

Patton Boggs TechComm Industry Update - October 30, 2009  
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## **Broadband Stimulus Funding From Round One Will be Delayed; Only One More Funding Round Anticipated**

NTIA and RUS Administrators told members of the Senate Commerce Committee on Oct. 27 that reviews of BTOP/BIP broadband stimulus applications were taking longer than expected.

The slower pace means that the first BTOP applications will not be granted until mid-December and that processing all applications under the first NoFA will not be completed until February 2010, according to Larry Strickling, NTIA Administrator. Meanwhile, RUS Administrator Jonathan Adelstein told the Senate panel that RUS will begin issuing awards "as soon as possible," although RUS expects to make announcements a month after its initially scheduled Nov. 7 award date.

As for the upcoming Request for Information (RFI) regarding the second funding round, Strickling did not provide committee members with any indication of when it would be released, but Adelstein noted that it would happen "shortly."

In response to questions, Adelstein and Strickling both acknowledged applicants' reluctance to seek BIP loans when BTOP grants are available. Witnesses also said that there will only be one more funding round, with more money in the second round than in the first for the BIP program.

Meanwhile, a third witness, Mark Goldstein, Director of Physical Infrastructure Issues for the Government Accountability Office, told senators that both agencies are understaffed and have been given insufficient time to process 2,200 applications. Goldstein also noted there was a lack of funding for oversight of the programs.

Committee Chairman Jay Rockefeller (D-WV) expressed his concern to witnesses about the definition of "remote" that RUS adopted for the first round of funding. Adelstein vowed to completely review the definition once comments are filed in response to the RFI and acknowledged flaws in the current definition.

The testimony from the administrators comes amid recent press reports that RUS has moved just 18 last mile, remote applications to Phase Two/Step Two of the broadband stimulus application review process. RUS and NTIA will both notify applicants that they will be moving to Phase Two /Step Two on a rolling basis rather than by a single public notice.

Please contact us if you need additional information about current happenings related to broadband stimulus funding.

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## Time Warner Cable Will Launch WiMAX in North Carolina By Year End

Time Warner Cable plans to launch its WiMAX-based service, called Road Runner, on Dec. 1 in Charlotte, Greensboro and Raleigh, North Carolina. In addition, Time Warner plans to bring Road Runner to Dallas and parts of Hawaii in early 2010. Time Warner's Road Runner service leverages Clearwire's Wi-Max network to offer speeds of up to 6 Mbps. Time Warner holds a 4.5 percent stake in Clearwire. Time Warner will offer customers three service packages ranging from \$39.95 for service that caps speeds at 2 gigabytes to \$79.95 for an unlimited 3G/4G wireless package. Time Warner's WiMAX launch follows Comcast's WiMAX launch of a service called High-Speed 2go. Comcast's service is available in Atlanta and Portland. Comcast plans to offer the High-Speed 2go service in its Dallas, Chicago and Philadelphia markets soon.

## McCain Introduces Bill to Block Net Neutrality Rules

Sen. John McCain (R-AZ) introduced legislation to block the FCC from regulating the Internet the same day the Commission adopted a rulemaking on net neutrality by a 3-2 vote. McCain said the intent of the legislation was to prevent net neutrality rules that would reign in the network management practices of all Internet service providers, including wireless telephone companies. The bill would create an exception for national security and make clear that the legislation applies only to new rules the FCC would adopt, rather than existing ones.

Sen. Kay Bailey Hutchison (R-TX) threatened to introduce a bill that would have blocked funding for net neutrality rules, but held off and has said she is closely examining the FCC's new rules.

## FCC Seeks Comment on New Net Neutrality Principles

The FCC released a Notice of Proposed Rulemaking seeking comment on the best way to balance carrier needs for network management techniques with preservation of an open and free Internet. Comments are due **Jan. 14, 2010** and reply comments are due **March 5, 2010**. The FCC seeks comment on the issues below.

- The FCC proposes to make the following four principles from its Internet Policy Statement into binding rules: (1) consumers are entitled to access the lawful Internet content of their choice; (2) consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement; (3) consumers are entitled to connect their choice of legal devices that do not harm the network; and (4) consumers are entitled to competition among network providers, application and service providers, and content providers. The principles are subject to "reasonable" network management.
- The FCC proposes to codify a fifth principle that would require a broadband Internet access service provider to treat lawful content, applications and services in a nondiscriminatory manner, and a sixth principle that would require a broadband Internet access service provider to disclose such information concerning network management and other practices as is reasonably required for users and content, application and service providers to enjoy anti-competitive protections.
- The FCC proposes clarifying language that the principles would be subject to reasonable network management and would not supersede any obligation a broadband Internet access service provider may have, or limit its ability, to deliver emergency communications or to address the needs of law enforcement, public safety or national or homeland security authorities, consistent with applicable law.
- The FCC seeks comment on a category of "managed" or "specialized" services, how to define such services, and what principles or rules, if any, should apply to them.
- The FCC proposes that the six principles apply to all platforms for broadband Internet access, but seeks comment on how, in what time frames or phases, and to what extent the principles should apply to non-wireline forms of Internet access, including, but not limited to, terrestrial mobile wireless, unlicensed wireless, licensed fixed wireless and satellite.
- The FCC seeks comment on the enforcement procedures that it should use to ensure compliance with the proposed principles.

According to the FCC, the draft rules would not prohibit broadband Internet access service providers from taking reasonable action to prevent the transfer of unlawful content, would not impede providers from complying with other laws and would not inhibit a provider's ability to flexibly respond to new challenges. The FCC hopes its proposal will help safeguard the openness and of the Internet and assure transparency in the Internet's operations.

### **Sprint Nextel Acquires iPCS to End Litigation Over Its Nextel Acquisition**

Sprint Nextel has entered into an agreement to acquire Sprint affiliate iPCS for \$831 million. The agreement settles a four-year legal battle over competitive issues arising from the merger of Sprint and Nextel. iPCS argued that Sprint's acquisition of Nextel violated its exclusive right to sell wireless services under the Sprint brand name in seven states in the Midwest. Sprint was ordered to divest the Nextel network in iPCS' territory. After appealing the decision and losing, Sprint decided to acquire iPCS for \$24 a share. Sprint also will assume \$405 million of debt. Under the agreement, the pending litigation between the companies will be resolved upon closing, which is expected in late 2009 or early 2010.

### **DC Circuit Hears Rate Cap Case; FCC, Incumbents and Wireless Carriers Likely to Win**

The U.S. Court of Appeals for the District of Columbia Circuit recently heard oral argument in *Core Communications, Inc. v. FCC*. Core Communications (Core) challenged an FCC order that provides legal justification for its application of a rate cap on telecommunications providers' intercarrier payments for dial-up traffic to ISPs. The D.C. Circuit has rejected the FCC's legal justifications for the cap two times before. In its November 2008 order and the order at issue in this case, the FCC concluded that ISP-bound dial-up traffic is a mixture of interstate and intrastate communications and therefore should be afforded different treatment than other reciprocal compensation traffic, and should be subject to an FCC cap. Core argues that because the traffic is reciprocal compensation traffic under the Communications Act, state PUCs have the authority to set the final rates, not the FCC. Industry analysts predict that the court is not likely to overturn the FCC's November 2008 decision. Maintaining the current payment arrangements will benefit incumbents, wireless carriers and backhaul providers, and will allow the FCC more time to resolve intercarrier compensation.

### **Rural Health Care Pilot Program Proposals Released**

To date, 44 of the 68 participants who were approved to participate in the Rural Health Care Pilot Program have published requests for proposals (RFPs) on [USAC's Web site](#), seeking vendors and service providers to assist them in building broadband networks to support rural health care. Of the RFPs, the one below to serve Northern New York was recently posted. Participants must wait at least 28 days before entering a contract date with a vendor. Please contact us for more information about this opportunity.

<b>Applicant</b>	<b>Location</b>	<b>Date Posted</b>	<b>Allowable Contract Date</b>
<a href="#">North Country Telemedicine Project</a>	New York	10/16/2009	11/13/2009

### **House Panel Examines Video Competition, FCC Program Carriage Complaint Process**

The House Subcommittee on Communications, Technology and the Internet is investigating program carriage issues and fielded concerns last week during a congressional hearing about program distributors favoring their own program over unaffiliated programming. A representative for Verizon Communications urged Subcommittee Chairman Rick Boucher (D-VA) to pursue a bill to close a 17-year-old "terrestrial loophole" through which cable operators with programming assets can avoid FCC program access requirements that apply to satellite-delivered content.

Verizon previously issued a complaint to the FCC that Cablevision is purposely withholding HD signals which are available on the Cablevision-owned Madison Square Garden channel. The FCC has yet to act on the request, but

Verizon claims Cablevision is trying to gain a competitive edge in the New York area by denying access to the signals.

Cablevision COO Tom Rutledge told the subcommittee that federal law permits cable operators to decide the parties to whom they will sell their programming, including the Madison Square Garden channel. According to Rutledge, it is crucial in Cablevision's case that it is allowed to deny a rival MVPD the right to carry its channel, Rutledge added.

Boucher indicated that members want input on whether the FCC's program carriage complaint process works, or whether the Congress should provide a remedy. His question stemmed from carriage complaints about program distributors favoring their own programming. In addition to Verizon's complaint about HD signals, the FCC is considering a complaint from Wealth TV and the MidAtlantic Sports Network.

The hearing dealt with many issues, including broadband deployment, satellite carriage and retransmission consent. Boucher noted that major network Web sites offer full episodes of programs that aired as recently as the day before. "The more such programming migrates to the Internet," he said, "the less consumers may need to subscribe to a multichannel video provider at all." Ranking Member Cliff Stearns (R-FL) also noted that competition in the multichannel video marketplace is vigorous. He pointed to a drop in cable's market share from nearly 100 percent 20 years ago to roughly 63 percent now.

### **House Panel Clears Satellite TV Bill**

The House Energy and Commerce Committee marked up legislation on Oct. 15 that renews for five years the law governing transmission of broadcast television signals through systems such as DirecTV and EchoStar. The law expires on Dec. 31. Energy and Commerce Communications Subcommittee Chairman Rick Boucher (D-VA) expressed concern in recent months that local signals are not available via satellite in dozens of rural areas.

Under an agreement the panel brokered with EchoStar, its Dish network would add so-called "local-into-local" service — available in 181 cities it serves — to its remaining 29 markets starting next year. Sources said EchoStar, which must launch a new satellite to accomplish this goal, agreed to incur the expense in exchange for being exempted from a court order restricting it from offering distant network signals to viewers in outlying local markets. The restriction was imposed after EchoStar made those signals available to ineligible customers.

DirecTV, the nation's largest satellite provider, offers local signals in 152 markets, and negotiations are under way to convince the company to expand the service to its remaining 58 markets, a step it has said would cost tens of millions of dollars.

### **NTIA to Host Broadband Data Workshop**

NTIA plans to host a workshop on Oct. 30 at 1 p.m. on data that the agency collects related to broadband Internet access, data needs of researchers and future broadband research. At the workshop, NTIA will discuss the types and frequency of broadband Internet access data that NTIA can compile through its ongoing programs, the current sources of data available to the research community and the legal requirements regarding the agency's collection of and dissemination of data from third parties.

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## **[INDUSTRY CALENDAR](#)**

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If you have any questions about the foregoing or if you require additional information, please contact:

**Jennifer Cetta**

202.457.6546

[jcetta@pattonboggs.com](mailto:jcetta@pattonboggs.com)

**Carly Didden**

202.457.6323

[cdidden@pattonboggs.com](mailto:cdidden@pattonboggs.com)

**Rebecca Murphy**

202.457.5312

[rlmurphy@pattonboggs.com](mailto:rlmurphy@pattonboggs.com)

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