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CLIENT ALERT¹

To: Clients and Friends
From: Sapronov & Associates, P.C.
Date: July 2, 2010
Subject: FCC Broadband Regulation Gets Underway

On June 17, the Federal Communications Commission (“FCC” or “Commission”) took the next step in its efforts to regulate broadband Internet access² by releasing a notice of inquiry (“NOI”)³, an administrative fact finding and comment proceeding, on this topic. This NOI is a prelude to what will likely be a rulemaking in the FCC’s much publicized push for a “third way” approach to broadband regulation.⁴

¹ THIS COMPLIMENTARY CLIENT ALERT IS PROVIDED TO CLIENTS AND FRIENDS OF SAPRONOV & ASSOCIATES, P.C. FOR TUTORIAL PURPOSES ONLY AND IS NOT TO BE CONSTRUED AS A LEGAL OPINION OR LEGAL ADVICE. PLEASE CONTACT US AT 770-399-9100 OR AT info@wstelecomlaw.com IF YOU HAVE SPECIFIC QUESTIONS ABOUT THIS ALERT – OR IF YOU WISH TO BE REMOVED FROM OUR MAILING LIST.

² Comcast Corporation v. Federal Communications Commission, D.C. Cir., No. 08-1291 (April 6, 2010). See also Sapronov & Associates, P.C. Client Alerts, “FCC vs. Comcast: Round One – and an Unrelated Announcement” (Aug. 12, 2008) and “Federal Communications Commission (“FCC”) v. Comcast: Round Two” (April 9, 2010), all available upon request.

³ *In re: Framework for Broadband Internet Service*, Notice of Inquiry, GN Docket No. 10-127, (Rel. June 17, 2010) (“NOI”).

⁴ Under the Third Way, the Commission would: (i) reaffirm that Internet information services should remain generally unregulated; (ii) identify the Internet connectivity service that is offered as part of wired broadband Internet service (and only this connectivity service) as a telecommunications service; and (iii) forbear under section 10 of the Communications Act (47 U.S.C. § 160) from applying all provisions of Title II other than the small number that are needed to implement the fundamental universal service, competition and small business opportunity, and consumer protection policies that have received broad support. See Sapronov & Associates, P.C. Client Alert, “*The Federal Communication Commission’s*

Among others, the Commission seeks comments on the following specific issues:

- Is the “information service” classification of broadband Internet adequate to support the FCC’s statutory responsibilities?
- What are the legal and practical consequences of classifying Internet connectivity service as a “telecommunications service,” if all Title II requirements were to apply?⁵
- Comments on the Commission’s proposed Third Way
- USF Reform: Can the Commission reform its universal service program to support broadband Internet service by asserting direct authority under Section⁶ 254, combined with ancillary authority under Title I?⁷
 - Can Section 254 be interpreted to give the Commission authority to provide universal service support for broadband Internet service if that service is classified as a unitary information service?
 - Is Section 706(b)⁸ a source of authority to support broadband Internet service with Universal Service Fund money even though it was rejected in the D.C. Circuit Court of Appeals’ *Comcast* decision?
- What is the best approach for ensuring privacy for broadband Internet service users under the current information service classification, and what, if any legal obstacles may exist if the Commission retains that classification?
- What statutory provisions could aid the Commission’s authority to address harmful practices by Internet service providers?
- What are the implications for state and local regulation that would result under each of the three proposed approaches (information services, full Title II, and Third Way) to broadband reclassification?
- Should “Internet connectivity”⁹ be redefined? Is it possible to separate the Internet connectivity component from the rest of the service?

(“FCC) *New Approach to Broadband Regulation, “Third Way” or “Third Rail,”* (May 26, 2010) (“May 26 Alert”)(attached hereto at Attachment “A” (without FCC Statements)).

⁵ 47 U.S.C. Section 201 *et. seq.* Title II of the Communications Act of 1934 (as amended) codifies (and applies to telecommunications carriers) certain common carrier regulations such as rate, entry, and other regulations largely borrowed from the Interstate Commerce Act. *See generally*, M.J. Becker, “Legislative History of the Communications Act of 1934”, TELECOMMUNICATIONS LAW, REGULATION AND POLICY (Sapronov & Read, ed. 1998).

⁶ Section references are to sections of the Communications Act of 1934 (as amended), 47 U.S.C. 101 *et. seq* (the “Act”).

⁷ 47 U.S.C. § 151 (granting policy making authority to FCC under Title I of the Act as part of its enabling statute). For a discussion of the FCC’s so-called “ancillary jurisdiction” under Title I, see May 26 Alert at Attachment “A.”

⁸ Section 706(a) states that the Commission “shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans. . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” 47 U.S.C. § 1302(a).

- The Commission also seeks comment on the appropriate classification of terrestrial wireless and satellite broadband Internet services.

Finally, the Commission realizes that if it were to alter its current approach to Internet connectivity service, affected providers will need time to adjust to any new requirements. It therefore proposes delaying the effective date 180 days after the release of a decision, and seeks comment on this proposed extension.

Comments on the NOI are due by July 15, 2010, with Reply Comments due by August 12, 2010.

As always, should you have any questions or comments, or need assistance in

⁹ The FCC has previously defined Internet Connectivity to include the functions that “enable [broadband Internet service subscribers] to transmit data communications to and from the rest of the Internet.” *See NOI, at n. 175 (citing to Wireline Broadband Report and Order, 20 FCC Rcd at 14856, para. 3 & n.7, 14880-81, para. 50).*