IOWA MUNICIPAL ELECTRIC ASSOCIATION
APRIL 2, 2020

FEDERAL COMMUNICATIONS LAW
COMPLIANCE WEBINAR

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Disclaimer

This presentation does not constitute legal advice and should not be interpreted as such.

For advice on federal, state, or local law, please consult qualified legal counsel.
Program Overview

I. Scope of This Presentation / Handouts
II. Basic Concepts / Key Definitions
III. Tier I Requirements
IV. Tier II Requirements
V. Tier III Requirements
VI. Enforcement
VII. Q&A
I. Scope of This Presentation / Handouts

- Covers federal requirements that focus on communications service providers as such. Does not cover requirements:
  - That apply to local governments acting as regulators
  - That apply to grants, loans, etc.
  - That generally apply to all entities (e.g., tax, antitrust, etc.)
  - That are not strictly “regulatory” in nature (e.g., pole attachments, wireless facility siting, inside wiring, retransmission consent, public-private partnerships, etc.)
  - That are established by state governments

- Handouts
  - This PowerPoint + extensive BSL compliance memo + checklist + outline
II. Basic Concepts / Key Definitions

- Telegraph=>Telephone=>Radio=>Cable=>Cellular=>Internet Access=>VoIP=>IPTV=>Over the Top=>”5G”

- Each has its own market experience, statutory and regulatory history, distinct body of FCC and court interpretations, regulatory incentives and burdens, etc.

- **Problem**: As providers invaded each other’s turfs, they found that similar services were regulated differently, which distorted competition

- **Solution**: Congress and FCC have been moving toward putting all providers of the same services on the same footing, relying on certain basic concepts
II. Basic Concepts / Key Definitions (continued)

- In general, federal regulation today does not focus on the provider’s industry of origin, but on nature of each service provided, as defined by the following key definitions (detailed in the BSL Fed Compliance Memo):
  - “Telecommunications”
  - “Telecommunications Service”
  - “Cable Service”
  - “Information Service” (including Internet Access)
- For each service provided, there could be up to three tiers of federal regulatory requirements (next slide)
II. Basic Concepts / Key Definitions (continued)

- **Tier I**
  - Relatively simple registration, record-keeping, and reporting requirements ("the 3Rs")

- **Tier II**
  - More complex rules that require a provider to establish written policies, train staff, and possibly certify compliance under oath

- **Tier III**
  - Highly complex requirements that can have significant financial, competitive, and enforcement consequences
III. Tier I Requirements

- See BSL handouts for details on Tier I requirements
- Key question: What specific service(s) are you providing, as each service may be subject to its own 3Rs?
  - E.g., a cable operator that provides broadband Internet access service (BIAS) and a provider of only BIAS will both have to file a Form 477, but the cable operator will also have to comply several Tier I rules on cable services
- As relationships between network operators and service providers grow ever more complicated, who will be responsible for FCC compliance obligations? Contracts vs. FCC requirements?
IV. Tier II Requirements

- See BSL handouts for details about Tier II requirements.
- Some highlights of important or new requirements in the following slides:
  - Communications Assistance to Law Enforcement Act
  - Consumer Proprietary Network Information
  - Digital Millennium Copyright Act
  - Kari’s Law / Ray Baum Act
  - RIFA Transparency Rules
  - Truth-in-Billing
  - Access Arbitrage
  - Others
IV. Tier II Requirements (continued)

• The Communications Assistance to Law Enforcement Act (CALEA) requires network operators to have internal or external (e.g., trusted third party) capacity to respond promptly to lawful requests by law enforcement for surveillance of particular accounts.

• Substantial penalties may be levied if network operators cannot respond quickly to such requests, particularly in cases of national emergency.

• May require complex coordination if provider uses another entity for phone or VoIP service
IV. Tier II Requirements (continued)

- Providers of telecommunications services or VoIP must protect **Customer Proprietary Network Information (CPNI)**, which includes personal information that providers obtain about their customers (e.g., phone numbers called; frequency, duration, and timing of calls; services purchased, such as call waiting).

- Detailed rules for marketing to customers, others.

- Providers must develop written policy manuals, train employees, and file annual reports to certify their compliance with the CPNI rules.

- Congress invalidated FCC CPNI rules for Internet Service Providers.
IV. Tier II Requirements (continued)

- The Digital Millennium Copyright Act (DMCA) affords “safe harbor” protections to web host service providers.
- Can avoid both (1) contributary infringement claims by copyright holders alleging a provider’s end users are infringing, and (b) breach-of-contract claims by end users alleging that provider illegally took down service.
- Service providers must register a designated agent with Copyright Office and adhere to other specifications/requirements, including posting key information on website.
- Compliance with DMCA is voluntary, but very useful.
IV. Tier II Requirements (continued)

- **Kari’s Law** and **Ray Baum’s Act** seek to improve E911 in facilities served by multi-line telephone systems (MLTS)

- Kari’s Law requires persons installing, operating, or maintaining MLTS (1) to provide equipment that enables users to reach 911 without first dialing anything else and (2) to provide a number to notify someone at the facility of the call. New FCC rules became effective 02/16/2020.

- Ray Baum’s Act requires MLTS and other 911-capable services to convey a “dispatchable location” to Public Safety Answering Points when 911 calls are placed. Complex Rules to be phased in for fixed services (January 6, 2021) and non-fixed services (January 6, 2022).
IV. Tier II Requirements (continued)

• In 1999, the FCC enacted Truth-in-Billing rules to make bills by telephone service providers more accurate and consumer-friendly.

• As part of the Television Viewers Protection Act of 2019, Congress enacted additional Truth-in-Billing requirements for providers of cable television services.

• The new rules will become effective on June 20, 2020, unless the FCC extends that date. The FCC has invited public comment on whether to postpone the date to December 20, 2020. Comments not due until mid-April.

• See BSL handouts for details of what the existing and new rules require.
When the current FCC issued its *Restoring Internet Freedom Order (RIFO)* at the end of 2017, which reversed its *Open Internet Order*, it adopted extensive transparency requirements.

An ISP must disclose accurate information regarding its network management practices, performance characteristics, and commercial terms of its broadband Internet access services, as required by paragraphs 218 – 223 of the RIFO.

Disclosures can be via website or by report to the FCC.
IV. Tier II Requirements (continued)

• In 2011, the FCC promulgated rules to discourage Access Stimulation (a/k/a “traffic pumping”). Rules focused on revenue-sharing agreements between carriers and free conference services and encouraged “bill-and-keep.”

• In 2019, the FCC promulgated additional rules to get at remaining access stimulation. Rules add new definitions of “access stimulation,” require LECs to pay all costs associated with stimulated service, require LECs to notify the FCC and everyone in chain if they meet the new definitions, and prescribe how LECs can leave business.

• New rules pose multiple complex issues, particularly for rural areas – e.g., how distinguish legitimate traffic? How deal with increased conference calls for Covid-19?
IV. Tier II Requirements (continued)

Many other issues that don’t quite fit into our “federal regulatory” framework, and each is worth its own extensive discussion. Three examples:

- **Pole Attachments**: Publicly-owned utility poles are exempt from federal regulation, but in its *Small Cell Order*, the FCC purported to regulate them – APPA is appealing this.

- **Multiple Tenant Environments (MTEs)**: The FCC has on several occasions addressed exclusivity at MTEs, invalidating some practices (e.g., exclusive service agreements and easements) approving others (e.g., exclusive marketing, bulk billing, control of inside wiring). Rules affect entrants in complex ways.
IV. Tier II Requirements (continued)

• Third example:
  
  • **Retransmission Consent**: FCC’s authority to require cable operators to provide a “basic tier” that includes the major broadcast channels is based on its authority to regulate rates in areas that lack “effective competition.” Now that the FCC has concluded that “effective competition” exists almost everywhere, are its “basic tier” rules still valid?

  • Locast litigation in S.D.N.Y. – Can cable operators avoid retransmission consent by distributing broadcast stations on a non-profit basis via Locast?

  • Can broadband providers avoid or get out of cable business?
V. Tier III Requirements

- Tier III requirements can potentially have significant financial, competitive, and enforcement consequences.
- The federal Universal Service Program (USP) is the main source of Tier III requirements
  - Rules are highly complex, often counterintuitive
  - Covered providers must file extensive reports and pay nearly 25% of their assessable end-user revenues into the Universal Service Fund and related programs
  - That’s not only a lot of money, but it can be a huge competitive disadvantage if competitors are taking advantage of exemptions and exceptions
  - Failure to comply can result in significant penalties
V. Tier III Requirements (continued)

• See BSL handouts for much more extensive discussion of the definitions and concepts outlined here

• Providers of “interstate” “telecommunications,” “telecommunications services,” and “Interconnected Voice over Internet Protocol (VoIP)” are subject to federal USP reporting and contribution obligations on their assessable “end-user revenues”

• There are many exemptions and exceptions, which turn on the definition and nature of the service provided and on the manner in which the provider offers the service
The Big Picture
V. Tier III Requirements (continued)

• Exemptions and Exceptions Include:

  • Telecommunications sold to a “reseller” (not an “end-user”) that (1) incorporates the telecommunications into a service that is itself subject to USP contribution requirements (e.g., cellular telephone service), and (2) provides a certification, using language specified by the FCC, that it is in compliance with USP requirements on such sales.

  • Information services (including Internet Access Service), Cable Television, Dark Fiber, Inside Wiring, etc. -- See FCC Instructions to Form 499-A
More Exemptions and Exceptions:

- Transport service provided on a private-carriage basis, but not on a common-carrier basis, to a provider of Internet access service

*Note:* In general, a private carrier negotiates each deal individually, whereas a common carrier demands the same rates, terms, and conditions from all of its customers

- “Cable TV program transmission”
V. Tier III Requirements (continued)

- Still More Exemptions and Exceptions:
  
  - Intrastate services – i.e., Services on a private line or circuit whose total traffic is no more than 10% interstate in nature.
  
  - **Note:** That the seller only transmits information between endpoints within the same state is not alone dispositive. For example, if 11 percent of the traffic is Internet service, which the FCC considers inherently interstate, the whole line is deemed interstate. It may, however, qualify for the private-carrier Internet transport exception.
V. Tier III Requirements (continued)

• Other Exemptions and Exceptions:

  • The *De Minimis* exemption – If a provider’s total annual contribution obligation would be less than $10,000,
    
    • If the provider is a private carrier, it need not file reports or contribute to Universal Service programs

    • If the provider is a common carrier (including I-VoIP), if must file reports, but it need not make contributions
V. Tier III Requirements (continued)

- Service to only government entities or public safety organizations:
  - Entirely exempt from contribution and reporting obligations.
  - Exemption unavailable if the provider serves even a single non-governmental entity (including private non-profits).
  - Creation of separate entities to handle exempt and non-exempt sales may be an option.
VI. Enforcement

- FCC Has Broad Enforcement Authority
  - Principal and interest
  - Fines and forfeitures
  - Potential treble damages
  - Asymmetric periods of limitation
- Options for addressing past liabilities