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**WEDNESDAY, MARCH 17, 2010
9:00AM-12:00PM**

PART I: Money, Pipes, and the Rules of the Road

- Money: How to Maximize Your Network Realization Via Intercarrier Compensation and Universal Service Funding
 - Ross Buntrock, Jon Canis, Katherine Barker Marshall, and Joe Bowser
- Pipes: What We Know About the National Broadband Plan
 - Stephanie Joyce
- The Rules of the Road: The “Open Internet” Proceeding and What It Means To You
 - Stephanie Joyce

PART II: A Pragmatic Approach to FCC Enforcement Issues

- FCC Enforcement
 - USAC Collections
 - Compliance Inquiries
- Primary Jurisdiction Referrals

Presented by Jon Canis and Michael Hazzard

PART I

Money, Pipes, and the Rules of the Road

Ross Buntrock, Jon Canis,
Stephanie Joyce, Katherine Barker
Marshall, and Joe Bowser

Part I: Money

How to Maximize Your Network Realization Via Intercarrier Compensation and Universal Service Funding

Ross Buntrock, Jon Canis,
Katherine Barker Marshall,
and Joe Bowser

Part I: Money

Enforceable Access Tariffs

Katherine Barker Marshall

Part I: Money

Enforceable Access Tariffs

- In the wake of the FCC's decisions in Qwest v. Farmers and Merchants Telephone, carriers must be mindful of the enforceability of their tariffs for Switched Access Services. Many of the issues raised in Farmers and in other cases turn on the applicability of a filed tariff to the traffic that was delivered to the Local Exchange Carrier and its end user.
- Switched Access Service Tariffs are subject to more scrutiny than ever before.

Part I: Money (Tariffs) (cont.)

- Many carriers have been using the same terms and conditions in their Switched Access Tariffs for a number of years without updating them to account for changes in business plan, law, or customer base.
- Much of the language in competitive Switched Access Tariffs has been taken from the National Exchange Carriers Association Tariff No. 5 that have been filed over the years. Farmers, for example, cites NECA in its own FCC tariff during the period of time that was the subject of Qwest's Complaint.
- Generally, NECA Tariff No. 5 and other Switched Access Tariffs currently on file are based upon the premise that all carriers utilize the same network configuration as the Bell Companies and do not account for deviations from that type of network plan.

Part I: Money (Tariffs) (cont.)

- Carriers should be sure to review their terms and conditions of service regularly in order to ensure that their current filed tariffs accurately reflect their business plan, and to minimize confusion as to who is the party taking service under the tariff.
 - Both Local Exchange Service and Switched Access Tariffs
 - Both federal Switched Access Tariffs and state Switched Access Tariffs
- If a term can be misconstrued or is unclear, the IXCs will use this as a reason not to pay terminating access.

Part I: Money (Tariffs) (cont.)

- Some areas of particular interest to review in the wake of Farmers and Merchants and other related cases:
 - Definitions
 - Do the current definitions in the tariff make it clear as to who is the Customer under the terms of the tariff?
 - Are there terms defined that are no longer used in the tariff itself, thereby leading to confusion?
 - Are all of the terms applicable to the services provided under the tariff?
 - Billing Terms
 - Are the dispute provisions strong enough to protect the company from a No-Pay situation?
 - Is there a limit on the time frame to raise disputes?
 - By way of example, the NECA Tariff No. 5 has no time limit as to when billing disputes can be raised. In some cases, IXC's have used this language in Switched Access Tariffs to justify No-Pay.

Part I: Money (Tariffs) (cont.)

- (Areas of particular interest, cont.)
 - Individual Case Basis (ICB) Clauses
 - Is there one present in the tariff to allow for the flexibility to enter into agreements for services outside of the tariff?
 - Constructive Ordering
 - Does the tariff require orders for service to be in writing?
 - Does the tariff contain a triggering clause for instances in which the Customer sends traffic without providing a written service order?

Part I: Money

Intercarrier Compensation in Wireless Services

Joe Bowser

Part I: Money

Intercarrier Compensation in Wireless Services

- **2005:** FCC provides 251/252 roadmap to ILECs and CMRS carriers
- **2009:** FCC tells CLECs to go back to states to set termination rates
- State PUC “road show” has begun
- Lessons: start negotiating now; seek state commission relief at first sign of delay or impasse

Part I: Money (Wireless) (cont.)

Lay of the Law (Part 1)

- **February 2005: FCC's *T-Mobile* decision**
 - LECs cannot bill CMRS carriers tariffed access charges for non-access CMRS traffic
 - ILECs can invoke section 251/252 by requesting interconnection and demanding arbitration with CMRS carriers
 - No mention of CLECs

Part I: Money (Wireless) (cont.)

Lay of the Law (Part 2)

- **March and November 2009:** Enforcement Bureau and Commission *North County* decisions
 - State Commissions must determine the “reasonable compensation” rate under FCC Rule 20.11 for CLECs (using whatever procedural devices the states choose, not 252)
 - FCC kept case on hold to determine any remaining issues under Rule 20.11 (but not the rate itself, which would need to be appealed via the appropriate state channels); principal issue would be retroactive relief
 - Case appealed to D.C. Circuit (filed Jan. 8, 2010)

Part I: Money (Wireless) (cont.)

Current State of Affairs

- **2009-present:** CPUC complaint proceedings (North County, Pac-West v. various CMRS)
 - CLECs seeking CPUC rate-setting under *North County*
 - CMRS arguing CPUC has no jurisdiction, or at least put on hold pending D.C. Circuit's handling of appeal
- **January 2010:** NYPSC *Xchange* decision
 - Follows FCC's holdings that CLECs cannot compel 251/252 arbitrations with CMRS carriers, but that states can set rates under state law for CLECs' termination of intrastate CMRS traffic
 - NYPSC tracked ILEC rate (but end office termination rate, not tandem rate, because Xchange could not terminate calls to all customers via one interconnection point)
 - No retroactive compensation

Part I: Money (Wireless) (cont.)

Bottom Line

- If you have not already, initiate negotiations TODAY with all CMRS carriers whose traffic you terminate
 - Propose clear terms, including rate(s), term of contract, and process for renewal (with no gaps in compensation pending renewal)
 - Put in hard response deadlines making clear that you will assume negotiations are at impasse if they do not accept an offer or make a substantive counter-offer within reasonable time
- File Complaints at appropriate PUCs when negotiations stall or fail
- And, for the CMRS carriers that argue that state commissions do not have jurisdiction to set the rates (*e.g.*, VZ, T, S, T-Mobile, Cricket), also file at the FCC

Part I: Money

Universal Service Funding

Jon Canis

Part I: Money (Universal Service)

Agenda

- Overview:
 - The 3 flavors of USF, and who is eligible to receive payments
- USF Reform:
 - Pending proposals and likely outcomes
- Don't Trust Your Wholesaler:
 - Protecting yourself against overpayment

Part I: Money (Universal Service) (cont.)

Overview: The 3 Flavors of USF

- The High Cost Fund:
 - Subsidizes services provided in “rural, insular and high-cost” areas.
 - Applies per line to every household or business in a high-cost area.
 - Supports basic telephone service only
- The Low Income Fund:
 - Subsidizes basic telephone service to low-income users
 - Low-income user: Eligible for any of a number of government assistance programs – school lunches, Medicaid, affordable housing subsidies
 - Amount determined by delta between prevailing market charge for basic telephone service, and target subsidized charge
 - 2 flavors: 1) recurring monthly support (“Lifeline”), 2) one-time subsidy for installing new line into home (“Link-Up”)
- The “E-Rate” Fund:
 - Supports advanced services to schools, libraries, and rural health care facilities

Part I: Money (Universal Service) (cont.)

Overview: Who Is Eligible?

- High Cost and Low Income: ETCs Only
 - Must be designated an Eligible Telecommunications Carrier (“ETC”)
 - State PUCs usually do the designation, if they don’t the FCC will
 - This can be problem in rural areas – many state PUCs are very protective of rural ILEC interests, ETC status for competitive carriers often contested
 - CMRS carriers are the best example – mix of states and FCC
 - Interesting exception: Native American Tribes (Tribe, State or FCC)
 - Most interesting new possibility: Broadband wireless applications
 - Argument that FCC has exclusive authority (uses spectrum, services are all IP-based, may cut across jurisdictional boundaries)
 - Can be a way for the FCC to use existing USF rules to fund broadband: VoIP over WiMAX is fundable by current USF, and supports broadband infrastructure deployment at the same time!

Part I: Money (Universal Service) (cont.)

Overview: Who Is Eligible?

- “E-Rate” Fund: Anyone Can Play
 - ETC designation not required – funds go to the school, library, or health institution that purchases advanced services, and they pay the provider
 - Used to fund infrastructure/equipment; now funds services as well
 - Bell Companies are among the largest recipients
 - Still an attractive source of funding for advanced service providers that have relationships with schools, libraries, and rural health care facilities

Part I: Money (Universal Service) (cont.)

Reform

- Complaints for years that USF fund is growing out of control
 - 1996 – Less than \$1Billion; 2007 – \$7.1 Billion
 - Today, over \$8 Billion (estimated)
 - Amounts to a surcharge of more than 14% on bills for regulated interstate and international telecom services, VoIP and conferencing
- Partial reform effort:
 - In May 2008, the FCC capped competitive ETC High Cost support at the state level to the amount received in 2008
 - ILECs get full funding, but per-line support for competitive ETCs gets reduced with each additional competitive ETC line
 - To avoid cap limits, competitive ETCs can receive support based on their own costs by filing their costs with the FCC

Part I: Money (Universal Service) (cont.)

Reform

- Biggest drivers for growth of USF:
 - Cellular carriers: Started getting ETC designation in 1998, have been one of the biggest drivers of demand for High Cost funding
 - High Cost funding consistently has caused as much as 80% of the growth of USF
- ILEC ETCs receive support based on their costs
- CLEC and cellular ETCs receive support on a per-line basis equal to the per-line support received by the incumbent ETC
 - In May 2008, the FCC capped competitive ETC support at the state level to the amount received in 2008
 - Total high-cost funds available within a state remain static regardless of competitive ETC line growth
 - A competitive ETC receives funding based on the percentage of total competitive ETC lines that the carrier serves within the study area
 - The FCC has also secured concessions from some large cellular carriers to reduce or eliminate the amount of USF they receive over time

Part I: Money (Universal Service) (cont.)

Reform Proposal 1 – Dutch Auction

- Carriers will “bid” to receive USF support in a given study area
 - Only the carrier(s) willing to accept COLR obligations within the study area at the lowest subsidy levels will receive support
 - Winners likely would be required to offer broadband service throughout the study area
- One option under consideration would be to hold separate auctions for wireline and wireless services
- Auctions can be conducted so that carriers can submit bids across multiple study areas to take advantage of economies of scale
- Unclear whether an ILEC that loses the reverse auction in its study area would be relieved of its COLR obligations
- Reps. Boucher (D., VA) and Terry (R., NE) have sponsored several bills utilizing reverse auctions to distribute USF support

Part I: Money (Universal Service) (cont.)

Reform Proposal 2 – Cost-Based Reimbursement

- Competitive ETCs, like ILECs, will receive support based on costs
 - Several parties argue that the identical support rule provides a windfall for competitive ETCs, and cellular carriers in particular
 - Requiring competitive ETCs to file their own costs avoids overpayment to these carriers
- The FCC will have to develop an accounting mechanism to allow competitive ETCs to file costs
 - Competitive ETCs would receive support based on the accounting mechanism established by the Commission
 - Spectrum costs are likely to be excluded from permissible cost list, potentially leaving wireless carriers at a competitive disadvantage
- Competitive ETCs that have chosen to file their costs have shown that they are entitled to more support than the uncapped identical support rule would provide

Part I: Money (Universal Service) (cont.)

Reform Proposal 3 – Limiting the Number of ETCs

- USF support will be limited to a few ETCs in each study area
 - For example, support could be limited to one wireline ETC and one wireless ETC in each study area
 - These proposals were developed in response to criticism that USF funds “duplicate” networks in areas that cannot support even one ETC
- The FCC would pick supported ETCs either through reverse auctions or through a “beauty contest” proceeding
 - The FCC could select recipients through competitive bidding or by examining the carriers (*i.e.*, choosing recipient based on which carrier offers the most reasonable rates, best service, widest network, etc.)
 - The FCC could distribute support based upon any of several methods (*e.g.*, cost filings, reverse auctions, or the identical support rule)
- Limiting the number of supported carriers in an area could still allow customers to benefit from competition, but avoid funding unnecessary network build-out

Part I: Money (Universal Service) (cont.)

Reform – Prognostications

- The FCC will eliminate the identical support rule (CLEC and cellular support = ILEC support), but it is unclear exactly what will replace it
 - Support to competitive ETCs likely will be limited to one or two providers in each study area (*e.g.*, support for one wireline carrier and one wireless carrier in each study area)
 - Support may also be distributed based upon technology (*e.g.*, wireline fund, mobility fund, broadband fund)
 - Analysis of carriers' costs highly unlikely
- USF funds will be used to help transition to an IP-based network
- ETCs will be allowed to use USF funds to provide broadband; ETCs may be required to provide broadband in order to receive support
- The USF contribution requirement will be extended to broadband service providers
- Any reforms likely will include a lengthy glide path to wean current USF recipients away from the current mechanism
- Native American Tribes will continue to receive unique, favorable treatment

Part I: Money (Universal Service) (cont.)

Don't Trust Your Transport Provider

- FCC's failure to resolve critical regulatory classification questions = chaos
 - Retail broadband (cable modem, DSL, etc.) is not subject to USF
 - Traditional end user broadband (DS1, ATM) is subject to USF
 - Treatment of higher level protocols (SONET, DWDM, Gig-E, MPLS) not defined
- What this means: Providers of transport may self-classify their service as subject to USF (in which case they pass these expenses on to you), or not
 - Worst case scenario: They collect from you, but don't remit to USAC
 - Protect yourself!
 - Ask for exemption certificates, make sure they are not restricted
 - Review contracts and practices to clarify treatment

Part I: Pipes
What We Know About the
National Broadband Plan

Stephanie Joyce

**Happy
St. Patrick's Day!**



**Happy
National Broadband Plan
Day (+ 1)!**

Part I: Pipes (Replacement Slide)

Six Goals:

- 100 MM homes have “affordable access” to 100 Mbps down, 50 Mbps up
- US leads the world in mobile innovation
- Every American has “affordable access” to “robust broadband service” (all homes have “actual” 4 Mbps/1 Mbps)
- One “anchor institution” (*e.g.*, school, government building) per community has 1 Gbps connectivity
- First Responders have nationwide, wireless, interoperable public safety network
- Every American can track energy in real time via broadband in order that “America leads in the clean energy economy”

Part I: Pipes (cont.) (Replacement Slide)

How We Will Get There

- Innovation and Investment
 - Fostering competition via improved disclosures to consumers, Special Access reform, and better data gathering
 - Focus markets are networks, devices, and applications
 - 500 MHz of new spectrum (including 120 MHz of TV spectrum), increasing access to conduits and poles, and recommending extension of the Research & Experimentation Tax Credit

Part I: Pipes (cont.) (Replacement Slide)

■ Inclusion

- Three Stages: Foundation for Reform (2010-11); Accelerate Reform (2012-16); and Complete the Transition (2017-20)
- Connect America Fund (CAF) will be established via shifting up to \$15.5 Billion from USF
 - Eventually eliminate per-minute intercarrier compensation
- Mobility Fund will focus on wireless 3G deployment
- Recommend to Congress additional grant/loan combination programs and a Tribal Broadband Fund
- Improve USF performance and accountability

Part I: Pipes (cont.) (Replacement Slide)

■ Focus on “National Purposes” (ARRA § 6001(k))

■ Education

- Rulemaking on funding connectivity to portable learning devices

■ Energy and the Environment

- Spectrum and RUS grants for Smart Grid

■ Economic Opportunity

- Public-private partnership offering technology training to enterprises in low-income areas

■ Government Performance and Civic Engagement

- Federal agencies as “broadband anchor tenants” for local governments and unserved or underserved communities

■ Public Safety

- Wireless, interoperable, nationwide network for First Responders

Part I: The Rules of the Road
The “Open Internet” Proceeding and
What It Means To You

Stephanie Joyce

Part I: Rules

- Six Principles: A provider of Internet Access Service may not
 - Prevent users from sending or receiving lawful content
 - Prevent users from using lawful applications or services
 - Prevent users from connecting lawful devices to the network
 - “Deprive” users of their “entitlement to competition” among providers of networks, applications, content, and services
 - Treat providers of lawful content, applications, or services in a discriminatory manner
- A provider of IAS must disclose information about “network management and other practices” so users and providers may “enjoy the protections” of the other Principles

Part I: Rules (cont.)

- Every Principle preceded by “subject to reasonable network management practices”
 - Reduce congestion and address “quality-of-service concerns”
 - Address traffic “unwanted by users or harmful”
 - “Other reasonable network management practices”
- Assisting law enforcement and preserving homeland security may trump all principles
- Boundaries of what is “lawful” content
 - Copyright infringement
 - Transmission
 - Pornographic content
 - Possession

Part I: Rules (cont.)

Do We Need New Rules?

- CALEA 47 U.S.C. § 1002(a)
- Copyright Act 17 U.S.C. § 506
- DMCA 17 U.S.C. § 512
- Child Pornography Laws 18 U.S.C. § 2252

Will Creation of New Rules
Establish New Liability for Net Ops?

Part I: Rules (cont.)

- Who or what is the arbiter of “lawful” and “reasonable”?
 - Network Operators?
 - Wireline Competition Bureau?
 - Enforcement Bureau?
 - Technical Advisory Board?
- Jurisdiction and Authority
 - *Comcast* argument: 706 is not an independent grant of authority; 4(i) needs statutory hook

Part I: Rules (cont.)

- Legacy “silos” a barrier to workable rules?
 - Wireline v. wireless v. cable v. satellite
 - Telecommunications v. information
- Break down the silos?
 - Two-way Internet transmission is Title II regardless of medium or technology
 - Web surfing, teleconferences
 - One-way Internet transmission is Title I
 - Downloading entertainment content

PART II

A Pragmatic Approach to FCC Enforcement Issues

Jon Canis and Michael Hazzard

Part II: FCC Enforcement

USAC – USAC Is NOT Your Friend

- USAC's primary focus is one thing – maximizing the amount of USF it collects, period
- USAC's tactics can be extremely heavy handed and unfair to carriers
 - Does not provide carriers with enough time to correct mistakes made on 499 forms
 - When carriers manage to make timely corrections, refunds take 60-90 days or more
 - Does not allow carriers to argue that other carriers paid full USF, and so eliminated the obligation
 - Result: Double payment of USF on same circuits
 - Wrong or inconsistent advice from USAC staffers is not accepted as an excuse
 - Draconian payment schedules for underpayments
 - Can be very damaging when one carrier purchases another with a deficiency
 - Routine imposition of fines, even for honest mistakes, and even if you voluntarily report mistaken underpayments

Part II: FCC Enforcement (cont.)

USAC – How to Protect Yourself From USAC

- Most important: Establish a detailed, documented, and consistently applied method of computing USF payment obligations
 - Most retail service providers offer a mix of unregulated “information” services (not subject to USF), and regulated “telecommunications” services or VoIP or conferencing services (which are subject to USF)
 - There are few, if any, rules regarding how to allocate revenues among these classes of service
 - It is incumbent upon you to establish a common-sense formula for computing your USF payment obligation
 - Make sure it is fully documented
 - Especially make sure it is consistently applied
 - This way, if you are subject to an audit, you have a supportable case
- 2nd most important: Do USF due diligence on any telco acquisitions!

Part II: FCC Enforcement

The CPNI Quagmire

- Most daunting FCC compliance issue: Customer Proprietary Network Information (CPNI)
 - A few years ago, the FCC changed its requirements for certification that carriers were complying with the FCC's rules relating to the protection of CPNI
 - Initially, carriers were required to maintain an annual certification within their files
 - This requirement has since evolved into an annual FCC filing requirement
 - This certification became its own separate regulatory obligation – failure to file the letter with the FCC subjected carriers to penalties, even if they were fully compliant with the underlying regulatory obligation
 - This tactic reached its zenith last year, when the FCC found what it deemed to be massive non-compliance with carriers' obligations to send in letters stating that they were in compliance with the FCC's CPNI rules
 - Last year, the FCC issued an Omnibus Notice of Apparent Liability (NAL), citing 666 carriers for failure to file their CPNI certification by March 1st
 - Each carrier was subject to a \$20,000 fine!

Part II: FCC Enforcement (cont.)

The CPNI Quagmire

- Ironically, the FCC does not have the resources to process all of the NALs and fines that it noticed in 2009
 - Carriers receiving NALs must either
 - Pay the \$20,000 fine, or
 - Negotiate with FCC staff, sign a “consent decree,” and pay a settlement (which is typically less than \$20,000)
 - A majority of the negotiations have been pending for almost a year, and the FCC staff assigned to this task is clearly overwhelmed
- This year, the FCC greatly reduced the number of NALs (to approximately a dozen), but increased the fine to \$25,000

Part II: FCC Enforcement (cont.)

The CPNI Quagmire

- This is a cynical and infuriating regulatory game that appears designed to demonstrate “toughness” of FCC enforcement and generate payment of fines.
- In addition, the sanctioning of carriers for failure to file their annual CPNI certifications gives the FCC the opportunity to remind the public that the FCC is protecting it from the invasion of privacy – it is one of the few areas of telecom that the average consumer understands.

Part II: FCC Enforcement

Primary Jurisdiction Referrals

- Primary Jurisdiction Referral is ordered by a federal or state court when a pending lawsuit:
 - Involves facts not within a Court's expertise
 - Could result in inconsistent rulings by different courts
 - Involves issues within unique discretion of expert agency
- The Court maintains jurisdiction over the case, and will ultimately rule, but asks the FCC to resolve specific technical or policy issues
- We are now in a time where Referral is becoming increasingly common
 - Why? Telecom carriers and users resolve disputes either through regulation or litigation
 - We are emerging from 8 years of unprecedented deregulation, and in the absence of FCC guidance, parties have gone to court
 - However, issues are sufficiently technical that courts are hesitant to rule, and so are increasingly referring back to the FCC

Part II: FCC Enforcement (Referrals) (cont.)

- How Primary Jurisdiction Works – At the Court
 - Typically, a party files a Motion, asking the Court to refer (the Court may also refer on its own motion, but this is unusual)
 - The parties brief the issue, and if the judge agrees to refer, he/she issues an order
 - The judge may refer a single, specific issue, or all issues
 - If all issues are referred, judges often issue a simple order stating that the case in total is referred to the FCC, but this is not optimal for the parties or the FCC
 - It is preferable for the moving party to identify a specific set of questions that it wants the FCC to answer – in some cases, the judge may encourage the parties to present a joint list, so that all issues relevant to both sides of the case are resolved
 - This approach provides detailed guidance to the FCC, and makes it more likely that a complete and timely response is forthcoming
 - Typically, the judge stays the case until the FCC resolves the matter

Part II: FCC Enforcement (Referrals) (cont.)

- How Primary Jurisdiction Works – At the FCC
 - Once a Court issues an order granting referral, it is up to the parties to submit it to the FCC (sometimes the Court gives the parties a deadline)
 - The Referral “intake” office is the FCC’s Enforcement Bureau
 - They do the initial review, and determine if they, or another Bureau at the FCC, will take it
 - Referrals are either answered by the Enforcement Bureau (by conducting a Formal Complaint proceeding), or by the Wireline Competition Bureau (by issuing a Declaratory Ruling)

Part II: FCC Enforcement (Referrals) (cont.)

- FCC Referrals – Formal Complaint vs Declaratory Ruling
 - The Formal Complaint process:
 - Formal Complaints are used when the matters to be resolved involve questions of FACT
 - The Formal Complaint process is like a mini-trial, with discovery, depositions, cross-examination, etc.
 - It is intended to evaluate and resolve factual disputes
 - Formal Complaints are by definition party-specific (*e.g.*, *Qwest v. Farmers & Merchants Tel. Cooperative*)
 - It is possible to have 2 or 3 Complainants or Defendants, but not more than that
 - Timing:
 - It generally takes 2-3 months or more to bring a Formal Complaint – FCC rules require that the parties first submit an Informal Complaint and conduct settlement discussions
 - This process usually takes a minimum of 2-3 months, and can take much longer
 - Once filed, the FCC makes an attempt to resolve Formal Complaints within a year, but it is not unusual for them to take much longer
 - One exception: Complaints involving tariffed rates or terms must be resolved within 5 months, and the FCC takes this deadline seriously
 - The FCC has an “accelerated docket” process in its rules, but it has not held one of these accelerated proceedings in almost a decade

Part II: FCC Enforcement (Referrals) (cont.)

- FCC Referrals – Formal Complaint vs Declaratory Ruling
 - Limitations of the Formal Complaint process:
 - The agenda is set by the party filing the Complaint
 - No counterclaims or cross-claims are allowed
 - The Enforcement Bureau can consider and award direct damages, but not others (*e.g.*, attorneys' fees, consequential damages)
 - These damages can be retroactive, even if they apply to some types of tariffed rates
 - This issue is complicated, however, and merits detailed discussion
 - The Enforcement Bureau will not hear allegations against “self-help” refusals to pay
 - Formal Complaints are “Restricted Proceedings” – Lobbying is limited; Commissioners and Staff generally will not schedule meetings to discuss restricted proceedings
 - When a ruling is finally made, its authority as precedent is unclear
 - Because Formal Complaints are party-specific, and fact-specific, it can be argued that the ruling has no precedential effect outside that specific dispute

Part II: FCC Enforcement (Referrals) (cont.)

- FCC Referrals – Formal Complaint v. Declaratory Ruling
 - The Declaratory Ruling process:
 - Declaratory Rulings are used when the matters to be resolved involve questions of LAW and/or POLICY
 - The Declaratory Ruling process is like a rulemaking proceeding – the FCC typically issues a Public Notice, and interested parties are invited to submit Comments, Replies, and Ex Parte submissions
 - There's no deadline: The FCC can move quickly or not at all
 - Restrictions of the Declaratory Ruling process:
 - The FCC cannot make new law – rather, it is limited to confirming the state of existing law and rules, as applied to the specific case at hand
 - The Declaratory Ruling process cannot award damages
 - Both Declaratory Rulings and Formal Complaint orders:
 - Can be issued by the respective Bureau or the full Commission
 - Are subject to Petitions for Reconsideration
 - Commission orders may also be appealed to a Court of Appeals

Part II: FCC Enforcement (Referrals) (cont.)

- Primary Jurisdiction Referrals to the FCC – Conclusions and Recommendations:
 - Declaratory Rulings are preferred when:
 - The matters to be resolved involve questions of LAW and/or POLICY
 - The matters affect multiple carriers or an industry segment
 - The referring party seeks to establish broadly applicable precedent
 - Parties seek to challenge refusals to pay tariffed charges (the FCC will not consider these allegations in a Formal Complaint)
 - Time is important (the FCC can issue a final order more quickly than in a Formal Complaint proceeding; at the same time, there is no deadline, so the FCC can delay indefinitely if it wants)

Part II: FCC Enforcement (Referrals) (cont.)

- Primary Jurisdiction Referrals to the FCC – Conclusions and Recommendations:
 - Formal Complaints are preferred when:
 - The matters to be resolved involve questions of FACT
 - The matters are unique and affect a limited number of parties
 - The referring party wants the advantage of defining the issues, and preventing counterclaims
 - Parties seek to challenge tariffed rates and terms
 - Time is important (this only applies to challenges to tariffed rates and terms, which invokes the mandatory 5-month deadline)

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