



# Memorandum

**TO: RULES AND OPEN GOVERNMENT COMMITTEE**      **FROM: Betsy Shotwell**

**SUBJECT: SEE BELOW**

**DATE: April 25, 2011**

Approved

Date

4/27/11

**SUBJECT: 112<sup>TH</sup> CONGRESS STATUS AND FORECAST OF NOTABLE FEDERAL LEGISLATION RELEVANT TO LOCAL GOVERNMENT INTERESTS**

## RECOMMENDATION

Acceptance of the attached status report from the City's Federal advocacy firm of Patton Boggs, LLP, in Washington, D.C.

## OUTCOME

That the Rules and Open Government Committee and the City Council have the opportunity to review the status report by Patton Boggs staff on pending federal legislation in Washington, D.C. during the first session of the 112<sup>th</sup> Congress in 2011.

## BACKGROUND

The firm of Patton Boggs, LLP, is providing the attached update on the status and prospects of pending federal legislation of particular relevance and interest to local governments. This activity supports the City's advocacy and education in promoting our federal legislative priorities.

## ANALYSIS

The attached report describes in detail the status of high-profile federal legislation of interest to the City. The report references the status of the FY 2011 and FY 2012 appropriations and budget, the Federal Aviation Administration, SAFETEA-LU and Economic Development Administration reauthorizations, climate change/energy legislation, the Neighborhood Stabilization Program, telecommunications, including public safety interoperability/D Block spectrum allocation, tax reform and a number of bills on other priority topics. This Congressional recess report details action taken to date on these and other items. Patton Boggs will provide a subsequent update on what actions took place in Congress prior to their adjourning for their next recess in late May.

**Rules and Open Government Committee**

**Re: 112<sup>th</sup> Congress Status and Forecast of Notable Federal Legislation Relevant to Local Government**

**Interests**

April 25, 2011

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**PUBLIC OUTREACH**

- Criteria 1:** Requires Council action on the use of public funds equal to \$1 million or greater. **(Required: Website Posting)**
- Criteria 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**
- Criteria 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

By providing this document to the Rules and Open Government Committee in March, this document will be posted on the City's website with the May 4 meeting agenda and interested public will have the opportunity to review the document prior to the full Council acceptance.

**COORDINATION**

This memo was coordinated with the City's Washington, D.C. lobbyist firm of Patton Boggs, LLP.



BETSY SHOTWELL

Director, Intergovernmental Relations

Attachment: Patton Boggs, LLP memorandum, "112<sup>th</sup> Congress Status and Forecast of Notable Federal Legislation Relevant to Local Government Interests"

For more information contact: Betsy Shotwell, Director of Intergovernmental Relations at (408) 535-8270.

## MEMORANDUM

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**To:** City of San Jose  
**From:** Patton Boggs LLP  
**Date:** April 21, 2011  
**Subject:** Status and Forecast of Notable Federal Legislation Relevant to Local Government Interests

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This memorandum provides a comprehensive update on the status and prospects of pending, high-profile federal legislation of particular relevance to local governments as Congress is in recess until May 2. Specifically, the memo addresses –

- FY2011 Appropriations
- FY2012 Budget and Appropriations
- Transportation / SAFETEA-LU Reauthorization
- Federal Aviation Administration Reauthorization
- Chemical Security
- Clean Water Act
- Climate / Energy Legislation
- Neighborhood Stabilization Program
- Eminent Domain Legislation
- Economic Development Administration Reauthorization
- Telecommunications
  - Public Safety Interoperability / D Block Spectrum Allocation
  - Net Neutrality
  - Wireless Tax Fairness Act
  - FCC Orders re Pole Attachment Fees and ROWs
- Municipal Bonds
- Legislation to Repeal Three Percent Withhold IRS Provision

### **FY2011 Appropriations**

After a week of nearly around-the-clock negotiations, Administration and Congressional leaders reached a last minute FY2011 appropriations deal on April 8, averting a federal government shutdown by less than one hour. Congress cleared the final Continuing Resolution (CR) (H.R. 1473) of FY2011 on April 14 (House vote 260-167; Senate vote 81-19) and the President signed the measure on April 15.

A seventh short-term CR (H.R. 1363) was enacted on April 9 to fund the government through Friday, April 15 and allow Congressional leadership time to put the deal on paper and solicit support from their respective caucuses. As with the previous FY2011 CRs, this measure also contained \$2 billion in spending reductions.

The final allocation for FY2011 is \$1.05 trillion; approximately \$40 billion less than FY2010 and \$78.5 billion less than the President's FY2011 Budget request. Congress also held two separate votes on defunding Planned Parenthood and defunding the healthcare reform bill. As expected, these provisions passed in the House, but failed in the Senate.

The CR cut approximately \$28 billion from FY2010 funding levels (in addition to the \$12 billion cut in the previous three stopgap bills) and funds the federal government through September 30, 2011. This figure includes a 0.2 percent across-the-board cut to all non-defense programs, as well as a number of program-specific cuts. As example, the Community Development Block Grant program was funded with \$3.345 billion (\$647 million (16%) less than FY 2010; HR 1 had reduced CDBG \$1.9 billion). While many programs through which local governments and their partners receive funding were reduced, focused educational and advocacy efforts resulted in these reductions being significantly less than what the House passed in H.R. 1.

### **FY2012 Budget and Appropriations**

On April 5, House Budget Committee Chairman Paul Ryan (R-WI) released the Republican \$1.019 trillion FY2012 Budget Resolution, *The Path to Prosperity* (the President's FY2012 Budget proposal requests \$1.121 trillion), approximately \$100 billion less than current levels. The GOP proposal cuts over \$6 trillion from the budget over 10 years. In addition to spending reductions, the proposal addresses entitlements and tax reform and significantly modifies Medicaid and privatizes Medicare, shifting it to a voucher program. The proposal outlines a strategy to recede domestic discretionary spending below FY2008 levels and freeze it at that level for five years. The plan would extend the Bush-era tax cuts for all income levels, consolidate the six individual tax brackets, and set the top individual tax rate at 25 percent, as well as set the top corporate tax rate at 25 percent and eliminate tax loopholes for corporations. The House adopted the measure (H. Con. Res. 34) on April 15 after disposing of five alternative budget plans.

The House Budget Resolution sets an overall cap for domestic discretionary spending, known as the 302(a) allocation, which is essentially a "lump sum" of budget authority that goes to the Appropriations Committee. In other words, the Budget Resolution does not dictate funding for

specific subcommittees or specific programs. That occurs through the annual appropriations process.

However, the measure sets the stage for another heated debate with Senate Democrats and the Administration, particularly over the proposed changes to Medicare. On April 13, President Barack Obama presented his *Framework for Shared Prosperity and Shared Fiscal Responsibility*, a plan that would reduce the deficit by \$4 trillion over twelve years through spending cuts and increased revenue through tax reform. The proposal includes a plan to raise \$1 trillion in new tax revenues by ending the Bush-era tax cuts on high income earners and capping the value of deductions at 28%. He also proposes to reduce discretionary spending and entitlement programs, such as Medicaid and Medicare, but does not suggest restructuring the programs. Senate Democrats are expected to release their plan shortly after returning from the spring recess.

In addition to laying out his strategy to reduce the deficit, the President called on Congress to appoint 16 Members to a bi-partisan panel led by Vice President Joe Biden with the goal of reaching a final agreement on a plan to reduce the deficit by the end of June. This week Congressional leaders named their appointees: Senate Appropriations Chairman Daniel Inouye (D-HI); Senate Finance Chairman Max Baucus (D-MT); Senate Minority Whip Jon Kyl (R-AZ); House Majority Leader Eric Cantor (R-VA); House Budget Committee Ranking Member Chris Van Hollen (D-MD); and House Assistant Minority Leader James Clyburn (D-SC). The first meeting of the panel is currently scheduled for May 5.

## **Transportation / SAFETEA-LU Reauthorization**

### ***FY2011 Appropriations***

The year-end FY2011 Continuing Resolution (CR) made significant reductions in transportation programs, with the Transportation, Housing and Urban Development (THUD) Subcommittee receiving a larger percentage reduction in discretionary spending authority than any other appropriations subcommittee. However, for a variety of reasons, the spending reductions in transportation will have less of an impact on programs than would at first glance appear.

First, with two exceptions, the CR does not alter funding for contract authority programs funded through SAFETEA-LU and the Highway Trust Fund (HTF). As a result, highway and transit formula funding through the HTF is unaffected. In addition, programs such as the Transportation Community and System Preservation program (TCSP) (\$61.5 million) and Interstate Maintenance Discretionary (IMD) (\$100 million) are continued. Although those programs have traditionally been earmarked, the underlying funding is contract authority through the HTF, and those funds will be fully available to DOT for discretionary allocation. On the other hand, the Surface Transportation Priorities earmark account (\$293 million) - which is purely an earmark account, and not an authorized program funded through the HTF - was eliminated and those funds will not be available in FY2011.

As mentioned, the two exceptions where the CR does impact programs funded through the HTF are (1) the rescission of \$2.5 billion in excess contract authority for the highway program; and (2) the rescission of \$630 million in "orphaned" earmarks from TEA-21 and previous authorization bills. The \$2.5 billion rescission cuts contract authority that was beyond the obligation ceiling, so it was

not actually available for obligation and the cut does not have a real impact on states. Further, the old earmarks were unlikely to be obligated and spent at this point. As you can see, that accounts for over \$3 billion in spending cuts without a real impact on programs. The CR does eliminate another \$650 million in one-time highway formula funding from the general fund that was provided in FY2010 on top of the normal apportionment, but it was not expected that funding would continue. Other highlights of the FY2011 budget deal for transportation include:

#### Transportation Investment Generating Economic Recovery (TIGER)

The CR continues the TIGER grant program, funding it at \$527 million. It does not continue the \$35 million set aside for planning grants, but does continue the authority to use up to \$100 million for the Transportation Infrastructure Finance and Innovation Act (TIFIA) awards (in previous rounds, the Department of Transportation (DOT) has used much less than the amount available for TIGER TIFIA. DOT has indicated that the Notice of Funding Availability (NOFA) will be released within the next 60-90 days and that it will be substantially the same as the previous round. It also continues the Transit Investments for Greenhouse Gas and Energy Reduction (TIGGER) program for transit energy efficiency grants, providing \$50 million.

#### New Starts

The CR provides \$1.6 billion for FY2011 (\$400 million less than FY2010) and rescinds \$280 million from FY2010 New Starts. However, the Federal Transit Administration (FTA) can absorb the FY2011 cuts without affecting projects in the Full Funding Grant Agreement (FFGA) pipeline (i.e. projects in FTA's budget). This is because the cancelled New Jersey ARC project accounts for \$200 million of the cuts, and Congressional earmarks account for most all of the remaining \$200 million. Similarly, for FY2010, the bulk of the rescission - \$200 million - is money that was appropriated for the New Jersey ARC project that will not be spent. The remaining \$80 million in rescinded FY2010 funding does entail real cuts to funded projects. It is not yet clear how FTA will allocate the \$80 million in cuts.

#### High Speed Rail

The CR eliminates all new funding for High Speed Rail (HSR) in FY2011 and reaches back to rescind \$400 million from FY2010. The state of Florida, however, returned \$2.4 billion in High Speed Rail funding, of which \$400 million was impacted by the rescission. As such, DOT is now in the process of awarding \$2 billion in HSR funding this year, meaning that HSR funding is continuing to flow. However, the elimination of all new FY2011 funding raises significant questions about future funding for this Obama Administration priority.

#### ***FY2012 Budget***

The House-passed budget resolution impacts transportation programs in two ways, although the prospects for enactment of the House budget must be viewed in light of the sweeping and controversial reforms to the nation's entitlement, tax and discretionary spending programs it would make.

House Budget Committee Chairman Paul Ryan (R-WI) calls for a 1/3 reduction in current discretionary spending on transportation, about an \$11 billion cut. However, as stated above, this suggested cut to transportation spending is not binding even on the House. The Budget Resolution just provides the top line number for all discretionary programs, and all of the subsequent decisions are under the purview of the Appropriations Committee and Transportation Appropriations Subcommittee.

Additionally, the House Budget Resolution established caps for each authorizing committee as well as the Appropriations Committee. The effect of the cap on the House Transportation and Infrastructure Committee is to require that the overall Highway Trust Fund spending in a reauthorization bill has to be limited to available revenues. Since 2008, Congress has had to transfer \$34.5 billion from the general fund to the HTF to maintain its solvency as expenditures outpaced declining gas tax receipts. The Budget Resolution also assumes that there will be no increase in gas taxes or other new revenue. While estimates vary, this could mean between \$50 billion and \$70 billion less in spending through a six-year reauthorization bill. However, this is not inconsistent with what House Transportation and Infrastructure Committee Chairman John Mica (R-FL) has been saying, which is that a reauthorization bill will have to work within available revenue and “do more with less” by focusing resources on the core highway and transit programs, streamlining approval processes and expediting projects to save money, and increased use of leveraging / public private partnerships to make existing dollars go farther. As discussed below, this revenue constraint remains the primary obstacle to a long-term reauthorization bill.

### ***SAFETEA-LU Reauthorization***

The House and Senate authorizing committees continue to work on drafting reauthorization legislation. In the past weeks, both the House Transportation and Infrastructure Committee and the Senate Environment and Public Works (EPW) Committee have held a number of hearings to get input from a wide range of stakeholders. The Senate Banking Committee, which has jurisdiction over transit in the Senate, has begun the process of reaching out to its membership to determine their priorities in the reauthorization. The current extension expires at the end of the Fiscal Year and there is little appetite for a continued series of month-to-month extensions.

The lack of adequate revenue to fund the program at even currently authorized levels remains the primary obstacle to a long-term bill. Without additional revenue, a long-term bill would lock in reduced spending levels, which is a source of substantial concern in the stakeholder community and among many lawmakers. As a result, there is considerable below-the-surface discussion of a short term bill, such as a two-year bill, which could be funded at near-current levels based on available HTF revenue. On the other hand, there remains a desire for a long-term bill to provide stability and predictability to the program. Public statements from all key committee leaders remain focused on a six-year bill, as does the drafting effort.

In addition to House Chairman John Mica’s (R-FL) focus on “doing more with less” through refocusing the program, expediting project delivery and increasing leveraging, other key policy themes emerging out of the House include (a) program consolidation with more flexibility to recipients to use those dollars; and (b) formularization of many of the remaining discretionary

programs. Under Chairman Barbara Boxer's (D-CA) leadership, the Senate EPW Committee's signature issue is dramatically expanding the TIFIA innovative financing program.

The House is expected to produce a bill for Committee consideration in the May timeframe that will formally launch the reauthorization effort in the 112th Congress.

### **Federal Aviation Administration Reauthorization**

The House passed its version of the FAA reauthorization (H.R. 658) on April 1 by a vote of 223-196, largely on party lines. The close vote is attributable mostly to the failure of an amendment by Ranking Aviation Subcommittee Member Jerry Costello (D.-Ill.) and Rep. Steve LaTourette (R-Ohio) to remove a provision that would overturn a National Mediation Board (NMB) ruling that changed the way votes to certify a union are counted. Other Democrats objected to the reduction in funding for several accounts, such as the Essential Air Service (EAS) and Airport Improvement Program (AIP) accounts. The Senate thereafter re-passed its bill, setting up a House-Senate conference. Before the spring recess, the Senate appointed conferees; the House recessed without doing so.

Contemporaneously with the passage of the House bill, the House and Senate agreed -- for the 18th time -- to extend FAA programs by another two months, until May 31. This should give enough time for a compromise bill to emerge from conference and be voted on by both Houses, were it not for the distinct possibility that the conferees may reach an impasse over the NMB provision. The House floor debate and other House statements after passage suggest that the NMB provision will be every bit as divisive as the so-called FedEx provision included in the House-passed bill in the previous Congress.

There are a number of differences between the House and Senate bills, although none likely as contentious as the NMB provision in the House bill.

For airports, the House bill is not as favorable as the Senate bill: AIP funding in the House bill is \$3.176 billion for FY 11 and \$3 billion for the out years FY 12-14. The Senate bill provides \$4.1 billion (but covers only FY 11). The end-of-fiscal year 2011 continuing resolution that was enacted earlier this month provides \$3.515 billion for AIP funding, subject to a small haircut to be applied across the board to discretionary accounts. This appropriated funding amount is therefore still subject to whatever authorized amount emerges from the House-Senate conference.

The House bill does not include any across-the-board increase in the Passenger Facility Charge (PFC). Because the Senate bill includes a six-airport pilot program that would allow a participating airport to raise its PFC without limit, provided any amount over the existing \$4.50 maximum would be required to be collected directly from the passengers, the conferees conceivably could entertain an across-the-board PFC increase, perhaps as a compromise for a reduction in AIP funding. Note that the Obama Administration FY 12 budget proposal would reduce AIP funding to \$2.4 billion, and prohibit all AIP funding to large and medium hub airports. The Administration's position is that Congress should raise the PFC to \$7, thereby obviating AIP funding for these airports. Smaller airports would then not compete with larger airports for the smaller AIP funding pie. We do not

expect an across-the-board PFC increase to emerge from the conference, largely because it would be portrayed by some as a tax increase.

The House bill would reduce EAS funding and eliminate the program entirely after FY 13, except for Alaska and Hawaii. The Senate's EAS provisions (both amendments offered by Senator Coburn) are more surgical, prohibiting a subsidy for any market (1) within 90 miles of a large or medium hub airport or (2) with enplanements fewer than 10 a day. We expect the EAS program to survive, albeit with limitations such as are in the Senate bill.

The House and Senate bills each would add a number of beyond-the-perimeter non stop flights to and from Reagan National Airport. The Senate provision, the result of a compromise reached after nearly two weeks of floor debate, would provide about double the number of slots as are in the House bill. We expect the Senate provision to be adopted, perhaps with some minor changes. Other House provisions of interest to airports include a provision maintaining a 95% Federal share for AIP grants to small airports, and a provision giving liability protection to airport officials who implement a Safety Management System (SMS). The FAA has proposed to require airports to adopt and implement an SMS; a final rule may issue by the end of this year.

### Chemical Security

Congress once again authorized a clean extension of the Department of Homeland Security's Chemical Facility Anti-Terrorism Standards (CFATS) through the FY2011 appropriations process. The program will continue through October 4, 2011 -- without impacting water facilities.

On April 15, the House Homeland Security's Cybersecurity, Infrastructure Protection and Security Technologies Subcommittee marked up and favorably reported Chairman Dan Lungren's (R-CA) CFATS bill (H.R. 901) on a party-line vote, 6-4. It would extend CFATS for seven years. Democrats opposed the legislation for not including an Inherently Safer Technologies provision and criticized Republicans for rejecting an amendment that would have eliminated the drinking water and wastewater facility exemption -- a position also in line with the Obama Administration's.

Chairman Lungren did pledge to hold Subcommittee hearings on that issue in the future. Doing so would likely reignite previous jurisdictional conflicts with the House Energy and Commerce Committee, which oversees drinking water facilities, and the House Transportation and Infrastructure Committee, which oversees wastewater facilities. (That issue had been resolved after months of arduous House negotiations in the Democrat-controlled 111<sup>th</sup> Congress, where drinking water and wastewater facilities retained exclusive Environmental Protection Agency regulatory oversight, rather than being subjected to dueling standards under both EPA and the Department of Homeland Security, which does not have water quality regulatory expertise.)

As various Congressional Committees consider several different chemical security bills, we continue to believe CFATS is likely to be extended again for an additional year, through October 2012. Doing so will provide additional time for Congress to sort through Committee jurisdictional issues; consult with the Administration; and conference substantive differences between the House, where Republicans would prefer a long-term extension of existing regulations, and the Senate, where Democrats would prefer substantive reforms that would both strengthen chemical security standards

to better protect public health and safety and expand the program to cover drinking water and wastewater facilities.

### **Clean Water Act**

In the 111<sup>th</sup> Congress, Democratic leaders moved legislation through Congressional Committees that would have reformed and dramatically expanded the scope of the Clean Water Act (CWA). That legislation – to replace “navigable waterways” with “waters of the United States” – would have returned the CWA to pre-2001 status by overturning two Supreme Court rulings that some Members believe dramatically weakened the Federal Government’s jurisdictional authority. Opponents believed the effort usurped local jurisdiction and broadened Federal jurisdiction far too much. Proponents continue to believe reform is necessary to restore CWA integrity and to better protect the environment.

In the 112<sup>th</sup> Congress, House Republican leaders recently collected 170 bipartisan Member signatures on a letter to both EPA and the Army Corp of Engineers in response to concerns with EPA’s draft Clean Water Protection Guidance. Members expressed concern that that guidance could significantly expand the Act’s scope in how “waters of the United States” is defined and regulated. Although Senate Environment and Public Works Committee Chairman Barbara Boxer (D-CA) is expected to resume legislative efforts to strengthen the Clean Water Act, that effort is unlikely to gain Republican approval in the House.

### **Climate Change / Energy Legislation**

Senate Energy and Natural Resources Committee staff will begin reviewing the roughly 150 comments received on the Clean Energy Standard White Paper offered by Chairman Jeff Bingaman (D-NM) and Ranking Member Lisa Murkowski (R-AK). The white paper was released in April, following the President’s State of The Union Address, where he called on Congress to enact legislation that would increase the percentage of electricity generated from “clean energy” sources (which could include nuclear, natural gas, and “clean coal”) to 80% by 2035. Chairman Bingaman, who announced he will be retiring from the Senate at the end of his term next year, has historically been an ardent advocate of a Renewable Energy Standard.

House Republican leaders have been steadfastly focused on rising gas prices. The House is expected to consider three bills, authored by Natural Resources Committee Chairman Doc Hastings (R-WA) and favorably reported from that Committee on April 13, to expand domestic offshore oil and gas production in early May. All three bills are expected to pass the House. The Chairman is also expected to address industry safety issues once ongoing investigations into the Deepwater Horizon disaster conclude. The Senate Energy and Natural Resources Committee is likely to build upon a single comprehensive regulatory offshore drilling reform and oil spill response bill that had been favorably reported in the 111th Congress before the upcoming summer recess.

### **Neighborhood Stabilization Program (NSP)**

The Republican-controlled House has passed all four housing foreclosure termination bills. This includes the NSP Termination Act (H.R. 861), that would repeal and rescind funds for the *third round* of Neighborhood Stabilization Program funding, as well as measures to terminate the FHA Refinance Program (H.R. 830), Emergency Mortgage Relief Program (H.R. 836), and the Home Affordable Modification Program (H.R. 839). Only the HAMP bill has a Senate companion piece (S. 527). Republicans touted passage as budget saving measures to help reduce the national deficit by ending failed Democrat-passed stimulus programs.

The NSP Termination Act passed the House on March 16, the same day the Administration issued a veto warning. In order for any such legislation to become law it would have to pass the Democrat-controlled Senate and be signed into law by President Obama – something unlikely to happen as it would require a two-thirds vote of both the House and Senate to override a Presidential veto. Furthermore, the Congressional Budget Office has already assumed that even if the bill were to become law by summer, it would not affect budgetary spending since the law would affect unobligated balances – and it is assumed that all remaining NSP-3 funds would be obligated by then.

### **Eminent Domain Legislation**

On April 7, *The Private Property Rights Protection Act* (H.R. 1433) was introduced. This legislation has been considered in prior Congresses, where it passed in the House, but was not considered in the Senate. The measure would prohibit state and local governments that exercise eminent domain from receiving federal economic development funds. There are some public exemptions, hospitals, roads, etc. but the legislation removes a vital state and local resource.

The House Judiciary Constitution Subcommittee held a hearing on April 12. Witnesses included a homeowner, a representative from the Institute for Justice, and John Echeverria a professor at Vermont Law School and former Executive Director of the Georgetown Environmental Law and Policy Institute.

Many local governments reached out in opposition to the bill in its previous iterations. Our DC City Representatives group will be meeting next week to discuss strategy and next steps.

### **Economic Development Administration Reauthorization**

The current authorization of the Economic Development Administration (EDA) expired on September 30, 2009. On April 8, Senators Barbara Boxer (D-CA) and James Inhofe (R-OK), Chair and Ranking Member, respectively, of the Environment and Public Works (EPW) Committee introduced *The Economic Development Revitalization Act of 2011* (S. 782). The bill would authorize EDA at \$500 million per year for 2011 through 2015.

### **Telecommunications**

#### ***Public Safety Interoperability / D Block Spectrum Allocation***

It appears that Senate Commerce Committee Chairman Jay Rockefeller (D-WV) is pressing forward with his legislation, the Public Safety Spectrum and Wireless Innovation Act that would reallocate

the 700 MHz D Block for public safety purposes. The committee is preparing for a May markup of the bill, S. 28, which also would establish \$11 billion worth of grants for construction and maintenance of a nationwide public safety broadband network.

Although Chairman Rockefeller is intent on moving his legislation through the Senate before the 10<sup>th</sup> anniversary of the September 11 attacks, it is unclear how close the House will come to passing its version of spectrum legislation by that date.

The key House panel with spectrum jurisdiction, the Energy and Commerce Committee, has yet to introduce its own measure. Meanwhile, House Homeland Security Committee Chairman Peter King (R-NY) and Ranking Member Bennie Thompson (D-MS) introduced the Broadband First Responders Act of 2011 (H.R. 607) in February and are poised to move that legislation through committee soon. The bill would allow \$2 billion in interest-free loans to be borrowed from the general Treasury for the construction and operation of the public safety broadband network. Additionally, the bill would reserve \$11 billion in auction proceeds to be evenly split to fund the construction of the network and the maintenance and operation costs (for a total potential authorization of \$13 billion).

On the federal regulatory front, the Federal Communications Commission is seeking reply comments to its Fourth Further Notice of Proposed Rulemaking about whether it should establish service rules for a national public safety broadband network. Dozens of municipalities already have submitted comments in the proceeding, which were due April 11. Reply comments are due May 10.

### ***Net Neutrality***

On April 8, House Republicans successfully passed H.J. Res. 37 – a Resolution of Disapproval of the FCC's net neutrality rules (adopted under the Congressional Review Act), continuing their efforts to nullify FCC net neutrality rules approved in December 2010. Under the Congressional Review Act, such a measure requires a simple majority in both chambers and is filibuster proof in the Senate. As passed in the House, the resolution simply states: "That Congress disapproves the rule submitted by the Federal Communications Commission relating to the matter of preserving the open Internet and broadband industry practices (Report and Order FCC 10–201, adopted by the Commission on December 21, 2010), and such rule shall have no force or effect." A similar resolution introduced by Senator Kay Bailey Hutchison (S.J.Res. 6, 2/16/11) is pending in the Senate where it is unlikely to see action until this summer at the earliest. It is anticipated that the resolution will face stiff opposition in the Senate and President Obama has promised to veto any such resolution. During debate of the FY 2011 budget, Democrats also successfully blocked Republican efforts to bar the FCC from using funds to implement its net neutrality.

### ***Wireless Tax Fairness Act***

In March, Congresswoman Zoe Lofgren (D-CA) and Senator Ron Wyden (D-WA) introduced *The Wireless Fairness Act of 2011* (H.R. 1002 / S. 543). The bill is identical to *The Cell Tax Fairness Act* (H.R. 1521) that was introduced in the 111<sup>th</sup> Congress.

The legislation would impose a five-year moratorium on new state and local taxes on mobile services and the providers of mobile services, thereby preempting local revenue generation authority and hindering efforts to update related tax ordinances.

While no action has yet been taken in the Senate, where there are only seven co-sponsors signed on to the bill, hearings have already been held in the House Judiciary Subcommittee on Courts, Commercial and Administrative Law. There are currently 187 co-sponsors to the House bill.

### ***FCC Orders re Pole Attachment Fees and ROWs***

On April 7, the FCC adopted orders on data roaming and pole that furthered recommendations of the National Broadband Plan. With respect to the pole attachment order, the Commission determined that “the lack of timelines for access to poles, the resulting potential for delay in attaching broadband equipment to poles, and the absence of adequate mechanisms to resolve disputes creates uncertainty that deters investment in broadband networks.”

To address these concerns, the FCC set: (1) a maximum time of 148 days for utilities to allow pole attachments in the communications space; and (2) a maximum of 178 days for attachments of wireless antennas on pole tops. The Commission intended to provide utilities with a fair rate in exchange for these time requirements by setting a rate for telecommunications companies near or at the rate cable providers pay. ILECs not subject to the rate schedule will be able to file complaints with the FCC alleging unfair terms, rates or conditions, and wireless providers would be entitled to the same rate as telecommunication providers.

The second order, requiring facilities-based providers of commercial mobile data services to offer data roaming arrangements on commercially reasonable terms and conditions, passed by party-line vote of 3-2. Commissioner McDowell argued that “(b)ecause data roaming *is not* a commercial mobile service, Section 332(c)(2) of the Act prohibits the Commission from subjecting the provision of data roaming to common carrier regulation.” Chairman Genachowski argued that “the framework we adopt leaves mobile service providers free to negotiate and determine, on an individualized case-by-case basis, the commercially reasonable terms of data roaming agreements. Under the law, this is the very opposite of common carriage.”

At stake for local governments is millions of dollars in ROW-related revenues and loss of management authority over its ROWs. A Notice of Inquiry (NOI) will be published shortly in the Federal Register (FR). Once published, interested parties will have 60 days in which to submit a comment. We will let you know when the comment period is triggered by the FR publication.

### **Municipal Bonds**

There is renewed interest in tax reform as part of the larger effort of deficit reduction. In December, the National Commission on Fiscal Responsibility and Reform, headed by former Senator Alan Simpson and Erskine Bowles, former White House Chief of Staff for President Clinton, called for tax exempt interest on municipal bonds to be eliminated.

In early April, Senators Ron Wyden (D-OR) and Dan Coats (R-IN) introduced *The Bipartisan Tax Fairness and Simplification Act of 2011* (S. 727), tax reform legislation that would eliminate tax exempt interest for new state and local debt in favor of tax credit bonds. The philosophy behind this is that

tax credit bonds would be more inclusive and would engage all tax payers while the bonds tend to be used by the more affluent.

In addition, this legislation would eliminate the alternative minimum tax, and establish three income tax rates of 15%, 25% and 35% for individuals. It would also eliminate advance refundings for governments and non profit organizations. No hearings have been scheduled on this legislation and there is not a companion bill introduced in the House.

### **Legislation to Repeal Three-Percent Withholding IRS Provision**

Legislation has again been introduced to repeal the three-percent withholding law which mandates State and Local governments that expend more than \$100 million per year in outside contracts to withhold three percent of all payments for goods and services, remit that three percent to the IRS and adhere to new reporting requirements. Set to go into effect on January 1, 2012, the law would impose new administrative and potential contract costs to local governments. The *Withholding Tax Relief Act of 2011* (H.R. 674 / S. 89 / S. 164) was introduced in the Senate in January and the House in February. The measure was also proposed as an amendment to the Small Business Reauthorization (S. 493), which was on the Senate floor for several days before the recess, but neither the amendment nor the full bill came up for a vote before the Senate adjourned for the spring recess.