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As a result of the FCC’s recent Order changing many aspects of the intercarrier compensation system, interconnection agreements between Commercial Mobile Radio Service (CMRS) providers and Local Exchange Carriers (LECs) will likely need to be renegotiated pursuant to their change-of-law provisions.

Changes to Intercarrier Compensation
CMRS providers and LECs are parties to many interconnection agreements that establish the rates, terms and conditions of traffic being exchanged between their networks. On November 18, 2011, the FCC released its “Connect America Fund Order,” making broad changes to the system under which telecommunications providers compensate each other for traffic exchanged between their networks. One critical change is that the Connect America Fund Order adopts bill-and-keep as the default methodology for all non-access CMRS-LEC traffic. The Order also reaffirms the rule that all traffic routed to or from a CMRS provider that originates and terminates within the same Major Trading Area (MTA) is subject to reciprocal compensation. The FCC’s sweeping decisions on these and related intercarrier compensation topics will have a significant effect on existing interconnection agreements.

The Change-Of-Law Provision
One of the key clauses in most interconnection agreements is the “change-of-law” provision. A typical change-of-law provision might specify, “if any legislative or regulatory decision materially affects any provision of this agreement, the rights or obligations of either party, or the ability of a party to perform a material provision of this Agreement, the parties shall promptly renegotiate in good faith and amend this agreement as necessary.” A change-of-law provision is intended to allow the parties to adjust their relationship when the underlying premises on which it is based have changed.

Potential Renegotiation of Interconnection Agreements
The FCC is aware of the sweeping nature of the changes in the Connect America Fund Order; indeed, the Order states (¶ 815) “…our actions today constitute a change of law” triggering potential renegotiation of interconnection agreements. But, renegotiation of the many interconnection agreements between CMRS providers and LECs may not be a simple matter. Issues will likely arise concerning (1) whether decisions reached in the Connect America Fund Order trigger the
change-of-law provision in a specific agreement; (2) what issues should be renegotiated; (3) whether the negotiations pursuant to the change-of-law provision are governed by 47 U.S.C. § 251(c)(1) and 47 C.F.R. § 51.301; (4) the date as of which the change-of-law provision is triggered, and many other issues. When the FCC has issued similarly broad decisions in the past, the process of renegotiation pursuant to change-of-law provisions has resulted in extensive and protracted litigation. See, e.g., Puerto Rico Tel. Co., Inc. v. Sprintcom, Inc., —F.3d—, 2011 WL 5386296 (1st. Cir., Nov. 9, 2011) (concerning whether FCC’s 2001 “ISP Remand Order” triggered change-of-law provision); Qwest Corp. v. Universal Telecom, Inc., 2004 WL 2958241 (D.Or., Dec. 15, 2004) (same); MCImetro Access Transmission Sys. LLC v. New Jersey Bd. of Pub. Util., 2007 WL 3071811 (D.N.J., Oct. 19, 2007) (analyzing disputes arising from invocation of change-of-law provision in response to the ISP Remand Order).

In order to minimize the risk of such litigation, and to take a proactive approach with regard to ongoing negotiations and disputes, CMRS providers and other telecommunications companies should promptly analyze their existing interconnection agreements and arrangements, and develop a strategy for consistently implementing and negotiating the changes arising from the Connect America Fund Order.

For more information about the impact of the Connect America Fund Order on interconnection agreements, please contact a member of the Briggs and Morgan Telecommunications practice group.