BALLER STOKES & LIDE
A PROFESSIONAL CORPORATION
2014 P Street, NW
Suite 200
Washington, DC 20036
(202) 833-5300
(202) 833-1180 (FAX)
www.Baller.com

FEDERAL COMMUNICATIONS LAW COMPLIANCE OVERVIEW FOR 2019

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Baller Stokes & Lide, P.C. has prepared this document for providers of cable television, telecommunications, interconnected voice over Internet protocol (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 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, or other requirements. It discusses the matters covered only as they existed as of the end of 2018 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.

If you have questions or need additional information, please contact:

Jim Baller, 202-833-1144, Jim@Baller.com
Sean Stokes, 202-833-0166, SStokes@Baller.com
Casey Lide, 202-277-6276, Casey@Baller.com
McKenzie Schnell, 509-844-1487, McKenzie@Baller.com

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I. CABLE SERVICE

Providers of "cable service" over a "cable system," as defined in the federal Communications Act and Federal Communications Commission (FCC) rules, may be subject to the following requirements.[1]

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

1. Requirements for New Cable Operators and New Communities Served

In addition to the reporting, filing, and other obligations outlined below, 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.[2] Cable Operators may register through the FCC's Cable Operations and Licensing System ("COALS") at: https://apps.fcc.gov/coals/forms/createlogin/loginCreate.cfm.

Cable operators and other multichannel video programming distributors (MVPDs) seeking to utilize cable television relay stations ("CARS")[3] as part of their system are required to file for a CARS License using FCC Form 327 .[4]

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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]."

2 47 C.F.R § 76.1801

3 CARS stations are point-to-point or point-to-multipoint microwave systems. CARS stations cannot be used to distribute programming directly to subscribers.

4 https://transition.fcc.gov/Forms/Form327/327.pdf

2. 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).5

Cable systems whose semiannual gross receipts are less than $527,600 are to complete the SA1-2 Short Form.[6]

Cable systems with semiannual gross receipts exceeding $527,600 must use the SA3 Long Form.[7]

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 2018 accounting period, file between January 1 and March 1, 2019. For the January – June 2019 accounting period, file between July 1 and August 29, 2019.

3. 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. The deadline for submission is typically in late September.

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5 "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).

6 https://www.copyright.gov/forms/sa1-2.pdf

7 https://www.copyright.gov/forms/sa3.pdf

4. Annual FCC Regulatory User Fees

Pursuant to 47 C.F.R. § 1.1155, cable operators operating on October 1, 2018 must pay an annual regulatory fee in 2019 on a per-subscriber basis, based on the number of basic cable subscribers served on December 31, 2018.

Government entities[8] and non-profit entities[9] 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.

***De minimis* exception**: Regulated entities whose total regulatory fee liability amounts to less than $1,000 are exempt from payment of regulatory fees. The *de minimis* threshold applies only to filers of annual regulatory fees, not fees paid through multi-year filings.

The regulatory fee applicable to fiscal year 2018 (FY 2017) was set at $0.77 per subscriber, based on the number of basic cable subscribers served on December 31, 2017. If the Commission remains consistent with past practice, it will issue a fact sheet in mid-2019 addressing what providers owe for fiscal year 2019, and when the fee is due. Regulatory fees are typically due in late August or September. In 2018, the regulatory fee was due September 25, 2018.[10]

In 2013, the FCC concluded that Internet Protocol Television (IPTV) providers should be included in the cable television systems category, and assessed a regulatory fee at the same rate.[11]

Licensees of CARS (Cable Television Relay Service) facilities must pay a per-license regulatory fee.[12] For fiscal year 2018, entities that held a CARS license on October 1, 2016, were required to pay $1,075 per license.

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8 "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).

9 *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."

10 *See Effective Date of FY 2018 Regulatory Fees*, FCC Document (Sept. 14, 2018), available at: https://docs.fcc.gov/public/attachments/DA-18-952A1.pdf.

11 *See FY 2013 Report and Order*, 28 FCC Rcd at 12363, ¶ 33.

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

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.

Further information, including methods of payment, waivers, deductions, and deferments, is available at http://www.fcc.gov/regfees.

5. Public Inspection Files

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). The FCC maintains an online public file database located at https://publicfiles.fcc.gov/, for which each cable system with 1,000 or more subscribers must submit public file documents electronically. The searchable database, public file requirements, and filer information are all available at https://publicfiles.fcc.gov/.

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
- Availability of signals
- Operator interests in video programming
- EAS tests and activation
- Complaint resolution
- FCC rules and regulations
- Sponsorship identification
- Other compliance with technical standards

Cable systems with 1,000 or more subscribers but fewer than 5,000 subscribers were not required to place new political file material in the Commission's online file until March 1, 2018. Cable systems with fewer than 1,000 subscribers are exempt from all online filing requirements.

6. 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).

7. 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.[13] The regulations establish leased access set-aside requirements 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, and cable operators with more than 100 activated channels must designate 15 percent of such channels for commercial use.

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.[14]

On June 8, 2018, the FCC released a Further Notice of Proposed Rulemaking seeking to take various steps, mostly procedural, to modernize its leased access rules.[15]

8. Form 325 – Annual Cable Operator Report (*No longer required)*

On September 26, 2018, the FCC released a Report and Order eliminating the requirement that cable systems serving 20,000 or more subscribers file a Form 325 Annual Cable Operator Report.[16] Form 325 was used to collect general information and signal and frequency distribution data from

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13 FCC Summary of Leased Access available at: https://www.fcc.gov/general/leased-access.

14 47 C.F.R. § 76.977.

15 *In the Matter of Leased Commercial Access, Modernization of Media Regulation Initiative*; Further Notice of Proposed Rulemaking, MB Docket No. 07-42; MB Docket No. 17-105 (June 8, 2018) available at: https://docs.fcc.gov/public/attachments/FCC-18-80A1.pdf.

16 *In the Matter of FCC Form 325 Collection,* MB Docket No. 17-290, Report and Order, FCC 18-136, released September 26, 2018.

cable MVPDs.[17] Cable systems with fewer than 20,000 subscribers were never subject to this requirement

9. Performance Testing

In September 2017, the FCC declined to extend the performance testing and certification and requirements set forth in sections 76.601 and 76.605 to digital systems.[18] Instead, the FCC elected to require digital cable operators to adhere to an accepted industry standard to ensure that they provide "good quality" video and audio to their subscribers and institute procedures to detect and limit signal leakage in digital cable systems.

10. 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" (Section 76.611). Form 320 must be filed electronically via COALS.

In the event a cable system signal leakage impacts certain aeronautical frequencies, cable systems must also file Form 321, Aeronautical Frequency Notification.

11. 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

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17 *See* 47 CFR §76.403.

18 *In the Matter of Cable Televisions Technical and Operational Standards*, MB Docket 12-217, Report and Order, FCC 17-120, released September 25, 2017, https://ecfsapi.fcc.gov/file/0925163241137/FCC-17-120A1.pdf.

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).

television programs.[19] On February 20, 2014, the FCC adopted a Report and Order containing new rules for TV closed captioning that became effective on March 16, 2015.[20]

In 2016, the FCC extended responsibility to video programmers for closed captioning their content.[21] While the 2015 rules remain in effect and VPDs continue to be primarily responsible for ensuring provision of closed caption on programing, the new rules give video programmers some responsibility and allow the FCC to reach such programmers when they have been non-compliant.

The closed captioning rules dictate that VPDs must use best efforts to obtain a certification from each video programmer with whom it contracts attesting that the programmer:

- Complies with the new captioning quality standards;
- Adheres to the best practices for video programmers; or
- Is exempt from the closed captioning rules under one or more pre-existing exemptions.

a. Exemptions

Self-implementing exemptions.[22] 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).

Exemptions based on economic burden.[23] The FCC has established procedures for petitioning for an exemption from the closed captioning rules when compliance would be economically

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19 47 C.F.R. § 79.1 *et seq*.

20 *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

21 Closed Captioning of Video Programming; Telecommunications for the Deaf and Hard of Hearing, Inc., Petition for Rulemaking, FCC (Aug. 23, 2016), https://www.federalregister.gov/documents/2016/08/23/2016-19685/closed-captioning-of-video-programming-telecommunications-for-the-deaf-and-hard-of-hearing-inc?mc_cid=b55c9bf3b0&mc_eid=ac5d5060c3.

22 47 C.F.R. § 79.1(d).

23 47 C.F.R. § 79.1(f).

burdensome on a cable operator (previously referred to as "undue burden petitions"). The FCC must consider the following facts to determine whether closed captioning would be economically burdensome: (1) the nature and cost of the closed captions for the programming, (2) the impact on the operation of the provider or program owner, (3) the financial resources of the provider or program owner, and (4) the type of operations of the provider or program owner. While a petition is pending, the programming that is the subject of the petition is exempt from the closed captioning requirements.

In 2018, the FCC granted two waivers of its rules requiring the accessibility of user interfaces for certain small and mid-sized MVPDs because compliance would be economically burdensome.[24] A limited waiver was granted for certain mid-sized or smaller systems that utilize quadrature amplified modulation (QAM) for two-way service offerings if the system: (1) falls under the definition of cable system under Section 76.640(a), and (2) offers a user guide that does not enable the accessibility of all functions required by Section 79.108. A full waiver was granted for small cable systems that offer video programming only in analog format or do not offer broadband Internet access to their video subscribers if the system: (1) meets the requirements stated directly above, and (2) has 20,000 or fewer subscribers. Systems that qualified for these waivers were subject to two conditons; they could no longer rely on waivers if technology became available that would provide full accessibility and as long as they did rely on waivers, they had to provide annual notice to their current customers about such reliance.

b. Closed captioning 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 to 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.

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[24] *In the Matter of Accessibility of User Interfaces, and Video Programming Guides and Medus*, MB Docket No. 12-108, Memorandum Opinion and Order (November 2, 2018), available at: https://docs.fcc.gov/public/attachments/DA-18-1130A1.pdf .

Further, all cable operators are required to provide the Commission their contact information for immediate and written closed captioning concerns.[25] 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-ata/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.

C. Effective Competition

The Satellite Television Extension and Localism Reauthorization (STELAR) Act, enacted in late 2014, streamlined the process for determining that "effective competition" exists in a particular community, effectively removing local regulatory authority over basic tier rates.[26] As a consequence, very few communities around the country directly regulate rates (mostly in Massachusetts and Hawaii). In October 2018, the FCC released a Notice of Proposed Rulemaking that could effectively end local rate regulation for the provision of video service altogether. [27]

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25 *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).

26 In particular, STELAR directed the FCC to establish a streamlined process by which small cable operators could file petitions arguing that "effective competition" existed in a particular community. If the FCC determined there was "effective competition" in a community where the petition was filed, the petitioning cable operator would no longer be subject to regulation of basic tier services. On June 3, 2015, the FCC adopted a rebuttable presumption that cable operators are subject to effective competition. *In the Matter of Amendment to the Commission's Rules Concerning Effective Competition*, Implementation of Section 111 of STELA Reauthorization Act; Report and Order, 30 FCC Rcd 6574 (2015) ("Effective Competition Order"). As a result, franchising authorities are prohibited from regulating basic cable rates unless they can demonstrate that the cable system in question is not subject to effective competition. To do so, a franchising authority would need to file a Form 328 and attach evidence to overturn the FCC's presumption. *Notice of Effective Date of Revised Effective Competition Rules*, FCC Public Notice (Sept. 17, 2015) available at: https://apps.fcc.gov/edocs_public/attachmatch/DA-15-1049A1.pdf

27 *In the Matter of Modernization of Media Regulation; Revisions to Cable Television Rate Regulations; Implemetnation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation; Adoption of Uniform Accounting System for the Provision of Regulated Cable Service*, Futher Notice of Proposed Rulemaking and Report and Order, MB Docket No. 17-105; MB Dockent No. 02-144; MM Docket No. 92-266; MM Docket No. 93-215; CS Docket No. 94-28; CS Docket No. 96-157 (Released [ ]) available at: https://docs.fcc.gov/public/attachments/DOC-354371A1.pdf.

II. "TELECOMMUNICATIONS" AND "TELECOMMUNICATIONS SERVICE"

This section outlines the main filing, reporting, and other requirements applicable to providers of "telecommunications" [28] and to providers of "telecommunications service."[29] 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 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. Conversely, providers of "telecommunications service" are entitled to interconnection, collocation, pole attachments, E911, and certain wholesale benefits (Section 251); to protection from state and local barriers to entry (Section 253); and to universal service subsidies of various kinds (Section 254). As discussed below, providers of "telecommunications" on a private carrier basis are not subject to most of these obligations or incentives.

Unfortunately, it is not always easy to distinguish between "telecommunications" and "telecommunications service." Accordingly, before discussing the compliance requirements of providers of "telecommunications" and "telecommunications service" 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."

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28 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).

29 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).

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.[30] In contrast, "private carriers" of "telecommunications" are entities that negotiate carriage agreements individually on a case-by-case basis.[31]

A comprehensive discussion of the differences between common and private carriage is beyond the scope of this compliance overview. 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.

This determination is especially important for purposes of compliance with the federal Universal Service Program (USP).

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30 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).

31 *Id.*

B. Federal Registration Requirement

There is no federal requirement to obtain prior authorization or certification to provide domestic telecommunications services, *per se*. However, all domestic *interstate telecommunications service* providers must 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.[32] 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. It is also crucially important, from both a federal compliance perspective and a competitive perspective. As to federal compliance and enforcement, the FCC has undertaken significant enforcement efforts with regard to the USP over the past few years, and may assess fines and forfeitures amounting to treble damages. From the competitive perspective, the various exemptions and other intricacies surrounding the USP may permit knowledgeable service providers to reduce their USP exposure, while less-savvy service providers may find themselves at a competitive disadvantage.

In general terms, the federal USP requires 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"), to pay into the Universal Service 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 16% - 20%. The proposed contribution factor for the first quarter of 2019 is 20.0% (up from 19.5% for the same quarter in 2018).[33]

Given its importance and complexity, we have prepared a separate, standalone memorandum specifically addressing the federal Universal Service Program.[34] That memo is publicly available, and we encourage readers to refer to it as an introduction, at least, to the myriad issues surrounding compliance with the federal USP.

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32 https://apps.fcc.gov/edocs_public/attachmatch/DA-16-138A2.pdf.

33 https://docs.fcc.gov/public/attachments/DA-18-1249A1.pdf?utm_campaign=Newsletters&utm_source=sendgrid&utm_medium=email; https://www.fcc.gov/document/usf-contribution-factor-1st-quarter-2018-195-percent

34 Baller Stokes & Lide, P.C., *Annual Federal Universal Service Program Memorandum*, (available online at https://www.baller.com/library/.

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.[35] This includes carriers that have received a blanket grant of 214 authority mentioned above.

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.[36] 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.[37]

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

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35 47 C.F.R. § 63.03.

36 47 U.S.C. § 214(a).

37 *See* 47 C.F.R. §§ 63.60 *et seq.*

30 or 15 days, respectively, after the FCC releases public notice of the proposed discontinuance.[38] 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."[39]

After a carrier has given the prescribed notice to all of its affected customers, it must submit a discontinuance application to the FCC.[40] 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 service to be discontinued, reduced, or impaired; and (3) any other information the Commission may require.[41]

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.[42]

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, intercarrier 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.

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38 47 C.F.R. § 63.71(a).

39 *See id.*

40 *See* 47 C.F.R. § 63.71(b).

41 *See id.*

42 47 C.F.R. § 63.71(c).

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.[43]

While the 2019 filing obligation and due date have not yet been announced, in prior years the due date has been March 1 for data as of December 31 of the preceding year, and by September 1 for data as of June 30 of the then current year.

2. Annual FCC Regulatory Fees

Interstate telecommunications service providers,, local exchange carriers and other telecommunications service providers, as well as interconnected VoIP providers, must pay an annual FCC regulatory fee. The regulatory fee assessed is based on an interstate telecommunications service providers' total revenue. For more information, see: https://www.fcc.gov/licensing-databases/fees/regulatory-fees.

In 2017, the *de minimis* exemption threshold, which applies to any provider whose total regulatory fee liability, including all fee categories, was increased from $500 to $1,000.

Government entities[44] and non-profit entities[45] exempt under section 501(c) of the IRS Code are exempt from regulatory fees and need not submit payment. See 47 CFR § 1.1162.

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 2019 payment late in mid 2019.

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43 *See Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership*, 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.

44 "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).

45 *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."

3. Customer Proprietary Network Information (CPNI) Compliance Certification

FCC rules require providers of telecommunication services to take certain steps to safeguard customer information.

Telecommunications service providers must file an annual certification acknowledging compliance with the CPNI rules along with an accompanying statement explaining CPNI procedures, a summary of customer complaints in the past year concerning the unauthorized release of CPNI, and list any proceedings instituted or petitions filed against data brokers.

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. 2015-02, Annual CPNI Certifications Due March 1, 2011, EB Docket No. 06-36, rel. Feb. 9, 2015, https://apps.fcc.gov/edocs_public/attachmatch/DA-15-178A1.pdf.

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, Stokes & Lide web site (http://www.baller.com/calea.html) and the FCC web site: (https://www.fcc.gov/public-safety-and-homeland-security/policy-and-licensing-division/general/communications-assistance). 4

6. 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. In a series of orders applying various telephone-like requirements on the service, the FCC has defined the term as follows:

> [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 "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 Contributions (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

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46 *In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket 04-295, *First Report and Order and Further Notice of Proposed Rulemaking*, 20 FCC Rcd. 14989, 2005 WL 2347765, ¶ 39. *See* 47 CFR § 9.3.

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 current safe harbor presumption allows providers to assume that 64.9% percent of their revenue from interconnected VoIP service is from interstate service.[47]

As a result of the Twenty First Century Communications and Video Accessibility Act of 2010,[48] 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] As a result, non-interconnected VoIP service providers are required to complete and file Form 499A within thirty days of commencing service and must file Form 499A every April 1st thereafter.[50]

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. 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.

The form – which requests a large amount of information and may take substantial time to complete – must be submitted twice a year, as described above in Section II, E.1.

While the 2019 filing obligation and due date have not yet been announced, in prior years it has always been **March 1** for data as of December 31 of the preceding year, and by **September 1** for data as of June 30 of the then current year.

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. *See infra*, Section II.E.3.

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47 *See* Instructions to Form 499-A (2016), at 40.

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.

50 FCC 2018 Form 499A Instructions https://docs.fcc.gov/public/attachments/DOC-349326A1.pdf

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 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.[51] 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 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.[52]

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 by April 2. The certification must be made on-line at: https://apps.fcc.gov/rccci-registry/login!input.action.

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51 47 U.S.C. § 153(1).

52 47 U.S.C. § 617(f).

6. Local Number Portability

On November 8, 2007, the FCC released a Local Number Portability ("LNP") Order,[53] 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.[54] 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 make numbers available to their customers through commercial arrangements with carriers (*i.e.*, numbering partners).

In July 2018, the FCC adopted a Report and Order that eliminated some of the parity requirements, such as unnecessary toll interexchange dialing and database query requirements that result in obstacles and inefficiencies.[55]

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

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

54 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*).

55 *In the Matter of Nationwide Number Portability; Numbering Policies for Modern Communications*, WC Docket 17-244, 13-97, Report & Order , FCC (July 13, 2018), https://www.gpo.gov/fdsys/pkg/FR-2018-08-20/pdf/2018-17843.pdf .

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. For more information *see:* http://www.fcc.gov/fees/regfees.

A de minimis exemption applies to any provider whose amount due is under $1,000.

Government entities[56] and IRS Code § 501(c) non-profit entities[57] are exempt from regulatory fees and need not submit payment.[58]

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 2018 payment in mid 2019.

10. Battery Backup Obligation

On August 5, 2015, the FCC adopted rules requiring VoIP providers to offer new subscribers the option to purchase, for themselves at their own cost, a backup power solution that provides at least eight hours of standby power during a commercial power outage.[59] These rules went into effect on February 13, 2016, for providers with 100,000 U.S. customers or more, and went into effect on August 11, 2016, for VoIP providers with fewer than 100,000 customers.

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56 "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).

57 *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."

58 *See* 47 CFR § 1.1162.

59 *Ensuring Continuity of 911 Communications*, Report and Order, FCC (Aug. 5, 2016) https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-98A1.pdf.

Within three years of the effective date, February 2019 and August 2019 respectively, providers must make at least one option available to subscribers that provides 24 hours of backup power to enable 911 calls. If there is not a 24-hour backup power option at that time, the FCC will allow providers to offer their subscribers the option of purchasing three 8-hour batteries.

IV. BROADBAND INTERNET ACCESS SERVICE

A. Regulatory Treatment of "Broadband Internet Access Service" (BIAS)

In its *Restoring Internet Freedom Order* issued in January 2018,[60] the current FCC rolled back the *Open Internet Order* that the previous FCC issued in March 2015.[61] In so doing, the FCC reclassified broadband Internet access service (BIAS) from a Title II common carrier "telecommunications service" to an unregulated Title I "information service."

Although the FCC now considers BIAS to be an information service, it retained the 2015 *Open Internet Order*'s definition of BIAS as: :

> A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service.[62]

In adopting its new Order, the FCC stated that it intended to free ISPs from unnecessary regulatory burdens and to allow them to pursue additional revenue streams. The FCC also found that existing legal and regulatory regimes, primarily under the adminstration of the Federal Trade Commisison (FTC), would be sufficient to govern any ISP behavior that impeded on the openness of the Internet:

> In the unlikely event that ISPs engage in conduct that harms Internet openness, despite the paucity of evidence of such incidents, we find that utility-style regulation is unnecessary to address such conduct. Other legal regimes—particularly antitrust law and the FTC's authority under Section 5 of the FTC Act to prohibit unfair and deceptive practices—provide protection for consumers. These long-established and well-understood antitrust and consumer protection laws are well-suited to addressing any openness concerns, because they apply to the whole of the Internet ecosystem, including edge providers, thereby avoiding tilting

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60 *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, FCC 17-166, rel. Januar 4, 2018.

61 *In the Matter of Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd. 5601 (F.C.C.), 2015 WL 1120110, ("*Open Internet Order*"), *aff'd, United States Telecom Association v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

62 *Restoring Internet Freedom Order,* at ¶ 21.

> the playing field against ISPs and causing economic distortions by regulating only one side of business transactions on the Internet.[63]

B. Transparency Requirements

While removing all of the *Open Internet Order*'s rules governing the business practices of ISPs, the *Restoring Internet Freedom Order* establishes new transparency requirements that would give the FCC insight into current ISPs practices, and would theoretically allow consumers to understand the business practices of their ISP and oppose the practices with which they disagree:

> Properly tailored transparency disclosures provide valuable information to the Commission to enable it to meet its statutory obligation to observe the communications marketplace to monitor the introduction of new services and technologies, and to identify and eliminate potential marketplace barriers for the substantially reduces the possibility that ISPs will engage in harmful practices, and it incentivizes quick corrective measures by providers if problematic conduct is disclosures improve consumer confidence in ISPs' practices while providing entrepreneurs and other small businesses the information they may need to innovate and improve products.[64]

The specific transparency rule the FCC adopted states:

> Any person providing broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient to enable consumers to make informed choices regarding the purchase and use of such services and entrepreneurs and other small businesses to develop, market, and maintain Internet offerings. Such disclosure shall be made via a publicly available, easily accessible website or through transmittal to the Commission.[65]

The FCC specifies the information ISPs must provide to help the FCC and consumers evaluate their network management practices, performance, and commercial terms. **The FCC found that all BIAS providers must comply with the disclosure requirements listed below, including small providers that were previously eligible for an exemption.**[66] The disclosures must be made via a publicly available, easily accessible website, or submitted to the FCC and the FCC will make the disclosure available on a publicly available, easily accessible website.

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63 *Id.*, at ¶ 140.

64 *Id.*, at ¶ 209.

65 *Id.*, at ¶ 215.

66 "Because the requirements we adopt today … do not impose disparately high burdens on small providers, we find an exemption for small providers unnecessary." *Id.*, ¶ 227.

1. Network Management Practices

The FCC requires all ISPs to disclose the following:

- *Blocking.* Any practice (other than reasonable network management elsewhere disclosed) that blocks or otherwise prevents end user access to lawful content, applications, service, or non-harmful devices, including a description of what is blocked.

- *Throttling*. Any practice (other than reasonable network management elsewhere disclosed) that degrades or impairs access to lawful Internet traffic on the basis of content, application, service, user, or use of a non-harmful device, including a description of what is throttled.

- *Affiliated Prioritization.* Any practice that directly or indirectly favors some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, or resource reservation, to benefit an affiliate, including identification of the affiliate.

- *Paid Prioritization.* Any practice that directly or indirectly favors some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, or resource reservation, in exchange for consideration, monetary or otherwise.

- *Congestion Management*. Descriptions of congestion management practices, if any. These descriptions should include the types of traffic subject to the practices; the purposes served by the practices; the practices' effects on end users' experience; criteria used in practices, such as indicators of congestion that trigger a practice, including any usage limits triggering the practice, and the typical frequency of congestion; usage limits and the consequences of exceeding them; and references to engineering standards, where appropriate.

- *Application-Specific Behavior*. Whether and why the ISP blocks or rate-controls specific protocols or protocol ports, modifies protocol fields in ways not prescribed by the protocol standard, or otherwise inhibits or favors certain applications or classes or applications.

- *Device Attachment Rules*. Any restrictions on the types of devices and any approval procedures for devices to connect to the network.

- *Security.* Any practices used to ensure end-user security or security of the network, including types of triggering conditions that cause a mechanism to be invoked (but excluding information that could reasonably be used to circumvent network security).[67]

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67 *Id.*, ¶ 220 (internal citations omitted).

2. Performance Characteristics

The FCC also requires ISPs to disclose a service description as well as the impact of specialized services on performance.

- *Service Description.* A general description of the service, including the service technology, expected and actual access speed and latency, and the suitability of the service for real-time applications.

- *Impact of Non-Broadband Internet Access Service Data Services.* If applicable, what non-broadband Internet access service data services, if any, are offered to end users, and whether and how any non-broadband Internet access service data services may affect the last-mile capacity available for, and the performance of, broadband Internet access service.[68]

3. Commercial Terms

Finally, the FCC requires ISPs to disclose the terms on which they make their services available:

- *Price.* For example, monthly prices, usage-based fees, and fees for early termination or additional network services

- *Privacy Policies.* A complete and accurate disclosure about the ISP's privacy practices, if any. For example, whether any network management practices entail inspection of network traffic, and whether traffic is stored, provided to third parties, or used by the ISP for non-network management purposes.

- *Redress Options.* Practices for resolving complaints and questions from consumers, entrepreneurs, and other small businesses.[69]

C. Other Issues Impacted by the *Restoring Internet Freedom Order*

1. Infrastructure Access Rights

The FCC's reclassification of BIAS as a Title II service in the *Open Internet Order* meant that BIAS providers might take advantage of certain infrastructure access rights traditionally only available to Title II telecommunications carriers and cable television operators, including nondcriminatory access to poles, ducts and conduits. The *Restoring Internet Freedom Order* effectively removed such rights. The FCC explained:

> To the extent today's classification decision impacts the deployment of wireline infrastructure, we will address that topic in detail in proceedings specific to those issues. The importance of facilitating broadband infrastructure deployment indicates that our authority to address barriers to infrastructure deployment

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68 *Id.*, ¶ 222 (internal citations omitted).

69 *Id.*, ¶ 223.

> warrants careful review in the appropriate proceedings. We disagree with commenters who assert that Title II classification is necessary to maintain our authority to promote infrastructure investment and broadband deployment. Because the same networks are often used to provide broadband and either telecommunications or cable service, we will take further action as is necessary to promote broadband deployment and infrastructure investment. Further, Title I classification of broadband Internet access services is consistent with the Commission's broadband deployment objectives, whereas the Title II regulatory environment undermines the very private investment and buildout of broadband networks the Commission seeks to encourage. Additionally, in the twenty states and the District of Columbia that have reverse-preempted Commission jurisdiction over pole attachments, those states rather than the Commission are empowered to regulate the pole attachment process.
>
> We are resolute that today's decision not be misinterpreted or used as an excuse to create barriers to infrastructure investment and broadband deployment. For example, we caution pole owners not to use this *Order* as a pretext to increase pole attachment rates or to inhibit broadband providers from attaching equipment—and we remind pole owners of their continuing obligation to offer "rates, terms, and conditions [that] are just and reasonable." We will not hesitate to take action where we identify barriers to broadband infrastructure deployment. We have been working diligently to remove barriers to broadband deployment and fully intend to continue to do so.[70]

2. Consumer Protection, Enforcement and Redress

In the *Restoring Internet Freedom Order*, the FCC suggests that consumer protection concerns should primiarly be the function of the FTC.[71] The FCC stated that the FTC already had broad authority to protect consumers from unfair or deceptive practices, and that the FTC has the ability to apply consumer protection principles to the entire Internet ecosystem as opposed to only certain businesses within the FCC's ambit.

3. Customer Privacy / CPNI

Much like consumer protection issues, the FCC in the *Restoring Internet Freedom Order* designated the FTC as the primary agency for ensuring customers' privacy.

> By reinstating the information service classification of broadband Internet access service, we return jurisdiction to regulate broadband privacy and data security to the Federal Trade Commission (FTC), the nation's premier consumer protection agency and the agency primarily responsible for these matters in the past. Restoring FTC jurisdiction over ISPs will enable the FTC to apply its extensive privacy and

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70 *Id.*, ¶¶ 185-186

71 *Id.*, ¶ 141.

data security expertise to provide the uniform online privacy protections that consumers expect and deserve.[72]

4. Disability Access

While the 2015 *Open Internet Order* incorporated certain rules pertaining to disability access to BIAS providers, the FCC in the *Restoring Internet Freedom Order* found that there was still significant authority for the FCC to ensure broadband services were available to consumers with disabilities.[73] Thus, the Open Internet Order's disability access rules remain in place.

D. BIAS Filing and Reporting Requirements

In addition to the obligations imposed as a consequence of the *Restoring Internet Freedom Order* outlined above, BIAS providers must also comply with the following:

1. Form 477: Local Telephone Competition and Broadband Reporting

Form 477 collects information about broadband connections and wired and wireless local telephone services. 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 providers of broadband service connections to end-user locations.

Form 477 requests a large amount of information and may take substantial time to complete. It must be submitted twice a year, as described below.

Form 477 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.

The FCC is examining proposals to improve and streamline the Form 477 data collection.[74] The Form 477 fiing interface is now open.[75]

Deadline: Normally, affected 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. Information on the latest instructions are available on the FCC website.

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72 *Id.*, ¶ 181.

73 *Id.*, ¶ 205.

74 *In the Matter of Modernizing the FCC Form 477 Data Program*, WC Docket No. 11-10, Further Notice of Proposed Rulemaking, FCC 17-103, rel. August 4, 2017.

75 https://apps2.fcc.gov/form477/login.xhtml

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 Stokes & Lide website: http://www.baller.com/calea.html and the FCC website: https://www.fcc.gov/public-safety-and-homeland-security/policy-and-licensing-division/general/communications-assistance.

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). Online service providers are to 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/onlinesp/.

COMPLIANCE TIMETABLE		
FILING/REPORT	**DUE DATE**	**AFFECTED PROVIDERS**
Form 499Q: Quarterly Telecommunications Reporting Worksheet (Universal Service)(1)	February 1, 2019	All telecom service and telecom or interconnected VoIP that exceed *de minimis* level
Form 477: Local Telephone Competition and Broadband Reporting Data (1)	Subject to Further Notice of Proposed Rulemaking ; status unclear (normally March 1, and September 1)	All broadband, telecom service, interconnected VoIP
CPNI Compliance Certification	March 1, 2019	All telecom service, interconnected VoIP
Copyright Statutory Royalty Fee Report (1)	March 1, 2019, August 29, 2019	Cable
Form 499A; Annual Telecomm-unications Reporting Worksheet pp. 1,2,3 and 8 (initial registration)	Within one week of providing telecom service	All telecom service and interconnected VoIP
Form 499A: Annual Telecommunications Reporting Worksheet (Universal Service)	April 1, 2019	All telecom service, VoIP (interconnected and non-inter-connected), and telecom provi-ders that exceed *de minimis* level
Annual Disability Access Record Keeping Certification	April 1, 2019	All telecom service, interconnected VoIP, and providers of advanced services.
Form 499Q: Quarterly Telecommunications Reporting Worksheet (Universal Service)(2)	May 1, 2019	All telecom service and telecom or interconnected VoIP providers that exceed the *de minimis* contribution
Form 395: Common Carrier Annual Employment Report	May 31, 2019	Telecom service (and possibly interconnected VoIP) with >16 employees
Form 499Q: Quarterly Telecommunications Reporting Worksheet (Universal Service)(3)	August 1, 2019	All telecom service and any telecom or interconnected VoIP providers that exceed the *de minimis* contribution
Form 477: Local Telephone Competition and Broadband Reporting Data (2)	September 4, 2018* (Subject to pending rulemaking)	Broadband, telecom service, interconnected VoIP
Form 396-C: MVPD EEO Program Annual Report	September 30, 2019	Cable
Annual FCC Regulatory Fee	TBD, sometime in Q3	Cable, telecom, interconnected VoIP
Form 499Q: Quarterly Telecommunications Reporting Worksheet (Universal Service)(4)	November 1, 2019	All telecom service and any telecom or interconnected VoIP providers that exceed *the de minimis* contribution
Form 322: Cable Registration	Before commencing service	Cable
Performance Testing	Twice each year	Cable (non-digital)
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 2018. Please refer to the FCC forms page for latest information.		