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JULY 20, 2016

SPECIAL BULLETIN

Technology Transitions Rulings

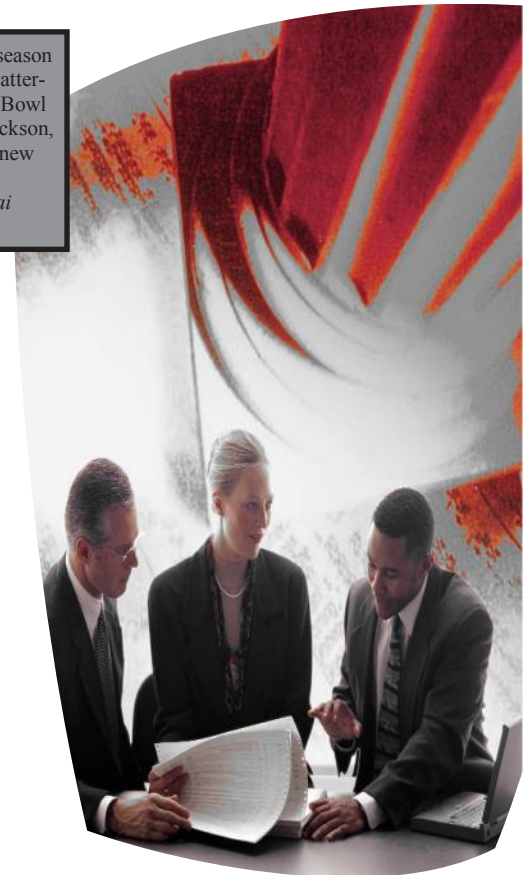
The FCC [adopted](#) a Declaratory Ruling, Second Report and Order, and Order on Reconsideration in the ongoing “Technology Transitions” proceeding last week that, among other things, could add a new layer of regulation to carriers undergoing now or in the future a change from TDM– based voice services to, for example, IP-based voice services (in other words, all carriers). While a portion of the release finds that ILECs are now considered “non-dominant” in regards to the provision of interstate switched access service, the majority of the decision is spent on describing and justifying the technology transition application and approval procedures.

And so, much like the final season of *Lost*, that recent James Patterson novel, and every Super Bowl halftime show since Janet Jackson, there’s just not that much new being revealed.
- Commissioner Ajit Pai

Provision of Interstate Switched Access Services—Semi-Streamlined

Until now, ILECs have been considered “dominant” in the provision of interstate switched access services, meaning they were subject to additional and slightly more onerous regulations related to tariffing and other items. In the Declaratory Ruling, the FCC, in response to a petition filed by USTelecom, declares that ILECs are now non-dominant in the provision of interstate switched access services. In large part, this decision follows from the Commission’s *USF/ICC Transformation Order* and the accompanying transition and compensation plan for interstate (and intrastate terminating) access rates. In addition, the Commission finds, not surprisingly, there “has been an indisputable ‘societal and technological shift’ away from switched telephone service as a fixture of American life” and thus providers of switched access service no longer hold any sort of meaningful market power.

While non-dominant carriers are generally allowed to make tariff changes upon one day’s notice, for ILECs subject to the Commission’s aforementioned ICC rate transition and recipients of Connect America Fund (CAF) ICC support, not much will change. Due to the Commission’s need to ensure compliance with ICC transition rules and that the level of CAF ICC is accurate, annual switched access tariff filings will be subject to normal notice (7 or 15 days) timelines. Also, it is important to note that special access and end user services are not covered under this order.



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Technology Transitions—Values, Factors, and Prongs

The FCC, over the past few years, has been concerned about the transition from TDM-based technology to other technologies, such as IP-based, and especially about how such transitions by ILECs may affect consumers' reliance on legacy voice service. In large part, it is these concerns that the FCC attempted to lay to rest in this latest decision.

To address concerns about technology transitions, the FCC adopted a process pursuant to Section 214 of the Communications Act that requires ILECs to file for authority to “discontinue, reduce, or impair” existing TDM-based voice service with a service using a different technology (wireless, IP, etc). However, most of the decision is spent discussing the process for ILECs to obtain an “automatic grant” of such an application—a somewhat streamlined process that takes no more than 60 days. The Commission is careful to stress that applying for the new, streamlined process is completely voluntary, and that any application not requesting streamlined treatment will be processed by the Wireline Competition Bureau as per current procedures.

3 Prongs Instead of Five Factors

For the streamlined process, the FCC replaces the current five-factor test (to which non-streamlined applications will still be subject) with a test focused on an adequate replacement analysis. According to the FCC, the new analysis is grounded in the four values inherent in the Commission's work (ensure competition, consumer protection, universal service, and public safety). To accomplish this, the FCC adopted a new three-pronged test that applicants must pass before the section 214 application is considered on a streamlined basis:

- * **Network infrastructure and service quality**—the new service must provide substantially similar performance and service availability as the service being discontinued, and must cover the entire affected geographic service area.
- * **Access to critical applications and functionalities**—the new service must allow access to 911 and emergency services, contain some type of cybersecurity features, and provide for services for individuals with disabilities.
- * **Interoperability with key applications and functionalities**—a beginning list of key applications was adopted (including fax machines, home security alarms, and point-of-sale terminals) was adopted in addition to a general process for identifying new key applications and how those applications can be shown to be interoperable with the new service.

Of particular interest in the three prong test are the network performance and service availability requirements, to which the Commission devotes considerable time describing testing details, and the communications security provisions that some parties describe as an attempt to place new regulations on the industry. In addition, accompanying each technology transition application under streamlined treatment must be a adequate customer outreach plan.

Finally, the Commission added Tribal governments to the list of parties to be notified when section 214 applications for technology transitions are filed, for both the streamlined and traditional processes.



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Analysis/Conclusion

While it may not be clear, to echo Commissioner Pai's opinion, what exactly this latest round of technology transition regulations reveals, it is clear is that rural LECs are not exempt and may now have to consider a Section 214 / 47 CFR § 63.71 application any time a change to, for example, IP voice is being made. In addition, a decision will have to be made as to whether or not to request streamlined treatment of the application.

Services covered under these rules are domestic/interstate in jurisdiction, but the nature of the technology transitions being discussed will make it nearly impossible to argue that any such change is intrastate or local in jurisdiction only. Thus, RLECs should be prepared to tackle Section 214 / 63.71 for all transitions, for legacy voice services, from TDM to another technology such as IP or wireless. As to the decision to apply under streamlined treatment, Commissioner Pai perhaps said it best *"...the bulk of the Order is devoted to laying out the various tests, numerous conditions, and multiple obligations of carriers that volunteer to undergo a "streamlined" discontinuance process for voice services—a framework sure to scare away most, if not all, volunteers and thus unlikely to have much practical impact."*

If Commissioner Pai is correct, and the conditions attached to streamlined treatment for applications to discontinue, reduce, or impair a service defined as a technology transition are so onerous as to not elicit any volunteers, then RLECs will have to fall under the current application and non-streamlined approval process. This process, until now generally reserved for companies leaving the market entirely or selling portions of service areas, is largely controlled by section new 63.602 and 63.605 of the Commission's rules. Any non-streamlined application is subject to the FCC's current five factor test:

- (1) the financial impact on the common carrier of continuing to provide the service;
- (2) the need for the service in general;
- (3) the need for the particular facilities in question;
- (4) increased charges for alternative services; and
- (5) the existence, availability, and adequacy of alternatives.

Finally, non-streamlined applications are under no specific timelines for approval by the Wireline Competition Bureau.

Action Items

- ⇒ Review current plans to transition to IP-based technology that will affect voice service (i.e., packet switching)
- ⇒ Depending on the timing and variety of planned transitions, an application to the FCC for approval under Section 214 of the Communications Act may be necessary.
- ⇒ If an application is necessary, review the three-pronged test and determine if it is worth applying for streamlined treatment.
- ⇒ If not, a non-streamlined application in compliance with sections [63.71](#), 63.602 (new), and [63.505](#) will be necessary.

Please let us know if you have any questions.

