer accepted.
- Licensees of CARS (Cable Television Relay Service) facilities must pay a regulatory fee.⁶ For fiscal year 2014, entities that held a CARS license on October 1, 2013 were required to pay \$605 per license. In cases where the license or permit was transferred or assigned after October 1, 2013, the holder of the license or permit at the time of the fee due date will be responsible for payment.
- *De minimis* exception: Regulated entities whose total regulatory fee liability amounts to less than \$10 are exempt from payment of regulatory fees.
- Further information, including methods of payment, etc., available at <http://www.fcc.gov/regfees>

6. Copyright Statutory Royalty Fee

- Under federal law, cable operators are required to pay a statutory royalty fee for retransmitting television and radio broadcasts. 17 U.S.C. § 111. On a semi-annual basis, operators must file Statements of Account with the Licensing Division of the U.S. Copyright Office, reflecting accounting periods of January 1-June 30, and July 1-December 31.
- Notably, under the federal rules certain providers may qualify as “cable systems” for copyright purposes, even if there may be some question about whether the system would be a “cable system” for other purposes under federal law. *See* 37 CFR § 201.17(b)(2).⁷

⁶ *See* 47 CFR § 1.1155 Schedule of regulatory fees and filing locations for cable television services.

⁷ “A cable system is a facility, located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service. A system that meets this definition is considered a “cable system” for copyright purposes, even if the FCC excludes it from being considered a “cable system” because of the number or nature of its subscribers or the nature of its secondary transmissions....” 37 CFR § 201(b).

- Cable systems whose semiannual gross receipts are less than \$527,600 are to complete the [SA1-2 Short Form](#).⁸
- Cable systems with semiannual gross receipts exceeding \$527,600 must use the [SA3 Long Form](#).⁹
- **Deadlines:** Cable systems are given 60 days after the close of each accounting period in which to file statements of account and royalty fees. Accordingly, for the July – December 2014 accounting period, file between January 1 and March 1, 2015. For the January – June 2015 accounting period, file between July 1 and August 29, 2015.

7. Review and Update Public File

- Under the FCC’s “public file” requirement, certain records must be maintained and made available for inspection by cable systems (47 CFR §§ 76.1700 – 1717). We recommend that cable operators periodically review their compliance with FCC public file requirements. Information required to be kept in the public file may include:
 - Political file
 - Equal employment opportunity
 - Commercial records on children’s programming
 - Proof-of-performance test data
 - Performance tests
 - Signal leakage logs and repair records
 - Leased access
 - Principal headend
 - Availability of signals
 - Operator interests in video programming
 - EAS tests and activation
 - Complaint resolution
 - FCC rules and regulations
 - Sponsorship identification
 - Compliance with technical standards
- Different requirements based on the number of subscribers:

⁸ <http://www.copyright.gov/forms/SA1-2c-2011.pdf>

⁹ <http://www.copyright.gov/forms/SA3c-2011.pdf>

- < 1,000: exempt from public inspection requirements pertaining to the political file, sponsorship identification, EEO records, children's programming, proof-of-performance test data, and signal leakage.
- 1,000 – 4,999: sets of records outlined above for <1,000 must be provided upon request, but need not be maintained for public inspection.
- >5,000: must maintain such records in a public inspection file.

8. Annual Privacy Notice

- Section 631 of the Communications Act of 1934, as amended (codified at 47 U.S.C. § 551), regulates the disclosure of the personally identifiable information collected by cable operators. Under the provisions, cable companies are required to provide notice to their customers regarding what personally identifiable information is collected, if it is disclosed, how long the information is stored, etc. In addition, cable operators are prohibited from collecting or disclosing personally identifiable information without the subscriber's written or electronic consent, and must take steps to prevent unauthorized disclosure of personally identifiable information.
- Cable operators must provide the privacy notice to subscribers "at the time of entering into an agreement to provide any cable service or other service to a subscriber and at least once a year thereafter..." 47 U.S.C. § 551(a)(1).
- Some debate has emerged over whether Section 631 applies to Internet services provided by cable operators. Section 631 governs "cable service and other services;" however, it is unclear what is included by the term "other services." Section 631(a)(2)(B) defines "other services" as "any wire or radio communications service provided using any of the facilities of a cable operator that are used in the provision of cable service." Whether the term "other services" was meant to include Internet services or only apply to other cable services remains unresolved.

9. Commercial Leased Access

- Section 612 of the Communications Act of 1934, as amended, and as codified at 47 U.S.C. § 532, requires a cable operator to set aside channel capacity for commercial use by unaffiliated video programmers.
- The FCC has adopted extensive rules governing commercial leased access, which are codified at 47 C.F.R. §§ 76.970 through 76.977. In 2008, the Commission issued a *Report and Order* that would have imposed far more demanding requirements on cable operators and would have lowered significantly the rates that they could charge for commercial leased access. *In the Matter of Leased Commercial Access, Report and Order and Further Notice of Proposed Rulemaking*, 23 FCC Rcd 2909 (2008). The U.S. Court

of Appeals for the Sixth Circuit stayed the effect of the *Report and Order*, leaving the regulations contained in the October 2007 Edition of the Code of Federal Regulations as presently controlling.

- The Communications Act and the FCC's current regulations establish leased access set-aside requirements that are based on a cable system's total activated channel capacity. Cable operators with 36 to 54 activated channels must set aside 10 percent of those channels not otherwise required for use, or prohibited from use, by federal law or regulation for leased access. Operators with 55 to 100 activated channels must set aside 15 percent of those channels not otherwise required for use, or prohibited from use, by federal law or regulation. Cable operators with more than 100 activated channels must designate 15 percent of such channels for commercial use.
- In accordance with the statute, cable operators may continue to employ any unused channel capacity designated for leased access until an unaffiliated programmer actually obtains use of the channel capacity pursuant to a written agreement. 47 U.S.C. § 532(b)(4). Moreover, cable operators may use up to 33 percent of the channel capacity designated for leased access for qualified minority or educational programming sources, whether or not the source is affiliated with the cable operator.¹⁰
- Under the FCC's current rules, cable operators are required to provide prospective leased access programmers the following information on receipt of a bona-fide request for leased access capacity:
 - A statement of how much of the operator's leased access set-aside capacity is available;
 - A complete schedule of the operator's full-time and part-time leased access rates;
 - Rates associated with technical and studio costs; and
 - If specifically requested, a sample leased access contract.¹¹
- If a cable operator has less than 15,000 subscribers, it must provide the above information within 30 calendar days of the date which a bona fide request for leased access is made. If the cable operator has more than 15,000 subscribers, it must provide the above information within 15 days of the request for leased access.

¹⁰ 47 C.F.R. § 76.977.

¹¹ 47 C.F.R. § 76.970(i)(1).

10. Closed Captioning

- All video programming distributors (VPDs) (cable operators, broadcasters, satellite distributors, and other multi-channel video programming distributors) are required to close caption their television programs.¹² On February 20, 2014, the FCC adopted a Report and Order containing new rules for TV closed captioning.¹³ The rules go into effect January 15, 2015, and apply to all television programming with captioning. The rules address quality standards for accuracy, synchronicity (timing), program completeness, and placement of closed captions. The rules distinguish between pre-recorded, live, and near-live programming recognizing the difficulties involved with captioning live or near-live programming. The Order also contains measures to promote greater access to news programming for individuals who are deaf and hard of hearing.
- The FCC has also established different closed captioning schedules applicable to English language and Spanish language programming.
 - English Language Programming
 - As of January 1, 2006, all “new” English language programming, defined as analog programming first published or exhibited on or after January 1, 1998, and digital programming first aired on or after July 1, 2002, must be captioned, with some exceptions.¹⁴
 - As of January 1, 2008, and thereafter, 75% of the programming distributor's pre-rule nonexempt video programming being distributed and exhibited on each channel during each calendar quarter must be provided with closed captioning.¹⁵

¹² 47 C.F.R. § 79.1 *et seq.*

¹³ *See Closed Captioning of Video Programming; Telecommunications for the Deaf and Hard of Hearing, Inc.*, CG Docket 05-231, Report and Order, Notice of Declaratory Ruling, and Further Notice of Proposed Rulemaking (February 20, 2014), available at: <http://www.fcc.gov/document/closed-captioning-quality-report-and-order-declaratory-ruling-fnprm>

¹⁴ 47 C.F.R. § 79.1(b)(1)(iv).

¹⁵ 47 C.F.R. § 79.1(b)(2)(ii).

- Spanish Language Programming
 - As of January 1, 2010, all “new” Spanish language must be captioned, with some exceptions.¹⁶
 - For “pre-rule” Spanish language programming, the following schedule applies:
 - January 1, 2005, to December 31, 2011: 30 percent of programming per channel per quarter.
 - January 1, 2012, and thereafter: 75 percent of programming per channel per quarter.¹⁷

▪ Exempt Programming

- Self-Implementing Exemptions¹⁸

Self-implementing exemptions operate automatically and programmers do not need to petition the FCC. Examples include public service announcements that are shorter than 10 minutes and are not paid for with federal dollars, programming shown in the early morning hours (from 2 a.m. to 6 a.m. local time), and programming that is primarily textual in nature. There is also an exemption for non-news programming with no repeat value that is locally produced by the video programming distributor (VPD). To see a complete list of self-implementing exemptions, visit the FCC’s Web site at: <http://fcc.us/fvNL26>.

- Exemptions Based on Undue Burden¹⁹

The FCC has established procedures for petitioning for an exemption from the closed captioning rules when compliance would pose an undue burden on a cable operator. A petition must include facts demonstrating that implementing closed captioning would impose an undue burden, which is defined as a significant difficulty or expense. To find out more about the undue burden exemption, see the FCC’s website at: <http://fcc.us/fRkmQy>

¹⁶ 47 C.F.R. § 79.1(b)(3)(iv).

¹⁷ 47 C.F.R. § 79.1(b)(4)(ii).

¹⁸ 47 C.F.R. § 79.1(d).

¹⁹ 47 C.F.R. § 79.1(f).

There is no form to fill out. Electronic filing and faxes will not be accepted. A summary of the petition process is provided at the FCC Web site address above. While a petition is pending, the programming that is the subject of the petition is exempt from the closed captioning requirements.

- Compliance and Complaints

Cable operators are required to provide a telephone number, fax number, and e-mail address for the receipt and handling of immediate closed captioning concerns raised by consumers while they are watching a program. Operators must also include this information on their Web sites. In situations where a cable operator is not immediately available, any calls or inquiries received, using this dedicated contact information, should be returned or otherwise addressed within 24 hours. In those situations where the captioning problem does not reside with the distributor, the staff person receiving the inquiry should refer the matter appropriately for resolution.

In addition, cable operator are required make contact information available for the receipt and handling of written closed captioning complaints. The contact information required for written complaints shall include the name of a person with primary responsibility for captioning issues and who can ensure compliance with our rules. In addition, this contact information shall include the person's title or office, telephone number, fax number, postal mailing address, and e-mail address. Cable operators are required to provide this information on their billing statements and on their website.

Further, all cable operators are required to provide the Commission their contact information for immediate and written closed captioning concerns.²⁰ Failure to provide such information could result in enforcement action. Section 79.1(i)(3) offers three methods by which VPDs may submit the requisite contact information. The preferred method for submission is through a web form on the Commission's closed captioning webpage: <https://esupport.fcc.gov/vpd-data/login!input.action>.

The FCC rules establish specific time limits for cable subscribers to file closed captioning complaints. The complaint must be filed within 60 days of the captioning problem. After receiving a complaint, a cable operator will have 30 days to respond to the complaint.

²⁰ See *Closed Captioning of Video Programming; Closed Captioning Requirements for Digital Television Receivers*, CG Docket No. 05-231, ET Docket No. 99-254, Declaratory Ruling, Order, and Notice of Proposed Rulemaking, 23 FCC Rcd 16674 (rel. Nov. 7, 2008) (*November 2008 Order*). Notice of the effective date of the new rule was published in the Federal Register on February 19, 2010, 75 FR 7370.

11. Special Requirements for New Cable Operators

- In addition to the reporting, filing, and other obligations outlined above, new providers of cable, service may be required to submit a variety of information to the FCC prior to, or shortly after, commencing service. This is in addition to local or state franchise requirements, if any, and other regulatory requirements (e.g., notifying local broadcasters, etc.). FCC filing requirements for new operators include:
- Obtaining FCC Registration Number (FRN). All entities that wish to do business with the FCC must first obtain an FRN, which can be obtained online at: <https://apps.fcc.gov/coresWeb/publicHome.do>.
- Community Registration. Before commencing operation, a cable system operator must file Form 322 Cable Community Registration for each community to be served.²¹ Registration is accomplished online through the FCC’s Cable Operations and Licensing System (“COALS”).
- If applicable, filing a form to establish a New Cable Television Relay Station (“CARS”) (FCC Form 327).

B. CALM Act

The [Commercial Advertisement Loudness Mitigation \(CALM\) Act](#) went into effect on December 13, 2012, making mandatory the Advanced Television Systems Committee A/85 Recommended Practice (“ATSC A/85 RP”), which describes how the TV industry can monitor and control the audio of digital TV programming.

Under the rules as they apply to cable operators, the FCC makes cable operators responsible for the volume of both national and local ads, and TV stations will also be responsible for the national network and syndicated ads on both broadcast and on the signals they deliver to cable operators. In other words, if a cable operator delivers an embedded TV station ad that violates the act, it is the broadcaster who will be responsible. If the cable operator inserts a local commercial, the operator must install and use the equipment and software necessary to comply with ATSC A/85. If a local commercial is inserted by a third party, a cable operator can show compliance with ATSC A/85 by relying on a certification by the third party. In addition, a cable operator can comply with ATSC A/85 by using a real-time audio processor, which limits the dynamic range of all content.

While cable operators are generally not responsible for ensuring that embedded commercials are compliant and smaller systems need not perform spot checks, cable operators must have in place *“the equipment necessary to pass through programming compliant with the RP, and be able to demonstrate that the equipment has been properly*

²¹ 47 C.F.R § [76.1801](#)

installed, maintained, and utilized.” Moreover, in the context of an enforcement inquiry, the cable operator “*must be prepared to certify to the Commission that [its] own transmission equipment is not at fault for any such pattern or trend*” of Complaints.

II. “TELECOMMUNICATIONS” AND “TELECOMMUNICATIONS SERVICE”

This section outlines the main filing, reporting, and other requirements applicable to providers of “telecommunications”²² and to providers of “telecommunications service.”²³ In our experience, distinguishing between “telecommunications” and “telecommunications service” is crucially important. That is so because Congress treated the term “telecommunications service” as the linchpin of the Telecommunications Act – that is, as the vehicle through which Congress allocated a wide range of regulatory obligations and incentives among persons subject to the Act.

For example, the Act requires providers of “telecommunications service” to interconnect their facilities with those of other providers of telecommunications service and to refrain from engaging in activities that may harm disabled Americans (Section 251); to file annual reports and make contributions to various federal universal service support mechanisms (Section 254); to take various steps to protect consumer privacy (Section 222); to comply with the Communications Assistance to Law Enforcement Act of 1994; etc. At the same time, providers of “telecommunications service” are entitled to interconnection, collocation, pole attachment, E911, and certain wholesale benefits (Section 251); to protection from state and local barriers to entry (Section 253); to universal service subsidies of various kinds (Section 254). Providers of private “telecommunications” are not subject to most of these obligations or incentives.

Unfortunately, it is not always easy to distinguish between “telecommunications” and “telecommunications service” in particular circumstances. Accordingly, before discussing the compliance requirements of providers of “telecommunications” and “telecommunications service”

²² The Communications Act defines “telecommunications” as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(43).

²³ The Communications Act defines “telecommunications service” as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” 47 U.S.C. § 153(46). A “telecommunications carrier” is defined as “any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.” 47 U.S.C. § 153(44).

in detail, we provide below a brief overview of some key points to consider in determining whether a service is properly characterized as “telecommunications” or “telecommunications service.”

A. Private Carriage (“Telecommunications”) vs. Common Carriage (“Telecommunications Service”)

As the FCC and the courts have often held, Congress intended that the term “telecommunications service,” as used throughout the Communications Act, would apply only to “common carriers” of “telecommunications” – i.e., to entities that hold themselves out as being willing to transmit the information of all potential customers indifferently, on the same terms and conditions.²⁴ In contrast, “private carriers” of “telecommunications” are entities that negotiate carriage agreements individually on a case-by-case basis.²⁵

A comprehensive discussion of the differences between common and private carriage is beyond the scope of this memo. Indeed, it is virtually impossible to make categorical statements without reviewing particular situations in detail, as it is often necessary to evaluate complex facts that point in different directions. In general, however, the outcome will require weighing various factors, including, but not limited to, the following considerations:

- Whether contract terms are offered indiscriminately, or on a case-by-case basis;
- Whether the provider is using excess capacity, as distinguished from capacity developed to support the particular business in question;
- Whether, to what extent, and how the provider markets its services;
- Whether the provider serves a large number of transient customers, as distinguished from a small and stable number of customers;
- Whether the provider has a screening process that can result in rejection of potential customers for various reasons;
- Whether the service is regulated or certified by the state (i.e., CLEC certification);
- Whether the provider has sought to obtain regulatory, commercial, or other benefits that are available to common carriers.

²⁴ See, e.g. *In the Matter of Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 ¶ 785 (1997), citing the Joint Explanatory Statement of the Conference Committee, S. Rep. No. 104-230, 104th Cong., 2d Sess. 115 (1996) and *National Association of Regulatory Utility Commissioners v. FCC*, 553 F.2d 601, 608 (D.C. Cir. 1976).

²⁵ *Id.*

As discussed in the following section, the determination is especially important for purposes of compliance with the federal Universal Service Program (USP).

B. Federal Registration Requirement

There is no federal requirement to obtain prior authorization or certification to provide domestic telecommunications services. All domestic interstate telecommunications service providers must, however, register with the FCC within one week of providing service. Registration is accomplished by filing with the Universal Service Administrative Company a signed copy of FCC Form 499-A, with completed pages 1,2, 3 and 8.²⁶ Among other things, the form requires a carrier to provide an agent for service of process in the District of Columbia and requires the carrier to furnish a list of states where the carrier provides or intends to provide service.

C. Federal Universal Service Program

The federal Universal Service Program (USP) is highly complex and, in many ways, counterintuitive. Many of its requirements are widely misunderstood. In general, providers of “interstate” and “international” “telecommunications,” “telecommunications service,” or “Voice over Internet Protocol” service that enables calls to and from the Public Switched Telephone Network (“Interconnected VoIP”), must pay into the Universal Services Fund (USF) a certain percentage of their “end-user revenues” on sales of these services. Each calendar quarter, the FCC announces the relevant percentage for that quarter, which generally ranges from 12% - 17%. For the first quarter of 2015, the proposed percentage is 16.8%.

In August 2014, the FCC requested that the Federal-State Joint Board on Universal Service (Joint Board) provide recommendations on how the Commission should modify the universal service contribution methodology.²⁷ The FCC recognized that the “the contribution system has become increasingly complex and difficult to administer” and, therefore, sought recommendations for improving the current system. The Joint Board’s recommendations are expected to be presented no later than April 7, 2015.

²⁶ Form 499 is discussed in greater detail below in II.B.

²⁷ *See In the Matter of Federal State Joint Board on Universal Service; Universal Service Contribution Methodology; A National Broadband Plan For Our Future*, WC Docket No. 96-45, WC Docket No. 06-122, GN Docket No. 09-51, *Order*, August 7, 2014, available at: https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-116A1.pdf.

1. Key Principles

In this section, we highlight a few of the key features of, and important exceptions to, the federal USP, in particular as it applies to providers of “telecommunications” and “telecommunications service.”

- **“Interstate.”** The physical location of the line is not determinative. If the terminating points of the line are located in different states, if the line provides a connection to the Internet or an interexchange carrier, or if more than 10% of the traffic transmitted over the line is interstate in nature (whether or not originating with the provider), the line itself likely will be deemed “interstate.” While at first glance this would appear to be a simple determination, it has proven to be quite controversial in practice, and the FCC has before it several proceedings relating to providers’ burdens and presumptions concerning the “10 percent rule.” Clarification may be forthcoming in 2015.
- **“End-user revenues.”** Ordinarily, one thinks of an “end-user” as the last purchaser in a chain of distribution – typically a retail customer. Under the federal USP, however, “end-user” has a special meaning – it also includes purchasers of covered “telecommunications,” “telecommunications services,” or “interconnected VoIP” that do not make payments into the USF. For example, if a carrier sells telecommunications services to an Internet Service Provider (ISP) that combines them with information services and sells the combined service at retail as Internet access service, the retail Internet access service is exempt from USF obligations, so the USP treats the ISP as the carrier’s “end-user” and requires the carrier to make payments into the USF on its gross revenues from its sales to the ISP.²⁸ In contrast, if the carrier sells telecommunications service on a wholesale basis to another telecommunications provider that itself contributes to the USF, the carrier’s wholesale revenues from such sales will not count as “end-user revenues.” The wholesaler must, however, annually obtain and retain certain information from its customers, as prescribed by the FCC.

²⁸

Note that the FCC treats revenues earned by common carriers on sales of the transmission component of wireline broadband Internet access service as assessable under the USP. In contrast, the FCC treats revenues earned by private carriers on sales of the same services as non-assessable. “Line 406 includes all revenue from broadband service (including the transmission component of wireline broadband Internet access service) provided on a common carrier basis. Revenues for the provision of wireline broadband Internet access transmission on a non-common-carrier basis should be reported [as non-assessable] on Line 418.” Instructions to Form 499-A (2014), at 17.

- **De minimis exception.**²⁹ Sellers of “telecommunications” are exempt from USP reporting and contribution obligations if their projected annual end-user revenues, multiplied by the FCC’s contribution factor, would result in a contribution obligation of less than the *de minimis* threshold of \$10,000. For example, if a provider of “telecommunications” anticipates sales of \$62,000 in the forthcoming year and the FCC’s current estimation factor was 16.1 percent, its USP contribution obligation would be \$9,982. Because that is below \$10,000, the provider would be exempt from USP reporting and contribution obligations. It would just have to retain its calculations for possible inspection by the FCC or its administrative agent, the Universal Service Administration Corporation. In contrast, a seller of even *de minimis* amounts of “telecommunications service” or “interconnected VoIP” must complete and file Form 499A and contribute relatively small amounts to three other federal funding mechanisms – *i.e.*, those supporting Telecommunications Relay Service, Local Number Portability, and the North American Numbering Plan Administration. See also Section

- **Government or public safety service exemption.** Since 1997, the FCC has recognized exemptions from USP filing and contribution requirements for “Government entities that purchase telecommunications services in bulk on behalf of themselves, such as state networks for schools and libraries;” “Public safety and local governmental entities licensed under Subpart B of Part 90 of the Commission’s rules or any entity providing interstate telecommunications exclusively to public safety or government entities who does not offer services to others;” and “Broadcasters, non-profit schools, non-profit libraries, non-profit colleges, non-profit universities, and non-profit health care providers.”³⁰ The exemption is a strict one: if a service entity provides service to *any* customer that is not a government or public safety entity, it cannot take advantage of the exemption.

- **“Self-service” exception.** “Entities that provide telecommunications only to themselves or to commonly-owned affiliates need not file” Form 499 or contribute directly to the federal USP.³¹

²⁹ Instructions to Form 499 (2014), at 4.

³⁰ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157 (rel. May 8, 1997), ¶ 800; Instructions to Form 499-A (2012), at 5.

³¹ Instructions to Form 499-A (2014), at 5.

2. Universal Service Compliance: Forms 499-A, 499-Q

- USP payment obligations are imposed on providers of “interstate and international end-user telecommunications revenues, net of prior period actual contributions,” 47 C.F.R. § 54.709(a), and are calculated on the basis of a contributor’s “projected collected end-user telecommunications revenues, and on a contribution factor determined quarterly by the Commission.” *Id.* The FCC determines the contribution factor each quarter “based on the ratio of total projected quarterly expenses of the universal service support mechanisms to the total projected collected end-user interstate and international telecommunications revenues, net of projected contributions.” 47 C.F.R. § 54.709(b). While the contribution factor historically has ranged from 12% - 17%, the proposed percentage for Q1 is 16.8%.
- The FCC requires providers subject to the USP to register and file Telecommunications Reporting Worksheets, utilizing FCC Form 499A for annual reports and FCC Form 499Q for quarterly reports. Beginning in April 2015, all contributors are required to file the FCC Forms 499-A and 499-Q electronically. Accommodations may be made for any filers that lack sufficient Internet access to submit the forms through Universal Service Administrative Company’s (USAC) website.
- Providers of solely “telecommunications” must make the relevant calculations and keep them for three years, but they need not file a Form 499A until the year in which they project that their contribution obligations will exceed the *de minimis* amount of \$10,000.
- As indicated above, all providers of “telecommunications service” must register and begin to file reports within thirty days of the commencement of their services, but they need not make contributions until their payment obligations are expected to exceed \$10,000 in the year ahead. Even if providers of “telecommunications service” qualify for the *de minimis* exception, they must still file Form 499A, which includes reporting and contributions toward three other federal programs: Local Number Portability, Telecommunications Relay Service, and the North American Numbering Plan.
- If a provider’s customers are themselves subject to the USP (including, for example, resellers), the provider can avoid having to make USP payments on its sales of “telecommunications” or “telecommunications service” to them if it can show that they are making appropriate payments into universal service support mechanisms themselves. To the extent that the provider’s customers are making such payments, the customers are not treated as “end users” of the provider. The FCC’s instructions to Form 499A specify the kinds of information that providers must obtain and retain for this purpose.

In particular, wholesale providers may need to obtain a “reseller certification” from reseller customers *each calendar year*, as specified in the Instructions.³²

- Providers that have not yet made any USP filings or contributions must initially file Form 499-A, writing “NEW” in the space seeking the filer ID number. Upon filing, the FCC will issue a filer ID to be used for all subsequent Form 499 purposes.
- The quarterly report (Form 499-Q) is due **February 1, May 1, August 1, and November 1**. The annual report (Form 499-A) is due **April 1**. To access the most current version of the forms (an updated version of 499-A will be released on March 1, 2015), visit the [FCC forms webpage](#) or the [USAC website](#).

D. Section 214 Certification

1. Construction, Acquisition and Extensions of Lines

- Under 47 U.S.C. § 214, a telecommunications common carrier which seeks to construct, acquire or operate a new line, or to extend a line, must obtain a certificate from the Commission. Unless such line is “within a single State unless such line constitutes part of an interstate line, [or] local, branch, or terminal lines not exceeding ten miles in length. . . .” 47 U.S.C. §214(a). The FCC has, however, adopted a blanket grant of authority for all domestic interstate telecommunications services. Specifically, 47 C.F.R. § 63.01 states,

(a) Any party that would be a domestic interstate communications common carrier is authorized to provide domestic, interstate services to any domestic point and to construct or operate any domestic transmission line as long as it obtains all necessary authorizations from the Commission for use of radio frequencies.

2. Prior Authorization of Transfer of Line Subject to 214

- Under the FCC’s rules any telecommunications service provider of interstate service that seeks to transfer control of lines or authorization to operate pursuant to section 214 is required to file for prior Commission authorization.³³ This includes carriers that have received a blanket grant of 214 authority mentioned above.

³² See Instructions to Form 499A (2014), at 24.

³³ 47 C.F.R. § 63.03.

3. Discontinuance of Service

Section 214(a) of the Communications Act requires all common carriers to obtain FCC authorization before discontinuing, reducing, or impairing telecommunications service to a community.³⁴ Under Part 63 of its rules, the FCC has adopted specific requirements that clarify this duty and ensure that customers of domestic telecommunications services receive adequate notice of a carrier's discontinuance plans and have an opportunity to inform the Commission of any resultant hardships.³⁵

- Before discontinuing service, a telecommunications carrier must notify all affected customers of its proposed discontinuances. Notice to customers must include the name and address of the carrier, the date of the planned service discontinuance, the geographic areas where service will be discontinued, and a brief description of the type of service affected.
- The notice must include a prescribed statement that informs customers of their right to object to the proposed discontinuance of the dominant or non-dominant carrier by filing comments either 30 or 15 days, respectively, after the FCC releases public notice of the proposed discontinuance.³⁶ The prescribed statement also informs customers that the Commission normally will authorize the proposed discontinuance “unless it is shown that customers would be unable to receive service or a reasonable substitute from another carrier or that the public convenience and necessity is otherwise adversely affected.”³⁷
- After a carrier has given the prescribed notice to all of its affected customers, it must submit a discontinuance application to the FCC.³⁸ In addition to the information provided in the notice to affected customers, each application must contain: (1) a brief description of the dates and methods of notice to all affected customers; (2) a statement as to whether the carrier is considered dominant or non-dominant with respect to the

³⁴ 47 U.S.C. § 214(a).

³⁵ See 47 C.F.R. §§ 63.60 *et seq.*

³⁶ 47 C.F.R. § 63.71(a).

³⁷ See *id.*

³⁸ See 47 C.F.R. § 63.71(b).

service to be discontinued, reduced, or impaired; and (3) any other information the Commission may require.³⁹

- Carriers also must notify and submit a copy of the discontinuance application to the public utility commission and Governor of each state in which the discontinuance is proposed, and also to the Secretary of Defense.
- Unless the FCC notifies the carrier otherwise, discontinuance applications for dominant and non-dominant carriers will be automatically granted on the 60th and 31st day after public notice of the application, respectively.⁴⁰

E. Other Requirements

Again, a complete discussion of the regulatory burdens for providers of telecommunications and telecommunications service is beyond the scope of this document. In particular, we do not address here any reporting or other requirement relating to rates, access charges, inter-carrier compensation, tariffs, and the like. The FCC website includes a more complete collection of forms and reporting requirements for firms providing telecommunications services at: <http://www.fcc.gov/wcb/filing.html>.

1. Form 477: Local Telephone Competition and Broadband Reporting Data

- Form 477 collects information about wired and wireless local exchange telephone services and broadband connections. *See* 47 CFR § 43.11. The form – which requests a large amount of information and may take substantial time to complete – must be submitted twice a year, as described below.
- Form 477 previously applied primarily to local exchange carriers, but the FCC has since expanded its scope to apply also to providers of interconnected VoIP service (as defined at 47 CFR § 9.3), as well as facilities-based broadband service connections to end-user locations, as described below.⁴¹

³⁹ *See id.*

⁴⁰ 47 C.F.R. § 63.71(c).

⁴¹ *See Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscriberhip Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscriberhip*, WC Docket No. 07-38, Report and Order and Further Notice of Proposed Rulemaking, FCC 08-89 (rel. June 12, 2008) (Form 477 Order), ¶ 25.

- In 2013, the FCC issued an Order announcing it would begin tracking broadband deployment in 2014. Previously, the National Telecommunications & Information Administration (NTIA) collected deployment data through its State Broadband Initiative and the FCC collected subscription data through Form 477 collection. These efforts were consolidated in 2014 with an updated Form 477.
 - The latest instructions for Form 477 instructions are available at: <http://www.fcc.gov/Forms/Form477/477inst.pdf>.
- **Deadline:** Providers must file by **March 1** for data as of December 31 of the preceding year, and must file by **September 1** for data as of June 30 of the same year. The September 1, 2014 deadline was extended until December 11, 2014 because of the changes adopted by the Order, however the future schedule remains unchanged. Form 477 data as of December 31, 2014 will be due March 1, 2015.

2. Annual FCC Regulatory Fees

- Interstate telecommunications service providers (ITSPs), including interconnected VoIP providers, local exchange carriers and other telecommunications service providers must pay an annual FCC regulatory fee. See <http://www.fcc.gov/fees/regfees>.
- *A de minimis* exemption applies to any provider whose amount due is under \$10.
- Government entities⁴² and non-profit entities⁴³ exempt under section 501(c) of the IRS Code are exempt from regulatory fees and need not submit payment. *See* 47 CFR § 1.1162.

⁴² “For purposes of this exemption, a government entity is defined as any state, possession, city, county, town, village, municipal corporation, or similar political organization or subpart thereof controlled by publicly elected or duly appointed public officials exercising sovereign direction and control over their respective communities or programs.” 47 CFR § 1.1162(b).

⁴³ *See* 47 CFR § 1.1162(c). Such entities must provide proof of status to the Commission within “60 days of its coming under the regulatory jurisdiction of the Commission or at the time its fee payment would otherwise be due, whichever is sooner.”

- Affected providers must use Fee Filer to review their regulatory fee bill. The fee itself may be paid online via Fee Filer, or via more traditional means with an accompanying Form 159-E (generated by Fee Filer).
- **Deadline:** The Annual Regulatory Fee is typically due in late August or September. Assuming it remains consistent with past practice, the FCC will issue guidance on the 2015 payment late in the first quarter of 2015.

3. Consumer Proprietary Network Information Compliance Certification

- FCC rules require providers of telecommunication service and interconnected VoIP to take certain steps to safeguard customer information.
- Annually, affected entities must file a certificate asserting compliance with the FCC's rules pertaining to the treatment of Customer Proprietary Network Information. Under 47 CFR § 64.2009(e): "A telecommunications carrier must have an officer, as an agent of the carrier, sign and file with the Commission a compliance certificate on an annual basis. The officer must state in the certification that he or she has personal knowledge that the company has established operating procedures that are adequate to ensure compliance with the rules in this subpart. The carrier must provide a statement accompanying the certificate explaining how its operating procedures ensure that it is or is not in compliance with the rules in this subpart. In addition, the carrier must include an explanation of any actions taken against data brokers and a summary of all customer complaints received in the past year concerning the unauthorized release of CPNI. This filing must be made annually with the Enforcement Bureau on or before **March 1** in EB Docket No. 06-36, for data pertaining to the previous calendar year."
- In the past, the FCC has issued enforcement advisories relating to CPNI compliance shortly after the start of each year, which include a FAQ, a CPNI Certification Template, and the text of the CPNI rules. *See* Enforcement Advisory No. 2011-02, Annual CPNI Certifications Due March 1, 2011, EB Docket No. 06-36, rel. Jan. 28, 2011, http://transition.fcc.gov/eb/Public_Notices/DA-11-159A1.html.
- The FCC also has published a CPNI compliance guide directed to small entities, which includes detailed information on compliance and the contents of the aforementioned certificate. *See* FCC Small Entity Compliance Guide, Customer Proprietary Network Information, FCC 07-22, DA 08-1321, June 6, 2008, online at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-08-1321A1.pdf.
- **Deadline: March 1** (for data pertaining to previous calendar year).

4. Common Carrier Annual Employment Report (Form 395)

- Common carriers with sixteen or more employees must complete and file FCC Form 395, Annual Employment Report, by **May 31** of each year. Data must reflect employment figures from any one payroll period in January, February, or March. The form may be completed and filed electronically. See <http://www.fcc.gov/Forms/Form395/395instr.pdf>.

5. Communications Assistance for Law Enforcement Act (CALEA)

- Providers of telecommunications service are generally subject to the Communications Assistance for Law Enforcement Act (CALEA). Various resources relating to CALEA are available on the Baller Herbst web site: <http://www.baller.com/calea.html>.

6. Disability Access

- The FCC has long required telephone carriers to comply with the disability access requirements of Section 255 of the Communications Act. In 2007, the FCC extended these requirements to providers of interconnected VoIP. Under the FCC’s rules, all covered entities must act to make their services “accessible” to, and “usable” by, individuals with disabilities where doing so is “readily achievable.” The FCC has defined the term “readily achievable” as meaning that the accessibility and accessibility of a feature can be easily accomplished and carried out without substantial difficulty or expense to the provider.
- In 2010, Congress amended the Communications Act by, among other things, adding new Sections 716, 717 and 718. New Section 716 requires providers of “advanced communications services” and manufacturers of equipment used for those services to ensure that such services and equipment are accessible to and usable by individuals with disabilities, unless doing so is not achievable. “Advanced communications services” means interconnected VoIP service, non-interconnected VoIP service, electronic messaging service, and interoperable video conferencing service.⁴⁴ Unlike Section 255, the new standard under Section 216 is that the access be made available where “achievable” which the FCC defines as available with “reasonable effort or expense.”
 - Importantly, the requirements of Section 716 do not apply to any equipment or services, including interconnected VoIP service, that were

⁴⁴ 47 U.S.C. § 153(1).

subject to the requirements of Section 255 of the Act on October 7, 2010, and such services and equipment remain subject to the requirements of Section 255.⁴⁵

- As of January 30, 2013, providers of telecommunications services and VoIP service have been required to maintain records of their efforts to ensure that the services and equipment they provide are accessible to individuals with disabilities. A provider is required to make changes to its services or equipment only if it can "readily" achieve the goal of accessibility.
- Providers of telecommunications service, VoIP service and advanced communications services must make an annual recordkeeping certifications to the FCC on April 1. The certification must be made on-line at: <https://apps.fcc.gov/rccci-registry/login!input.action>.

7. Special Access

On September 15, 2014, after receiving conditional approval from OMB, the FCC released an amended Special Access Data Collection Order, calling for a *one-time* mandatory data collection from both providers and purchasers of special access services, as well as larger entities that provide “best efforts” broadband Internet access services. Special access services, also referred to as “dedicated services,” are high-capacity connections used to transmit the voice and data traffic of businesses and institutions. These services are often purchased by competitive local exchange carriers, Internet service providers, and wireless providers to enable them to connect their networks to facilities or customers to which they have not extended their own networks.

The data collection is mandatory for most providers of dedicated services in price cap areas, including entities offering “connections” capable of providing dedicated services (i.e., dark fiber). The data collection is also mandatory for any entity that purchased more than \$5 million in dedicated services during 2013,. providers of best efforts business broadband Internet Access with more than 1,500 customers, and any entity that was required to File a Form 477.

The Special Access Data Collection reporting requirements may be intensive and time consuming, and the deadline (already extended once by the FCC) is fast approaching. We suggest reviewing the Special Access Data Collection Alert provided on our [firm’s website](#) or viewing the FCC’s [Special Access Data Collection Overview](#) for more information. The deadline for filing was **December 15, 2014** for entities that need to file a streamlined certification (i.e., that only needed to file due to their filing of Form 477, and did not fall within any category subject to a complete reporting requirement). The deadline is **January 29, 2015**

⁴⁵ 47 U.S.C. § 617(f).

for large businesses with more than 1,500 employees that are required to respond, and the deadline is **February 27, 2015** for small businesses with 1,500 or fewer employees that are required to respond.

8. Other Requirements

As noted in the introduction, the compliance obligations outlined within this document are not intended to be exhaustive. This advice is particularly true for providers of “telecommunications service,” as such providers may face additional federal regulatory duties depending on the specific services they provide and the circumstances surrounding their provision. For example, 47 U.S.C. § 251 imposes on all “telecommunications service” providers the general duty to “(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and (2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256.” We urge providers to conduct a thorough regulatory review based on their particular circumstances.

III. INTERCONNECTED VOIP

A. Definition and Regulatory Status

The term “interconnected VoIP” is not defined in the Communications Act, and the FCC has not yet classified it for regulatory purposes. The FCC has, however, defined that term as follows in a series of orders applying various telephone-like requirements on that service:

[I]nterconnected VoIP services include those VoIP services that: (1) enable real-time, two-way voice communications; (2) require a broadband connection from the user’s location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive calls from *and* terminate calls to the PSTN... To be clear, a service offering is ‘interconnected VoIP’ if it offers the *capability* for users to receive calls from and terminate calls to the PSTN; the offering is covered by CALEA for all VoIP communications, even those that do not involve the PSTN. Furthermore, the offering is covered regardless of how the interconnected VoIP provider facilitates access to and from the PSTN, whether directly or by making arrangements with a third party.⁴⁶

As noted above, the FCC to date has not classified any type of voice-over-IP (VoIP) service as a fully regulated “telecommunications service.” Over the past few years, however, the Commission has made an important regulatory distinction between a VoIP service that interconnects with the public-switched telephone network (PSTN) – deemed

⁴⁶ *First Report and Order*, ¶ 39. See 47 CFR § 9.3.

“interconnected VoIP” – and a VoIP service that does not. For a provider of interconnected VoIP service, the FCC in a piecemeal fashion has imposed various reporting and other regulatory requirements, including the following (many of which are discussed in greater detail elsewhere in this memo).

B. Requirements

1. Universal Service Reporting and Contribution (Form 499-A, 499-Q)

- In 2006, the FCC determined that interconnected VoIP providers are generally subject to contribution requirements under the federal Universal Service Program, and therefore must complete and submit Form 499-A. Unlike telecommunications service providers, however, VoIP providers need not file Form 499-Q unless they exceed the de minimis contribution threshold. For the purposes of the Universal Service program, the FCC treats “interconnected VoIP” in much the same way as it treats “interstate telecommunications service.” (A more detailed explanation of USP obligations is included in our discussion of “telecommunications service” providers in Section II.) One difference is that the FCC has established a presumption or “safe harbor” that providers of interconnected VoIP can use in calculating their USF contributions. Under this “safe harbor,” a certain percentage of interconnected VoIP traffic is presumed to be “interstate” in nature. The safe harbor percentage of revenue from interstate service remains 64.9%.⁴⁷
- As a result of the Twenty First Century Communications and Video Accessibility Act of 2010⁴⁸ interconnected VoIP providers must contribute to the Telecommunications Relay Service (TRS) Fund. In 2011, the FCC expanded this obligation to apply to *non*-interconnected VoIP services as well.⁴⁹

2. Form 477: Local Telephone Competition and Broadband Reporting

- Form 477 collects information about wired and wireless local exchange telephone services and broadband connections. *See* 47 CFR § 43.11. The form – which requests a large amount of information and may take

⁴⁷ *See* Instructions to Form 499-A (2014), at 27.

⁴⁸ Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, § 103(b), 124 Stat. 2751, 2755 (2010), enacted Oct. 8, 2010.

⁴⁹ *In the Matter of Contributions to the Telecommunications Relay Services Fund*, CG Docket No. 11-47, Report and Order, FCC 11-150, rel. October 7, 2011.

substantial time to complete – must be submitted twice a year, as described below.

- Form 477 previously applied primarily to local exchange carriers, but the FCC has since expanded its scope to apply also to providers of interconnected VoIP service (as defined at 47 CFR § 9.3), as well as facilities-based broadband service connections to end-user locations, as described below.⁵⁰
- The latest instructions for Form 477 instructions are available at: <http://www.fcc.gov/Forms/Form477/477inst.pdf>.

3. Customer Proprietary Network Information (CPNI)

- Interconnected VoIP providers are subject to customer proprietary network information protection, maintenance and reporting requirements, including the filing of an annual CPNI compliance certification.

4. E911 Service

- All interconnected VoIP service providers must meet several 911 service requirements, set forth in 47 CFR § 9.5. Such providers must acquire location information from the customer, must meet certain 911 service level requirements, must provide notification to customers if the service does not provide 911 capabilities, and must send a letter to the FCC detailing compliance with the statutory requirements.

5. Disability Access

- The FCC's *VoIP Disability Order* held that interconnected VoIP providers are subject to requirements of Sections 225 and 255 of the Communications Act. Section 255 requires equipment manufacturers and telecommunications and VoIP service providers to ensure that such equipment and service is accessible to and usable by individuals with disabilities, if readily achievable. Section 225 obligates telecommunications and interconnected VoIP service providers to

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See Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscriberhip Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscriberhip, WC Docket No. 07-38, Report and Order and Further Notice of Proposed Rulemaking, FCC 08-89 (rel. June 12, 2008) (Form 477 Order), ¶25.

contribute to the Telecommunications Relay Services (TRS) Fund,⁵¹ and offer 711 abbreviated dialing for access to relay services.

- As indicated above VoIP providers are required to maintain records of their efforts to ensure that the services and equipment they provide are accessible to individuals with disabilities. Providers of VoIP service must make an annual recordkeeping certifications to the FCC on April 1. The certification must be made on-line at <https://apps.fcc.gov/rccci-registry/login!input.action>.

6. Local Number Portability

- On November 8, 2007, the FCC released a Local Number Portability (“LNP”) Order,⁵² in which it extended LNP obligations to interconnected VoIP providers to ensure that customers of such VoIP providers may port their North American Numbering Plan (NANP) telephone numbers when changing telephone providers.⁵³ In its *LNP Order* the FCC found that customers of interconnected VoIP services should be entitled to receive the benefits of LNP. To effectuate this policy, the FCC addressed the obligations of interconnected VoIP providers as well as the obligations of telecommunications carriers that serve interconnected VoIP providers as their numbering partners. Specifically, the FCC affirmed that only certificated telecommunications carriers may access numbering resources directly from the North American Numbering Plan Administrator (NANPA) or the Pooling Administrator (PA). The FCC indicated that interconnected VoIP providers that have not obtained a license or certificate of public convenience and necessity from the relevant states or otherwise are not eligible to receive numbers directly from the administrators may

⁵¹ TRS is a service that allows persons with hearing or speech impairments to use the telephone. The TRS Fund is used to pay for the provision of TRS services and is funded by contributions from all telecommunications service providers offering interstate service. FCC Form 499 contains filing and reporting information related to the TRS.

⁵² *In the Matter of Telephone Number Requirements for IP-Enabled Services Providers*, WC Docket No. 07-243, Report and Order, released November 8, 2007.

⁵³ 47 U.S.C. § 251(b)(2); 47 C.F.R. §§ 52.20 *et seq.* The NANP is the basic numbering scheme that permits interoperable telecommunications service within the United States, Canada, Bermuda, and most of the Caribbean. *See Administration of the North American Numbering Plan*, CC Docket No. 92-237, Report and Order, 11 FCC Rcd 2588, 2590, ¶ 3 (1995) (*NANP Order*).

make numbers available to their customers through commercial arrangements with carriers (*i.e.*, numbering partners).

7. Communications Assistance for Law Enforcement Act

- Providers of interconnected VoIP are subject to the Communications Assistance for Law Enforcement Act (CALEA).

8. Form 395: Common Carrier Annual Employment Report

- Common carriers with sixteen or more employees must complete and file FCC Form 395, Annual Employment Report, by May 31 of each year. Data must reflect employment figures from any one payroll period in January, February, or March. The form may be completed and filed electronically. Up to now, the FCC does not appear to have explicitly required VoIP providers to file Form 395, see <http://www.fcc.gov/Forms/Form395/395instr.pdf>. As a precaution, however, VoIP providers that offer VoIP on a common carrier basis should consider filing such forms.

9. Annual FCC Regulatory Fees

- Interstate telecommunications service providers (ITSPs), including interconnected VoIP providers, local exchange carriers and other telecommunications service providers, must pay an annual FCC regulatory fee. See <http://www.fcc.gov/fees/regfees>.
- A de minimis exemption applies to any provider whose amount due is under \$10.
- Government entities⁵⁴ and IRS Code § 501(c) non-profit entities⁵⁵ are exempt from regulatory fees and need not submit payment. See 47 CFR § 1.1162.

⁵⁴ “For purposes of this exemption, a government entity is defined as any state, possession, city, county, town, village, municipal corporation, or similar political organization or subpart thereof controlled by publicly elected or duly appointed public officials exercising sovereign direction and control over their respective communities or programs.” 47 CFR § 1.1162(b).

⁵⁵ See 47 CFR § 1.1162(c). Such entities must provide proof of status to the Commission within “60 days of its coming under the regulatory jurisdiction of the Commission or at the time its fee payment would otherwise be due, whichever is sooner.”

- Affected providers must use Fee Filer to review their regulatory fee bill. The fee itself may be paid online via Fee Filer, or via more traditional means with an accompanying Form 159-E (generated by Fee Filer).
- Deadline: The Annual Regulatory Fee is typically due in late August or September. Assuming it remains consistent with past practice, the FCC will issue guidance on the 2014 payment late in the first quarter of 2015.

IV. BROADBAND INTERNET ACCESS SERVICE

A. Generally

Providers of Internet access services are subject to comparatively fewer regulatory burdens and filing requirements than providers of cable service and telecommunications service. Generally speaking, Internet services are treated as unregulated “information services” under federal law.

In an environment of converging services, with traditionally isolated services such as voice and video shifting to IP environments, it may not be immediately obvious whether a particular service is or is not an unregulated “information service,” or to what regulatory burdens it may be subject. For example, distinguishing between a provider of pure data transmission service and an integrated data transmission service (i.e., mixed with an Internet access or “information services” component), can be difficult, and the ramifications for being wrong may be serious. Accordingly, we strongly recommend that service providers obtain a clear understanding of how the services may be treated as a regulatory matter.

A provider of facilities-based broadband Internet access service will be subject to at least the following compliance obligations:

B. Filing and Reporting Requirements

1. Form 477: Local Telephone Competition and Broadband Reporting

- Form 477 collects information about broadband connections and wired and wireless local telephone services. The form – which requests a large amount of information and may take substantial time to complete – must be submitted twice a year, as described below.
- Form 477 previously applied primarily to local exchange carriers, but the FCC has since significantly expanded its role to include data collection for

facilities-based providers of broadband⁵⁶ service to end user locations.⁵⁷ It also previously tracked only broadband *subscriptions*, but in 2014, the FCC began tracking broadband *deployment*. Information on the updated filing and the latest instructions are available at: <http://www.fcc.gov/Forms/Form477/477inst.pdf>.

- In its recent instructions the FCC also clarified that entities that lease dark fiber are not required to file Form 477.
- Form 477 also applies to providers of interconnected VoIP service. It does not apply to providers of fixed wireless services (e.g., Wi-Fi) that only enable local distribution and sharing of a premises broadband facility.
- **Deadline:** Providers must file by **March 1** for data as of December 31 of the preceding year, and must file by **September 1** for data as of June 30 of the same year. The deadline was modified slightly in 2014 to accommodate

⁵⁶ While the FCC has since raised the bar for what connection speed qualifies as “broadband,” it is important to note that Form 477 retains the original 200 kbps definition. In other words, a service could potentially be deemed “broadband” for purposes of Form 477 filing obligations, yet not be considered “broadband” for most other purposes under federal law.

⁵⁷ FCC Form 477, Instructions for March 1, 2014 filing, <http://transition.fcc.gov/Forms/Form477/477inst.pdf> (emphasis in original):

Entities that are facilities-based providers of **broadband connections** – which, for purposes of this information collection, are wired “lines” or wireless “channels” that enable the end user to receive information from and/or send information to the Internet at information transfer rates **exceeding 200 kbps in at least one direction** – must complete and file the applicable portions of this form for **each state** in which the entity provides **one or more** such connections **to end user locations**. For the purposes of Form 477, a broadband “**end user**” is a residential, business, institutional, or government entity who uses broadband services for its own purposes and who does not resell such services to other entities or incorporate such services into retail Internet-access services. For purposes of Part I of Form 477, an Internet Service Provider (ISP) is not an “end user” of a broadband connection. For the purposes of Form 477, an entity is a “**facilities-based**” **provider** of broadband connections **to end user locations** if any of the following conditions are met: (1) it **owns** the portion of the physical facility that terminates at the end user location; (2) it obtains unbundled network elements (UNEs), special access lines, or other leased facilities that terminate at the end user location and **provisions/equips** them as broadband, or (3) it **provisions/equips** a broadband wireless channel to the end user location over licensed or unlicensed spectrum.

filers adjusting to the new Form 477; however, the schedule will return to normal. Data as of December 31, 2014, must be filed by March 1, 2015.

2. Communications Assistance for Law Enforcement Act (CALEA)

- Facilities-based Internet access providers may be subject to the Communications Assistance for Law Enforcement Act (CALEA). Various resources relating to CALEA are available on the Baller Herbst website: <http://www.baller.com/calea.html>.

3. Digital Millennium Copyright Act (DMCA)

- The Digital Millennium Copyright Act of 1998 includes various “safe harbors” for online service providers, including broadband Internet access providers and providers of website hosting services, from potential liability for contributory copyright infringement based on the actions of users. Service providers must take steps to avail themselves of the limitations of liability, including:
 - Adopt and reasonably implement, and inform subscribers and account holders of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers. *See* 17 U.S.C. § 512(i). We recommend that online service providers draft such a policy and post it conspicuously on the service website.
 - Register a designated agent with the U.S. Copyright Office, to receive notifications of claimed infringement. *See* [http://www.loc.gov/copyright/onlineasp/](http://www.loc.gov/copyright/online.asp/).

V. OTHER OBLIGATIONS

In addition to the obligations outlined above, communications providers may also be subject to the following:

A. Antenna Structure Registration; Tower Siting Environment Compliance

The FCC requires owners to register certain antenna structures (generally those more than 60.96 meters (200 feet) in height or located near an airport) with the Commission. The FCC Rules specifically define the term “antenna structures” as “[T]he radiating and/or receive system, its supporting structures and any appurtenances mounted thereon.” As the FCC explains on its Antenna Structure Registration webpage: “In practical terms, an antenna structure could be a free standing structure, built specifically to support or act as

an antenna, or it could be a structure mounted on some other man-made object (such as a building or bridge).”⁵⁸ All such registrations are via FCC Form 854.

Tower siting projects may require review under various federal environmental and historic preservation laws. In 2014, the FCC adopted a Wireless Siting Order, which added new exceptions to some of the environmental and historic review requirements. Resources are available at the FCC webpage entitled “Environmental Compliance for Tower Siting,” http://wireless.fcc.gov/siting/environment_compliance.html.

B. Network Neutrality – Open Internet Transparency Statement

On January 14, 2014, the D.C. Circuit Court of Appeals held that the FCC has authority under Section 706 of the Telecommunications Act of 1996 (47 U.S.C. § 1302) to adopt appropriate rules governing Broadband Internet Access Service (“BIAS”).⁵⁹ The Court went on to invalidate some of the rules the so-called “*Open Internet Order*” that the FCC had adopted in 2010.⁶⁰ In that Order, the FCC, among other things, had ruled that wireline BIAS providers (1) could not block lawful content, applications, services or non-harmful devices (“no blocking”); (2) could not unreasonably discriminate in transmitting lawful Internet traffic (“no unreasonable discrimination”); and (3) must disclose the network management practices, performance characteristics, and terms and conditions of service (“transparency”). The FCC’s also imposed less extensive rules on wireless providers.

In *Verizon v. FCC*, the D.C. Circuit upheld the “transparency” rules but struck down the FCC’s no-blocking and non-discrimination rules, finding them to be tantamount to forbidden common-carrier requirements. Thus, the rules that the FCC subsequently adopted to implement the transparency rule in the *Open Internet Order* apparently remain unaffected by the *Verizon* decision.

The transparency rules in question require providers to publicize certain information about the performance of their broadband services, network practices, and commercial terms and conditions. As a general matter, the FCC’s approach is one of flexibility. The FCC specifically declined to be prescriptive, choosing instead to provide general guidance and suggestions for disclosures that may satisfy the transparency requirement. In the *Open Internet Order*, the FCC included an extensive list of the types of information that could satisfy the various aspects of the transparency rule, but it made clear that the list was only suggestive. “We believe that at this time the best approach is to allow flexibility in implementation of the transparency rule, while providing guidance regarding effective

⁵⁸ <http://wireless.fcc.gov/antenna/index.htm?job=about>

⁵⁹ *Verizon Corp. v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

⁶⁰ *In the Matter of Preserving the Open Internet*, GN Docket No. 09-191, 2010 WL 5281676 (F.C.C.) (rel. December 23, 2010) (“*Open Internet Order*”).

disclosure models. We expect that effective disclosures will likely include some or all of the following types of information . . .”⁶¹

Throughout 2014, there was much discussion surrounding if and how net neutrality rules, i.e. anti-blocking and non-discrimination rules, should be implemented. The FCC sought comments on the issue and received more than three million responses. In October 2014, the FCC was said to be considering “hybrid rules” that would employ Title II reclassification and Section 706 rules. The proposal was met with widespread disapproval. On November 11, 2014, President Obama urged the FCC to “reclassify consumer broadband service under Title II” and forbear from applying certain provisions. The future of net neutrality, at least as it relates to FCC regulation, remains unclear at this time, but a decision of some sort is expected in early 2015.

COMPLIANCE TIMETABLE		
FILING/REPORT	DUE DATE	AFFECTED PROVIDERS
Form 499Q: Quarterly Telecommunications Reporting Worksheet (Universal Service)(1)	February 1, 2015	All telecom service and telecom or interconnected VoIP that exceed <i>de minimis</i> level
Form 477: Local Telephone Competition and Broadband Reporting Data (1)	March 1, 2015	All broadband, telecom service, interconnected VoIP
CPNI Compliance Certification	March 1, 2015	All telecom service, interconnected VoIP
Copyright Statutory Royalty Fee Report (1)	March 1, 2015, August 29, 2015	Cable
Form 499A; Annual Telecommunications Reporting Worksheet pp. 1,2,3 and 8 (initial registration)	Within one week of providing telecom service	All telecom service
Form 499A: Annual Telecommunications Reporting Worksheet (Universal Service)	April 1, 2015	All telecom service, interconnected VoIP, and telecom providers that exceed <i>de minimis</i> level
Form 499Q: Quarterly Telecommunications Reporting Worksheet (Universal Service)(2)	May 1, 2015	All telecom service and telecom or interconnected VoIP providers that exceed the <i>de minimis</i> contribution
Form 395: Common Carrier Annual Employment Report	May 31, 2015	Telecom service with >16 employees
Form 499Q: Quarterly Telecommunications Reporting Worksheet (Universal Service)(3)	August 1, 2015	All telecom service and any telecom or interconnected VoIP providers that exceed the <i>de minimis</i> contribution
Form 477: Local Telephone Competition and Broadband Reporting Data (2)	September 1, 2015*	Broadband, telecom service, interconnected VoIP
Form 396-C: MVPD EEO Program Annual Report	September 30, 2015	Cable
Annual FCC Regulatory Fee	Q3	Cable, telecom, interconnected VoIP
Form 499Q: Quarterly Telecommunications Reporting Worksheet (Universal Service)(4)	November 1, 2015	All telecom service and any telecom or interconnected VoIP providers that exceed <i>the de minimis</i> contribution
Form 322: Cable Registration	Before commencing service	Cable
Form 325: Annual Cable Operator Report	If more than 20,000 subscribers end of calendar year, if notified by Commission; due "within 60 days after FCC notifies operator that form is due"	Cable
Performance Testing	twice each year	Cable
Form 320: Signal Leakage	once each year	Cable (aero. freq.)
For general reference purposes only. Providers are urged to obtain a determination specific to their own circumstances and offerings. Dates marked with "*" are tentative, unreleased, and/or may be subject to change, but are based on filing dates for 2015. Please refer to the FCC forms page for latest information.		