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**CLIENT ALERT**<sup>1</sup>

**Broadband Regulatory and Transactional Developments:  
What to Expect in 2010**

February 4, 2010

To our clients and friends, as we enter the second month of a new decade, please let us share with you our complimentary outlook on broadband developments in 2010, including the federal regulatory agenda,<sup>2</sup> broadband stimulus, and their impact on broadband contract negotiations.

**1. 2010: The Regulatory Front.**

On the regulatory front, we expect the Federal Communications Commission (“FCC”) to continue promoting network neutrality, to arrive at a preliminary nationwide broadband plan (with emphasis on broadband wireless), to fund implementation through increased universal service fund (“USF”) fees and enforcement, and to do what it can to help roll out Congress’ broadband stimulus package.

Under Chairman Julius Genachowski, the agency is in transition as it shifts its agenda away from the previous one under Kevin Martin’s chairmanship. The FCC is now controlled by a Democratic majority: in addition to the new Chairman, the majority includes Commissioners Clyburn and Copps; they join Republican Commissioners McDowell and Baker. All can be expected to support President Obama’s fiscal stimulus initiative (the broadband one in particular) and, over the long term, to bring domestic

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<sup>1</sup> This client alert, while accurate to the best of our knowledge, is provided on a complimentary basis to clients and friends of Saprnov & Associates, P.C. for informational purposes only and is not to be construed as a legal opinion or legal advice. Please contact us at 770-399-9100 or 202-223-0646 or at [info@wstelecomlaw.com](mailto:info@wstelecomlaw.com) if you have specific questions about this alert – or if you wish to be removed from our mailing list.

<sup>2</sup> For further information, please see Saprnov & Associates, P.C. Client Alert, “*The New FCC and Its Agenda: National Broadband Plan, Net Neutrality and Recovery Act Broadband Funding*” originally distributed October 9, 2009 and available upon request (email [info@wstelecomlaw.com](mailto:info@wstelecomlaw.com)).

broadband networks up to par with what appear to be more advanced ones around the globe.

Here are some key developments to watch.

- ❖ Net Neutrality. The FCC's decision to sanction Comcast for violation of net neutrality "principles" is under review by the D.C. Circuit Court of Appeals.<sup>3</sup> At oral argument, the judges' comments suggested that the Court may question the FCC's authority to do so. If reversed, the FCC will be faced with an uphill battle to enforce those principles unless and until it first concludes its net neutrality rulemaking<sup>4</sup> and adopts actual rules and not just policies.<sup>5</sup> As the net neutrality proceeding will be highly contentious, this effort will be much easier said than done.
- ❖ Universal Service. Federal USF payments continue to go up. The USF contribution factor for first quarter of 2010 is a whopping 14.1%. Historically, this assessment fell under the FCC's Part 69 access charge rules and was collected by local exchange carriers to subsidize low income subscribers and those in high cost areas. The Telecommunications Act of 1996 established an explicit fund for this purpose, administered through the Universal Service Administrative Company ("USAC"), and requiring contributions from telecommunications carriers and other providers of telecommunications. In recent years, the FCC – with Congressional support<sup>6</sup> - has both expanded USF contribution requirements to "interconnected" VOIP providers and rigorously enforced collection efforts (e.g., with seven figure forfeiture penalties) against those failing to pay or report.<sup>7</sup>

We see no reason to believe these enforcement efforts will let up. In fact, we expect USF obligations to increase even as the contribution base widens to include new wireless applications (perhaps Google voice?) and other modes of 21<sup>st</sup> century communication, possibly along with an administrative or legislative USF reform initiative.

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<sup>3</sup> In August 2008, the FCC had ordered Comcast to cease throttling Bit Torrent's peer-to-peer file sharing applications, finding such practices to be in violation of its net neutrality principles. The case is under appeal in the D.C. Circuit Court of Appeals. *In Re: Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation; Memorandum Opinion and Order*, 23 FCC Rcd 13028; 2008 FCC LEXIS 5898 (rel. August 20, 2008) (appeal pending, *sub. nom.*, Comcast Corporation v. FCC, No. 08-1291, (D.C. Circuit, September 4, 2008). Oral argument was held on January 8, 2010.

<sup>4</sup> *In re: Preserving the Open Internet, Broadband Industry Practices*, Notice of Proposed Rulemaking, GN Docket No. 09-191, WC Docket No. 07-52, (Rel. October 22, 2009) ("*Notice*").

<sup>5</sup> Net neutrality principles were codified in the federal American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 §600 I 0) (2009) ("*Recovery Act*").

<sup>6</sup> The Debt Collection Improvement Act of 1996 calls for referral of delinquent USF contributors to the Justice Department for collection.

<sup>7</sup> Global Crossing, for instance, recently settled a notice of apparent liability for failing to make timely USF contributions by paying the entire outstanding balance of \$18 million, plus a \$2.8 million "voluntary contribution to U.S. Treasury. See *Global Crossing North American, Inc. et al.*, Order, 24 FCC Rcd 8775 (2009).

Bottom line: If you are a seller of telecommunications or telecommunications service, ignore these USF regulations at your peril. If you are a buyer, be prepared to either pay more or seek appropriate exemption(s). As a precaution, careful record keeping is a must.

- ❖ Spectrum Management. A priority for the FCC is the urgent need for more spectrum to augment existing wireless broadband capabilities. To find it, regulators are looking at underused spectrum as well possible reallocation of current spectrum assignments from broadcasters and others. Together with initiatives to open wireless networks to independent device attachment (so called “wireless Carterphone” competition), these all promise to provoke substantial controversy. For now, the FCC has initiated a number of inquiries<sup>8</sup> into broadband wireless and related markets, apparently gathering data for quantitative market analysis. We expect spectrum management to be high on the FCC’s near term agenda.
- ❖ National Broadband Plan. As directed by Congress in the Recovery Act, the FCC has begun developing a National Broadband Plan, essentially turning broadband access into an entitlement. For now, the Commission has issued a Broadband Notice of Inquiry<sup>9</sup> and asked Congress for a one month extension to deliver the Plan. Expect the FCC’s findings in the National Broadband Plan proceeding to dovetail with the Administration’s broadband stimulus funding (discussed below).
- ❖ Other Regulatory Reforms. Under prior administrations, the FCC had initiated a number of comprehensive regulatory reform initiatives: inter-carrier compensation reform, universal service reform, and a reexamination of the proper regulatory classification of Voice-over-IP and similar technologies. For now, other than possible USF reform, these appear dormant. The FCC’s elusive attempts at access reform in the final months of former Chairman Martin’s tenure proved to be his swan song, as Congress put a halt to that effort. Apart from USF, these other initiatives appear dormant with no indication that they will be soon resurrected.

## 2. **Broadband Stimulus Funding Under the Recovery Act.**

- ❖ Broadband Stimulus. As most of you know, Congress, through the Recovery Act, allocated \$7.2 billion to be spent on broadband deployment throughout the U.S.: \$2.5 billion through the Department of Agriculture’s Rural Utilities Service (“RUS”) Broadband Infrastructure Program (“BIP”); and \$4.7 billion through the Department of Commerce’s National Telecommunications and Infrastructure

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<sup>8</sup> See *Fostering Innovation and Investment in the Wireless Communications Market*, GN Docket No. 09-157, FCC 09-66 (rel. Aug. 27, 2009) (“*Innovation NOI*”); *In the Matter of Implementation of Section 60002(b) of the Omnibus Budget Reconciliation Act of 1993*, WT Docket No. 09-66, Notice of Inquiry, FCC 09-67 (Aug. 27, 2009).

<sup>9</sup> *In Re: A National Broadband Plan for Our Future* (GN Docket No 09-51) (FCC 09-31), Notice of Inquiry (Released April 8, 2009) (“*NOI*”).

Administration (“NTIA”) Broadband Technology Opportunities Program (“BTOP”). Prospective applicants are urged to memorize the acronyms . . . and to keep track of the following dates.

- ❖ Round 2 Notice of Funds Availability (“NOFA”). The notice for the second round of broadband stimulus funding was published January 15, 2010. The application window for Round 2 applications will open on **February 16, 2010** and close on **March 15, 2010**. All funds will be committed by September 30, 2010.

Surprisingly, as of this writing, most Round 1 funding decisions are just beginning to be announced. As discussed elsewhere<sup>10</sup> at length, the application process is exceedingly complex. Applicants left “out of the money” in Round 1 should carefully review the application process and funding criteria in order to determine how to improve their chances of funding in Round 2.

### **3. 2010: Broadband and Telecom Transactions.**

Last year, our Firm negotiated various telecom and broadband infrastructure transactions representing well over a half billion dollars in deal value. This year, as broadband infrastructure (especially wireless) continues to expand, we expect a shift in emphasis on some of the related deal points for buyers. We anticipate this will result, at least in part, from regulatory developments – including the push to network neutrality, the expiration of the AT&T/BellSouth merger conditions, and, eventually, the impact of broadband stimulus spending on broadband access supply. To this one may add the increasing popularity of Ethernet as a replacement for increasingly passé T-1 circuits and the emergence of cable company and other broadband providers as third party access suppliers in enterprise agreements.

Carrier interconnection negotiations,<sup>11</sup> a periodic exercise that has become largely routine, may also see new volatility in the pricing of co-called “transit” charges, those assessed on competitors’ telecommunications traffic that is delivered by an incumbent telephone carrier to a (typically rural) third party. A recent court decision involving MetroPCS has left the pricing for such traffic to state public utility commission (not FCC) determinations.<sup>12</sup> Expect some contested proceedings on that score at state commissions as incumbents, CLECs, mobile service providers, and rural telcos enter the transit fray.

Finally, even as the U.S. economy recovers (we hope), the commercial real estate markets remain fragile and, according to some, may see a second wave of foreclosures.

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<sup>10</sup> See Saprnov & Associates, P.C. Client Alert, “*Application Window Opens for Broadband Stimulus Funds*,” originally distributed July 15, 2009 and available upon request (email [info@wstelecomlaw.com](mailto:info@wstelecomlaw.com)).

<sup>11</sup> 47 USC §§ 151-152.

<sup>12</sup> *In re: North County Communications Corporation v. MetroPCS California, LLC*, Memorandum Opinion and Order, File No. EB-06-MD-007 (Rel. March 30, 2009).

If so, telecom “tenants” relying on commercial leases, collocation, hosting, rooftop access and other building access arrangements may do well to review their long term occupancy rights.<sup>13</sup>

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A future alert will discuss these (and many other deal points) in further detail.

We hope you find this alert informative. While we cannot predict the future, we will be watching developments closely and keep you apprised. As always, please feel free to contact us with any questions or comments.

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<sup>13</sup> For more information on this somewhat technical but very important topic, please see our alert, “Telecom Tenants at Risk,” available upon request.