



1 of 33 DOCUMENTS

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Proposed Data Privacy Legislation Generates Relief as Well as Concerns

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Proposed Data Privacy Legislation Generates Relief as Well as Concerns

By Daniel T. Rockey

November 22, 2010

SUMMARY: Rick Boucher (D-Va) and Cliff Stearns (R-Fl) released a "discussion draft" of proposed legislation aimed at regulating the collection and sharing of information for marketing purposes (*15 ECLR 741, 5/12/10*). The legislation would impose sweeping changes in existing practices in online and offline advertising. This article discusses notable provisions and identifies a number issues that must be addressed before the measure is brought to committee.

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ARTICLE: U.S. Representatives Rick Boucher (D-Va) and Cliff Stearns (R-Fl), Chair and Ranking Member, respectively, of the Subcommittee on Communications, Technology, and the Internet, released a "discussion draft" of proposed legislation aimed at regulating the collection and sharing of information for marketing purposes (*15 ECLR 741, 5/12/10*). After repeated threats by FTC Commissioner Jon Leibowitz to press for an "opt-in" regulatory scheme for data collection, marketers breathed an initial sigh of relief at the fact that, in many respects, the draft embraces the notice and "opt-out" approach advocated by many self-regulatory organizations. The relief was short-lived, however, as the reality set in that the legislation, as proposed, would impose sweeping changes in existing practices in both online and offline advertising. This article discusses notable provisions of the Boucher proposal, and identifies a number issues that must be addressed by the authors before the measure is brought to committee.

Broad Definition of Covered Data

In general, the Boucher proposal prohibits any entity n1 from collecting, using, or disclosing "covered information" unless it first makes available to the consumer a comprehensive privacy notice and obtains "consent" within the meaning of the bill. Although the objectives of the bill are relatively non-controversial, the categories of information deemed to implicate privacy interests ("covered information") are quite broad, even amorphous, and go beyond the definitions of Personally Identifiable Information in existing regulatory regimes. *See, e.g.,* California Online Privacy Protection Act, n2 Massachusetts Data Protection Act. n3 In addition to the categories of data traditionally considered PII, such as name, address, Social Security Number, financial account numbers, etc., the Boucher proposal extends coverage to IP addresses, cookies, user alias' and any other "unique identifier, where such identifier is used to collect, store, or identify information about a specific individual or a computer, device, or software application owned or used by a particular user or that is otherwise associated with a particular user." In a similar vein, covered information also includes "preference profiles;" defined as "a list of information, categories of information, or preferences associated with a specific individual or a computer or device owned or used by a particular user that is maintained by or relied

upon by a covered entity." Although it is generally accepted that persistent cookies, IP addresses, preference profiles, "browser fingerprints," and the like can and are being used to track users online, until now there has been little agreement as to whether such data constitutes personally identifiable information. The Boucher proposal answers this question in the affirmative, and thereby brings network advertisers and others who rely on such data to serve ads within the fold.

More troubling is the bill's catch-all provision covering "[a]ny other information that is collected, stored, used or disclosed in connection with any covered information." It is unclear what kinds of information were intended to be captured by this provision, or how broadly such a provision would be interpreted. Calls for clarification have already been heard with respect to this provision and should result in much needed guidance from the authors and/or revisions to the final bill.

Preserves Opt-Out for First-Party Online Data Collection, With Expansive Privacy Disclosures

The bill largely preserves existing industry best practices with respect to the online collection of data in *first party* interactions, (i.e., use by the collecting entity), requiring only that the entity "make available" its privacy policy and provide an opportunity to the consumer to opt-out. The notice mechanism - clear and conspicuous posting, accessible from a link on the homepage - is generally consistent with existing self-regulatory guidelines and current state law governing privacy policies. n4 And, consistent with recent comments by the FTC Commissioner, the bill exempts from the notice and consent requirement data collected or used for a transactional n5 or operational purpose. n6

The bill would, however, require all but the most fastidious firms to revise, and expand, their privacy policies to more comprehensively address their data collection, marketing and storage practices. In addition to disclosing what data is collected and to whom it may be disclosed, the privacy policy mandated by the bill would include, among other items, descriptions as to how the data will be used, how it will be stored, for how long it will be kept in personally identifiable form, whether and how it may be merged with data from unaffiliated sources, and how the company will provide notification of changes to the policy. Concerns have been raised that by imposing an ever-expanding list of privacy disclosures, the bill would actually render privacy policies more complicated and less transparent, and would therefore be counter to the stated goal of enhancing consumer information and choice. Others have raised concerns that certain of the proposed disclosures would generate security concerns by providing valuable information to prospective identity thieves. In light of prior comments by the FTC's Liebowitz concerning the need to streamline the disclosure process, it seems like likely that this provision will be the subject of further discussion.

Imposes Opt-In Requirement For Retroactive Modifications

Also of concern to marketers is the proposal to require opt-in for "material changes" to the treatment of previously collected data. Many clients have objected that the provision would create an administrative nightmare, requiring marketers to implement a complicated data segregation scheme to ensure alignment of business practices with policy changes, and may over time stifle innovation and flexibility by discouraging changes in data collection policies and practices. However, given that the provision effectively codifies the FTC's current interpretation of the FTC Act Section 5, as applied in prior FTC enforcement actions, see, e.g., *In the Matter of Gateway Learning Corp.*, FTC Docket No. C-4120 (Sept. 10, 2004)(9 *ECLR* 622, 7/14/04), significant changes to this provision appear unlikely.

Imposes Opt-In For Sharing With Unaffiliated Entities

Perhaps the most controversial provision, and the one most likely to engender fierce opposition from certain quarters of the marketing industry, is the proposal to require opt-in- "express affirmative consent"-to share data with unaffiliated parties(i.e. entities not under common corporate control). The provision would have a significant impact on many current business practices, including in particular offline marketers, cataloguers, list brokers, and others that compile or rely on marketing lists, or who append data gathered by third parties to enhance customer targeting and modeling,

The bill attempts to mitigate the impact of this provision in two ways. First, the bill includes a safe-harbor provision for online advertising networks. Essentially adopting the self-regulatory model of the NAI, the bill allows members of advertising networks to freely share data within the network so long as the network (1) provides a persistent opt-out mechanism, (2) data is deleted or rendered anonymous after 18 months, (3) a seal or symbol is placed on ads linking to the privacy policy and an opt-out mechanism and (4) the data is not shared outside the network. Second, the bill exempts disclosures to "service providers" for the purpose of "executing a first party transaction," so long as the entity has complied with the opt-out consent requirement applicable to first party interactions and the agreement with the service provider includes an appropriate non-disclosure provision. This provision would presumably cover not only payment processors, fulfillment services and the like, but marketing vendors and ad servers as well.

However, neither of the proposed exemptions does much to address the concerns of offline marketers and others who have traditionally relied on data collected by third parties. It is likely that this provision will be the subject of intense negotiations and revisions before a final bill is introduced.

Proposal Would Require Substantial Changes to Offline Data Collection

Although the impetus of the Boucher proposal was clearly to regulate the use of online behavioral advertising, by its terms it extends its regulatory reach to the offline marketing world. The Boucher proposal provides that where data is collected by "any means that does not use the Internet," the entity must nevertheless provide the prescribed privacy notice, in writing, to the individual from or about whom the data is collected "*before* the covered entity collects any covered information." (emphasis added). Although a seemingly commonsense provision, the practical implications of this requirement have generated great concern among direct mailers, cataloguers, telemarketers and list brokers, as it raises a number of questions concerning how the provision would be implemented. The bill does, however, exempt from the notice and consent requirement the offline collection of certain basic data, including name, address, telephone number and email address, and does not include within the definition of covered information demographic or other data that would typically be appended thereto.

Sensitive Information

The bill requires express affirmative consent (opt-in) for the collection or use of "sensitive information," which expectedly includes medical data and financial data, but which also includes data concerning an individual's race or ethnicity, religious beliefs, sexual orientation and "precise geolocation information." Restrictions on the latter categories may have significant impacts in certain niche marketing circles and may have enormous implications for mobile ad networks and geolocation service providers, such as Quova and Digital Envoy, and certain social networking applications that seek to leverage geolocation data. Furthermore, because "sensitive information" is said to include data that "relates" to the enumerated categories, concerns have been expressed that it could include information from which sensitive information might be inferred, such as the consumer's preferred language, which might raise an inference of the consumer's ethnicity. As a result, it is likely that the authors will act to clarify the limits of what is considered sensitive information prior to placing the bill in final form.

National Data Security Standards?

Finally, taking a page from existing state law on data security, the Boucher proposal would also create national data security standards, requiring covered entities to establish, implement and maintain appropriate administrative, technical and physical safeguards to protect against security threats and unauthorized access or misuse. However, unlike most state regulatory schemes, the Boucher proposal does not incorporate a data breach notification requirement, requiring only that a covered entity determine the scope of any data breach and take steps to prevent further access to the data and restore the integrity of the data. Significantly, the bill includes a general preemption provision, stating that it preempts any state law that "includes requirements for the collection, use or disclosure of covered information." As a result of this provision, the data security requirements would presumably preempt current state data security schemes, such as those in Massachusetts, Minnesota, and Utah, and perhaps the ubiquitous state data breach notification laws as

well. Uniform national standards would certainly be welcomed by the industry, but consumer groups and others have already objected to the preemption provisions and the prohibition on private rights of action, setting the stage for a showdown on these issues as the bill heads to committee.

Return to Text

n1 The bill would exempt anyone who collects data from fewer than 5,000 individuals in a 12-month period.

n2 *See* Cal. Bus. & Prof. § 22577 ("The term "personally identifiable information" means individually identifiable information about an individual consumer collected online by the operator from that individual and maintained by the operator in an accessible form, including any of the following:

- (1) A first and last name.
- (2) A home or other physical address, including street name and name of a city or town.
- (3) An e-mail address.
- (4) A telephone number.
- (5) A social security number.
- (6) Any other identifier that permits the physical or online contacting of a specific individual.

(7) Information concerning a user that the Web site or online service collects online from the user and maintains in personally identifiable form in combination with an identifier described in this subdivision.").

n3 *201 CMR 17.02* ("Personal information, a Massachusetts resident's first name and last name or first initial and last name in combination with any one or more of the following data elements that relate to such resident: (a) Social Security number; (b) driver's license number or state-issued identification card number; or (c) financial account number, or credit or debit card number, with or without any required security code, access code, personal identification number or password, that would permit access to a resident's financial account.").

n4 *See* Cal. Bus. & Prof. § 22575(a), 22577(b).

n5 A transactional purpose is one necessary for "effecting, administering or enforcing a transaction" with the consumer.

n6 An operational purpose includes site or product optimization, data security, legal compulsion or sharing with an affiliate.

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2 of 33 DOCUMENTS

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Does the Electronic Communications Privacy Act Needs to be Reformed?

2010 Emerging Issues 5407

Lening, Koepsel, and Weikers on Whether the Electronic Communications Privacy Act Needs to be Reformed

By Carey Lening, Kirsten Koepsel and Ron Weikers

November 18, 2010

SUMMARY: Do current laws governing the protection of digital information adequately balance individual privacy rights against the government's need to know? This is one of the questions that the 111th Congress actively addressed in a series of spirited debates on whether the Electronic Communications Privacy Act has kept up with technological change. Carey Lening, Kirsten Koepsel, and Ron Weikers discuss whether the ECPA needs to be reformed.

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ARTICLE: Do current laws governing the protection of digital information adequately balance individual privacy rights against the government's need to know? This is one of the questions that the 111th Congress actively addressed in a series of spirited debates on whether the Electronic Communications Privacy Act has adequately kept up with technological change.

FROM "PAPERS, AND EFFECTS" TO ELECTRONIC COMMUNICATIONS

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause... ." Over the last two centuries, courts have offered varying interpretations on the scope of how "papers, and effects" and the warrant requirements have adapted to changes in how we collect and maintain personal information.

In the early days of electronic communications, the Supreme Court addressed the Fourth Amendment's application to government wiretapping of private telephone conversations. In two landmark cases, *Olmstead v. United States* and *Katz v. United States*, the high court first rejected, and then affirmed, a right of privacy in electronic communications. n1 In response to the Supreme Court's decision, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968 to regulate wiretapping activity by the government. n2

Nearly twenty years later, in response to yet newer forms of electronic communications, Congress passed the Electronic Communications Privacy Act (ECPA). n3 Codified at *18 U.S.C. §2510 et seq.*, the ECPA dictates the specific legal processes necessary to monitor or review electronic communications held by third parties, ranging from phone companies and Internet service providers (ISPs) to application service providers (ASPs). n4

Generally, it is considered a crime for individuals or entities to intercept or obtain the "electronic communications" of another, absent certain exemptions. n5 However, the ECPA treats electronic communications obtained "in transmission" differently from communications that have reached their final destination. If an electronic communication is intercepted when it is in transit Title I of the ECPA applies, n6 whereas a communication that has been transmitted is governed by Title II of the ECPA, otherwise known as the Stored Communications Act, *18 U.S.C. §§ 2701-2712*. n7

Although the ECPA was designed to provide clarity when it comes to monitoring electronic communications, the law itself has routinely been criticized by commentators and the courts for being "famous (if not infamous) for its lack of clarity[.]" n8 Much of this stems from the fact that Title I and Title II differ markedly on standards of evidence and requirements that must be met in order for government (or private entities) to obtain electronic records. But courts have even expressed difficulty in applying consistent readings within each Title of the Act. For example, while most courts agree that an e-mail intercept under Title I must be contemporaneous with the transmission of the communication, they have disagreed on whether an e-mail residing in "transient electronic storage" prior to delivery qualifies. n9

Another aspect that has raised a number of concerns is the distinction within the ECPA between "Electronic Communication Service" (ECS) and "Remote Computing Service" (RCS) providers, and the standards necessary to obtain information from each. n10 When the ECPA was originally drafted, it reflected Congress's then-current understanding of how network services were used. Specifically, the Senate Report reflects that network services are used in two distinct ways: 1) either as a conduit for sending and receiving electronic communications (e.g., e-mail); or 2) as a means to remotely store and process data. n11 The ECPA ultimately divided electronic communications providers into the appropriate ECS or RCS category to reflect the predominant uses at the time of enactment. Complicating matters further is the fact that the ECPA itself applies radically different rules when it comes to obtaining electronic records from either an ECS or RCS.

Broadly speaking, under Title II, communications obtained from an ECS n12 require a warrant, whereas those same communications obtained from an RCS can be obtained either by a warrant, or with notice to the individual, by an administrative subpoena, or by a court order. n13 This has had substantial implications on how courts treat service providers that don't match the statutory framework of an ECS or an RCS. n14 Nor do the distinctions end after satisfying the ECS v. RCS conundrum, as the law also treats "public" and "private" service providers differently for purposes of warrant and notice requirements. n15

PROTECTING THE 'DIGITAL DUE PROCESS'?

In May 2010, Congress began holding a series of hearings on reform of the ECPA. Testimony on the need for ECPA reform has centered both on the law's famous "lack of clarity," and the belief that the law has simply been outpaced by a generation's worth of technological development. In the four hearings to date convened by the House and the Senate, n16 academics, law enforcement personnel, service providers, and "digital due process" advocates weighed in on the need (or lack thereof) for reform. At the September 22, 2010, Senate Judiciary Committee hearing, Committee Chairman Patrick Leahy (D-Vt.) stated that "[b]ringing this privacy law into the Digital Age will be one of Congress's greatest challenges" and that the "ECPA is a law that is often hampered by conflicting privacy standards that create uncertainty and confusion for law enforcement, the business community and American consumers." n17

One of the more vocal groups urging reform is the "Digital Due Process" coalition, a loose band of online service providers, privacy advocates, and academics. The Digital Due Process coalition has articulated specific suggestions on areas where the ECPA could benefit from an overhaul. n18 They include revisions to how the Act treats e-mail traffic, mobile data, cloud-computing platforms, and data collected by and stored on social networking services such as Facebook and MySpace. n19 They argue that three different standards are currently in force when it comes to obtaining e-mail, depending on whether it's an e-mail intercept (Title I), a recently transmitted e-mail, or an e-mail held in long-term storage (Title II).

Others have faulted the Act's antiquated distinctions between ECS and RCS providers as being wholly inapplicable

in an age where the long-term storage of data by e-mail providers to cloud computing networks has gone from being the exception to being more normal. For example, newer technologies such as Facebook allow you to send and receive e-mails - like a traditional ISP (or ECS). Facebook also allows for "remote storage" of information such as photos, links, and other personal information - like an RCS. How courts will treat Facebook and services like it will continue to remain a concern of tech innovators until the law is adapted, they argue. n20

Some opponents have complained that any changes made to the law in the direction of increased privacy protections would necessarily come at the cost of police time and expense-making it harder to track down cyber criminals and child pornographers. n21 Moreover, they argue that the push for reform, at least from the provider standpoint, is misdirected, as ISPs frequently provide voluntary disclosure after law enforcement requests, usually made with little more than notice on agency letterhead.

Based on the recent congressional interest, it seems all but certain that reform of the ECPA will occur. The only remaining questions concern the timing and scope of that reform, and who stands to benefit (or lose) with the passage of any new legislation.

[Return to Text](#)

n1 *Olmstead v. United States*, 277 U.S. 438 (1928) (rejecting the requirement that government obtain a warrant to monitor wire communications). *But see Katz v. United States*, 389 U.S. 347, (1967) (overturning *Olmstead*, holding that the Fourth Amendment applies to people, not places, and requiring the Federal Bureau of Investigation to obtain a warrant before monitoring a public phone).

n2 Pub. L. No. 90-351, 82 Stat. 197 (June 19, 1968), 18 U.S.C. § 2510-2522.

n3 Pub. L. No. 99-508 (1986) (codified as amended at 18 U.S.C. § 2510 *et seq.* (Title I); 18 U.S.C. §§ 2701-2711 (Title II)).

n4 18 U.S.C. § 2510.

n5 The ECPA defines an "electronic communication" as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce." 18 U.S.C. § 2510(12).

n6 Title I of the ECPA, 18 U.S.C. § 2510, *et seq* also known as the Wiretap Act, prohibits the intentional

actual or attempted interception, use, disclosure, or "procure[ment] [of] any other person to intercept or endeavor to intercept any wire, oral, or electronic communication." Title I provides certain exemptions for operators and service providers for uses "in the normal course of [] employment," and for "persons authorized" under the Foreign Intelligence Surveillance Act of 1978. *18 U.S.C. § 2511*. It also provides procedures for government officers to obtain judicial authorization for intercepting wire communications. *18 U.S.C. §§ 2516-2518*. Specifically, a court of competent jurisdiction may issue a warrant authorizing interception of communications for up to thirty days upon a showing of probable cause that the interception will reveal information related to the commission of specific offenses listed in § 2516.

n7 *18 U.S.C. § 2701*. Title II protects the privacy of the contents of files stored by service providers and of records held about the subscriber by service providers, such as subscriber name, billing records, or IP address. *18 U.S.C. §§ 2701-2712*. Section 2703 specifically controls government access to information maintained by third-party service providers.

n8 *Steve Jackson Games, Inc. v. U.S. Secret Service*, 36 F.3d 457, 462 (5th Cir. 1994).

n9 *United States v. Councilman*, 418 F.3d 67 (1st Cir. 2005) (court held that e-mail communications stored in service provider's "transient electronic storage" prior to transmission to intended parties was communication intercepted "in transit" for Wiretap Act purposes). *But see Bunnell v. MPAA*, 567 F. Supp. 1148 (C.D. Cal. 2007) (Wiretap Act did not apply to electronic records stored on RAM, since records were not obtained in real time); *United States v. Szymuszkiewicz*, 2010 U.S. App. LEXIS 18815 (7th Cir. Sept. 9, 2010) (automatic forwarding of copies of e-mails violates Wiretap Act).

n10 Section 2510(15) defines an ECS as "any service which provides to users thereof the ability to send or receive wire or electronic communications," whereas an RCS is defined under § 2711 as a service that provides "to the public [] computer storage or processing services by means of an electronic communications system."

n11 S. Rep. No. 99-541, at 2-3 (1986), *reprinted at* 1986 U.S.C.C.A.N. 3555, 3556-57.

n12 *18 U.S.C. § 2703(a), (b), (d)*. Records within an ECS are further divided into subcategories based on how long the information is being stored. Records held by an ECS for 180 days or less require a traditional warrant issued by a competent court. *18 U.S.C. § 2703(a)*. Those same records held past the 180-day mark, or materials obtained from an RCS, require the government to obtain either: a) a warrant; b) a subpoena; or c) a court order based on "specific and articulable facts" known as a "2703(d) order." *18 U.S.C. § 2703(b), (d)*.

n13 To use a subpoena or 2703(d) order, the government must provide either contemporaneous or, in some cases, delayed notice to the individual whose information is being obtained. 18 U.S.C. § 2705(a).

n14 See, e.g., *Crispin v. Christian Audigier Inc.*, 2010 U.S. Dist. Lexis 52832 (C.D. Cal. May 26, 2010) (social networking providers are both ECS and RCS providers); *In re Jet Blue Airways Corp. Privacy Litigation*, 379 F. Supp. 2d 299, 307 (E.D.N.Y. 2005) (airline's website does not automatically become an ECS merely by providing a means to communicate with its customers);

n15 See S. Rep. No. 99-541, at 8 (1986), reprinted at 1986 U.S.C.C.A.N. 3555; *Andersen Consulting LLP v. UOP*, 991 F. Supp. 1041, 1042 (N.D. Ill. 1998) (Company that purchased e-mail for employees was not an ECS, as it did not provide services to the public).

n16 *Hearing on ECPA Reform and the Revolution in Cloud Computing Before the H. Comm. on the Judiciary, Subcomm. on the Constitution, Civil Rights & Civil Liberties*, 111th Congress (Sept. 23, 2010), video available at http://judiciary.house.gov/hearings/hear_100923.html; *Hearing on The Electronic Communications Privacy Act: Promoting Security and Protecting Privacy in the Digital Age, Before the S. Comm. on the Judiciary*, 111th Congress (Sept. 22, 2010), video available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=4776>; *Hearing on ECPA Reform and the Revolution in Location Based Technologies and Services Before the H. Comm. on the Judiciary, Subcomm. on the Constitution, Civil Rights & Civil Liberties*, 111th Congress (June 24, 2010), video available at http://judiciary.house.gov/hearings/hear_100624.html; *Hearing on Electronic Communications Privacy Act Reform Before the H. Comm. on the Judiciary, Subcomm. on the Constitution, Civil Rights & Civil Liberties*, 111th Congress (May 5, 2010), video available at http://judiciary.house.gov/hearings/hear_100505_1.html.

n17 *Hearing on The Electronic Communications Privacy Act: Promoting Security and Protecting Privacy in the Digital Age, Before the S. Comm. on the Judiciary*, 111th Congress (Sept. 22, 2010), video available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=4776> (Statement Of Senator Patrick Leahy, available at http://judiciary.senate.gov/hearings/testimony.cfm?id=4776&wit_id=2629).

n18 For a discussion of specific recommendations see J. Beckwith Burr, *The Electronic Communications Privacy Act of 1986: Principles for Reform*, at http://www.digitaldueprocess.org/files/DDP_Burr_Memo.pdf; see also Orin S. Kerr, *A User's Guide to the Stored Communications Act - And a Legislator's Guide to Amending It*, 72 *Geo. Wash. L. Rev.* 1208 (2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=421860.

n19 ECPA Reform: Why Now?, Digital Due Process, at:

<http://www.digitaldueprocess.org/index.cfm?objectid=37940370-2551-11DF-8E02000C296BA163> (last accessed Oct. 16, 2010). Members of the Digital Due Process coalition include major ISPs (AOL, AT&T, Qwest), ASPs (Amazon.com, Google, Intel & Salesforce.com), and privacy advocates (ACLU, Electronic Frontier Foundation, Center for Democracy & Technology). A full membership list is available at: <http://www.digitaldueprocess.org/index.cfm?objectid=DF652CE0-2552-11DF-455000C296BA163> (last accessed Oct. 16, 2010).

n20 Thus far, only one court has arrived at any conclusion. In *Crispin v. Christian Audigier Inc.*, 2010 U.S. Dist. LEXIS 52832 (C.D. Cal. May 26, 2010), a court was asked to determine whether the plaintiff's e-mail messages, wall postings, and comments sent through Facebook and MySpace were discoverable in a civil case. After the defendants requested the plaintiff's subscriber information and all communications relevant to the litigation, the court had to determine whether the information was protected under the SCA. In holding that the social networking services were *both* ECS and RCS providers, the court determined that the plaintiff's private e-mails were protected under the ECPA. However, the court recognized a distinction between private messages and messages or comments posted on a "wall," which can generally be accessed by many subscribers at a time. On that issue, it remanded to the magistrate judge to determine whether the plaintiff's privacy settings rendered the wall postings and comments public and therefore unprotected by the SCA.

n21 An anonymous source leaked a copy of the Republican policy memo on whether ECPA reform is necessary to the information-sharing site Scribd. The GOP position generally challenges testimony from industry and privacy-rights groups that complain that the law is rigid and difficult to apply. "[A]s the years have gone by, courts have been able to apply ECPA's provisions to evolving technological advances to the point that ECPA's standards are generally clear and settled." Memorandum to Senate Judiciary Comm. Minority Staff, The Electronic Communications Privacy Act: Promoting Security and Protecting Privacy in the Digital Age, at 2, 111th Congress (Sept. 17, 2010), *available at* <http://www.scribd.com/doc/38407733/Republican-Senate-memo-against-privacy-and-cloud-computing-reform>. The memorandum also lambasted the offered reforms as favoring industry at the expense of legitimate law enforcement needs.

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3 of 33 DOCUMENTS

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Net Neutrality

2010 Emerging Issues 5073

American Bar Association Report on Net Neutrality

By ABA SECTION OF PUBLIC UTILITY, COMMUNICATIONS AND, COMMUNICATIONS, CABLE and AND INTERNET COMMITTEE

May 24, 2010

SUMMARY: This report from the American Bar Association's Communications, Cable, and Internet Committee looks at the latest developments in net neutrality.

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ARTICLE: Net Neutrality

As we have discussed in previous Committee Reports, in 2005, the FCC issued an Internet Policy Statement adopting net neutrality as the FCC's regarding management of, and access to, the Internet. n1 The Internet Policy Statement stated that the Communications Act gives the FCC "jurisdiction necessary to ensure that [Internet service] providers . . . are operated in a neutral manner" and announced four principles intended to "preserve and promote the open and interconnected nature of the public Internet": (1) "consumers are entitled to access the lawful Internet content of their choice"; (2) "consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement"; (3) "consumers are entitled to connect their choice of legal devices that do not harm the network"; and (4) "consumers are entitled to competition among network providers, application and service providers, and content providers." The FCC stated that these principles were "subject to reasonable network management." n2

On October 22, 2009, the FCC issued a Notice of Proposed Rulemaking that sought to codify the Internet Policy Statement, along with "additional principles of nondiscrimination and transparency[.]" n3 These principles would "apply to all platforms for broadband Internet access, including mobile wireless broadband," although the FCC sought comment on how to apply the principles "to non-wireline forms of Internet access[.] n4 The new draft "nondiscrimination principle," FCC explained, "would prohibit broadband Internet access service providers from favoring or disfavoring lawful content, applications, or services accessed by their subscribers[.]" n5 The four original principles and the nondiscrimination principle would be "subject to reasonable network management." n6 But the last new principle - the "transparency principle" - would require broadband Internet Service Providers (ISPs) to make certain information about their network management practices available to consumers, ISPs, the FCC, and others. n7

The original deadline for comment on the proposed rules was January 14, 2010, with a reply deadline of March 5, 2010. The reply deadline has since been extended to April 8, 2010. n8 Much more information about the FCC's new

proposed net neutrality rules can be found on the FCC's net neutrality website n9 and blog. n10

As we further discuss in Section B.7 below, the D.C. Circuit's April 6, 2010 decision in *Comcast Corp. v. FCC*, No. 08-1291, calls into serious question the FCC's legal authority to promulgate rules in the areas of network management and nondiscrimination by information services providers.

Return to Text

n1 In the Matters of Appropriate Framework for Broadband Access to the Internet over *Wireline Facilities et al.*, *CC Docket No. 02-33 et al.*, *Policy Statement*, 20 *FCC Rcd* 14986 (2005).

n2 *Id.* 5.

n3 In the *Matters of Preserving the Open Internet, Broadband Industry Practices*, *GN Docket No. 09-191, WC Docket No. 07-52, Notice of Proposed Rulemaking*, 24 *FCC Rcd* 13064, 11 (2010).

n4 *Id.* at 13, 16.

n5 *Id.* at 11

n6 *Id.*

n7 *Id.* A brief video explanation of the rules from the FCC's Wireline Competition Bureau Chief, Sharon Gillett, with a focus on the transparency principle, is available at <http://blog.openinternet.gov/?p=146>.

n8 In the *Matters of Preserving the Open Internet, Broadband Industry Practices*, *GN Docket No. 09-191, WC Docket No. 07-52, Order*, DA 10-306 (2010).

n9 See <http://www.openinternet.gov/about-the-nprm.html>.

n10 <http://blog.openinternet.gov>.

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ABOUT THE AUTHOR(S):

This report is excerpted from the Spring 2010 Report of the Communications, Cable, and Internet Committee of the American Bar Association's Section of Public Utility, Communications and Transportation Law. The Section of Public Utility, Communications and Transportation Law brings together members of the bar interested in the rapidly changing legal environment in the communications, cable TV, internet, electricity, gas, oil pipelines, aviation, motor carriers, railroads, and water industries. The third oldest Section in the ABA, the Section was established in 1917 when public interest demanded regulation of these fields. The Section currently has approximately 3,900 members, plus over 3,000 law students.

The Communications, Cable, and Internet Committee addresses regulatory and other legal developments in the rapidly changing telecommunications industry.

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4 of 33 DOCUMENTS

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American Bar Association Report on Traffic Pumping

2010 Emerging Issues 5074

American Bar Association Report on Traffic Pumping

By AMERICAN BAR ASSOCIATION SECTION OF PUBLIC UTILITY, COMMUNICATIONS AND TRANSPORTATION LAW, COMMUNICATIONS, CABLE and AND INTERNET COMMITTEE

May 24, 2010

SUMMARY: This report from the American Bar Association's Communications, Cable, and Internet Committee looks at traffic pumping, which is the practice by which some rural local exchange carriers have attempted to artificially stimulate additional phone traffic (for which they bill access charges to other carriers) to their sparsely populated service areas.

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ARTICLE: Traffic Pumping

As we previously described in our Fall 2009 Committee Report, *Traffic pumping* refers to practices by which some rural local exchange carriers have attempted to artificially stimulate additional phone traffic (for which they bill access charges to other carriers) to their sparsely populated service areas. "For example," observes the FCC's recent *National Broadband Plan*, "companies have established 'free' conference calling services, which provide free services to consumers while the carrier and conference call company share the [access] revenues paid by interexchange carriers." n1 Other companies have established similar arrangements for chat lines, which often feature content of a sexually explicit nature. The incentive to establish such arrangements exists because "[m]ost [access] rates are above incremental costs"; as a result, "investment is directed to free conference calling and similar schemes for adult entertainment that ultimately cost consumers money." n2 Interexchange carriers ("IXCs ") have challenged several such arrangements, maintaining that they are illegal and fraudulent schemes designed to inflate switched access charges and abuse the intercarrier compensation system for interexchange traffic. Traffic pumping has therefore become the subject of complaints and lawsuits in forums around the country. The following describes recent developments in this area.

FCC Reconsideration Orders. In October 2007, the FCC granted in part a formal complaint that Qwest Communications Corporation ("Qwest") filed against Farmers and Merchants Mutual Telephone Company ("Farmers"), a local exchange carrier operating in rural Iowa. n3 The FCC's 2007 order agreed that Farmers "vastly exceeded the prescribed rate of return" by artificially pumping its access volumes with free conference call services, but held that Qwest could not recover damages for past traffic pumping activities and that the imposition of access charges on such calls was consistent with Farmers' tariff. n4

But on November 24, 2009 (FCC 09-103), the FCC reversed its 2007 order in part, holding that Farmers' switched access charges did violate Farmer's tariff. n5 Based on newly-available information presented by Qwest, the FCC held that the conference calling companies to whom Farmers was allegedly terminating calls were not "end users" under Farmer's Switched Access Service tariff and therefore concluded that Farmers was not entitled to charge switched access rates to Qwest. n6 The FCC found that Farmers and the conference calling companies had structured their business arrangements pursuant to contracts and not the terms and conditions of Farmer's tariff, that Farmers provided service to the conference calling companies in a manner different than how it provided services to end users under its tariff, and that Farmers backdated contracts with and invoices to the conference calling companies in an attempt to show that Farmers had billed them pursuant to its end user tariff. n7 Farmers asked the FCC to reconsider the reconsideration order, but the FCC denied Farmers' motion on March 17, 2010. n8

South Dakota Decision. On March 15, 2010, Chief Judge Karen E. Schreier issued substantially identical orders in two cases pending before the United States District Court for the District of South Dakota, referring various issues to the FCC. n9 The cases before Judge Schreier were brought by Sancom and Northern Valley, two CLECs operating in South Dakota, against Sprint's IXC affiliate ("Sprint"). The CLECs argued that Sprint had failed to pay interstate and intrastate switched access charges for calls allegedly terminated to the CLECs' end users. n10 In each case, Sprint denied liability, arguing that the services provided by the CLECs are not "switched access services," under the applicable tariffs, and that each of the CLECs is engaged in a "traffic pumping" scheme. n11 Sprint also filed counterclaims against each CLEC, as well as third-party complaints against the companies providing conference calling, chat lines or similar services, in which it alleged the same "traffic pumping" schemes. n12

Plaintiffs in each case asked the Court to stay the proceeding and refer certain issues to the FCC. n13 The Court agreed, applying the doctrine of primary jurisdiction. n14 Accordingly, the Court referred to the FCC the following: (1) determination of whether each plaintiff is entitled to collect switched access charges for calls to numbers assigned to free calling providers pursuant to its interstate access tariff; (2) if the plaintiff's interstate access tariff does not apply to the services at issue, determination of the proper legal classification of these services and determination of whether plaintiff is entitled to compensation for them; and (3) determination of a reasonable rate for those services. n15 In its orders, the Court noted that there were approximately two dozen cases regarding traffic pumping schemes pending before the District of South Dakota or other courts, state commissions or the FCC, and that referral to the FCC would promote uniformity and consistency in the field. n16

The National Broadband Plan. The *National Broadband Plan* recommends that the FCC adopt long-term reforms aimed at reducing access rates (and thus reducing incentives for traffic pumping and other arbitrage schemes), and that the FCC encourage states to "rebalance" rate structures. n17 The *Plan* also recommends that the FCC "adopt interim rules to reduce . . . arbitrage," including "rules to reduce access stimulation and to curtail business models that make a profit by artificially inflating the number of terminating minutes." n18

Return to Text

n1 *Connecting America: The National Broadband Plan*, at 142 (rel. Mar. 16, 2010), available at <http://download.broadband.gov/plan/national-broadband-plan.pdf>.

n2 *Id.*

n3 *Qwest Communications Corp. v. Farmers & Merchants Mutual Tel. Co.*, 22 FCC Rcd. 17973 (2007).

n4 *Id.* 25, 26-27, 39.

n5 *Qwest Communications Corp. v. Farmers & Merchants Mutual Tel. Co.*, 24 FCC Rcd. 14801 (2009).

n6 *Id.* 10.

n7 *Id.* 11-20.

n8 *Qwest Communications Corp. v. Farmers & Merchants Mutual Tel. Co.*, 2010 WL 972315 (FCC Mar. 17, 2010).

n9 *Sancom, Inc. v. Sprint Communications Co.*, 2010 U.S. Dist. LEXIS 23888 (D. S.D. Mar. 15, 2010) & *Northern Valley Communications, LLC v. Sprint Communications Co.*, 2010 U.S. Dist. LEXIS 23923 (D. S.D. Mar. 15, 2010). For ease of reference, subsequent citations refer only to the *Sancom* decision.

n10 *Sancom*, 2010 WL 936718, at *1.

n11 *Id.*

n12 *Id.*

n13 *Id.* at *2.

n14 *Id.* at *4.

n15 *Id.*

n16 *Id.* at *8.

n17 *National Broadband Plan*, at 148.

n18 *Id.*

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5 of 33 DOCUMENTS

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Unjustified Criticisms of the Supreme Court's Recent Antitrust Decisions

2009 Emerging Issues 3597

Don't Believe Everything You Hear; Unjustified Criticisms of the Supreme Court's Recent Antitrust Decisions

By Pat Pascarella

May 6, 2009

SUMMARY: In the past few years, critics of the Supreme Courts antitrust decisions have claimed that the Court is pro-big business and anti-consumer. The opinion emanates largely from plaintiff bars and other proponents of regulatory and legislative intervention and typically contain a common theme, that the Court is freeing big companies to run roughshod over smaller firms and ultimately over consumers. However, nothing could be further from the truth.

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ARTICLE: Over the past few years, critics of the Supreme Court's antitrust decisions have claimed that the Court is pro-big business and anti-consumer. This opinion emanates largely from plaintiff bars and other proponents of regulatory and legislative intervention. Typically directed at the opinion *du jour*, the criticisms repeat a common theme -- the Court is freeing big companies to run roughshod over smaller firms and ultimately over consumers. Among the cases that have appeared on the critics' menu have been *Trinko*,ⁿ¹ *Leegin*,ⁿ² and now, *linkLine*.ⁿ³

For example, the president of the American Antitrust Institute recently stated:

The Supreme Court's [*linkLine*] decision is a gift to monopolists and their recently-departed laissez-faire cheerleaders in the Bush Administration. . . . This decision will harm consumers by giving monopolists a green light to eliminate competitors who depend on the dominant company for critical inputs, especially in markets where there is no possibility of regulatory relief. n4

However, nothing could be further from the truth. In fact, had the Court not rejected the *linkLine* plaintiffs' price-squeeze theory of liability, the end result would have been higher consumer prices.

In each of these cases -- *Trinko*, *Leegin*, and *linkLine* -- consumers' interests prevailed over all else. The undisputable result of each case is that competition flourished and consumers benefited. The only parties harmed by these decisions were companies that, due to bad business cases or poor execution, could not survive in a competitive market. But as the courts have recognized since the inception of the antitrust laws, consumers benefit when competition, and not competitors, are protected. *linkLine* provides an excellent example of this principle in action.

The decision in *linkLine* rejected a cause of action referred to as a "price-squeeze." A price-squeeze allegation

typically involves a dual distributor, which is a company that both competes at the retail level and serves as a wholesale supplier to some or all of its retail competitors. The basic theory behind a price-squeeze allegation is that the dual distributor is not leaving its competitor/customers a sufficient or "fair" margin between the wholesale prices it charges them and the retail prices it charges consumers.

In rejecting a price-squeeze theory of liability, the *linkLine* Court ruled that the "price-squeeze" doctrine wrongly protects competitors and is not necessary to protect competition and consumers. Moreover, the Court continued, the mere existence of such a cause of action chills the very competitive zeal the antitrust laws were designed to foster. n5

A quick review of the underlying facts in the case illustrate this point:

AT&T California (comprised of affiliates of SBC and Pacific Bell at the time of the complaint) sells high-speed Internet access service to retail consumers. This service is provided via a technology referred to as Digital Subscriber Line (DSL). AT&T faces numerous strong competitors in its sale of high-speed Internet access services -- most significantly, the cable companies.

AT&T also was required by the FCC to sell an upstream input to high-speed Internet access service to potential competitors of AT&T -- sometimes referred to as DSL Transport. The potential competitors, primarily ISPs such as linkLine, purchase DSL Transport, combine it with other capabilities and services, and provide their own brand of high-speed Internet access service in competition with AT&T and others.

The *linkLine* claim arose when AT&T's prices to consumers for its retail high-speed Internet access services fell and began to approach AT&T's prices to ISPs for wholesale DSL Transport. The ISP competitors found themselves "squeezed" between the falling retail prices to consumers and AT&T's wholesale prices for DSL Transport. Fearing their own inevitable demise, some of these ISPs sued AT&T, alleging, among other things, that this "price-squeeze" violated the antitrust laws.

At the core of plaintiffs' case was a 75-year-old opinion rendered by Judge Learned Hand, *United States v. Aluminum Company of America*. n6 In that case, the court of appeals did in fact recognize a price-squeeze theory of liability. Three-quarters of a century later, the Supreme Court laid *Alcoa* to rest.

Is this bad for American consumers as some would have us believe? Again, looking at the facts underlying *linkLine*, it becomes clear why eliminating a price-squeeze theory of liability in fact leads to lower prices and consumer benefit.

When the facts that gave rise to *linkLine* occurred, AT&T was in the midst of a competitive struggle against its stronger, incumbent cable competitors to enter the emerging high-speed Internet access marketplace. Cable already had deployed high bandwidth coaxial cables to its customers' homes vis-[grave]-vis its video services, while AT&T had nothing more than a pair of copper wires to its potential customers. This, of course, required AT&T to incur significant build-out and network deployment costs.

Once deployed, AT&T faced the issue confronted by all new entrants -- how do you get consumers to buy your service? In the Internet access market, it was a combination of price and features that would drive the consumer decision -- in other words, *value*.

So AT&T commenced an aggressive pricing campaign, lowering its retail prices to consumers (which at the same time "squeezed" its wholesale customers). Cable and other competitors responded, adding features and lowering their own retail prices. And consumers reaped the benefits.

But what if price-squeeze had been a viable cause of action? AT&T's competitive zeal would have been tempered. AT&T would have had to make one of two irrational choices: (1) raise its retail prices to consumers to provide a protective umbrella for the ISPs, or (2) lower its wholesale DSL Transport prices. Raising retail high-speed Internet

access prices would have made AT&T less competitive vis-[grave]-vis cable. Lowering its wholesale price would have increased AT&T's costs, again handicapping its ability to compete aggressively.

Hence, what *linkLine* plaintiffs really were asking the Court to do was help *them*, regardless of the impact on competition and consumers. Fortunately, in this case, the Court chose to protect competition and consumers, not *linkLine*.

Return to Text

n1 *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*. 540 U.S. 398 (2004).

n2 *Leegin Creative Leather Products v. PSKS, Inc.* 127 S. Ct. 2705 (2007).

n3 *Pacific Bell Telephone Company v. linkLine Communications, Inc.* 2009 U.S. LEXIS 1635 (U.S. 2009).

n4 See "Death of the 'Price Squeeze' Offense," American Antitrust Institute, February 27, 2009 press release.

n5 *linkLine* at *23-24.

n6 *United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. N.Y. 1945) ("Alcoa").

RELATED LINKS: *Verizon Communications v. Law Offices of Curtis V. Trinko*

■ 540 U.S. 398

Leegin Creative Leather Products v. PSKS, Inc.

■ 127 S. Ct. 2705

Pacific Bell Telephone Company v. linkLine Communications, Inc.

■ 2009 U.S. LEXIS 1635

United States v. Aluminum Company of America

■ 148 F.2d 416

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6 of 33 DOCUMENTS

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Garvey, Esq., on In the Matter of Petitions of Qwest Corporation for Forbearance

2008 Emerging Issues 3020

John M. Garvey, Esq., on In the Matter of Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas, Memorandum Opinion And Order, 2008 FCC LEXIS 5585 (July 25, 2008)

By John Garvey

October 9, 2008

SUMMARY: In *In re Petitions of Qwest Corp. for Forbearance*, 23 FCC Rcd 11729, the FCC rejected Qwest's petition under Sec. 10 of the Communications Act of 1934 to eliminate dominant carrier, unbundled network element, and Computer III regulatory requirements in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas. The rejection of Qwest's petition is notable since it reverses a trend toward granting these petitions.

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ARTICLE: FCC Denies Qwests Petition to Deregulate Four Major Metropolitan Areas

The Federal Communications Commission (FCC or Commission) rejected Qwest Corporation's petition under Section 10 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.* (1934 Act), to eliminate dominant carrier, unbundled network element (UNE), and *Computer III* regulatory requirements in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas (MSAs). Section 10 allows the Commission to forbear from applying any of its provisions, or any of the FCC's implementing regulations, if the Commission makes certain findings related to the competitiveness of the market and whether such forbearance is in the public interest and protects consumers. Specifically, the Commission is required to forbear if it determines that the provision is not needed to protect consumers or to ensure just and reasonable rates. Section 10 also requires the Commission to find that forbearance is in the public interest and will promote competitive markets. n1

The FCC's rejection of Qwest's petition in *I/M/O Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c)* in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas, *Memorandum Opinion And Order*, 2008 FCC LEXIS 5585 (July 25, 2008) (*Qwest Forbearance Order II*) is notable since it reverses a trend toward granting these types of petitions. In recent years, the number of petitions from telecommunications carriers seeking forbearance has increased significantly. The FCC has generally reacted favorably towards these requests for the provision of broadband services and other advanced telecommunication capabilities, granting waivers of specific regulatory requirements to most of the carriers requesting such relief.

However, the FCC has been relatively reluctant to grant forbearance for non-broadband services, particularly if the

provisions relate to the market-opening requirements of the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56 -- such as Section 271, Section 251, and other public policy requirements such as 911. *See, e.g.*, In the Matter of Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas, *Memorandum Opinion and Order*, 2007 FCC LEXIS 9071 (December 4, 2007) (rejecting forbearance petition from dominant carrier regulation applicable to switched access services, certain UNE requirements, and *Computer III* requirements because, *inter alia*, facilities-based competition was minimal).

The FCC's reluctance to grant non-broadband forbearance requests started to change with the 2007 FCC decision in *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, *Memorandum Opinion and Order*, 20 FCC Rcd 19415 (*Qwest Forbearance Order I*), *aff'd*, *Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007); *see also* *Petition of ACS of Anchorage, Inc., Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, *Memorandum Opinion and Order*, 22 FCC Rcd 1958, 1959-60, paras. 1-2 (2007) (*ACS Dominance Forbearance Order*) (granting forbearance from dominant carrier regulation of mass market switched access services). The requested forbearance in *Qwest Forbearance Order I* included rules applicable to non-broadband services, including mass-market switched access. The Commission based its decision on evidence that, *inter alia*, the company had lost significant market share to facilities-based competitors, which had substantial deployment of facilities capable of serving the end-user locations in the wire center service areas for which forbearance was granted. The FCC's decisions in *Qwest Forbearance Order I* and the *ACS Dominance Forbearance Order* potentially signified a shift towards granting more non-broadband forbearance requests in the politically-charged area of local telecommunications services.

Qwest Forbearance Petition II. That potential trend is doubtful now as a result of *Qwest Forbearance Order II*. Qwest sought forbearance in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle MSAs from: (1) dominant carrier rate and tariff regulations applicable to mass-market and enterprise-switched access services; n2 (2) UNE requirements under Section 251(c)(3) for loops, subloops and transport; and (3) *Computer III* requirements. The UNE requirements in Section 251 of the 1996 Act imposes on incumbent carriers the duty to, *inter alia*, provide unbundled access to loops, various subloops, and back-office transport at cost-based rates. Dominant carrier regulations include, *inter alia*, transfer of control and discontinuance proscriptions, cost-supported tariffing, and rate regulation. *Computer III* regulations were promulgated pursuant to the FCC's Title I jurisdiction under the 1934 Act, and allows the Bell Operating Companies (BOCs) providing data services to choose between the *Computer II* structural separation requirements or nonstructural safeguards. The *Computer II* obligations have for decades allowed competitors to access the BOCs underlying telecommunication functionality in order to provide data-based services to end-users. n3 *See Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, 28 F.C.C.2d 267, P 2 (1971); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 F.C.C.2d 384, P 2 (1980); *Amendment of Sections 64.702 of the Commission's Rules and Regulations*; and *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations*, 104 F.C.C.2d 958 (1986).

In rejecting Qwest's petition, the Commission noted that the degree of competition in the four MSAs does not warrant such forbearance. The Commission explained that the degree of facilities-based competition is not comparable to other proceedings where forbearance was granted. It also noted that competition that relies on Verizon's wholesale inputs is not a sufficient basis to grant forbearance. Moreover, competition from cable companies is problematic due to their minimal build-out outside the residential space. n4

Insufficient Data. As it has in other forbearance proceedings, the FCC was highly critical of the data used to support the forbearance petition. For example, it noted that the data submitted by Qwest to gauge wireless substitution consists of information Telephia published based on some sort of survey conducted of the wireless-only household rate in specific market areas, including the Denver, Phoenix, Minneapolis-St. Paul, and Seattle metropolitan areas. However, the only substantive information in the record regarding the Telephia survey is a news release that does not describe Telephia's methodology or provide any other information to support the significance of the data. To the contrary, the

news release states that the [d]ifferences in wireless penetration rates between cities may not be statistically significant. Thus, the margin of error in such a survey alone would not allow us to draw any firm conclusion as to whether the criteria had been met.

It also stated that we reject Qwest's attempt to demonstrate that a particular MSA is competitive by calculating percentage reductions in retail lines. There are many possible reasons for such decreases unrelated to the existence of last-mile facilities-based competition. For example, as the Commission explained in the ACS UNE Forbearance Order, the abandonment of a residential access line does not necessarily indicate capture of that customer by a competitor, but may indicate that the consumer converted a second line used for dial-up Internet access to an incumbent LEC broadband line for Internet access.

In concluding that Qwest has not sufficiently supported its petition for forbearance, the Commission did note that Qwest might have qualified for some forbearance upon a better evidentiary showing. Qwest may, of course, refile its petitions and our decision in this instance does not prejudice the outcome in any future proceeding. We emphasize that petitioners relying on mobile wireless substitution to support forbearance relief should submit complete and reliable data that is geographically specific to the areas for which forbearance is sought. Another encouraging sign for Qwest was the FCC noting that the evidence does show that cable operators have deployed facilities that meet the 75 percent coverage threshold in some wire centers. Thus, future relief from [Section 251] unbundling obligations might be warranted in such wire centers upon a showing of a more competitive environment in these MSAs.

[Return to Text](#)

n1 The FCC must respond to a petition for forbearance within one year (which can be extended for an additional 90 days), otherwise the petition is deemed granted. This statutory language and the FCC's generally favorable response to forbearance requests has been the impetus for various Congressional attempts to eliminate the one-year requirement and impose other restrictions on the Commission's forbearance authority. The Commission has attempted to quell the criticism by recently releasing a Notice of Proposed Rulemaking seeking comments on whether procedural and substantive changes to the forbearance petition process should be implemented. *See Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended, Notice of Proposed Rulemaking, 2007 FCC LEXIS 9029* (November 27, 2007).

n2 Switched access is the ability to originate and terminate long distance calls.

n3 The FCC has recently granted forbearance relief from various requirements derived from the Computer Inquiries for various residential and enterprise broadband services. *See e.g., Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed*

Rulemaking, 20 FCC Rcd 14853 (2005).

n4 As it has in past proceedings, the FCC excluded voice over Internet Protocol services in its competitive analysis since, according to the FCC, there are no data in the record that justify finding that these providers offer close substitute services.

RELATED LINKS: see Charles D. Ferris and Frank W. Lloyd,
■ Telecommunications Regulation: Cable, Broadcasting, Satellite, and the Internet

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7 of 33 DOCUMENTS

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John M. Garvey and David Ponet on Section 201 of the FISA Amendments Act of 2008

2008 Emerging Issues 3021

John M. Garvey, Esq., and David Ponet, Ph.D., on Section 201 of the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, H.R. 6304 (July 10, 2008)

By John Garvey and David Ponet

October 9, 2008

SUMMARY: In this Emerging Issues Analysis, John M. Garvey and David Ponet look at the Telecom Immunity Provisions of the FISA Amendments Act of 2008, which would immunize telecommunications companies from surveillance activities starting on September 11, 2001, and ending on January 17, 2007.

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ARTICLE: The Telecom Immunity Provisions of the FISA Amendments Act of 2008

Background. In 2005, press reports indicated that warrantless electronic surveillance of communications into and out of the US -- named the Terrorist Surveillance Program -- was being conducted by the Bush Administration potentially in violation of the Foreign Intelligence Surveillance Act of 1978 (FISA) and the Fourth Amendments prohibition against warrantless searches. Also reported were assertions that certain telecommunications companies cooperated with the government in the alleged unlawful surveillance. Subsequently, a substantial number of lawsuits were filed against the telecommunications companies who allegedly cooperated with the government.

Under existing law, companies who furnish aid to the government under FISA for purposes of surveillance and other activities are generally immune from lawsuits so long as they have a warrant or certification from the US Attorney General stating that the surveillance is lawful. The Bush Administration has declared such documents state secrets, a common law doctrine that prevents the companies from using the warrants and certifications in court to prove they acted in good faith. Consequently, the telecommunications companies have been lobbying for changes to FISA that would immunize them from the surveillance activities starting on September 11, 2001, and ending on January 17, 2007 -- when Attorney General Alberto Gonzales informed U.S. Senate leaders that the Terrorist Surveillance Program would not be reauthorized by the President. Instead, warrants requests would again be submitted to the FISA court for review.

As a result of the reports of potential violations of FISA, and coupled with the general belief in Congress and the White House that FISA was in need of modernization to reflect a post-9/11 environment, a slew of legislative activity ensued -- starting with the August 2007 enactment of the Protect America Act (PAA) and culminating in the July 2008 enactment of the FISA Amendments Act of 2008 (FISA Amendments Act). While the most critical -- and, not surprisingly, the most controversial -- provisions in the statutes generally focused on warrant requirements in

surveillance activity, particularly as it relates to spying on Americans at home and abroad, the FISA Amendments Act includes provisions that affect the legal liability of telecommunications carriers who allegedly cooperated with the Bush Administration's warrantless electronic surveillance program.

Telecom Immunity Under The FISA Amendments Act. The FISA Amendments Act includes two critical provisions that are relevant to telecommunications companies. The most important is the statute's retroactive immunization of electronic communications service providers (ECSPs) that cooperated with the Bush Administration's wiretapping program. The universe of companies falling under the ECSP definition is delineated in Section 801 of the FISA Amendments Act to include: telecommunications carriers, as defined in section 3 of the Communications Act of 1934 (47 U.S.C. 153); providers of electronic communication services, as that term is defined in Section 2510 of title 18, United States Code; a provider of a remote computing service, as that term is defined in Section 2711 of title 18, United States Code; any other communication service provider who has access to wire or electronic communications either as such communications are transmitted or as such communications are stored; a parent, subsidiary, affiliate, successor, or assignee of an entity described above; and an officer, employee, or agent of an entity described above.

Section 201 of the FISA Amendments Act releases ECSPs from liability in state and Federal civil actions due to surveillance assistance provided to the government if such assistance was authorized by the President between September 11, 2001, and January 17, 2007, and the intelligence activity was designed to detect or prevent terrorist activity on US soil, and such assistance was the subject of written requests or directives from the Attorney General or head of an element of the intelligence community indicating that the activity was authorized by the President and determined to be lawful. Below is the relevant language from the statute:

(a) **REQUIREMENT FOR CERTIFICATION.**--Notwithstanding any other provision of law, a civil action may not lie or be maintained in a Federal or State court against any person for providing assistance to an element of the intelligence community, and shall be promptly dismissed, if the Attorney General certifies to the district court of the United States in which such action is pending that--

(1) any assistance by that person was provided pursuant to an order of the court established under section 103(a) directing such assistance;

(2) any assistance by that person was provided pursuant to a certification in writing under section 2511(2)(a)(ii)(B) or 2709(b) of title 18, United States Code;

(3) any assistance by that person was provided pursuant to a directive under section 102(a)(4), 105B(e), as added by section 2 of the Protect America Act of 2007 (Public Law 110-55), or 702(h) directing such assistance;

(4) in the case of a covered civil action, the assistance alleged to have been provided by the electronic communication service provider was--

(A) in connection with an intelligence activity involving communications that was--

(i) authorized by the President during the period beginning on September 11, 2001, and ending on January 17, 2007; and

(ii) designed to detect or prevent a terrorist attack, or activities in preparation for a terrorist attack, against the United States; and

(B) the subject of a written request or directive, or a series of written requests or directives, from the Attorney General or the head of an element of the intelligence community (or the deputy of such person) to the electronic communication service provider indicating that the activity was--

(i) authorized by the President; and

(ii) determined to be lawful; or

(5) the person did not provide the alleged assistance.

An appeal of the Attorney Generals certification is removable to Federal district court, and such court will review the decision under a substantial evidence standard of review.

Federal Preemption Under The FISA Amendments Act. The second critical provision applicable to telecommunications companies in the FISA Amendments Act is the Federal preemption declaration, which ostensibly works to eliminate states from investigating or penalizing telecom providers for cooperating in Federal surveillance activities. The preemption declaration specifically includes public utilities commissions (PUC) under its ambit. The Maine PUC, for example, had initiated an investigation of Verizons involvement in the surveillance activities. *See* State of Maine Public Utilities Commission, Request for Commission Investigation into Whether Verizon is Cooperating in Maine with the National Security Agencys Warrantless Surveillance Program, Docket No.2006-274. Below is the relevant language from Section 803 of the statute.

(a) IN GENERAL.--No State shall have authority to--

(1) conduct an investigation into an electronic communication

service providers alleged assistance to an element of the

intelligence community;

(2) require through regulation or any other means the

disclosure of information about an electronic communication

service providers alleged assistance to an element of the intelligence

community;

(3) impose any administrative sanction on an electronic

communication service provider for assistance to an element

of the intelligence community; or

(4) commence or maintain a civil action or other proceeding

to enforce a requirement that an electronic communication

service provider disclose information concerning alleged assistance

to an element of the intelligence community.

Return to Text

ⁿ¹ The PAA, which was signed into law on August 5, 2007 and sunsetted on February 17, 2008, amended FISA by, inter alia, authorizing warrantless electronic surveillance of foreign intelligence sources, so long as the

Director of National Intelligence and the US Attorney General authorize such surveillance. The statute also clarified existing law by allowing warrantless surveillance of foreign communications even if the communications are routed through US-based telecommunications equipment. If the communication is between an American and a foreigner being investigated, warrantless surveillance could be initiated only if there is a reasonable expectation that such surveillance will lead to information relevant to the investigation of the foreigner. The role of the Foreign Intelligence Surveillance Court (FISA Court) was limited to examining the appropriateness of the government guidelines used in investigating overseas suspects.

n2 The FISA Amendments Act also includes, *inter alia*, the following provisions: increases the time allowed from 48 hours to 7 days for warrantless surveillance; requires FISA court authorization before surveillance of Americans overseas; authorizes emergency surveillance without court approval subject to subsequent notification to the FISA Court within a week; prohibits foreigner surveillance as a means to target an Americans communications without court approval; and prohibits the government from using its war powers to circumvent compliance in the future.

RELATED LINKS: see Charles D. Ferris and Frank W. Lloyd,
■ Telecommunications Regulation: Cable, Broadcasting, Satellite, and the Internet

PDF LINK: Click here for enhanced PDF of this Emerging Issues Analysis at no additional charge

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8 of 33 DOCUMENTS

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Robert P. Latham on Nationwide Biweekly Administration, Inc. v. Belo Corp.

2008 Emerging Issues 2876

Robert P. Latham on the Fifth Circuits Application of the Single Publication Rule to Internet Publication: Nationwide Biweekly Administration, Inc. v. Belo Corp., 512 F.3d 137 (5th Cir. 2007)

By Robert P. Latham

September 18, 2008

SUMMARY: In this commentary, Texas-based media attorney Robert P. Latham analyzes *Nationwide Biweekly v. Belo Corp.*, in which the Fifth Circuit determines that the policy supporting the single publication rule for print media applies with equal force to internet publication, and rejects the libel plaintiffs argument that each time a viewer accesses an article from a website it constitutes a publication for limitations purposes.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: The Fifth Circuits Application of the Single Publication Rule to Internet Publication

In *Nationwide Biweekly Administration, Inc. v. Belo Corp.*, 512 F.3d 137 (5th Cir. 2007), the Fifth Circuit was called upon to decide, for the first time, whether the so-called single publication rule in libel cases should apply to publications over the internet.

The single publication rule is a long recognized principle in libel cases involving traditional printed matter. Historically, each time a book was sold containing the allegedly libelous material, it would not trigger a new limitations period. Rather, the statute of limitations would be fixed on the last day of the mass distribution of copies of the printed matter. *Holloway v. Butler*, 662 S.W.2d 688 (692) (Tex. App.--Houston [14th Dist.] 1983, writ refd n.r.e.). Nationwide, in this suit against *The Dallas Morning News*, alleged that the defamatory material appeared not only in the printed issue of the newspaper, but also on *The Dallas Morning News* website. To avoid the application of the one-year statute of limitations under Texas law for a libel claim, Nationwide took the position that each time *The Dallas Morning News* website was accessed, it constituted a new publication of the complained of material.

The Fifth Circuit joined the Second Circuit and Ninth Circuit in holding that the single publication rule, and not Nationwides advocated continuous publication rule, should apply to internet publications. In so doing, the Fifth Circuit found no difference in calling up content on a web page and taking a book from a shelf and opening it to a particular page.

The Ninth Circuit had reached a similar conclusion in *Oja v. U.S. Army Corp. of Engineers*, 440 F.3d 1122(9th Cir. 2006), in which the plaintiff alleged a violation of the Privacy Act, 5 U.S.C. § 552(a) for disclosing personal

information about him on the internet. Oja brought his claim more than two years (the Privacy Acts limitations period) after the material was first posted but argued that since the material had been continually available, the violation was ongoing. The Court rejected such an argument, noting the harassment through multiple suits and drain on judicial resources that the single publication rule is designed to prevent. Notably, in its opinion in *Oja*, the Ninth Circuit stated that posting of the material on a different URL address would be a separate publication.

The *Oja* court, in turn, relied in part on the Second Circuits opinion in *Van Buskirk v. The New York Times Co.*, 325 F.3d 87 (2d Cir. 2003), in which the Second Circuit relied on the New York State Court of Appeals decision in *Firth v. New York*, 98 N.Y. 2d 5, 747 N.Y.S. 2d 69, 72, 775 N.E. 2d 463 (2002) to apply the single publication rule to internet publishing. *Van Buskirk* court cited not only the policy reasons once for the single publication rule that are referenced in the *Oja* opinion, but also noted, as the *Firth* court had, that the single publication rule was beneficial to plaintiffs by allowing them to collect all damages in a single case commenced in a single jurisdiction. 325 F.3d at 89.

In light of the courts holding in the *Nationwide* case, the one case that had applied a continuous publication rule, being *Swafford v. Memphis Individual Practice Association*, now would seem to be relegated to its facts. Counsel seeking to avoid the application, for purpose of the statute of limitations, of the single publication rule to a publication over the internet, would have to show that the two underlying policy considerations behind the single publication rule -- being the avoidance of stale claims and the avoidance of a multiplicity of suits over the same content -- are not compromised. Best practice dictates, of course, that any suit over material published over the internet be filed within the applicable statute of limitations, calculated from the time the material was first posted.

Media practitioners, to insure that their clients are able to take advantage of the single publication rule, should caution their clients about any delay in posting printed matter on the internet. Additionally, the website posting should be in a manner that is widely available to the public. Interestingly, in the *Nationwide* case there was no definitive proof as to when the content at issue was first posted, but the Fifth Circuit found that the absence of such proof did not make any difference to the outcome of the case. Finally, practitioners should also be cautious of the language in *Oja* that posting on a different URL address could constitute a separate publication.

For the rationale behind the single publication rule as applied to the print media: See Holloway v. Butler, 662 S.W.2d 688(692) (Tex. App.--Houston [14th Dist.] 1983, writ refd n.r.e.).

For a useful discussion of the pros and cons of applying the single publication rule to internet publications, see Sapna Kumar Comment, Website Libel and the Single Publication Rule, 70 U. Chi. L. Rev. 639 (2003).

For opinions from the three federal circuits that have considered the issue and applied the single publication rule to internet publication, see Oja v. U.S. Army Corp. of Engineers, 440 F.3d 1122 (9th Cir. 2006), *Van Buskirk v. N.Y. Times Co.*, 325 F.3d 87 (2nd Cir. 2003) and now *Nationwide Biweekly Administration, Inc. v. Belo Corp.*, 512 F.3d 137 (5th Cir. 2007).

For a list of state and lower federal courts that have considered the issue and applied the single publication rule to internet publications, see *Oja*, 440 F.3d at 1130 n.5, 1132 n.12.

For additional information, see Charles D. Ferris and Frank W. Lloyd, Telecommunications Regulation: Cable, Broadcasting, Satellite, and the Internet; and the Telecommunications Law page.

RELATED LINKS: See Robert P. Latham on Nationwide Biweekly Administration, Inc. v. Belo Corp.
■ 512 F.3d 137

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9 of 33 DOCUMENTS

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John M. Garvey, Esq. on In Re: Core Communications, Inc.

2008 Emerging Issues 2751

John M. Garvey, Esq. on In Re: Core Communications, Inc., 2008 U.S. App. LEXIS 14501 (D.C. Cir., July 8, 2008)

By John M. Garvey

August 28, 2008

SUMMARY: The DC Circuit in *In Re: Core Communications, Inc.*, issued a rare and scolding rebuke to the FCC by granting a writ of mandamus, directing the FCC to respond by November 5, 2008 to its 2002 decision in *WorldCom, Inc. v. FCC*. Otherwise, the court explained, the extant FCC rules on ISP intercarrier compensation would be vacated immediately thereafter.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: D.C. Circuit Rebukes FCC on Intercarrier Compensation; Orders Decision Within Six Months

Introduction. The history of dial-up Internet Service Provider (ISP) intercarrier compensation is muddled and confusing, and less significant today since broadband has become the dominant form of Internet access. Nevertheless, a significant amount of retroactive and prospective money is still on the table as a result of various court remands by the U.S. Court of Appeals for the District of Columbia Circuit (DC Circuit), and the Federal Communications Commissions (FCCs) inability to respond to such remands by mustering a majority of Commissioners to definitively end the controversy. Six years have elapsed since the FCCs rules were remanded by the DC Circuit.

As a result, the DC Circuit in *In Re: Core Communications, Inc.*, 2008 U.S. App. LEXIS 14501 Shepardize (D.C. Cir., July 8, 2008) (*Core Communications, Inc.*) issued a rare and scolding rebuke to the FCC by granting a writ of mandamus, directing the FCC to respond by November 5, 2008 to its 2002 decision in *WorldCom, Inc. v. FCC*, 351 U.S. App. D.C. 176 Shepardize (D.C. Cir. 2002) (*WorldCom Remand Decision*). Otherwise, the court explained, the extant FCC rules on ISP intercarrier compensation would be vacated immediately thereafter. *Core Communications, Inc.* (Core) had filed the petition -- its second -- in October 2007, under the All Writs Act, 28 U.S.C. Section 1651 Shepardize (a), seeking to compel the FCC to explain the legal justification for its ISP compensation regime. Core and other competitive local exchange carriers (CLECs) were at the losing end of the FCCs rules, with compensation rates 300-400% lower than what they were receiving before the FCC revised its intercarrier compensation regime.

Interim Compensation Regime. The modern history of this proceeding starts with the 2002 *WorldCom Remand Decision*, where the DC Circuit rejected the FCCs second attempt to justify its rules governing ISP intercarrier

compensation. n1 The court disagreed with the FCC's legal justification for prohibiting reciprocal compensation for ISP calls based on its determination that the calls are information access -- which are prohibited from receiving reciprocal compensation under Section 251(g) of the Communications Act of 1934 (the Act). Instead, the FCC concluded, those calls are subject to Section 201 of the Act, which requires just and reasonable compensation rates. The DC Circuit concluded that Section 251(g) is merely a transitional device and thus does not provide a basis for the Commission's action. While remanding the rules back to the FCC, the court nevertheless refused to vacate them because of its estimation that the Commission would likely be able to state a valid legal basis for its rules in the short term.

Because the rules were not vacated, the interim regime is still in effect. The purpose of this regime, according to the FCC, is to act as a stopgap while the reciprocal compensation rates are gradually eliminated in favor of a bill and keep or other type of intercarrier compensation regime. n2 As the DC Circuit explained it, the interim regime established a gradually declining maximum rate that a carrier (typically, a CLEC) can charge another carrier (typically, an [incumbent local exchange carrier] ILEC) for delivering a call to an ISP. The Commission also established a mirroring rule, which provides that the rate caps on ISP-bound traffic apply only if the ILEC also offers to charge the CLEC the same capped rate to terminate local traffic that originates on the CLEC's network. The other two provisions are growth caps, which impose a limit on the total number of ISP-bound minutes for which a carrier can receive intercarrier compensation, and a new markets rule, which denies intercarrier compensation for ISP-bound traffic in markets where the carrier was not exchanging traffic pursuant to [an] interconnection agreement prior to adoption of the Order. n3

Core Communications, Inc. In accepting Cores petition for writ of mandamus, the DC Circuit explained that any mandamus petition is an extraordinary remedy and reserved only for the most egregious violations of a clear duty to act. Because the *WorldCom Remand Decision* clearly required the FCC to act, the court next turned to whether the delay in acting is unreasonable. The court, citing *Telecommunications Research & Action Ctr. v. FCC*, 242 U.S. App. D.C. 222 *Shepardize*, 750 F.2d 70, 79 (D.C. Cir. 1984), explained that in evaluating whether the delay is unreasonable, the question is whether the agency's delay is so egregious as to warrant mandamus.

In answering this question, the DC Circuit recited a litany of FCC representations of imminent action concerning the *WorldCom Remand Decision*: In August 2004, in response to Cores first mandamus petition, the FCC advised us that Commission staff recently completed and forwarded to the Chairman of the FCC a draft order addressing the WorldCom remand. In light of this advice, we deferred consideration of the petition and ordered status reports. In its March 2005 status report, the FCC further advised that it had just issued a Further Notice of Proposed Rulemaking [FNPRM] in the Intercarrier Compensation docket in which it has been seeking, among other things, to adopt permanent rules to succeed the interim intercarrier compensation regime for Internet-bound traffic that this Court reviewed in [the *WorldCom Remand Decision*]. On further inspection, it appears that the FNPRM in question contained only a single, footnote reference to the [*WorldCom Remand Decision*]: In this proceeding, the Commission hopes to address the compensation regime for all types of traffic, including ISP-bound traffic.

The court also cited two main precedents to support its decision: (1) *Potomac Elec. Power Co. v. ICC*, 226 U.S. App. D.C. 289 *Shepardize*, 702 F.2d 1026, 1032 (D.C. Cir. 1983) (PEPCO); and (2) *Radio-Television News Directors Assn v. FCC*, 343 U.S. App. D.C. 305 *Shepardize*, 229 F.3d 269 (D.C. Cir. 2000) (Radio-Television). The court explained: It is now seven years since the FCC put in place the interim rules that it said would last only three. It is now six years since we held, for the second time, that the FCC's legal justification for the rules was invalid and remanded for the agency to provide a valid justification. During all this time, the FCC has proceeded -- as it did in PEPCO and Radio-Television -- to enforce rules for which it has articulated no lawful basis. In PEPCO, we issued the writ when the ICC failed to respond to our remand within five years. In Radio-Television, we did so when the FCC failed to respond within just nine months. The DC Circuit concluded that [a]t this point, the FCC's delay in responding to our remand is egregious.

For additional information, see Charles D. Ferris and Frank W. Lloyd, *Telecommunications Regulation: Cable, Broadcasting, Satellite, and the Internet*; and the *Telecommunications Law* page. The prior history of this case includes: *In re Core Communs., Inc.*, 2008 U.S. App. LEXIS 4945 *Shepardize* (D.C. Cir., Feb. 27, 2008); *In re Core Communs.*,

Inc., 372 U.S. App. D.C. 182 *Shepardize*, 455 F.3d 267, 2006 U.S. App. LEXIS 16444 (2006).

Return to Text

n1 The FCC's first attempt was remanded in March 2000. *See Bell Atl. Tel. Cos. v. FCC*, 340 U.S. App. D.C. 328 *Shepardize* (D.C. Cir. 2000).

n2 The FCC had issued a Notice of Proposed Rulemaking at the same time the interim compensation regime was enacted in order to determine the contours of the new regime. The FCC indicated at the time that the interim compensation regime would last approximately three years. *See Notice of Proposed Rulemaking, Developing a Unified Intercarrier Compensation Regime*, 16 *FCC Rcd* 9610 (2001).

n3 On July 14, 2003, Core filed a petition asking the FCC to forbear from applying the interim compensation rules. On October 8, 2004, the FCC ruled that it would not enforce the growth caps and new markets rule, but would nevertheless still enforce the rate caps and mirroring rules.

RELATED LINKS: John M. Garvey, Esq. on In Re: Core Communications, Inc.

■ 2008 U.S. App. LEXIS 14501

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10 of 33 DOCUMENTS

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John M. Garvey on Alliance for Community Media, et al. v. FCC

2008 Emerging Issues 2625

John M. Garvey, Esq. on Alliance for Community Media, et al. v. FCC, 529 F.3d 763 (6th Cir. 2008)

By John M. Garvey

July 30, 2008

SUMMARY: In this Emerging Issues Analysis, John Garvey examines the Sixth Circuits ruling in *Alliance for Community Media, et al. v. FCC*, 529 F.3d 763, a decision likely to lead to a more streamlined competitive cable franchise process by local officials acting under federal law. The ruling upheld the FCC's order restricting the ability of local franchising authorities to withhold or delay the granting of additional competitive cable franchises.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Cite as: Garvey, John M. *Alliance for Community Media, et al. v. FCC*. LexisNexis Expert Commentary, (Insert date you accessed the document online).

Federal Appellate Court Upholds FCC Rules Restricting Local Cable Franchising

Introduction. In a decision likely to lead to a more streamlined competitive cable franchise process by local officials acting under federal law, n1 the U.S. Court of Appeals for the Sixth Circuit upheld the FCC's recent order restricting the ability of local franchising authorities (LFAs) to withhold or delay the granting of additional competitive cable franchises. The Sixth Circuit's decision in *Alliance v. FCC*, 529 F.3d 763 (6th Cir. 2008) (*Alliance for Community Media*) addressed a March 5, 2007, Federal Communications Commission (FCC or Commission) order that adopted rules interpreting and implementing section 621(a)(1) of the Communications Act of 1934, 47 U.S.C. § 541 (a)(1) (the 1934 Act). Section 621(a)(1) prohibits LFAs from unreasonably refusing to award an additional competitive cable franchise. The FCC's March 5, 2007, order interpreted the meaning of the word unreasonably by codifying five standards that would need to be satisfied before an action by an LFA would be deemed reasonable. n2

Various LFAs and industry groups (Petitioners) had argued in *Alliance for Community Media*, that the FCC lacked the authority to promulgate the March 5, 2007, order because the FCC was never delegated the power to interpret section 621(a)(1) by Congress, and, in the alternative, that the FCC's interpretation of Section 621(a)(1) is not entitled to deference and is arbitrary and capricious. The Sixth Circuit rejected the Petitioners' arguments, holding that the FCC had sufficient authority to issue an interpretation of Section 621(a)(1), the interpretation of the ambiguous statutory provision was reasonable, and that the FCC's actions were not arbitrary and capricious.

No Role for the FCC? In arguing that the Commission had no authority to issue the order, Petitioners noted that the text of Section 621(a)(1) does not include a reference to the Commission at all. The Sixth Circuit rejected this argument, noting that equating the omission of a reference to the FCC in the text of Section 621(a)(1) with an absence of rulemaking authority is contrary to legal precedent. The court referenced the iconic *AT&T Corp. v. Iowa Utilities Board* decision, 525 U.S. 366 (1999) (*Iowa Utilities Board*), where the Supreme Court addressed whether the FCC possessed the authority to interpret the provisions of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act).

As the Sixth Circuit explained, the Supreme Court in *Iowa Utilities Board* hinged its analysis on section 201(b), a 1938 amendment to the Communications Act of 1934. *AT&T Corp.*, 525 U.S. at 377. Section 201 (b) provides, in relevant part, that [t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act. 47 U.S.C. § 201 (b). The Court reasoned that [s]ince Congress expressly directed that the 1996 Act, along with its local-competition provisions, be inserted into the Communications Act of 1934 . . . the Commission's rulemaking authority would seem to extend to implementation of the local competition provisions. Since the instrument used to modify Section 621(a)(1) to bar unreasonable refusals to grant a franchise -- the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (Cable Act) -- was an amendment to the 1934 Act, the same reasoning in *Iowa Utilities Board* is applicable here. Therefore, the Sixth Circuit held, the FCC was granted authority to interpret Section 621(a)(1) because of its inclusion in the 1934 Act.

Petitioners also argued that the FCC lacked authority to issue the order because Section 621(a)(1) also includes a judicial review provision, and therefore FCC rulemaking authority is incompatible. In rejecting the argument, the court noted that [t]he availability of a judicial remedy for unreasonable denials of competitive franchise applications does not foreclose the agency's rulemaking authority over section 621(a)(1). While the Order equips LFAs with guidance on reasonable versus unreasonable distribution of franchises, the courts ultimately retain their Congressionally-granted jurisdiction to hear appeals involving denials of competitive franchises. Although the courts may have to grant deference to the Order, this does not in any way impede the courts fact-finding or legal analysis during actual judicial proceedings. The court concluded that a judicial remedy is therefore not incompatible with agency rulemaking authority.

Chevron Analysis. Because the Sixth Circuit concluded that the FCC had the authority to issue the order interpreting Section 621(a)(1), the court next analyzed Petitioners argument that judicial deference pursuant to *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (*Chevron*) should be rejected. Such deference analysis requires the court to determine first whether the relevant statutory provision is silent or ambiguous, and secondly whether the agency's response to that ambiguity is based on a permissible or reasonable construction of the statute. The court noted that the first step in the Chevron analysis is satisfied since the word in dispute in Section 621(a)(1) -- *unreasonably* refuse to award an additional competitive franchise [emphasis added] -- has historically been considered ambiguous by numerous courts.

The second step of the Chevron analysis required the court to analyze each of the four challenged FCC rules constructing Section 621(a)(1) to determine whether they are reasonable interpretations of the statute. The rules include: timing requirements for awarding new franchises; limitations on build-out requirements; franchise fees; and limitations on peg capacity.

Timing Requirements for Awarding New Franchises. The FCC required LFAs to rule on an applicant with existing access to rights-of-way within 90 days and for a new applicant within six months. The Sixth Circuit held that these requirements are more than reasonable: Due to protracted franchise negotiations, the agency found that prospective entrants were abandoning attempts to join the cable market and acceding to otherwise unacceptable franchise terms simply to expedite the process. The court noted that the FCC, based on a substantial record, reasonably found that six months would provide LFAs sufficient time to review a proposal and negotiate acceptable terms of a competitive

franchise, or deny the application.

Limitations on Build-Out Requirements. The FCC order noted types of build-out mandates considered unreasonable under Section 621(a)(1), such as requiring an operator to serve everyone in a given area as a precondition for providing service, requiring incumbent operators to build out beyond the footprint of their existing facilities before they have even begun providing service, and placing more stringent service requirements on new entrants than those facing incumbent operators. In contrast, the agency described as reasonable an LFAs consideration of benchmarks requiring the new entrant to increase its build-out after a reasonable period of time had passed after initiating service and taking into account its market success.

The Sixth Circuit held that this provision is reasonable in light of the legislative history. The court noted that when the Cable Act amended Section 621, the following language was excised: an LFAs refusal to award a franchise shall not be unreasonable if, for example, such refusal is on the ground . . . of inadequate assurance that the cable operator will, within a reasonable period of time, provide universal service throughout the entire franchise area. The Sixth Circuit reasoned that Congress explicitly considered and rejected the preceding language, which would have situated all build-out requirements as presumptively reasonable. Thus, in light of Congresss patent consideration and rejection of statutory language that would have created a presumption of reasonableness surrounding build-out requirements, we find the FCC to have the better argument. The court therefore upheld the FCC rule as a permissive construction of the statute.

Franchise Fees. Section 622(b) of the 1996 Act prohibits an LFA from charging as a franchise fee more than five percent of a cable operators cable service revenues. Excluded from the definition of franchise fee and therefore from the five percent cap, however, are requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages. The FCC interpreted the incidental charges language to exclude attorneys and consultants fees, application or processing fees that exceed the reasonable cost of processing the application, acceptance fees, free or discounted services provided to an LFA, any requirement to lease or purchase equipment from an LFA at prices higher than market value, and in-kind payments. The FCC also stated that any requests made by LFAs that are unrelated to the provision of cable services by a new competitive entrant are subject to the statutory 5 percent franchise fee cap. In upholding the FCCs rule as reasonable, the Sixth Circuit noted that the fact that three district courts independently arrived at the same interpretation of incidental to as the Commission lends further credence to the rules governing franchise fees in the Order.

Limitations on Peg Capacity. The fourth standard the FCC formulated concerns public, educational, and governmental (PEG) access channel capacity. Section 622(g)(2)(C) exempts from the definition of franchise fee the capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental [PEG] access facilities. The agency distinguished between costs associated with the construction of PEG access facilities and those associated with the use of PEG access facilities, with the former excluded from the five percent cap and the latter included. The court noted that the legislative history supports this interpretation by the FCC. Similarly, the Sixth Circuit also upheld the FCCs definition of capital costs to include the expense of equipment as long as it is incurred in or associated with the construction of PEG access facilities.

Finally, the court addressed whether the FCCs PEG standard is a permissible construction of Sections 611 and 621 of the 1934 Act. As the court explained, Section 611(a) establishes the authority of LFAs to call for franchise terms relating to the use of channel capacity for public, educational, or governmental use but only to the extent provided in this section. *47 U.S.C. § 531 (a)*. Section 621(a)(4)(B), in turn, states that, in awarding a franchise, an LFA may require adequate assurance that the cable operator will provide adequate public, educational, or governmental access channel capacity, facilities, or financial support. *47 U.S.C. § 541 (a)(4)(B)*. The FCC claims that its rules regarding PEG carriage obligations and pro rata sharing give concrete meaning to the statutory term adequate in section 621(a)(4)(B). That is, the term adequate takes shape in relation to section 621(a)(1)s reasonableness requirement: LFAs that impose PEG . . . commitments on new entrants in excess of what is adequate . . . violate section 621(a)s prohibition on

unreasonable refusals to award competitive franchises. In upholding the FCC's construction, the Sixth Circuit noted that adequate in Section 621(a)(4)(B) is ambiguous and the standard represents a lawful exercise of its gap-filling authority and thus deserves our deference under Chevron. The court also noted that nothing in this standard prevents LFAs from harmonizing the PEG obligations new suppliers do assume with local interests. Moreover, nothing in the Order bars LFAs from updating the PEG obligations incumbents face during franchise renewal proceedings, thereby permitting the PEG obligations new entrants shoulder to likewise reflect the most current needs of the community.

Arbitrary and Capricious Analysis. Lastly, the Sixth Circuit rejected the Petitioners argument that the FCC's rules were arbitrary and capricious. We conclude that the FCC's rulemaking activity was rooted in a sufficient evidentiary basis it appears that the FCC spearheaded its regulatory activity only after pursuing a more than adequate fact-finding endeavor. In a similar vein, the 465 comments presented to the Commission contained substantial evidence that build-out requirements were posing significant obstacles to new entrants in providing video and broadband services. Likewise, the record demonstrated that LFAs were imposing various demands on service providers, including those unrelated to cable service, those involving excessive franchise fees, and those involving excessive PEG requirements, that were significantly escalating prospective entrants costs and thereby deterring entry. The court concluded that the administrative record fully supported the order and therefore the FCC's actions are not arbitrary or capricious.

For additional information, see Charles D. Ferris and Frank W. Lloyd, Telecommunications Regulation: Cable, Broadcasting, Satellite, and the Internet; and the Telecommunications Law page.

[Return to Text](#)

n1 . The FCC declined to preempt state laws or local franchising decisions specifically authorized by state law. The FCC's order preempted local laws or regulations to the extent that: (1) provisions in those laws, regulations, practices, and agreements conflict with the rules or guidance adopted in this Order; and (2) such provisions are not specifically authorized by state law.

n2 . Since the March 5, 2007 order only applied to additional competitive cable franchises, the FCC also issued a Further Notice of Proposed Rulemaking seeking comment on how [its] findings in [its] Order should affect existing franchisees and on local consumer protection and customer service standards as applied to new entrants.

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John Garvey works at the New Jersey Board of Public Utilities. He was formerly a telecommunications analyst with Regulatory Research Associates, Inc. (RRA), a utility research firm, which is now part of SNL Financial. At RRA, he published over 30 reports on telecommunication and cable regulation and law. Previous to RRA, he was a telecommunications analyst at the Illinois Commerce Commission. Mr. Garvey obtained a B.A. with honors from Michigan State University, an M.S. degree in Public Administration and Public Policy and an M.S. degree in Regulation from the London School of Economics, and he earned a J.D. degree from DePaul University. The views of the author are his own and do not represent those of the New Jersey Board of Public Utilities.

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11 of 33 DOCUMENTS

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David Bender on Privacy Issues Attendant to Behavioral Advertising

2008 Emerging Issues 2538

David Bender on Privacy Issues Attendant to Behavioral Advertising

By David Bender

July 16, 2008

SUMMARY: What happens to the data generated from Internet surfing and queries to search engines? Is this data destroyed when you log off, or is it kept? Is it used and, if so, how and by whom? David Bender, the author of Computer Law (LexisNexis Matthew Bender) with extensive experience in privacy, information technology, and intellectual property litigation, counseling, and transactional matters discusses this important and emerging issue.

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Introduction. What happens to the data generated from all of your Internet surfing, and from all your queries to search engines such as those offered by Google, Ask.com, Yahoo!, etc.? Is this data destroyed when you log off, or is it kept (and for how long and by whom)? Is it used and, if so, how and by whom? An increasing number of Americans have recently become aware that much of this data is indeed being kept and used to target advertising to them in a more precise manner, based on their interests as evidenced in their surfing and search activities a form of a practice known generally as behavioral advertising. n1 Is this lawful? If so, should it be?

In the United States, there are no laws, state or federal, directed expressly to this practice. However, the privacy aspects of behavioral advertising are receiving an increased amount of attention as of late. In particular, in December 2007 the staff of the Federal Trade Commission released for comment a set of proposed principles for guidance in the development of self-regulation with regard to behavioral advertising. n2 In April 2008 the EUs Article 29 Working Party issued a working paper on the topic. And in May 2008 a bill directed generally to curbing or regulating this practice was introduced in the New York State legislature.

The FTC Proposal. The FTC proposed principles are summarized as follows.

. The FTC staff believes that privacy issues in behavioral advertising should be both more transparent, and more under the control of consumers:

o Every Web site where data is collected for behavioral advertising should provide a clear, consumer-friendly, and

prominent statement that data is being collected to provide ads targeted to the consumer and give consumers the ability to choose whether or not to have their information collected for such purpose.

. To mitigate concerns that this data may find its way to malefactors, and also concerns about unnecessarily lengthy retention periods, the FTC staff proposes:

o Any company that collects or stores consumer data for behavioral advertising should provide reasonable security for that data and should retain data only as long as is necessary to fulfill a legitimate business or law enforcement need.

. To meet concerns that companies may fail to keep their privacy-related promises when they modify their privacy policies, the FTC staff proposes:

o Companies should obtain affirmative express consent from affected consumers before using data in a manner materially different from promises the company made when it collected the data.

. To address concerns that sensitive data, *e.g.*, medical data or childrens activity data, may be used in behavioral advertising, the FTC staff proposes:

o Companies should only collect sensitive data for behavioral advertising if they obtain affirmative express consent from the consumer to receive such advertising.

o The FTC shall also seek comment on what constitutes sensitive data and whether the use of sensitive data should be prohibited, rather than subject to consumer choice.

The Proposed New York Statute. As noted above, at this writing there are no federal or state laws directed specifically to behavioral advertising. However, such a bill was introduced in May 2008, in the New York legislature. Some existing New York State privacy laws are summarized at § 2A.11[3], 1 D. Bender, *Computer Law* (LexisNexis Matthew Bender). New York State Assemblyman Richard Brodsky, who represents a district just north of New York City, feels that this type of advertising should not be permitted unless consumers give their permission: Should these companies be able to sell or use whats essentially private data without permission? The easy answer is absolutely not. n3 Mr. Brodsky has introduced in the New York Assembly a bill n4 that would restrict such advertising. n5

The NY Bill. The bill would create, in the NY General Business Law, a new section entitled The Third Party Internet Advertising Consumers Bill of Rights Act of 2008. The impetus for the bill apparently comes from the April 2007 announcement that Google, a leading provider of search capability and targeted advertising, would acquire DoubleClick, a leader in digital marketing technology and services, including ad management. n6 Google characterized the combination as offering superior tools for targeting, serving and analyzing online ads of all types, significantly benefiting customers and consumers. n7

The bill contains several important definitions. n8 It then goes on to require, for online preference marketing, that third party entities may not use sensitive medical, financial, or sexual PII or social security numbers, must try to obtain online preference marketing data from reliable sources, must protect online preference marketing data they collect, and must impose online privacy guidelines on PII recipients. Third party entities may collect PII for online preference marketing only from sites of business entities with which they have contracts. NPPII that third party entities use for online preference marketing may not be linked to a particular individual. Where a consumer opts out of NPPII online preference marketing, third party entities may use her or his NPPII only for ad delivery and reporting.

Much of the bill is directed to notice requirements, to assure that consumers are aware of the pertinent collection, use, profiling, ad delivery, and reporting policies and practices of the third party entities and the business entities with which they contract. Privacy policy changes may not be applied retroactively absent affirmative consent.

The bill also contains several provisions relating to the merger of different types of data. In such instances,

businesses must provide notice including profiling done by a third party entity, types of PII and NPII previously collected that the third party entity will merge, how the third party entity will use merged data (including any transfer), procedures for affirmative consumer consent to such use, and the duration of third party entity data retention. Absent prior affirmative consent obtained when the PII is collected or first used online, third party entities may not merge PII with data previously collected as NPII for any online preference marketing activity, or merge previously collected NPII with PII for online preference marketing. Business entities may not merge PII with NPII collected on a going-forward basis for online preference marketing unless the consumer has been offered prior notice and choice, provided when the PII is collected or first used online. The notice must disclose that the PII is shared with a third party entity for purposes of online preference marketing, types of data that may be collected and linked by the third party entity, resulting loss of anonymity to the ad company of future web usage, and the consumers right to opt out.

Nor may business entities use PII collected offline that is merged with PII collected online absent pre-merger consumer notice and choice. This notice must describe the third party entity's profiling, types of PII and NPII that it will merge, how it will use the merged data (including any transfer), procedures for opting out of such use, and the length of time the third party entity retains the data.

Businesses must provide consumers with reasonable access to PII and related data retained by the third party entity for online preference marketing uses. The bill authorizes the Attorney General to bring a civil action against those who violate this law, with a maximum penalty of \$1,000/violation (\$3,000 where defendant engaged in a pattern of such violations).

Reactions to the NY Bill. Microsoft has stated that it favors legislation such as set forth in the New York bill, but Yahoo! is opposed. n9 Yahoo! is not alone as, even among those who would like to rein in this genre of Internet advertising, there is an underlying fear that without the ad revenue that it generates, the companies that control the search engines would not make them available to consumers for free searches. That would surely (and greatly) diminish the value of the Internet to many consumers and, indeed, completely change the business paradigm that presently governs use of the World Wide Web. This possible effect has not gone unnoticed by Assemblyman Brodsky: What we have with this new technology is a conflict between the economic model of the Internet and consumers reasonable expectations of privacy. n10

Conclusion Regarding the NY Bill. There is presently no state with a statute similar to NY A9275, and the only other state with a bill even moderately similar is apparently Connecticut. n11 If New York were to enact A9275, the laws practical effect might not stop at the state line. n12 When a California statute requiring notification to California residents of breaches in the security of their data became effective in mid-2003, many of the companies subject to that statute notified affected individuals nationwide (even before other states required notice to their residents). For a discussion of data breach notification statutes, see § 2A.11[2], 1 D. Bender, *Computer Law* (LexisNexis Matthew Bender). In complying with a statute based on A9275, companies would find it difficult to distinguish between consumers residing in New York and others. Accordingly, compliance might require treatment of all consumers as though they resided in New York, in which case the statute (should the bill be enacted) would effectively set a national, if not international, standard for behavioral advertising.

The EU Weighs In. As mentioned above, the matter of processing and retention of the results of web searches has attracted the attention of the EU. The EU Data Protection Directive is discussed at § 2A.02, 1 D. Bender, *Computer Law* (LexisNexis Matthew Bender). Specifically, the EU's Article 29 Working Party (the WP) has commented on the use of search results, in an Opinion (WP 148) n13 released on 4 April 2008, which professes that its main purpose is to strike a balance between the legitimate business needs of search engine providers, and the requirements of the data protection laws. n14 WP 148 is reproduced in the Chapter 2A Appendices of D. Bender, *Computer Law* (LexisNexis Matthew Bender). WP 148 is summarized below.

Given that some of the most popular search engines are owned and operated by companies headquartered outside the EEA, an issue of particular importance is whether the EU Data Protection Directive and the member state laws

implementing it apply to the processing of personal data by those owner/operators. The jurisdictional aspects of the EU Data Protection Directive are discussed at § 2A.02, 1 D. Bender, *Computer Law* (LexisNexis Matthew Bender). The starting point is Art. 4 of the Directive, as amplified by WP56. n15 Article 4 provides that national law applies where (a) processing is carried out in the context of activities of an establishment of the controller on the territory of the member state, n16 (b) the controller is not established in a member state, but national law applies by virtue of international law, or (c) the controller is not established in a member state, and processes data by means of equipment, automated or otherwise, situated in a member state (unless used only for transit through that member state). n17 Examples of the condition identified in (c) would be an involved data center in a member state, the use of personal computers, terminals, or servers there, or the deposit of cookies on a PC in the EU. n18 Nor is it entirely clear from the language of WP56 and WP 148 whether the users mere use of a PC in a member state to communicate personal data to an entity outside the EEA suffices for application of the Directive, although the better view seems to be that it does not. Analyzing Article 4, WP 148 concluded that the Directive does indeed apply to the processing of personal data by those search engines that fit within Article 4.

Having decided that the Data Protection Directive may apply, WP 148 next addressed whether the ePrivacy Directive (Dir. 2002/58/EC) and/or the Data Retention Directive (Dir. 2006/24/EC) applies. In general, search engine services will not fall within the scope of the ePrivacy Directive, because that Directive deals with electronic communications services, a term that expressly excludes services providing or exercising editorial control over content. Moreover, Art. 5(2) of the Data Retention Directive states that the retention requirements of that Directive do not apply to data revealing the content of communications. So neither of these Directives applies to the content of searches.

A critical issue obviously is whether the search history of an identifiable individual is personal data. For a discussion of the EU perception of personal data, see § 2A.02, 1 D. Bender, *Computer Law* (LexisNexis Matthew Bender). The WP concluded in WP136 n19 that it is. n20 In WP 148, the WP applied to search engine operators the conclusion it reached with regard to ISPs in WP136: unless the Internet Service Provider is in a position to distinguish with absolute certainty that the data correspond to users that cannot be identified, it will have to treat all IP information as personal data . n21 Thus, the WP concluded that the Directive applied to the activities of search engine operators meeting the requirements of Art. 4(a), (c) that process data for users they cannot show with absolute certainty are not identifiable.

With applicability issues out of the way, WP 148 moved on to substantive issues. The WP alleged that search engine providers failed to present a comprehensive overview of the legitimate purposes for which they processed data. The WP saw three legitimate grounds that might be used for the processing. One was consent, but the WP noted that consent could not be construed for anonymous users. n22 A second basis was necessity for a contract to which the data subject is party. While providers argue that use by a user fits this rubric, WP 148 states (p. 17) that such a general assumption does not meet the strict limitation of necessity as required by the Directive. The final ground was necessity for a legitimate interest pursued by the controller.

Analyzing this third ground, WP 148 listed the grounds given by providers for storing the data they store. With regard to service improvement, the WP stated that personal identification is unnecessary for this purpose. As to system security and fraud prevention, the WP stated that the stored data must be subject to a strict purpose limitation, so that data stored for security purposes should not be used to optimize service. And data stored for security and fraud prevention should not be stored for longer than necessary for such purposes. With regard to accounting requirements, the WP stated that this could not justify systematic logging of search data where the user did not click on a sponsored link. As for personalized advertising, the WP saw a basis only for the data of users who agreed to the purpose of the processing. And as to compliance with requests and demands from law enforcement and litigation, the WP distinguished such compliance from a decision to store the data.

WP 148 identified issues that the WP believed must be solved by the industry. One is that of retention periods set

by national law. The WP stated that the provider must comply with both privacy standards and retention periods of the specific Member State. n23 It then asserted that it saw no basis for retention in excess of six months. n24 Another issue is further processing for different purposes. Here the espoused solution is full and clear disclosure about further use. Yet another issue is posed by cookies. The WPs view is that users must be informed fully and prominently about the use and effect of cookies, and that their lifetime should not be excessive. Anonymization is a further issue, and the WP opined that this is a substitute for deletion, but only where the process is complete and irreversible. Noting that some providers also provide services other than search services, the WP admonishes that correlating personal data across these services can be done legitimately only with informed consent.

WP 148 continues with a section on the obligation to inform data subjects, which it believes is fundamental. Controllers must provide their identity and that of their representative; the purposes of the processing; recipients (or categories of recipients); which replies are mandatory and the consequences of failing to respond; and the existence of a right to access and correct the data. This applies also to some cache data, once it no longer matches the content published on the Web. WP 148 also notes that as controllers, the providers within Article 4 of the Data Protection Directive are subject to that Directive. And as content providers they are not primarily responsible for the personal data they process (except for long-term cache and value-added data).

WP 148 ends with a set of conclusions:

- . Providers based outside the EEA must inform users as to why the providers are subject to the Data Protection Directive.
- . The Data Retention Directive does not apply to providers.
- . Providers may process only for legitimate purposes and only relevant data that is not excessive for those purposes.
- . Providers must delete or irreversibly anonymize data no longer necessary for these purposes.
- . Retention periods must be accessible from the homepage, must be minimized and proportionate to purposes, and must not exceed six months unless strictly necessary.
- . It is not necessary to collect from users data not pertinent to web searching.
- . The lifetime of any cookies should be no longer than necessary; and flash cookies n25 should be installed only if their purpose is described and users are informed on how to access, edit, and delete their content.
- . Providers must give users clear and intelligible information about their identity and location and the data they collect, store or transmit, as well as the purpose of collection.
- . Consent is necessary for adding to user profiles data not provided by the users.
- . Consent is necessary for retention of individual search history.
- . Providers should respect Website opt-outs from crawling and indexing.
- . Providers should permit data subjects to access and edit cached personal data available for periods in excess of those attendant to the original publication.
- . Value-added providers require consent, and must also comply otherwise with the Data Protection Directive.
- . Users have a right to access and correct their data.

. Cross-correlation of data originating from different services may be performed only with consent.

Conclusion. Although behavioral advertising has thus far been permitted with regard to the use of Internet surfing and search patterns and results, this era appears quickly to be coming to a close. In both the EU and the US (at both the federal and state levels), the unfettered use and retention of this genre of data is being challenged. It is likely that we shall see legislation directed to such conduct in the near future.

Return to Text

n1 . Behavioral advertising is generally the practice of using an individuals habits to determine his or her interests, and then sending that individual advertising that is directed to those interests. Nowhere is behavioral advertising employed more profusely than in analyzing the results of Web searches.

n2

[2]. These proposed principles may be found at <http://www.ftc.gov/os/2007/12/P859900stmt.pdf>.

n3

[3]. As quoted in L. Story, A Push to Limit the Tracking of Web Surfers Clicks, N.Y. Times Online (20 March 2008).

n4

[4]. A09275, introduced 19 June 2007. A corresponding bill, S 6441-A, was introduced in the New York State Senate on 7 August 2007 by Senator Andrew Lanza, whose district includes much of Staten Island, which is a part of New York City.

n5

[5]. L. Story, A Push to Limit the Tracking of Web Surfers Clicks, N.Y. Times Online (20 March 2008).

n6

[6]. The acquisition was concluded on 11 March 2008.

n7

[7]. Google press release, 13 Apr. 2007, at <http://www.google.com/intl/en/press/pressrel/doubleclick.html>. Among those tools, the press release mentioned (for users) an improved experience on the web, by increasing the relevancy and the quality of the ads they see; (for online publishers) access to new advertisers, which creates a powerful opportunity to monetize their inventory more quickly; and (for agencies and advertisers) an easy and efficient way to manage both search and display ads in one place.

n8

[8]. Personally identifiable information (PII) means data used to identify, contact or locate a person, including name, address, telephone number, or e-mail address.

Non-personally identifiable information (NPPI) is data used for online preference marketing, not linked to a particular person, and is typically compiled from click stream data or data provided by third parties.

Third party entity means any individual or entity that collects NPPI or PII for ad delivery and reporting.

Online preference marketing is a process whereby data is collected over time and across web pages to predict consumer characteristics or preference for use in web ads including the use of NPPI, alone or with PII i.e., essentially behavioral advertising.

Ad delivery and reporting means providing an ad based on a particular type of browser or time of day; statistical reporting of website activity; tracking the number of ads on a day to a particular website; and other non-online preference marketing uses.

Services means the collection of NPPI or PII from a website for online preference marketing.

Business entity means any individual or entity with an Internet page.

n9

[9]. L. Story, A Push to Limit the Tracking of Web Surfers Clicks, N.Y. Times Online (20 March 2008).

n10

[10]. As quoted in L. Story, A Push to Limit the Tracking of Web Surfers Clicks, N.Y. Times Online (20 March 2008).

n11

[11]. Conn. HB05765 (2008), which is somewhat narrower than the New York bill.

n12

[12]. But query as to the effect on such a statute of the dormant Commerce Clause of the US Constitution.

n13

[13]. Art. 29 Data Protection Working Party, WP 148, Opinion on data protection issues related to search engines, adopted 4 Apr. 2008.

n14

[14]. WP 148 deals generally with search engines whose business models are based on advertising. It does not apply to search engines that search only the domain of the website in which they are embedded.

n15

[15]. WP56, Working document on determining the international application of EU data protection law to personal data processing on the Internet by non-EU based web sites (2002).

n16

[16]. WP 148 explains that this means that the establishment should also play a relevant role in the particular processing operations. p. 10.

n17

[17]. According to WP 148, in situation (a) the member states data protection laws apply to all personal data (not just that of data subjects on the territory of or of a nationality of the member state).

n18

[18]. In WP 148 the WP seems (note 14) to adopt conditions for determining whether the use of cookies is sufficient for applicability, whereas previous WP statements seemed to imply (if not express) that the mere use of cookies sufficed.

n19

[19]. WP 136, Opinion 4/2007 on the concept of personal data, adopted on 20th June 2007.

n20

[20]. Acknowledging that IP addresses are not directly identifiable to an individual by search engines, the WP notes that identification can nevertheless be achieved by a third party (the ISP), and that this is sufficient to qualify the data as identifiable and therefore personal data.

n21

[21]. WP 136. Moreover, in WP136 the WP also stated that cookies containing a unique user ID were personal data. Further, the WP stated in WP 148 that a search engine provider that processes user data including either IP addresses or persistent cookies containing a unique identifier is a controller. p. 9. Search engine operators are not the principal controllers as to the content related processing of personal data the principal controllers are the information providers. However, search engine operators who perform value-added operations linked to characteristics or types of personal data are the primary controllers of that content. Moreover, caching for a period greater than required to address temporary inaccessibility to the website is an independent republication. WP 148, pp. 13 15.

n22

[22]. If the data is truly anonymous, it is not personal data, and not covered by the Data Protection Directive. The WP seems to be saying that if it is identified by a unique identifier other than a name it is identifiable and therefore covered by the Directive but is not subject to data subject consent.

n23

[23]. This leaves it uncertain as to what effect (if any) the WP would assign to a US federal or state law imposing a minimum retention period.

n24

[24]. According to WP 148, typical retention periods exceeded one year. Questions posed by CNET News elicited the following responses. Ask.com retains search data for a period of hours, links it with no user information, and engages in no behavioral targeting. AOL retains the data for 13 months, links it with no user information, engages in behavioral targeting, and permits opt-out of BT. Google retains the data for 18 months, links it with no user data, and engages in no BT. Microsoft retains the data for 18 months, links it with user data, engages in BT and permits no opt-out (except on third-party site). Yahoo! retains the data for 13 months, links it with user data, engages in BT and permits no opt-out. Europeans Warn Search Engines: Delete User Data Sooner, CNET News.com (7 Apr. 2008).

n25 25. Also known as local shared objects, flash cookies are cookies that embody larger data content (maximum of 100 KB as opposed to 4 KB) and are more difficult for the user to detect and delete.

ABOUT THE AUTHOR(S):

David Bender is the author of *Computer Law* (LexisNexis Matthew Bender), initially published in 1978 and now a five-volume set updated twice annually. He is a sole practitioner in Dobbs Ferry, NY, with extensive experience in privacy, information technology, and intellectual property litigation, counseling, and transactional matters. He was a founder of the intellectual property practice at White & Case, where he spent the majority of his career. He also headed that firm's privacy practice, which he helped found. Before practicing at White & Case, Mr. Bender served in-house at AT&T, where he was responsible for all IP litigation brought by or against any Bell System company. Prior to his service at AT&T, he engaged extensively in antitrust litigation. He is a past president of the International Technology Law Association (formerly called Computer Law Association). He has made over 250 presentations at conferences held by many different sponsors such as PLI, bar associations, and law schools, on numerous topics in the realms of privacy, IT, IP and antitrust law across the US and in some 17 other nations. He has also authored many law review articles and conference handbook papers. Before turning to the law, Mr. Bender served as an engineer with Ford Aerospace, and as a mathematician with Hughes Aircraft.

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12 of 33 DOCUMENTS

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John M. Garvey on Southwestern Bell Tel. v. Missouri Public Service Commission

2008 Emerging Issues 2511

John M. Garvey, Esq. on Southwestern Bell Telephone, L.P., v. Missouri Public Service Commission et al., 2008 U.S. App. LEXIS 13062 (8th Cir. 2008)

By John M. Garvey

July 8, 2008

SUMMARY: In this expert commentary, John M. Garvey looks at U.S. Court of Appeals for the Eight Circuit decision in *Southwestern Bell Telephone, L.P., v. Missouri Public Service Commission et al., 2008 U.S. App. LEXIS 13062 (8th Cir. 2008)*. The court held that the FCC -- and not states -- has exclusive authority to enforce Section 271 of the Telecommunications Act of 1996.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Federal Appellate Court Prevents State from Requiring Unbundling Under Section 271 of the Telecommunications Act of 1996

Introduction. In another unsuccessful attempt by a state to counteract the Federal Communications Commission's (FCC) limiting of incumbents' unbundling obligations, the U.S. Court of Appeals for the Eight Circuit (Eight Circuit) recently held that the FCC -- and not states -- has exclusive authority to enforce Section 271 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the 1996 Act). The case at hand, *Southwestern Bell Telephone, L.P., v. Missouri Public Service Commission et al., 2008 U.S. App. LEXIS 13062 (8th Cir. 2008)* (*Southwestern Bell Telephone*), is similar to other attempts by states in recent years to use Section 271 of the 1996 Act to require additional unbundling beyond what the FCC has required under Section 251. See e.g., *Verizon New England, Inc. v. Maine Public Utilities Commission et al., 2007 U.S. App. Lexis 21349* (September 6, 2007) (states prohibited from using Section 271 of the 1996 Act to require additional UNEs) (*Verizon New England*). Courts have rarely looked upon state attempts at shaping local telecommunications policy favorably, particularly if the provisions conflict with the 1996 Act or FCC implementing regulations. See, e.g., *Ill. Bell Tel. Co. v. OConnell-Diaz, 2006 U.S. Dist. LEXIS 70221* (N.D. Ill. Sept. 28, 2006) (provisions in state statute requiring unbundled elements beyond Section 251 preempted by the 1996 Act); see also *Illinois Bell Telephone Co. v. Illinois Commerce Commission, et al., 2008 U.S. Dist. LEXIS 6326* (N.D. Ill. January 28, 2008).

Section 271 requires carriers that are or were Bell Operating Companies (BOCs) to comply with various conditions in order to obtain permission to provide long distance service, including a delineated list of network elements that must be made available to competitors at just and reasonable rates. These requirements are distinct from Section 251 unbundling, which mandates that incumbent local exchange carriers (ILECs) provide unbundled access to its network

elements (UNEs) at cost-based rates, which is a considerably lower pricing standard than Section 271's just and reasonable rates. Before unbundling is required pursuant to Section 251 -- and in contrast to Section 271 -- the 1996 Act requires the FCC to determine whether the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer. Over a number of years, the FCC has increasingly restricted the availability of certain UNEs under this *impairment standard*. See, e.g., *Order on Remand, In the Matter of Unbundled Access to Network Elements*, 20 F.C.C.R. 2533(2005), *aff'd Covad Communications Co. v. F.C.C.*, 450 F.3d 528 (D.C. Cir. 2006) (*Triennial Review Remand Order*). Without UNE availability, CLECs would need to self-provision the facility or lease it at market-based rates if available, or in the territory of a BOC lease the facility at just and reasonable rates if the element is delineated in Section 271.

Section 271 Enforcement Authority. *Southwestern Bell Telephone* arose from the unsuccessful attempts by Southwestern Bell Telephone, L.P., d/b/a SBC Missouri (SBC) and a number of competitive local exchange carriers (CLECs) to sign interconnection agreements pursuant to the 1996 Act. In the midst of the negotiations, the FCC issued its *Triennial Review Remand Order*, which restricted the offering by ILECs of the UNE-Platform (UNE-P). The UNE-P allows a CLEC to lease an end-to-end network at cost-based rates without having to purchase a physical switch. The UNE-P includes a 2 wire analog loop, analog line side port and local switching, shared transport, and vertical switch features. The CLECs maintained that even though Section 251 no longer required it, the same network facilities from the UNE-Platform should be offered under Section 271. The Missouri arbitrators decision, which was adopted by the Missouri Public Service Commission (Missouri Commission), accepted the CLECs argument. SBC appealed, and the district court held that the Missouri Commission exceeded its authority regarding Section 271, but affirmed the Missouri Commissions decision on entrance facilities. On appeal to the 8th Circuit, the Missouri Commission argued that the structure of the Act implies Congress granted the states implicit authority to enforce Section 271. The 8th Circuit disagreed, holding that the state exceeded its authority under the Act in requiring the leasing of the UNE platform. The 8th Circuit did, however, uphold the Missouri Commissions requirement that entrance facilities be provided to CLECs at cost-based rates.

In affirming the district courts decision, the Eight Circuit summarized the Section 271 argument made by the Missouri Commission and CLECs: [they] concede the states have no authority to enforce § 271. Nonetheless, they contend Congress granted implicit authority by virtue of how the Act is structured. They argue the Act requires ILECs to enter into § 251 agreements with CLECs and those agreements are subject to mandatory state approval. They further argue ILECs seeking § 271 approval must, as a precondition, demonstrate they have obtained state approval of their § 251 agreements. Thus, a state can defeat an ILECs attempt to win § 271 approval by withholding § 251 approval. They contend this ability to hamstring an ILECs attempt to obtain § 271 approval means Congress intended to grant the states implicit authority to enforce § 271. The Eight Circuit rejected their argument, noting that the plain language of Section 271 makes clear states have no authority to interpret or enforce the obligations of § 271. The court contrasted the authority granted states under Section 251 with that under Section 271, explaining that Congress only gave states an advisory role at the application stage of the Section 271 process and nothing more, in contrast to Section 251 where states have explicit enforcement authority.

Entrance Facilities. The Missouri Commission had also concluded that CLECs are entitled to access SBCs entrance facilities for interconnection purposes only. In appealing the issue, SBC argued that the FCC no longer considered CLECs impaired with respect to entrance facilities, and therefore the facilities should not be available at cost-based rates. The Eight Circuit disagreed, noting that in the *Triennial Review Remand Order* the FCC limited the use of entrance facilities for interconnection purposes only: our finding of non-impairment with respect to entrance facilities does not alter the right of [competitors] to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, [competitors] will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the [ILECs] network. The Eighth Circuit explained that the Missouri Commission found that the entrance facilities requested by the CLECs would be used solely for interconnection purposes. Thus, the court concluded, CLECs must be provided access to entrance facilities at cost-based rates if necessary to interconnect with the ILECs network.

For additional information, *see* Charles D. Ferris and Frank W. Lloyd, Telecommunications Regulation: Cable, Broadcasting, Satellite, and the Internet; and the Telecommunications Law page.

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13 of 33 DOCUMENTS

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John M. Garvey on Nuvox Communications et al. v. Bellsouth Communications, Inc.

2008 Emerging Issues 2478

John M. Garvey on Nuvox Communications et al. v. Bellsouth Communications, Inc.

By John M. Garvey

July 3, 2008

SUMMARY: In this expert commentary, John M. Garvey, Esq. discusses Nuvox Communications, Inc. et al. v. Bellsouth Communications, Inc., in which the U.S. Court of Appeals for the Eleventh Circuit held that that Section 251 and Section 271 network elements can be commingled.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Federal Appellate Court Allows Section 251 and Section 271 Network Elements to be Commingled

Introduction. In a decision that will allow competitive local exchange carriers (CLECs) greater flexibility in combining cost-based and market-based wholesale services from incumbent carriers in order to provide a telecommunications product, the U.S. Court of Appeals for the Eleventh Circuit (Eleventh Circuit) held in *Nuvox Communications, Inc. et al. v. Bellsouth Communications, Inc.*, 2008 U.S. App. LEXIS 12765(11th Cir. 2008) (*Nuvox Communications*) that Section 251 and Section 271 network elements can be commingled. Commingling occurs when cost-based unbundled network elements (UNEs), or a prepackaged combination of UNEs (e.g., loop and transport), are connected or attached with other services obtained at market-based wholesale rates or resale rates from an incumbent carrier. The incumbent -- Bellsouth in this matter -- will normally perform the necessary functions to provision such commingling, thus allowing the CLEC to provide services to its customers with fewer self-provisioned facilities and at a cheaper cost.

The significance of this decision for competitive carriers and counsel negotiating access to incumbent facilities arises from the different pricing regimes for wholesale service in Section 251 (cost-based) and Section 271 (market-based), and a spate of recent administrative decisions minimizing cost-based unbundling under Section 251. Section 271 of the Telecommunications Act of 1996 (the 1996 Act), Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 151 et seq., requires carriers that are or were Bell Operating Companies (BOCs) to comply with a competitive checklist designed to open the local market in its territory to competition, including a delineated list of network elements that must be made available to competitors. In return for satisfying the conditions found in Section 271, a BOC may obtain permission to provide long distance service in its territory. The Federal Communications Commission (FCC) has interpreted Section 271 to require the leasing of network elements to competitors at just and reasonable rates, which are essentially market rates. Unlike Section 251, Section 271 specifically lists the network elements required to be leased to competitors at just and reasonable rates and leaves no discretion for the FCC to limit the network elements

availability. Moreover, the Section 271 obligations continue even after the BOC is granted permission to provide long-distance service.

Section 251 Elements Restricted. Section 251, on the other hand, mandates that incumbent local exchange carriers (ILECs) -- a larger universe of carriers than those BOCs falling under Section 271 -- provide unbundled access to its network elements (UNEs) at cost-based rates, which is a considerably lower pricing standard than Section 271s just and reasonable rates. Before unbundling is required, however, Section 251(d) of the 1996 Act requires the FCC to determine whether the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer. Over a number of years, the FCC has increasingly restricted the availability of certain UNEs under this *impairment standard*. See e.g., *Order on Remand, In the Matter of Unbundled Access to Network Elements*, 20 F.C.C.R. 2533 (2005), *affd Covad Communications Co. v. F.C.C.*, 450 F.3d 528 (D.C. Cir. 2006). Without UNE availability, CLECs would need to self-provision the facility or lease it at market-based rates if available, or in the territory of a BOC, lease the facility at just and reasonable rates if the element is delineated in Section 271 .

As UNEs become increasingly restricted, CLECs must rely more on a patchwork of the more expensive Section 271s elements, still-available cost-based UNEs, resale services, and its own facilities in order to offer telecommunications services to its customers. Allowing the commingling of Section 251 and Section 271 elements would be significant since it allows the competitor to use fewer of its own facilities in this patchwork and more wholesale and resale components of the incumbents network in order to provide competitive telecommunications services. The primary issue addressed by the Eleventh Circuit in *Nuvox Communications* is whether FCC rules prohibit such commingling. The Florida Public Service Commission (Florida PSC) concluded that FCC rules did not require the commingling of Section 271 elements and Section 251 elements. Nuvox Communications, Inc. and Xspedius Communications, LLC challenged the ruling in district court, which overturned the Florida PSCs decision. See *Nuvox Communs., Inc. v. Edgar*, 511 F. Supp. 2d 1198, 2007 U.S. Dist. LEXIS 39957 (N.D. Fla., 2007).

Eleventh Circuit OKs Commingling. The Eleventh Circuits review of the district courts decision in *Nuvox Communications* centered on the meaning of wholesale services in the FCC rules addressing commingling: [A]n [ILEC] shall permit a requesting telecommunications carrier to commingle an unbundled network element or a combination of unbundled network elements with *wholesale services* obtained from an [ILEC]. 47 C.F.R. § 51.309(e) (emphasis added). Since the FCC explicitly allowed for commingling UNEs with wholesale services, the question addressed by the Eleventh Circuit was whether the network elements under Section 271 are considered wholesale services for purposes of the commingling rule. The court noted that the FCC has repeatedly indicated that Section 271 elements are indeed wholesale. See e.g., *Petition of Qwest Corp. For Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metro. Statistical Area, Memorandum Opinion and Order*, 20 FCC Rcd 19415,19448-50, 65-68 (2005). The Eleventh Circuit also noted that the Florida PSC failed to establish any evidence indicating that Section 271 elements are not wholesale services. Indeed, the court noted, BellSouths own expert testified before the Florida PSC that Section 271 elements are considered wholesale services.

BellSouth raised four separate arguments: (1) the FCC declined to apply its combination rule to section-271 elements; (2) the commingling rule only applies to wholesale services that are subject to FCC tariffs; (3) the elimination of language in the Triennial Review Order suggests that the FCC intended to except section-271 elements from the commingling requirement; and (4) the district courts ruling would revive the anti-competitive UNE platform. The Eleventh Circuit quickly dismissed each argument, noting that the FCC only prohibited commingling among Section 271 elements; tariffed services are listed as examples of wholesale services only and the list is not exclusive; the alteration of language in the Triennial Review Order reflects the FCCs decision to remove potentially confusing language and does not narrow the otherwise broad wholesale services language in the commingling requirement to exclude specifically section-271 elements; and the UNE Platform would not be resurrected since Section 271 elements use market-based rates instead of the cost-based rates found in the UNE Platform.

For additional information, see Charles D. Ferris and Frank W. Lloyd, Telecommunications Regulation: Cable,

Broadcasting, Satellite, and the Internet; and the Telecommunications Law page.

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14 of 33 DOCUMENTS

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William A. Mogel on Burlington Res. v. FERC

2008 Emerging Issues 2458

William A. Mogel on Burlington Resources, Inc. v. FERC, 513 F.3d 242, 2008 U.S. App. LEXIS 1175 (D.C. Cir. 2008)

By William A. Mogel

July 2, 2008

SUMMARY: In this expert commentary, William A. Mogel examines the recent decision by the Court of Appeals for the District of Columbia Circuit in *Burlington Resources, Inc. v. FERC, 513 F.3d 242 1175 (D.C. Cir. 2008)*, which calls into question two pillars of FERCs regulatory regime--its prosecutorial discretion and its historic encouragement of settlements.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Summary. The recent decision by the Court of Appeals for the District of Columbia Circuit in *Burlington Resources, Inc. v. FERC, 513 F.3d 242, 2008 U.S. App. LEXIS 1175 (D.C. Cir. 2008)*, calls into question two pillars of FERCs regulatory regime--its prosecutorial discretion and its historic encouragement of settlements.

Facts. The underlying facts arose as a result of wellhead sales of natural gas that were subject to price ceilings (now repealed) mandated by the Natural Gas Policy Act of 1978, *15 U.S.C. §§ 3301 et seq.* (NGPA). In 1993, FERC ruled that sellers could not add to the ceiling price of natural gas the Kansas *ad valorem* property tax. According to the Court of Appeals:

To avoid litigation, the Commission encouraged Kansas gas producers to settle their refund disputes with pipelines. In 2000 and 2001, the Commission approved Omnibus Settlements under which settling producers paid only a portion of their refund liabilities, and the two pipelines waived any claims to further refunds. (citations omitted)

The petitioner, Burlington, did not join the Omnibus Settlements, but entered into settlements that included language seeming to dispose of *all* claims related to the contracts in question. Based on the foregoing, Burlington declined to make refunds of the Kansas *ad valorem* tax it had collected. Thereafter, FERC held a hearing on Burlingtons settlements and ruled in favor of the pipelines, concluding that the NGPA forbid a seller from collecting more than the ceiling price. Burlington was ordered to refund the excess revenue it had collected.

The Courts Decision. Before the Court was the inconsistency of FERCs action in approving the Omnibus Settlements which permitted the retention of excess revenues over the maximum NGPA ceiling price, and rejected the Burlington Settlements which permitted a similar result.

In its defense of its different treatment of the settlements, FERC asserted that it had exercised its prosecutorial discretion. n1 The Court summarily rejected FERCs assertion:

A more important reason for our disbelief is that the Commission enjoys prosecutorial discretion only when it acts as a prosecutor, which it is not doing here. Both in approving the Omnibus Settlements and denying effect to the Burlington Settlements, it acted as an adjudicator.

* * *

At most, the Commission may employ prosecutorial discretion in selling its *own* claims, by deciding not to take additional enforcement action against private parties.

In granting Burlingtons petition, the Court reviewed FERCs settlement process which long has been an integral tool of the Commission regulatory regime. n2 The Court concluded:

the Commission would forbid private parties from settling claims of uncertain value, if those settlements turn out once the uncertainty is resolved to have left excess revenues in the sellers hands.

Such goes far beyond the precedents on which the Commission relies.

* * *

Even in a settlement purporting to settle a single issue, the Commission cannot insist that the exchange match the parties exact obligations as ultimately determined; that would ignore the costs of formally resolving all uncertainties costs that the Commission recognized [--] the strong public policy that supports settling complex matters that thereby avoids the costs and burdens of litigation and mitigates administrative burdens. (citation omitted)

Conclusion. Although *Burlington Resources* deals with what some may view as an archaic issue--NGPA price ceilings--the dual issues dealing with the Commissions exercise of its prosecutorial discretion and the role of settlements in the administrative process are relevant today.

First, the FERCs attempt to rely on its prosecutorial discretion to rationalize the disparate treatment of two settlements dealing with an identical issue, reflects a possible shift away from the FERCs traditional adjudicatory role. Second, the Commissions reluctance to honor a settlement that provides comparable treatment, besides smacking of unfairness, forces parties and the Commissions Staff to litigate at a cost in time and dollars that may not further the administrative process.

For additional information on Energy Law, see David J. Muchow and William A. Mogel, Energy Law and Transactions; and the Energy Law page.

[Return to Text](#)

n1 . As a result of the Energy Policy Act of 2005 (P.L. No. 109-58, *119 Stat 594 (2005)*), FERCs civil penalty authority was increased to \$1 million per day per violation and the scope of its enforcement authority

was expanded. In connection with the latter, FERC issued a Report on Enforcement in Docket No. AD07-13-000 (Nov. 14, 2007) discussing the factors it takes into account exercise of its prosecutorial discretion:

- Nature and seriousness of the alleged violation
- Nature and extent of the harm, if any
- Efforts made to remedy the violation
- Whether , if known, the alleged violations were widespread or isolated
- Whether, if known, the alleged violations were willful or inadvertent
- Importance of documenting and remedying the potential violation to advance Commission policy objectives
- Likelihood of the conduct reoccurring
- Amount of detail in the allegation or suspicion of wrongdoing
- Likelihood that staff could assemble a legally and factually sufficient case
- Compliance history of the alleged wrongdoer
- Staff resources

n2 . The procedures for settlements at FERC are set forth in 18 C.F.R. § 285.602. By way of example, the FERC has made clear that settlements:

benefit[s] consenting parties by avoiding the costs of further litigation . The settlement would also terminate a number of appeals. The issue involved in these proceedings are complex and may not readily be determined. The settlement avoids the need for and the time and resources in what could be lengthy litigation. *Panhandle Eastern Pipe Line Co.*, 77 FERC 61,284 (1996).

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William A. Mogel, Esq., is an attorney at Saul Ewing LLP. He focuses his practice on energy law. He has extensive experience with federal and state issues affecting the electric and natural gas industries. He regularly represents clients before FERC, state regulatory commissions and courts. Mr. Mogel's representation includes marketers of electricity and natural gas, as well as investors in power plant assets, in both transactional and regulatory matters. As a consequence, he is experienced with the operations of PJM and MISO, particularly as affected by EPA Act 2005 and FERC's compliance program.

Mr. Mogel founded, and currently serves as Editor-in-Chief Emeritus of the Energy Law Journal. He recently was honored by the Energy Bar Association, which established, in his name, a summer internship program in Washington. He is also a Director of the Foundation of the Energy Law Journal, a Co-Editor of Energy Law and Transactions, an internationally known, seven volume treatise dealing with every aspect of energy law. As an author, Mr. Mogel has had published four books and numerous law review articles, magazine articles and book reviews on a broad range of energy

issues. He is co-editor of the recently published Energy Handbook. His writings have been cited as authority by the U.S. Supreme Court and the Court of Appeals. Mr. Mogel is listed in the Energy Who's Who Directory. He also has served on the Board of Trustees of Hobart College, his alma mater. Prior to entering private practice, Mr. Mogel was a captain in the U.S. Army and a trial attorney in the Civil Division of the Department of Justice.

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15 of 33 DOCUMENTS

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John M. Garvey, Esq. on Logix Communications v. Texas PUC

2008 Emerging Issues 2429

John M. Garvey, Esq. on Logix Communications, L.P. v. Public Utility Commission of Texas et al., 521 F.3d 361, 2008 U.S. App. LEXIS 5638, 44 Comm. Reg. (P & F) 890 (5th Cir. 2008)

By John M. Garvey

June 30, 2008

SUMMARY: In this commentary, John M. Garvey discusses *Logix Communications, L.P. v. Public Utility Commission of Texas et al.*, 2008 U.S. App. LEXIS 5638, a recent decision by the Court of Appeal for the Fifth Circuit in Texas that will likely make it more difficult for competitive local exchange carriers (CLECs) to gain access to certain unbundled network elements (UNEs) in key urban areas.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Federal Appellate Court Upholds AT&Ts Method of Counting Business Lines for Purposes of Determining Unbundling Requirements

Introduction. A recent decision by the Court of Appeal for the Fifth Circuit in Texas -- *Logix Communications, L.P. v. Public Utility Commission of Texas et al.*, 2008 U.S. App. LEXIS 5638 -- will likely make it more difficult for competitive local exchange carriers (CLECs) to gain access to certain unbundled network elements (UNEs) in key urban areas. Section 251 of the Telecommunications Act of 1996 (the 1996 Act), Pub. L. No. 104-104, *110 Stat. 56*, codified at *47 U.S.C. § 151* et seq., mandates that incumbent local exchange carriers (ILECs) lease UNEs at cost-based rates to CLECs. Before unbundling is required, however, Section 251(d) of the 1996 Act requires the FCC to determine whether the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer. Over a number of years, the FCC has increasingly restricted the availability of certain UNEs under this *impairment standard*. Without UNE availability, CLECs would need to self-provision or lease the facility at market-based rates. The FCC's restricting of UNE availability reflects its policy preference for a market structure of facilities-based carriers, rather than a larger number of smaller companies piggybacking on existing network providers to access end-users at regulated wholesale rates.

Most significantly for purposes of *Logix Communications, L.P. v. Public Utility Commission of Texas et al.*, 2008 U.S. App. LEXIS 5638 (5th Cir. 2008) (*Logix Communications*), the FCC's *Triennial Review Remand Order* (TRRO) in 2005, limited among other things the unbundling of high-capacity loops and interoffice transport. *See Order on Remand, In the Matter of Unbundled Access to Network Elements*, 20 F.C.C.R. 2533 (2005), *affd*, *Covad Communications Co. v. F.C.C.*, 450 F.3d 528 (D.C. Cir. 2006). The FCC held that DS1 loops need not be unbundled in wire centers with at least 60,000 business lines and four fiber-based collocators, and DS3 loops need not be unbundled

in wire centers with at least 38,000 business lines and four fiber based collocators. With regard to dedicated transport, the FCC determined that DS1 transport need not be unbundled in wire centers serving at least 38,000 business lines or four fiber-based collocators, and that dedicated DS3 transport or dark fiber transport need not be unbundled in wire centers with at least 24,000 business lines or three fiber-based collocators.

The primary issue addressed by the Fifth Circuit in *Logix Communications* was the interpretation of the TRROs metric used in evaluating whether high-capacity loops and interoffice transport need to be unbundled by the ILEC. As the Fifth Circuit explained, the TRRO meant to provide a metric for determining when an ILECs failure to provide CLECs with UNE access would impair competition. The analysis looks to the volume of business in a particular wire center to determine impairment. The FCCs rationale for such an approach is that line density in a switching area is a reasonable proxy in determining when a CLEC can earn sufficient revenues to self-provision the facility in that geographic area. If such revenues are possible, the *impairment standard* under the 1996 Act would not be satisfied and the facilities should no longer be available as UNEs.

What is a business line? *Logix Communications* is primarily concerned with what constitutes a business line for purposes of determining whether the volume of lines is sufficient in a particular wire center to eliminate the unbundling requirements pursuant to the TRRO. On June 30, 2005, the ILEC AT&T Texas (AT&T) filed for arbitration with the Public Utility Commission of Texas (PUC) regarding its interconnection agreement with Logix Communications, L.P. AT&T argued, and the PUC agreed, that considering all UNE loops and 64 kbps-equivalent digital access lines for purposes of counting business lines irrespective of whether they serve business customers correctly follows the FCCs TRRO. Logix argued that including these lines conflicts with the TRRO and overstates the amount of business lines for purposes of the TRRO in a particular wire center. The federal district court confirmed the PUC arbitration and Logix appealed to the Fifth Circuit.

In the TRRO, the FCC defined what it considered business lines for purposes of determining UNE obligations: [t]he number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to the wire center, including UNE loops provision in combination with other unbundled elements. Among these requirements, business line tallies: (1) Shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services, (2) Shall not include non-switched special access lines, (3) Shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 business lines.

Plain Reading Comports with AT&Ts Methodology. Logixs reading of the definition, according to the Fifth Circuit, ran contrary to its plain meaning and the underlying policy of the TRRO. The Fifth Circuit summarized Logixs argument: the first line of the business line definition limits the remainder of the definition such that: (1) only business (as opposed to residential) lines are counted; (2) the line must be a switched access line; and (3) whether the line should be counted is not affected by whether the services are provided by an ILEC or a CLEC leasing the line. The remainder of the definition, according to Logix, is an elaboration of the first sentence and must comport with those three criteria. Logix claims the second sentence in the definition identifies which lines served by ILECs and CLECs should be candidates for meeting the business line criteria and clarifies that incumbent LEC switched access lines qualify.

In rejecting Logixs argument, the court noted that only the first part of the definition references lines serving business customers, and the reference to UNE loops does not include any discussion of businesses at all. Therefore, the court explained, the plain meaning of the definition is that the number of business lines in a wire center is equal to the number of previously defined business lines in that center plus all UNE loops, even if those loops do not serve a business customer. Logix also argued that aside from the plain language of the definition, its reading is more consistent with the underlying FCC policy for using business lines as a proxy for the *impairment standard* found in Section 251 of the 1996 Act. Logix argued that it was the higher revenue characteristic of business lines that made them appropriate to be counted in the impairment analysis for high-capacity loops and interoffice transport.

In rejecting Logix's policy argument, the court noted approvingly the PUC's response that counting only business UNEs would require the tabulation be based on competitor-provided data that the FCC expressly rejected as a basis for the business line proxy in the TRRO. The FCC, according to the court, intended on using easily verifiable data which includes total UNE counts since ILECs are already required to report such figures. The court concluded: [b]usiness lines were therefore chosen as easily administrable proxies for determining where significant revenue opportunities were available. With this choice came the recognition of the imprecision of the method, but the FCC determined that, because it was measuring potential competition in addition to actual competition, a certain level of imprecision was acceptable. It follows that over-counting UNE loops by including those that serve residential customers along with those that serve business customers comports not only with the text of the rule but also with the policy underlying the TRRO.

Digital Equivalents. Logix also argued that using the full digital equivalents in counting high capacity loops, rather than looking at the end user of each line, is inconsistent with the TRRO's business line definition. Logix argued that only those lines in a high capacity loop that are (1) connected to an end-user business customer, (2) providing switched access service, and (3) provided by either the ILEC or CLEC leasing the UNE loop should be counted as business lines. In rejecting this argument, the court noted that the FCC expressly chose not to look to end-users: [t]he regulation does not indicate that ILECs or CLECs should, for the first time, undertake building-by-building, end-user analysis. Instead, the plain language indicates that all lines in a high-capacity loop should count as business lines.

For additional information, see Charles D. Ferris and Frank W. Lloyd, *Telecommunications Regulation: Cable, Broadcasting, Satellite, and the Internet*; and the *Telecommunications Law* page.

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16 of 33 DOCUMENTS

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John M. Garvey on Illinois Bell Telephone Company v. Charles Box

2008 Emerging Issues 2390

John M. Garvey, Esq. on Illinois Bell Telephone Company v. Charles Box et al., 2008 U.S. App. LEXIS 11077 (7th Cir. May 23, 2008)

By John M. Garvey

June 25, 2008

SUMMARY: John M. Garvey discusses Illinois Bell Telephone Company v. Charles Box et al., where the Illinois Commerce Commissions interpretation of the FCC rules limiting certain UNEs was at issue. The Seventh Circuit affirmed the lower courts ruling in *Ill. Bell Tel. Co. v. Box*, holding that the ICC's interpretation of the FCCs rule on entrance facilities was correct, but its interpretation of the UNE requirements for fiber optic loops was in error.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Cite as: Garvey, John M. *Illinois Bell Telephone Company v. Charles Box et al.* LexisNexis Expert Commentary, (*Insert date you accessed the document online*).

Federal Appellate Court Renders Mixed Decision on State Interpretation of FCC Unbundling and Interconnection Rules

Introduction. Section 251 of the Telecommunications Act of 1996 (the 1996 Act), 47 U.S.C. § 151 et seq., mandates that incumbent local exchange carriers (ILECs) provide unbundled access to its network elements (UNEs) at cost-based rates. Section 251(d) of the 1996 Act confines the FCCs discretion in implementing the UNE requirement by requiring an *impairment analysis* before unbundling is mandated -- the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer. Over the years, the FCC has increasingly restricted the availability of certain UNEs under the *impairment analysis*.

Most relevant to the outcome of *Illinois Bell Telephone Company v. Charles Box et al.*, 2008 U.S. App. LEXIS 11077 (7th Cir. May 23, 2008) (*Illinois Bell*), the FCC issued the *Triennial Review Remand Order*, which limited, among other things, the unbundling of entrance facilities and fiber optic loops. *See Order on Remand, In the Matter of Unbundled Access to Network Elements*, 20 F.C.C.R. 2533 (2005), *affd*, *Covad Communications Co. v. F.C.C.*, 371 U.S. App. D.C. 283, 450 F.3d 528 (D.C. Cir. 2006). At issue in *Illinois Bell* was the Illinois Commerce Commissions (ICCs) interpretation of the FCC rules limiting the availability of these UNEs. The Seventh Circuit affirmed the lower courts ruling, *see Ill. Bell Tel. Co. v. Box*, 2007 U.S. Dist. LEXIS 70551 (N.D. Ill., Sept. 21, 2007), holding that the ICCs interpretation of the FCCs rule on entrance facilities was correct, but its interpretation of the UNE requirements for fiber

optic loops was in error.

Federal Preemption. Absent a few other states, Illinois has perhaps been the most aggressive in attempting to counteract the FCC's more restrictive approach to UNEs by using state law or expansive interpretations of the 1996 Act. For example, the state legislature enacted a statute in 2006 that required the unbundling of certain UNEs without the *impairment analysis* -- and therefore the statute required more unbundling than what the FCC has required pursuant to Section 251 of the 1996 Act. *See Ill. Bell Tel. Co. v. OConnell-Diaz*, 2006 U.S. Dist. LEXIS 70221 (N.D. Ill. Sept. 28, 2006) (provisions in state statute requiring, *inter alia*, unbundling of local circuit switching, optical loops, dark fiber loops, entrance facilities and feeder subloops preempted by the 1996 Act); *Illinois Bell Telephone Co. v. Illinois Commerce Commission, et al.*, 2008 U.S. Dist. LEXIS 6326 (N.D. Ill. January 28, 2008) (provisions in state statute requiring unbundling of high-speed loops, dedicated transport, and dark fiber transport preempted by the 1996 Act).

Other states have attempted to use Section 271 of the 1996 Act to require additional unbundling beyond what the FCC has required under Section 251. *See Verizon New England, Inc. v. Maine Public Utilities Commission et al.*, 2007 U.S. App. Lexis 21349 (September 6, 2007) (states prohibited from using Section 271 of the 1996 Act to require additional UNEs) (*Verizon New England*). *Verizon New England* examined whether states can administratively shape local telecommunication policy by using Section 271 of the 1996 Act to add additional requirements not listed in the text of the statute. Section 271 requires carriers that are or were Bell Operating Companies (BOCs) to comply with various conditions in order to obtain permission to provide long distance service, including a delineated list of network elements that must be made available to competitors. As was the case with *Verizon New England* and the Illinois state statute, the courts have rarely looked upon state attempts at shaping local telecommunications policy favorably, particularly if the provisions conflict with the 1996 Act or FCC implementing regulations.

Fiber-Optic Loops. The Seventh Circuit in *Illinois Bell* likewise continued this skepticism, looking askance at the ICCs attempt to require the unbundling of fiber-optic loops for businesses, even though, as the court explained, the FCC eliminated their unbundling in the *Triennial Review Remand Order*: [t]he FCC found that competitors access to ILECs loops based on traditional copper wire means that they are not impaired by lack of access to ILECs loops based on optical fiber. The [ICC] interpreted the FCC's regulation as limited to mass-market customers (which the state commission defined as those that use fewer than four phone circuits) and directed AT&T to furnish optical and hybrid local loops between central offices and all other customers to its rivals as [UNEs]. The district court set this portion of the state commissions order aside, and sensibly. Consequently, the Seventh Circuit affirmed the lower court ruling, noting that [n]othing [in the FCC rules] turns on the customers identity or the number of phone lines a given customer uses. Access to copper-based loops is available for all customers; that's why the FCC concluded that access to optical loops is not required to avoid impairment. The court concluded that the ICC requirement is therefore preempted by the FCC rules.

Entrance Facilities. The Seventh Circuit did, however, uphold the ICCs requirement that entrance facilities be provided at cost based rates so long as they are used for interconnection purposes. As the court explained, an entrance facility is a connection between a switch maintained by an ILEC and a switch maintained by a [competitor]. In other words, it is a means of transferring traffic from one carriers network to another. The connection may be by copper cable, fiber-optic cable, or radio-frequency link. The connection may be long or short; multiple carriers switches may even be in the same building (this is known as co-location). ILECs built entrance facilities to comply with their obligation to interchange traffic among networks [pursuant to Section 251 of the 1996 Act]. The controversy arose because competitors began to use entrance facilities for not only interconnection, but also to backhaul traffic from one competitor to another or route its own customers calls over the ILECs network.

In the *Triennial Review Remand Order*, the FCC limited the use of entrance facilities for interconnection purposes only: our finding of non-impairment with respect to entrance facilities does not alter the right of [competitors] to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, [competitors] will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the [ILECs] network. The ICC, relying on this passage from the *Triennial Review*

Remand Order, ordered AT&T to make entrance facilities available at cost based rates for interconnection purposes only.

In upholding the ICCs requirement, the Court rejected AT&T's argument that allowing entrance facilities to be leased at cost based rates as interconnection facilities nullifies the FCC's order eliminating them as a UNE. As the court explained it, [w]hats the point of specifying that [competitors] cannot demand access to entrance facilities as [UNEs] AT&T inquires, if state commissions can turn around and require the same access at the same price anyway? The Seventh Circuit noted that, under the ICCs directive, competitors no longer enjoy the same access to entrance facilities as they did prior to the FCC's *Triennial Review Remand Order*. Instead, they must use the facilities for interconnection purposes only, and not to backhaul traffic. Moreover, the court accepted the ICCs finding that ILECs are able to block the use of an entrance facility for backhauling purposes.

For additional information, see Charles D. Ferris and Frank W. Lloyd, *Telecommunications Regulation: Cable, Broadcasting, Satellite, and the Internet*; and the *Telecommunications Law* page.

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17 of 33 DOCUMENTS

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John M. Garvey on ATT Cost Accounting Forbearance Petition

2008 Emerging Issues 2389

John M. Garvey on ATT Cost Accounting Forbearance Petition, Memorandum Opinion and Order, 2008 FCC LEXIS 3570 (April 24, 2008)

By John M. Garvey

June 23, 2008

SUMMARY: The Federal Communications Commission (FCC or Commission) continued its move to eliminate what it considers unnecessary legacy regulation by granting AT&T forbearance relief from filing cost assignment information with the Commission.

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ARTICLE: The Federal Communications Commission (FCC or Commission) continued its move to eliminate what it considers unnecessary legacy regulation by granting AT&T forbearance relief from filing cost assignment information with the Commission. The rules at issue in the *AT&T Cost Accounting Forbearance Order, 2008 FCC LEXIS 3570* (April 24, 2008) were created during the era when the company was rate of return regulated, and cost of service was the crucial variable in determining rates. While the company today is price cap regulated and therefore cost data is less crucial, the two Democratic Commissioners at the FCC along with many states and competitors argued that the information should still be filed with the Commission for various regulatory purposes. The relief, which may save AT&T approximately \$10 million per year according to press reports, was granted under the FCC's authority to forbear from enforcing statutory and regulatory provisions pursuant to Section 10 of the Communications Act of 1934, as amended. *47 U.S.C. §§ 151 et seq.* (1934 Act). The approval of the petition also suggests that similar, outstanding forbearance petitions from Verizon and Qwest, among others, will likely be granted by the FCC as well.

Section 10 of the 1934 Act allows the Commission to forbear from applying any of its provisions, or any of the FCCs implementing regulations, if the Commission makes certain findings related to the competitiveness of the market and whether such forbearance is in the public interest and protects consumers. Specifically, the Commission is required to forbear if it determines that the provision is not needed to protect consumers or to ensure just and reasonable rates. Section 10 also requires the Commission to find that forbearance is in the public interest and will promote competitive markets. The FCC must respond to petitions for forbearance within one year (which can be extended for an additional 90 days), otherwise the petition is deemed granted.

In recent years, the number of petitions from telecommunications carriers seeking forbearance has increased significantly. The FCC has generally reacted favorably towards these requests for the provision of broadband services and other advanced telecommunication capabilities, granting waivers of specific regulatory requirements to most of the

carriers requesting such relief. However, the FCC has been relatively reluctant to grant forbearance for non-broadband services, particularly if the provisions relate to the market-opening requirements of the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, *110 Stat. 56* -- such as Section 271's market opening requirements, Section 251 interconnection requirements, and other public policy requirements such as 911. The *AT&T Cost Accounting Forbearance Order* is notable because the rules at issue pertain to this latter category of non-broadband services, although the Commission in granting the petition emphasized the burden the rules placed on the development of new broadband services.

The FCC's largely favorable stance towards forbearance requests as they relate to broadband and other advanced telecommunication capabilities has exposed the agency to criticism from various members of Congress who are concerned that forbearance is being used as an end-run around the legislative process. In 2007, for example, bills were introduced in the Senate and House that would strengthen the FCC's ability to review forbearance requests. As a result of this criticism, the Commission recently released a Notice of Proposed Rulemaking seeking comment on whether procedural and substantive changes to the forbearance petition process should be implemented. *See Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Notice of Proposed Rulemaking, 2007 FCC LEXIS 9029 (November 27, 2007).

AT&T Cost Accounting Forbearance Order. The rules at issue in the *AT&T Cost Accounting Forbearance Order* are an outgrowth of the dual federal/state regulatory framework governing telecommunications over the past century, and the use of cost of service ratemaking in regulating the monopoly provision of local service. As the FCC explained, the cost assignment rules were developed because the same local network facilities were used to provide both interstate and intrastate services, as well as both regulated and nonregulated services. The Commission created rules to assign or allocate the common costs to build and maintain the network, and the revenues derived from the array of services offered over the network, by type of cost, type of service (regulated or nonregulated), jurisdiction (intrastate or interstate), and service categories. Because cost of service ratemaking requires detailed information regarding costs, the data at issue in the *AT&T Cost Accounting Forbearance Order* was needed by regulators in order to set rates. n1

Since cost of service ratemaking has now mostly been replaced with price caps, AT&T argued -- and the FCC agreed -- that there is no current need for the cost assignment rules. While price cap regulation often utilizes elements of cost of service ratemaking, the Commission noted that the adoption of various reforms that eliminated features of the original price cap regime that required rate-of-return regulation accounting inputs. The FCC cited, for example, the elimination in 1997 of the requirement that price cap carriers return to ratepayers earnings above a specified amount. Similarly, the X-factor in price caps -- which may include estimates of productivity gains -- is presently set at the rate of inflation and excludes a productivity factor requiring cost information.

The Commission also relied heavily on the argument that the rules could negatively affect AT&T's broadband service deployment, a consistent theme of the FCC over the past few years: We believe that these costs likely distort the market for telecommunications services by diverting AT&T resources that would otherwise be directed to positive activities that generate consumer benefit. The Commission quoted AT&T's local affiliate Legacy BellSouth: For every new broadband service that it seeks to offer, [BellSouth] must conduct an exhaustive analysis of every part of the network and the other resources used to provide the service to ensure compliance with the Commission's cost allocation and affiliate transaction requirements. The more technologically involved the product or service offering, the more allocation decisions are involved: some complex services, in fact, can require up to 100 separate allocation decisions. The FCC also accepted Legacy BellSouth's claim that new services can be delayed to market by as much as six months due to compliance with the Cost Assignment Rules; some never get to market at all.

Future Role for Cost Assignment Rules. While the Commission routinely analyzed each element of the statutory test for forbearance, a noteworthy aspect of the order pertains to the role of the data in future proceedings. Many commenters argued that the data at issue in the *AT&T Cost Accounting Forbearance Order* may be needed in future

regulatory proceedings at both the state and federal level. In rejecting this argument, the Commission noted that Section 10 of the 1934 Act does not allow us to find a regulatory requirement necessary to ensure that the charges, practices, classifications or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory if it is not a current need. The Commission also cited the D.C. Circuits conclusion that: [i]n the forbearance context, . . . it is reasonable to construe necessary as referring to the existence of a strong connection between what the agency has done by way of regulation and what the agency permissibly sought to achieve with the disputed regulation. *Cellular Telecommunications & Internet Assn v. FCC*, 330 F.3d 502, 512 (2003). Here, the FCC concluded, we cannot conclude that there is a strong connection between maintaining the Cost Assignment Rules in anticipation of a possible need for the information to modify rate regulation at some point in the future.

With regard to information needed for state purposes, the Commission concluded that we do not have authority under sections 2(a) and 10 of the [1934] Act to maintain federal regulatory requirements that meet the three-prong forbearance test with regard to interstate services in order to maintain regulatory burdens that may produce information helpful to state commissions for intrastate regulatory purposes solely. Nevertheless, the FCC also seemed to carve out the opportunity for state-by-state cost assignment rules: We emphasize that we do not in this Order preempt any state accounting requirements adopted under state authority. Although states will not have authority to enforce the federal Cost Assignment Rules as they apply to AT&T once this relief is effective, we do not read section 10(e) to prevent states from adopting similar provisions to the extent that they have authority under state law.

Regulatory Safeguards. In granting the petitions, the FCC relied heavily on the many statutory safeguards still available, including Section 254(k), Section 272(e)(3), Section 251, Section 271, and the continuing general obligation to provide service on just, reasonable, and not unjustly or unreasonably discriminatory rates, terms, and conditions pursuant to sections 201 and 202 of the Act. Most significantly, the FCC concluded, AT&T will remain subject to dominant carrier regulation of its interstate exchange access services, including price cap regulation of most exchange access services. The FCC also conditioned the forbearance on AT&T providing accounting data on request by the Commission for regulatory purposes. Further, the Commission required AT&T to file a compliance plan and implement a method of preserving the integrity for both costs and revenues of its accounting system in the absence of the Cost Assignment Rules to ensure that accounting data requested by the Commission in the future will be available and reliable. The relief granted in this Order will not become effective unless and until AT&T's plan is approved.

For additional information, see Charles D. Ferris and Frank W. Lloyd, Telecommunications Regulation: Cable, Broadcasting, Satellite, and the Internet; and the Telecommunications Law page.

Return to Text

n1 . AT&T noted that its petition only addresses the assignment of costs, rather than its accounting for revenues which can still be identified by jurisdiction through the Part 32 accounts.

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18 of 33 DOCUMENTS

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John M. Garvey on Comcast Corp. v. FCC et al.

2008 Emerging Issues 2354

John M. Garvey, Esq. on Comcast Corporation v. Federal Communications Commission et al., 2008 U.S. App. LEXIS 10524 (May 16, 2008)

By John M. Garvey

June 4, 2008

SUMMARY: This Emerging Issues Analysis from John M. Garvey discusses the Court of Appeals for the District of Columbia's decision in *Comcast Corp. v. FCC*, a decision likely to increase competitive choices for television converter boxes. In this case, the D.C. Circuit upheld an FCC decision denying a request by Comcast to carve out a broad exception to its competition policies related to converter boxes.

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ARTICLE: D.C. Circuit Upholds FCC Converter Box Policy

In a decision likely to increase competitive choices for television converter boxes, the Court of Appeals for the District of Columbia Circuit (D.C. Circuit) recently upheld an FCC decision denying a request by Comcast to carve out a broad exception to its competition policies related to converter boxes. Consumers use converter boxes to access subscription video programming supplied by cable or direct broadcast satellite companies. As the D.C. Circuit noted in *Comcast Corporation v. Federal Communications Commission et al., 2008 U.S. App. LEXIS 10524* (May 16, 2008) (*Comcast Corporation*), the converter box performs security functions—ensuring that only subscribers may access the programming—and may include other features such as channel tuners, program menus, pay-per-view, video-on-demand, video recording, and high-definition. Section 629(a) of the Telecommunications Act of 1996 (the Act), *47 U.S.C. § 151 et seq.*, directed the Federal Communications Commission (FCC or Commission) to facilitate competition in converter boxes by promulgating rules that would allow companies unaffiliated with video providers to sell converter boxes and other multichannel video programming equipment to consumers. *47 U.S.C. § 549(a)*.

Previous to the Act, video providers mostly leased the boxes directly to consumers and enjoyed monopoly protections since consumers had little choice but to use the provider-supplied devices due to the required security functions. A precondition for achieving the competition goals of Section 629(a) of the Act, therefore, required the unbundling of the security and programming components of the box. The FCC adopted rules in 1998 requiring such unbundling. *See Commercial Availability of Navigation Devices, 13 F.C.C.R. 14,775 (1998)*. To facilitate the introduction of competition, a credit-card-sized device was created that contains the video providers security information. This device can be inserted into any converter box, irrespective of whether the video provider manufactured or marketed the box. At issue in *Comcast Corporation* was the FCC's additional requirement that video

providers not sell or lease converter boxes that contained both security and navigation features -- thus preventing competitors from offering such devices. The Commission, after delaying the compliance date until 2007, noted that it would also consider waivers for certain low-cost boxes that do not include advanced features such as personal video recording and broadband Internet access.

Comcast Waiver Request. Comcast sought a waiver for various converter boxes it offered to customers. Although the boxes were the cheapest offered by Comcast, they nevertheless contain various advanced features such as video-on-demand and on-screen menus. The FCC denied the waiver request, claiming that, *inter alia*, the devices included too many advanced features. *See Comcast Corp., 22 F.C.C.R. 17,113 (2007)*. Comcast argued on appeal in *Comcast Corporation* that, in addition to the FCC policy violating the Act and being arbitrary and capricious, Section 629(c) of the Act entitles the company to a waiver. Section 629(c) allows the Commission to waive a regulation adopted under Section 629(a) upon a showing that such waiver is necessary to assist the development or introduction of a new or improved multichannel video programming or other service offered over multichannel video programming systems, technology, or products. *47 U.S.C. § 549(c)*.

Comcast argued that the waiver is necessary in order for it to develop new digital programming services, which are improvements over the existing analog-based services. Comcast noted that digital technology allows it to reclaim excess spectrum in order to provision new or improved services. The converter boxes at issue in *Comcast Corporation* convert analog to digital signals and therefore enable viewers with analog televisions to view digital-based services. As the court noted, Comcast contended that without a waiver for low-cost integrated boxes, the price of converter boxes will rise, fewer customers will make the transition to digital cable, and Comcast will not be able to roll out new digital services as quickly as it would be with a waiver.

The FCC rejected this argument, noting that Comcast was already offering digital services without a waiver and would likely continue to do so whether a waiver is granted or not. The FCC also determined that granting the waiver would undermine common reliance, by reducing video providers incentive to ensure that security elements are properly designed and supported for competitive equipment manufacturers. According to the D.C. Circuit, [e]ssentially, the Commission has concluded, or rather predicted, that to allow Comcast to introduce an integrated box that contains security, navigation, and programming features would inhibit the development of competitive navigation and programming devices. The Commission wishes to force Comcast to rely on the same security element as its competitors.

D.C. Circuit Confirms. The D.C. Circuit agreed with the Commission, noting that the FCC's rationale for not granting a waiver was reasonable and not contrary to the Act. The court accepted the FCC's rationale that since Comcast was already currently offering digital programming to almost half of its customers, it was unlikely to stop if a waiver was not granted. The court noted that [c]able companies do not give away their services for free; as every cable customer knows, the more services and features you purchase, the higher your monthly bill will be. Thus, with or without a waiver, Comcast has a strong incentive to make as many services available as possible, and to continue introducing new high-value (and high-cost) features. The court also accepted the FCC's conclusion that the policy, while imposing various short-term costs on video providers and consumers, will nevertheless create benefits from a more competitive market. The D.C. Circuit also accepted the FCC's explanation that interactive programming guides, pay-per-view, and video-on-demand are advanced features that place the converter boxes outside the parameters of its definition of low-cost boxes that excludes advanced features.

The court also rejected Comcast's contention that the waiver policy has been inconsistently applied and is therefore arbitrary and capricious. Comcast asserted that the Commission has acted inconsistently by denying its waiver request even though the FCC has granted waivers to several other video providers (some of which involved the exact same boxes at issue in this case). The court noted in rejecting this argument that the earlier waivers were all granted by the FCC's Media Bureau and not confirmed by the Commission. Therefore, the doctrine that an agency is not bound by the decisions of its staff is applicable. *See Vernal Enters., Inc. v. FCC, 355 F.3d 650 (D.C. Cir. 2004)*. The court explained: unchallenged staff decisions are not Commission precedent, and agency actions contrary to those decisions cannot be

deemed arbitrary and capricious. Prior to Comcast's application for a waiver, the full Commission had not granted a waiver to any similarly situated entity. Thus, we reject Comcast's argument that the Commission's denial of its waiver request was discriminatory or inconsistent with prior FCC policies.

For additional information, see Charles D. Ferris and Frank W. Lloyd, Telecommunications Regulation: Cable, Broadcasting, Satellite, and the Internet; and the Telecommunications Law page. For prior history and additional information regarding the dispute, see *General Instrument Corp. v. FCC*, 213 F.3d 724, (D.C. Cir. 2000) and *Charter Communications, Inc. v. FCC*, 460 F.3d 31, (D.C. Cir. 2006).

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19 of 33 DOCUMENTS

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John M. Garvey on Sprint Communications v. Nebraska PSC

2008 Emerging Issues 2339

John M. Garvey, Esq. on Sprint Communications Company L.P., vs. Nebraska Public Service Commission et al., 2007 U.S. Dist. LEXIS 66902 (September 7, 2007)

By John M. Garvey

June 2, 2008

SUMMARY: In this commentary, John M. Garvey looks at the district courts decision in Sprint Communications Company L.P. vs. Nebraska Public Service Commission et al, which is instructive for its broad interpretation of what constitutes a common carrier, and by implication what carriers are afforded the many rights and responsibilities under the Communications Act of 1934 and the Act.

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ARTICLE: In an expansive interpretation of a Federal Communications Commission (FCC) Declaratory Order providing interconnection rights for wholesale common carriers, a federal district court rejected a state commissions determination that a company providing wholesale services to a retail telecommunications carrier is not a common carrier for purposes of the interconnection and reciprocal compensation provisions in the Telecommunications Act of 1996 (the Act). 47 U.S.C. § 151 et seq. The district courts decision in *Sprint Communications Company L.P. vs. Nebraska Public Service Commission et al (Sprint Communications)*, 2007 U.S. Dist. LEXIS 66902 (September 7, 2007) is instructive for its broad interpretation of what constitutes a common carrier, and by implication what carriers are afforded the many rights and responsibilities under the Communications Act of 1934 and the Act.

Sprint Communications Company L.P. (Sprint) had sought federal judicial review of a 2005 Nebraska Public Service Commission (NPSC) arbitration order between Sprint and the Southeast Nebraska Telephone Company (SENTCO) -- the incumbent local exchange carrier (ILEC). n1 The issues in the arbitration centered on whether SENTCO is required to provide for reciprocal compensation and interconnection with Sprint in order for another carrier, Time Warner Cable Inc. (TWC), to provide telecommunications service n2 to residential customers. Sprint and TWC had signed a Wholesale Voice Services Agreement that required Sprint to provide various telecommunications services to TWC on a wholesale basis. TWC would use parts of Sprints network, including Sprints interconnections facilities with SENTCO, to provide retail telecommunications services, and would, as the court explained, exclusively have all customer relationships, will market the service in the name of TWC, will perform all billing functions and will resolve all customer complaints. Consequently, the telecommunications service would be provided to TWCs customers over a combined Sprint and TWC network.

In the arbitration, SENTCO had argued that Sprint could not use its interconnection agreement for the benefit of a

third party, and instead TWC would need to negotiate its own agreement with SENTCO in order to use its interconnection facilities and to receive reciprocal compensation. The NPSC agreed, holding that Sprint could only use its interconnection agreement with SENTCO in order to provide telecommunications service to Sprints own retail customers, not those of a third-party carrier like TWC. Moreover, the NPSC ruled that reciprocal compensation was not required because SENTCO and Sprint were not competing to provide retail end user services since Sprint was acting in a wholesale capacity.

Pursuant to the Act, Sprint appealed the arbitration decision by the NPSC to the federal district court in *Sprint Communications*. In the midst of that proceeding, TWC filed with the FCC a request for a declaratory ruling on the matter. On March 7, 2007, the FCC held that Sprint could request interconnection for the benefit of TWC under the language of section 251(a) and (b) of the Act. The FCC explained that the rights of telecommunications carriers under sections 251 (a) and (b) apply regardless of whether the telecommunications services are wholesale or retail, and a state decision to the contrary is inconsistent with the Act and Commission precedent. *In the Matter of Petition of Time Warner Cable*, 22 FCC Rcd 3513. Section 251 of the Act requires each telecommunications carrier to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. 47 U.S.C.A. § 251 (a). While not completely resolving the issues in *Sprint Communications*, the FCC's explanation that a wholesale carrier acts as a telecommunications carrier (and therefore afforded the interconnection rights of the Act) only when the services it provides are offered on a common carrier basis, became the pivotal issue for the district court in resolving the arbitration appeal.

Broadening Common Carriers. In light of the FCC's declaratory ruling, SENTCO and the NPSC argued that Sprint would not be acting as a common carrier under its wholesale agreement with TWC, and therefore not be entitled to the interconnection and reciprocal compensation rights afforded telecommunications carriers. The NPSC argued that Sprint is not a common carrier because: Sprint and TWC entered into a private, confidential contract; that the contract was individually tailored to meet TWC's needs; that Sprint has no tariff on file; that Sprint offers no telecommunications services directly to the general public; and that TWC is the only user of Sprint's private contract services in Nebraska. The district court rejected SENTCO's and the NPSC's argument, instead relying on two findings of fact made by the NPSC during the arbitration proceeding: (1) the network over which TWC would be providing a telecommunications service consists of a combination of Sprint and TWC's facilities; and (2) Sprint stated that it is willing to make its wholesale services available to others. The district court held that [t]hese two findings of fact are sufficient to establish that Sprint's services are offered on a common carrier basis.

In explaining its decision, the district court heavily cited a similar case also involving Sprint, *Consolidated Comm. Fort Bend v. Public Utility Commn*, 497 F. Supp. 2d 836, 2007 U.S. Dist. LEXIS 54287 (W.D.Tex. 2007) (*Consolidated Comm.*). In examining what constitutes a common carrier, the district court cited language in *Consolidated Comm.*: [t]he key factor is that the operator offer indiscriminate service to whatever public its service may legally and practically be of use so that its services are effectively available to the public. The court in *Consolidated Comm.* rejected the argument that confidential pricing of wholesale services and individualized, privately negotiated agreements portend discriminate service, holding that [b]ased on Sprint's business model, without Sprint's services, the end-user customer who subscribes to the Sprint-cable company service would be incapable of placing or receiving telephone calls, as Sprint's switch performs all switching and routing functions for local, domestic, and foreign toll, emergency, operator assisted, and directory assistance calls. Thus, Sprint provides telecommunication services, and does so in a manner that offers indiscriminate service which is effectively available directly to the public. Similarly, the district court in *Sprint Communications* noted that [r]egardless of any agreement Sprint may negotiate with a participating cable company, or entity that has last mile facilities suitable to function as residential loops, Sprint's services will reach all end-user customers indiscriminately.

Reciprocal Compensation. The final issue the district court had to resolve was whether SENTCO has an obligation under the Act to enter into a reciprocal compensation arrangement with Sprint. The NPSC had ruled that reciprocal compensation only applies to local traffic for which both SENTCO and Sprint shall compete to provide retail end user services. Because TWC was the retail carrier *vis vis* Sprint, the NPSC reasoned that the Act does not entitle

Sprint to compensation for calls placed by SENTCOs customers because Sprint would be handing the calls off to TWC rather than delivering the calls directly to end users. In rejecting this argument, the district court cited language in the FCCs Declaratory Order: Although the FCC has defined the terms transport and termination for purposes of section 251(b)(5) as involving the delivery of calls to the end user, it is unreasonable to interpret these definitions in a manner which would preclude a wholesale carrier from receiving any compensation for the use of its facilities by the local exchange carrier. Rather, these definitions must be applied in a way which recognizes that calls may be delivered using the combined resources of the wholesale carrier and a third-party retail carrier. The court concluded that Sprint is entitled to receive from SENTCO reciprocal compensation, on behalf of both itself and TWC, for the transport and termination of calls placed by SENTCOs customers to TWCs customers that traverse Sprints network.

For additional information, see Charles D. Ferris and Frank W. Lloyd, *Telecommunications Regulation: Cable, Broadcasting, Satellite, and the Internet*; and the *Telecommunications Law* page.

[Return to Text](#)

n1 . An ILEC is the local exchange carrier that was in existence and providing local exchange service to a given area on the effective date of the Act, February 8, 1996. *See 47 U.S.C. § 251(h)*.

n2

[2]. Telecommunications service means the offering of telecommunications for a fee directly to the public, or to such class of users as to be effectively available to the public, regardless of the facilities used. *47 U.S.C.A. § 153 (46)*. Telecommunications means the transmission, between or among points specified by the user, of information of the users choosing, without change in the form or content of the information sent and received. *47 U.S.C.A. § 153(43)*.

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20 of 33 DOCUMENTS

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John M. Garvey on Telecom Exclusivity Order

2008 Emerging Issues 2342

John M. Garvey, Esq. on In The Matter Of Promotion of Competitive Networks in Local Telecommunications Markets, Report and Order, WT Docket No. 99-217 (March 19, 2008)

By John M. Garvey

June 2, 2008

SUMMARY: In this commentary, John M. Garvey examines the FCC's decision in the Telecom Exclusivity Order, 2008 FCC LEXIS 2503 (F.C.C. Mar. 19, 2008), which extends a number of recent decisions affecting multiple tenant environments (MTEs) and, in the cable context, multiple dwelling units (MDUs) in anticipation of full-scale competition between cable and telecom providers for triple play bundled services.

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ARTICLE: FCC Bans Telephone Exclusivity Contracts in Apartment Buildings and Other Multiple Dwelling Units

In its effort to create regulatory parity among telecom and cable providers, the Federal Communications Commission (FCC) banned most exclusive access arrangements between telecommunications providers and property owners of residential multiple tenant environments (MTEs). The FCC's decision in the *Telecom Exclusivity Order, 2008 FCC LEXIS 2503* (F.C.C. Mar. 19, 2008) extends a number of recent decisions affecting MTEs and, in the cable context, multiple dwelling units (MDUs) in anticipation of full-scale competition between cable and telecom providers for triple play bundled services. Most recently, the FCC prohibited both the execution of new exclusivity clauses, in addition to the enforcement of existing ones, by cable providers providing video services in MDUs. *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-189, 22 FCC Rcd 20235* (F.C.C. 2007) (*Cable Exclusivity Order*).

The Commission had already banned telecom exclusivity clauses in commercial MTEs in 2001, although existing clauses were unaffected. In that proceeding, the FCC refused to ban such arrangements in residential MTEs because of an inconclusive record and certain commenters noting that potential revenue streams from any one building are typically not enough to attract competitive entry without exclusive contracts. See *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, Fourth Report and

Order and Memorandum Opinion and Order in *CC Docket No. 88-57, 15 FCC Rcd 22983, 23052-53*, paras. 160-64 (2000). The FCC explicitly rejected this concern in the *Telecom Exclusivity Order*, noting that telecom carriers are now providing bundled services through its infrastructure and therefore potentially enjoy more than one revenue stream.

In prohibiting residential exclusive access arrangements and the enforcement of existing ones, the FCC found in the *Telecom Exclusivity Order* that such contracts were unjust and unreasonable practices and therefore in violation of Section 201 of the Communications Act of 1934. Section 201 requires the Commission to ensure just and reasonable rates by regulating charges, practices, classifications, and regulations for and in connection with [interstate or foreign] communication service. *47 U.S.C. § 201(b)*. The FCC noted that contractual terms granting telecommunications companies sole access to MTEs are harmful to competition by creating a barrier to entry for competitive telecom providers. The Commission also explained that the prohibition of exclusive arrangements will not only advance the local competition goals of the Telecommunications Act of 1996 (the 1996 Act), but also encourage the deployment of broadband pursuant to Section 706. *104 P.L. 104, 110 Stat. 56 (1996)*. Section 706 mandates that the Commission encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.

Other Preferential Treatment Unaffected. As was the case in the *Cable Exclusivity Order* -- and potentially a large loophole in FCC policy -- the *Telecom Exclusivity Order, 2008 FCC LEXIS 2503* (F.C.C. Mar. 19, 2008) does not address other arrangements that give a preference to a particular carrier but do not effectively restrict the premises owner from permitting other providers access. Exclusive marketing arrangements, for example, between MTE owners and telecom providers prevent to varying degrees a competitor from marketing its services to the MTE units, thus making it difficult to acquire customers. Wire exclusivity clauses, which prohibit competitors from using existing wires in the MTE, are also unaffected. Nor does the *Telephone Exclusivity Order* deny an MTE owners right under certain state law to prevent a particular provider access to its property. These practices can be significant *de facto* impediments to competitors gaining access to MTEs and competing with incumbents, although in many cases the building owner has economic incentives to allow competitors access to the building and its conduit under reasonable terms.

Intermodal Competition. In its decision to ban telecom exclusivity arrangements, the FCC relied significantly on the argument that bundled service offerings enhance the importance of regulatory parity and is particularly compelling in our determination to remove this impediment to fair competition. Such was the rationale in the *Cable Exclusivity Order*, where a number of commenters noted that incumbent cable providers were attempting to lock-up MDUs as a result of telephone companies accelerating their deployment of fiber-based infrastructure in order to provide bundled services. The FCC cited comments indicating that cable companies were trying to lock-up buildings using exclusivity clauses in anticipation of the telephone companies providing video services in the near future. For example, AT&T commented: [E]fforts to lock-up MDUs have occurred in California, Texas, and virtually every market where AT&T has begun to enter the video service market[and those efforts are] plainly intended to block competition and . . . not designed to address aesthetics or congestion in a MDUs common areas. Verizon noted that it has similarly encountered these agreements in rolling out its FiOS service, which have prevented it from providing cable services to significant numbers of residents...totaling tens of thousands of units in five separate states.

Similarly, the Commission noted in the *Telecom Exclusivity Order* that [t]he record before us leaves no doubt of the existence of exclusive arrangements for the provision of telecommunications services. These arrangements have the same harmful effects on the provision of triple play services and broadband deployment as discussed in the Video [Exclusivity] Order, and pose just as much of a barrier to competition where they are attached to the provision of telecommunications services as they are to the provision of video services. Such provisions can prohibit or economically discourage consumers from seeking alternative service providers for telecommunications services, thereby limiting consumer choice and competition. This not only could adversely affect consumers rates, but also quality, innovation, and network redundancy. While the record in the *Telecom Exclusivity Order* was less persuasive on this issue, the Commission noted that Qwest claims it is encountering residential MTEs where it is prevented from selling its voice services, and a survey entered into the record indicated that two percent of building owners have at least one exclusive access agreement.

For additional information, see Charles D. Ferris and Frank W. Lloyd, Tele-communications Regulation: Cable, Broadcasting, Satellite, and the Internet; and the Telecommunications Law page.

[Return to Text](#)

n1 . The ban on exclusive arrangements does not extend to hotels or similar establishments. The FCC noted in the *Telecom Exclusivity Order, 2008 FCC LEXIS 2503* (F.C.C. Mar. 19, 2008) that guests in hotels or similar establishments tend to be transient users, for whom such a prohibition likely would not bring the same competitive benefits. In contrast, the FCC in the *Cable Exclusivity Order* explicitly carved out a larger universe of MDUs falling outside the exclusivity ban, including time share units, academic campuses and dormitories, military bases, hotels, rooming houses, jails, prisons, halfway houses, hospitals, nursing and other assisted living places, and other group quarters characterized by institutional living, high transience and, in some cases, a high need for security. These institutions, according to the FCC, do not have most of the key defining attributes of MDUs that we have just described, including voluntary long-term residency and significant control by the resident over uses of the private dwelling space.

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21 of 33 DOCUMENTS

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John M. Garvey on Linkline Communications v. Pacific Bell

2008 Emerging Issues 2232

John M. Garvey, Esq. on Linkline Communications, Inc. et al. v. Pacific Bell Telephone Company et al., 503 F.3d 876; 2007 U.S. App. LEXIS 21719 (September 11, 2007)

By John M. Garvey

April 28, 2008

SUMMARY: In this Emerging Issues Analysis, John M. Garvey analyzes the decision in this case, which is likely to shape the parameters of the landmark U.S. Supreme Court decision in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*. The U.S. Court of Appeals for the Ninth Circuit in San Francisco held in a 2-1 decision that an antitrust price squeeze claim against the Pacific Bell unit of SBC survives *Trinko*.

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ARTICLE: Federal Appellate Court Preserves Antitrust Option in Telecom Suits; U.S. Supreme Court Asks for Solicitor Generals View

Background. In a case likely to shape the parameters of the landmark U.S. Supreme Court decision in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004) (*Trinko*), the U.S. Court of Appeals for the Ninth Circuit in San Francisco held in a 2-1 decision that an antitrust price squeeze claim against the Pacific Bell unit of SBC (now AT&T) (SBC Entities) survives *Trinko*. In *Trinko*, the U.S. Supreme Court significantly limited the applicability of antitrust law in the local telecommunications industry. In *Linkline Communications, Inc. et al. v. Pacific Bell Telephone Company et al.*, 503 F.3d 876, 2007 U.S. App. LEXIS 21719 (September 11, 2007) (*Pacific Bell*), Internet Service Providers (ISPs) argued to the Ninth Circuit that the SBC Entities created, *inter alia*, a price squeeze by charging the ISPs a high wholesale price for digital subscriber line (DSL) inputs in relation to what the SBC Entities were charging retail DSL customers, and intentionally interfered with DSL wholesale orders in order to disrupt the ISPs retail service. Under antitrust theory, a vertically integrated company like SBC creates a price squeeze when its rates in the upstream market (e.g., wholesale) are so high that its customers are competitively disadvantaged in the downstream market (e.g., retail).

Ruling in favor of the ISPs in a motion for judgment on the pleadings by the SBC Entities, the Ninth Circuit distinguished *Trinko* by citing Justice Scalia's majority opinion: One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny. Where, by contrast, [t]here is nothing built into the regulatory scheme which performances the antitrust function, *Silver v. New York Stock Exchange*, 373 U.S. 341, 358, 83 S. Ct.

1246, 10 L. Ed. 2d 389 (1963), the benefits of antitrust are worth its sometimes considerable disadvantages. Because the DSL retail market is mostly unregulated, the Ninth Circuit in *Pacific Bell* concluded that any safeguards at the retail level derive primarily from antitrust laws. While the court noted that it was unclear whether the ISPs based its price squeezing claim on wholesale or retail pricing, or both, it held that the ISPs could nevertheless prove facts, consistent with its complaint, that solely involves behavior at the retail level. Consequently, the Ninth Circuit refused to dismiss the suit.

Trinko Distinguished. By contrast, the Supreme Court held in the landmark *Trinko* decision that Verizon's refusal-to-deal at the *wholesale* level by not providing a statutorily required unbundled network element (UNE) to competitors on certain terms did not state a claim under the Sherman Antitrust Act because, *inter alia*, the highly regulated nature of wholesale telecommunications service made such judicial enforcement of antitrust laws unnecessary. The court explained in *Trinko* that pervasive federal and state regulation of the telecommunications industry via the Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.* (1996 Act), for example, likely minimizes the additional benefit of antitrust enforcement. Further, the Supreme Court noted the substantial costs that may result from the application of antitrust law, and the highly technical nature of telecommunication regulation that renders the court poor implementers of antitrust decisions. Importantly, as the Ninth Circuit made clear in *Pacific Bell*, the Supreme Court in *Trinko* did not preclude judicial enforcement of antitrust laws in the presence of regulatory oversight but merely noted that regulatory structure is of particular importance in evaluating an antitrust claim.

Retail vs. Wholesale Distinction. While the two cases are superficially similar, a variant of the issue addressed in *Trinko* was in front of the Ninth Circuit in *Pacific Bell* whether the same reasoning in *Trinko* applied to a price squeezing claim applicable to *retail* DSL service. As the Ninth Circuit explained, *Pacific Bell* addresses whether *Trinko* bars a plaintiff from claiming a violation of § 2 of the Sherman Antitrust Act by virtue of an alleged price squeeze perpetrated by a competitor who also serves as the plaintiff's supplier at the wholesale level, but who has no duty to deal with the plaintiff absent statutory compulsion. Ruling in favor of the ISP plaintiffs, the Ninth Circuit distinguished *Trinko* by noting that there is no comparable regulatory framework applicable to the retail DSL market as there is for wholesale UNEs. Because the DSL retail market is mostly unregulated, the Ninth Circuit concluded that any regulation of pricing at the retail level derive primarily from antitrust laws and not regulation by administrative agencies.

At issue in *Trinko* was the provisioning of operations support services (OSS), a wholesale UNE under the 1996 Act and a component of the Computer Inquiries regulations from the 1934 Act. In distinguishing *Trinko*, the Ninth Circuit emphasized the highly regulated nature of OSS. At the wholesale level, a slew of regulatory mechanisms and agencies ensures competitors are not disadvantaged. These derive from the 1996 Act, the Communications Act of 1934 (1934 Act), and the set of FCC decisions called the Computer Inquiries which instituted, *inter alia*, nondiscrimination rules for established carriers providing data services. The court also noted the various forums for enforcement complaints: the 1934 Act charged the FCC with enforcing these regulations and, in some cases, parties can also bring complaints before state public utility commissions. Aggrieved parties can either file a complaint in federal district court or before the Commission. 47 U.S.C. § 207. The FCC may also initiate its own enforcement proceedings and craft remedies as it deems appropriate. 47 U.S.C. § 205. The Ninth Circuit reinforced this point by noting that the Federal Communications Commission already had signed a consent decree with Verizon and the New York Public Services Commission had already issued a series of orders by the time the U.S. Supreme Court ruled in *Trinko*. The court added: Where the regulatory agencies have failed to prevent or remedy anticompetitive conduct, the balance may tilt in favor of judicial intervention.

Procedural History. The ISPs filed the original complaint on July 24, 2003, centering on three different categories of conduct: refusal to deal, denial of access to an essential facility, and price squeezing. The district court ruled that the refusal to deal and denial of access claims are barred by *Trinko*. The court nevertheless ordered the ISPs to file an amended complaint supporting the price squeezing allegations. In response, the SBC Entities filed various motions challenging, *inter alia*, the price squeeze allegations as being barred by *Trinko*. The district court denied the motion to

dismiss for failure to state a claim. At the request of the SBC Entities, the district court certified the order for interlocutory appeal which the Ninth Circuit granted.

Supreme Court Seeks Input. The U.S. Courts of Appeals for the District of Columbia and Eleventh Circuits each have conflicting opinions on the issue addressed in *Pacific Bell*. See *Covad Communications Co. v. Bellsouth Corp.*, 374 F.3d 1044 (11th Cir. 2004); *Covad Communs. Co. v. Bell Atl. Corp.*, 398 F.3d 666 (D.C. Cir. 2005). Consequently, in a move that may foreshadow a grant of certiorari, the U.S. Supreme Court has recently asked the U.S. Solicitor General for the governments view on the issue. *Pac. Bell Teleph v. Linkline Communs.*, 2008 U.S. LEXIS 1177 (Jan. 22, 2008).

For additional information, see Charles D. Ferris and Frank W. Lloyd, Telecommunications Regulation: Cable, Broadcasting, Satellite, and the Internet; and the Telecommunications Law page.

[Return to Text](#)

n1 . In addition to the retail market for DSL, its wholesale market is also now mostly unregulated. See *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 F.C.C.R. 14853 (2005). Note that the deregulation of the DSL wholesale market occurred during the litigation of *Pacific Bell*, although the Ninth Circuit noted that it had no implications on its holding.

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22 of 33 DOCUMENTS

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John M. Garvey on In the Matter of Universal Service Contribution Methodology

2008 Emerging Issues 2208

John M. Garvey, Esq. on In the Matter of Universal Service Contribution Methodology, Declaratory Order, 2008 FCC LEXIS 832 (December 26, 2007)

By John M. Garvey

April 25, 2008

SUMMARY: John M. Garvey looks at the FCC's response to the wireless industries' push for clarification on universal service contribution obligations for wireless carriers. In this order, the FCC addresses reporting requirements for any USF contributor that permissibly uses a traffic study to report USF revenues. The FCC included both wireless and VoIP providers.

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ARTICLE: Cite as: Garvey, John M. FCC Clarifies Wireless and VoIP Universal Service Obligations for Toll Calls. LexisNexis Expert Commentary, (*Insert date you accessed the document online*).

Section 254(b) of the Telecommunications Act of 1996, Pub. L. No. 104-104, *110 Stat. 56 (1996)* (1996 Act) requires every telecommunications carrier that provides interstate telecommunications services to contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. In implementing this provision, the Federal Communications Commission (FCC or Commission) determined that universal service fund (USF) contributions be based on end-user interstate and international telecommunications revenues. *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order*, *12 FCC Rcd 8776, 880103*, paras. 4651 (FCC 1997). n1 The FCC's methodology for determining USF contribution requirements therefore requires that a telecommunication carrier distinguish between its interstate and intrastate revenues.

The process of carving out interstate revenues from total revenues is simpler for landline, circuit-switched telecommunications carriers than for wireless carriers, who often use unlimited calling plans to attract customers. In response to wireless carriers concerns about the difficulties of tabulating separately its interstate and intrastate revenues, the FCC has permitted these carriers to use alternative methods in reporting revenues for universal service purposes. *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, *13 FCC Rcd 21252, 21258*, para. 11 (FCC 1998). Wireless carriers can choose to use actual revenues, a safe harbor or default percentage, or a proxy traffic study instead of tracking actual interstate revenues. The FCC also extended these alternative methods of calculating interstate and international revenues to interconnected Voice over Internet Protocol (VoIP) carriers, who were required by the FCC in 2006 to contribute to

USF. VoIP has many of the characteristics of wireless service in so far that interstate and intrastate boundaries are less meaningful, and therefore distinguishing between those revenues is a difficult process.

As wireless carriers continues to develop pricing plans that are incongruent with the concept of interstate and intrastate boundaries, the industry continues to push the FCC to clarify its rules on universal service contribution obligations for wireless carriers. In 2006, CTIA-The Wireless Association and Cingular Wireless, LLC (now AT&T Mobility, LLC) filed petitions with the FCC seeking clarification of the definition of toll services in determining USF contributions. Toll services for wireline carriers are generally those that allow customers to communicate outside of their local exchange calling areas. Such calls may or may not traverse state boundaries. For some wireless providers, the concept of toll service is problematic since many wireless plans include unlimited calling -- where the concept of local exchanges and state boundaries is irrelevant. The CTIA also requested that the FCC clarify how toll service revenues should be distributed among the intrastate, interstate, and international categories -- and consequently what toll revenues are subject to USF contribution obligations.

Although the 2006 wireless carriers petitions address wireless services only, the FCC included both wireless and VoIP providers in its *USF Declaratory Order* addressing the petitions since VoIP carriers are also allowed to utilize proxy traffic studies in order to estimate interstate and international revenues. Therefore, the FCC noted in the *USF Declaratory Ruling, 23 FCC Rcd 1411 (FCC 2008)*: [a]lthough the CTIA Petition only seeks a declaratory order in the wireless context, because both wireless and interconnected VoIP providers may utilize a traffic study or studies to report interstate and international revenues, we address in this Order the Commissions reporting requirements for any [USF] contributor that permissibly uses a traffic study to report USF revenues.

USF Declaratory Order. In *In re Universal Serv. Contribution Methodology, 23 FCC Rcd 1411, 1416 (FCC 2008)*, the FCC clarified that the previously used definition of toll services in past orders is the applicable definition that carriers must use to determine its obligations to contribute to the USF under applicable law. That definition states that [t]oll services are telecommunications services that enable customers to communicate outside of their local exchange calling areas. While the term local exchange is more relevant to the wireline world of telecommunications than to the wireless space, the FCC nevertheless noted that for wireless providers the definition refers to the customers plan-defined home calling area. The FCC explained: And although wireless service is not typically described in terms of local exchange areas, we note that wireless providers have long crafted calling plans for consumers that feature a separate charge for calls made outside of a plan-defined home calling area. In this respect, providers have demonstrated that their billing systems can and do segregate and separately track revenues associated with calls that fall outside of a subscribers plan, in terms of minutes used (overages), calls originating outside of the plan-defined home calling area (roaming), and calls placed to points outside of the plan-defined home calling area (toll).

The FCC concluded that *toll services* can be defined for wireless carriers as telecommunications services, regardless of how provisioned, that enable the customer to call points outside the customers plan-defined home calling area for an additional charge. In light of that definition, the FCC added that wireless providers must report toll service revenue to the extent they charge additional fees beyond the airtime charges for calls to points outside the plan-defined home calling area. For nationwide, fixed-price calling plans, toll service revenues are additional fees on calls outside the plan-defined home calling area -- which would likely be only international calls. For regional or local plan-defined home calling areas, additional fees for calls made to points outside the plan-defined home calling area would be considered toll revenues. Further, the FCC required that revenue from additional airtime, roaming, and overage charges, while not toll revenue, must be divided between the interstate and intrastate jurisdictions.

Traffic Studies. Revenues associated with toll services, the FCC explained, are sufficiently identifiable since the carrier needs to generate a bill for the customer that may include separate charges for calls made outside the

plan-defined home calling area. But the Commission acknowledged that the billing information alone may not in all cases be sufficient to determine whether the call and associated revenue is interstate/international or intrastate for purposes of billing a customer due to limitations of a providers billing system, attributes of a consumers calling plan, or for other reasons. Therefore, the FCC noted, the availability of traffic studies for use in revenue reporting is a necessary component of determining the correct percentage of revenue allocated to the interstate jurisdiction. The traffic studies, however, may be underreporting toll service revenues since carriers have incentives to design traffic studies so as to minimize their interstate and international end-user revenues. Unlike monthly charges associated with calling plans and associated usage, the revenue associated with toll service is predominantly a result of domestic long distance and international calling and is often much higher than the per-minute revenue associated with a plans bucket minutes.

In order to better tabulate toll service revenue, the FCC gave guidance to carriers using traffic studies to estimate toll revenues. The Commission noted, for example, that carriers may conduct one traffic study focusing on toll calls to allocate toll service revenue and a separate study of all calls to allocate all other telecommunications revenues. Conducting two studies should more accurately approximate actual revenues than a single study that includes all telecommunications revenues. Alternatively, [carriers] may be able to design a single traffic study that adequately accounts for toll service revenue by properly weighting such traffic. Irrespective of what method is chosen, the FCC noted: toll service traffic must be identified and treated in a manner that recognizes that such traffic is more likely to be interstate or international than intrastate. Moreover, appropriate weighting of the higher revenue that is often associated with toll service must be reflected in the traffic study or studies.

For additional information, see Charles D. Ferris and Frank W. Lloyd, *Telecommunications Regulation: Cable, Broadcasting, Satellite, and the Internet*; and the *Telecommunications Law* page.

[Return to Text](#)

n1 . In order to enforce these rules, the FCC requires carriers to report on a quarterly and yearly basis their end user telecommunications revenues on FCC Form 499-Q and Form 499-A. See 47 C.F.R. § 54.711(a).

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23 of 33 DOCUMENTS

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Garvey on Affordable Telecom v. Texas PUC

2008 Emerging Issues 2204

John M. Garvey, Esq. on Affordable Telecom v. Texas PUC et al., 2008 U.S. App. LEXIS 919 (5th Cir. 2008)

By John M. Garvey

April 24, 2008

SUMMARY: In this Expert Commentary, John M. Garvey discusses the arguments that the TPUC made when it ruled that Affordable Telecom violated its interconnection agreement with AT&T by providing information services to its paging customers and the court's ruling in this case.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Cite as: Garvey, John M. *Affordable Telecom v. Texas PUC et al.*. LexisNexis Expert Commentary, (*Insert date you accessed the document online*).

Fifth Circuit Precludes Paging Company from Using Interconnection Facilities for Internet Access

Introduction. The Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, *110 Stat. 56 (1996)*, allows competing carriers to interconnect with local exchange carriers (LECs) in order to exchange traffic. The 1996 Act also requires carriers whose customer originates a call to pay termination and transport charges if that call terminates on another carriers network. Commercial mobile radio service (CMRS) providers may also interconnect with LECs and receive termination charges for calls that originate from a LEC and terminate on its network. *See 47 C.F.R. § 51.701(c) & (e); 47 C.F.R. § 51.701(e)*. For a subset CMRS provider -- one-way paging and other services that do not originate traffic -- LECs are precluded from charging for interconnection.

In an unpublished opinion, the U.S. Court of Appeals for the Fifth Circuit in New Orleans recently addressed the issue of what type of traffic a paging carrier can provide through its no-cost interconnection agreement with LECs. In *Affordable Telecom*, the Fifth Circuit affirmed a lower court ruling upholding a Texas Public Utilities Commission (TPUC) decision that Affordable Telecom violated its interconnection agreement with AT&T by providing information services to its paging customers. Affordable had argued that Federal Communications Commission (FCC) rules allow customers of paging carriers to access information services, n1 but the TPUC noted that the FCC rules allow only incidental data transmittal in situations where the telecommunications carrier is also providing telecommunications services through the same arrangement.

According to the TPUC, Affordable had roughly 5,000 Internet access customers and only 200300 paging customers. The TPUC therefore concluded that most of the traffic Affordable was transmitting over its interconnection

facilities with AT&T was internet service provider (ISP) traffic. According to the Fifth Circuit, the TPUC held that Affordables Internet traffic was barred by the [interconnection agreement] and FCC paging rules, and that such use deprived AT&T of compensation to which it was entitled.

TPUC Arbitration. The primary issue in the TPUC arbitration was whether Affordable could provide other services besides paging and still avoid payment for the interconnection facilities it utilized through its agreement with AT&T. 47 C.F.R. § 51.100(b) states: A telecommunications carrier that has interconnected or gained access under Sections 251(a)(1), 251(c)(2), 251(c)(3) of the Act, may offer information services through the same arrangement, so long as it is offering telecommunications services *through* the same arrangement as well [emphasis added]. The TPUC held that because Affordable merely transmits radio signals over its facilities in order to activate pagers, it does not offer a telecommunications service n2 through its interconnection facilities with AT&T. The TPUC concluded, therefore, that Affordable is prohibited from receiving any traffic other than paging traffic through its interconnection arrangement with AT&T.

Fifth Circuit Confirms TPUC. n3 The main issue in front of the Fifth Circuit was whether the TPUC interpreted § 51.100(b) too narrowly. As discussed above, the TPUC argued that § 51.100(b) only permits telecommunications carriers to offer information services through the same interconnection arrangement. According to the TPUC, Affordables one-way paging service involves merely receiving information, rather than providing a telecommunications service. Therefore, under its interconnection agreement with AT&T, it cannot provide information services since it is not also providing telecommunications services through the same arrangement. Consequently, Affordables CMRS licenses permit it to provide paging services only, and to interconnect with and use AT&Ts facilities for the sole purpose of providing one-way paging service.

Affordable argued that its wireless licenses to provide paging services should be broadly interpreted to allow it to provide a host of services through its interconnection agreement. Affordable contended that the TPUC misinterpreted the phrase through the same arrangement from § 51.100(b). As explained by the Fifth Circuit, Affordable argued that the TPUC interpreted the word through to mean in one side and out the opposite, when in the context of § 51.100(b) the word actually means by the means and agency of. Therefore, according to Affordable, § 51.100(b) allows it to offer information services through its AT&T one-way paging interconnection agreement.

The Fifth Circuit rejected Affordables arguments, agreeing with the lower courts that one-way paging is not provided through an interconnection facility because the facility is merely transmitting a call from the customer initiating a page to the paging carrier. The lower court cited the TPUCs explanation: [§ 51.100(b)] does not just require that communications occur through the arrangement. If this were the standard, then all carriers would be able to offer information services through interconnection agreements, since the very purpose of an interconnection agreement is to transit communications. Rather, the carrier must offer telecommunication services through the arrangement. The Fifth Circuit also noted under Affordables interpretation of § 51.100(b), it would be able to provide information services without having to pay AT&T Texas anything for using its facilities. This is clearly contrary to FCC precedent, as the FCC has recognized that ISPs are end users of telecommunications services that are required to purchase LEC business lines.

For additional information, see Charles D. Ferris and Frank W. Lloyd, Telecommunications Regulation: Cable, Broadcasting, Satellite, and the Internet; and the Telecommunications Law page.

For additional information on ISP reciprocal compensation, see *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 F.C.C.R. 3689, 3690 P 4 (1999), vacated on other grounds, *Bell Atl. Tel. Co. v. FCC*, 340 U.S. App. D.C. 328, 206 F.3d 1 (D.C. Cir. 2000).

[Return to Text](#)

n1 . An *information service* is defined in the 1996 Act as the offering of the capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications. *47 U.S.C. § 153(20)*.

n2 . A *telecommunications service* is defined in the 1996 Act as the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used. *47 U.S.C. § 153(46)*. *Telecommunications* is likewise defined in the 1996 Act as the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received. *47 U.S.C. § 153(43)*.

n3 . Affordable initially appealed various issues to state court, but the case was removed to federal court based on federal question jurisdiction.

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24 of 33 DOCUMENTS

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John M. Garvey on Illinois Bell v. Illinois Commerce Commission

2008 Emerging Issues 2209

John M. Garvey, Esq. on Illinois Bell Telephone Co. v. Illinois Commerce Commission, et al., Case No. 05 C 1149, 2008 U.S. Dist. LEXIS 6326 (January 28, 2008)

By John M. Garvey

April 24, 2008

SUMMARY: In this Emerging Issues Analysis, John M. Garvey discusses the U.S. District Court for the Northern District of Illinois, Eastern Division ruling. The court examines whether a state statutory provision that requires the unbundling of certain UNEs without the impairment standard -- and therefore goes beyond what the FCC has required to be unbundled pursuant to Section 251 -- is preempted by or violates the Telecommunications Act of 1996.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: State Unbundling Requirements Preempted by the Telecommunications Act of 1996

Introduction. Section 251 of the Telecommunications Act of 1996 (the 1996 Act), 47 U.S.C. § 151 et seq., mandates that incumbent local exchange carriers (ILECs) provide unbundled access to its network elements (UNEs) at cost-based rates. Section 251(d) of the 1996 Act confines the Federal Communications Commissions (FCCs) discretion in implementing the unbundling requirement by, *inter alia*, requiring an *impairment analysis*--the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer. The FCC has used this statutory standard to increasingly restrict the availability of certain UNEs. For example, on February 4, 2005, the FCC issued the *Triennial Review Remand Order*, which limited, among other things, the unbundling of switching as a network element. *See Order on Remand, In the Matter of Unbundled Access to Network Elements, 20 F.C.C.R. 2533 (2005), aff'd Covad Communications Co. v. F.C.C., 371 U.S. App. D.C. 283, 450 F.3d 528 (D.C. Cir. 2006)*. The practical effect of these regulatory changes is a greater emphasis on facilitates-based competition in the local telecommunications space, rather than reliance on ILEC facilities in order for competitors to provide local telecommunications service.

Some states, though, have reacted to the FCCs limiting of UNE availability by instituting their own unbundling requirements. *Illinois Bell Tel. Co. v. Illinois Commerce Commission, 2008 U.S. Dist. LEXIS 6326 (D. Ill. 2008)*, for example, examines whether a state statutory provision that requires the unbundling of certain UNEs without the *impairment standard* -- and therefore goes beyond what the FCC has required to be unbundled pursuant to Section 251 -- is preempted by or violates the 1996 Act. The district courts affirmative answer to that question, and therefore its prohibition on the enforcement of certain provisions of the state statute, is somewhat anticlimactic since the same court had ruled on September 28, 2006, that much of the statute is preempted. *Ill. Bell Tel. Co. v. OConnell-Diaz, No. 2006*

U.S. Dist. LEXIS 70221 (N.D. Ill. Sept. 28, 2006). *Illinois Bell*, though, was the final nail in the coffin, and likely a strong warning to other state legislatures to stay away from local telecommunications policy that conflicts with the 1996 Act.

The Illinois Public Utilities Act. The offending provision in *Illinois Bell* is Section 13-801 of the Illinois Public Utilities Act (IPUA), 220 Ill. Comp. Stat. Ann. 5/13-801 (2006). The court had held in its September 28, 2006 order that many of the requirements from Section 13-801 were preempted by the 1996 Act, including unbundling of local circuit switching, optical loops and dedicated transport, dark fiber loops, entrance facilities, and feeder subloops. Various other requirements such as providing combination elements and splitters were also held invalid. These requirements had all been eliminated or restricted by the FCC in various orders previous to the September 28, 2006 decision because the *impairment standard* was, to varying degrees, not satisfied. Because the Illinois statute had no such impairment standard, access to these UNEs -- absent the September 28, 2006 decision -- would be unrestricted throughout Illinois. The court had refused to address the legality of an additional requirements found in Section 13-801 in its September 28, 2006 decision: unbundling of DS1 and DS3 loops, dedicated transport, and dark fiber transport. The district court explained that it was unable to determine the extent to which Illinois requirements regarding the unbundling of those network elements were incompatible with federal regulations. *Illinois Bell* subsequently addressed this final issue that was left unresolved from the September 28, 2006 order.

The UNEs required to be unbundled by the IPUA and the subset at issue in *Illinois Bell* have all been significantly restricted by the FCC. DS1 loops, for example, are not required to be unbundled in wire centers with at least 60,000 business lines and four fiber-based collocators. Similarly, DS3 loops are not required to be unbundled in wire centers with at least 38,000 business lines and four fiber-based collocators. Dedicated transport and dark fiber have also been restricted, particularly in high-density population centers. Moreover, the FCC has established quantity limits on the number of loops or transports a competitor can lease. For example, a competitor may obtain 12 unbundled DS3 dedicated transport circuits on each route where DS3 dedicated transport is available on an unbundled basis or ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis.

Illinois Bell. Arguing in support of the IPUA, Defendants, including the Illinois Commerce Commission, conceded that Section 251 of the 1996 Act prevents states from mandating unbundling at TELRIC rates where there is no impairment. However, they argued that Section 271 does allow states to require unbundling without an *impairment analysis* but with rates that are not necessarily TELRIC-based. Section 271 of the 1996 Act establishes a 14-point checklist that a Bell Operating Company (BOC) must satisfy in order to obtain approval to provide long distance service. Included in this list is the requirement that loops, switching, and transport be provided to competitors at just and reasonable rates whether there is impairment or not --similar to Section 13-801 of the IPUA, which has no impairment standard as well. Consequently, as the court explained, Defendants argue that since AT&T Illinois is a BOC that has obtained approval to enter the long distance market, and since § 271 requires AT&T Illinois to furnish unbundled access to [competitors] (albeit at non-TRILIC rates), then § 13-801 does not require AT&T Illinois to do any more than is already required by § 271. According to the defendants, the issue before the court is principally one of pricing protocols rather than preemption: unbundling is required either at TELRIC rates (if there is impairment) or just and reasonable rates (if there is no finding of impairment).

The court in *Illinois Bell* rejected the Defendants argument, holding that the plain language of Section 271 authorizes only the FCC to decide whether to grant Section 271 approval, and leaves the states with merely a consultative role. Moreover, the court explained, the right to set prices for the unbundled elements derives from the FCCs power to set just and reasonable rates. Thus, the authority to enforce obligatory unbundling by the ILECs and to set the rates of access to the unbundled network elements under § 271 inheres solely in the FCC and not to the state commissions. There is nothing in § 271 that grants the state commissions anything more than a consultative role. The court also noted that other district courts have examined a states role vis vis Section 271 and decidedly ruled in favor of federal preemption: Indeed, nine out of ten district courts (including this courts September 28th order) that have addressed the question of whether states may compel ILECs to adhere to § 271s requirements have found that they may

not; and the sole court to find otherwise was reversed on appeal. Furthermore, the majority of state commissions that have examined this question agree that states are preempted by the Act from enforcing § 271. Consequently, the court held that Section 13-801 impermissibly preempts the 1996 Act.

For additional information, see Charles D. Ferris and Frank W. Lloyd, Telecommunications Regulation: Cable, Broadcasting, Satellite, and the Internet; and the Telecommunications Law page.

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25 of 33 DOCUMENTS

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Garvey on Verizon v. Maine PUC

2008 Emerging Issues 2201

John M. Garvey, Esq. on Verizon New England, Inc. v. Maine Public Utilities Commission et al., 2007 U.S. App. Lexis 21349 (September 6, 2007).

By John M. Garvey

April 17, 2008

SUMMARY: Federal Appeals Court Prohibits States from Requiring Delisted UNEs. In another blow to states ability to influence local telecommunications policy, the U.S. Court of Appeals for the First Circuit held that the Maine and New Hampshire Public Utility Commissions are prohibited from using Section 271 of Telecommunications Act of 1996 to require Verizon to provide network elements to competitors at wholesale rates.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Federal Appeals Court Prohibits States from Requiring Delisted UNEs

In another blow to states ability to influence local telecommunications policy, the U.S. Court of Appeals for the First Circuit (First Circuit) held that the Maine and New Hampshire Public Utility Commissions (PUCs) are prohibited from using Section 271 of Telecommunications Act of 1996 (the 1996 Act), 47 U.S.C. § 151 et seq., to require Verizon to provide network elements to competitors at wholesale rates. *Verizon New England, Inc. v. Maine Public Utilities Commission et al.*, 2007 U.S. App. Lexis 21349 (September 6, 2007) (*Verizon New England*). Coupled with recent court decisions holding that a state statute requiring additional unbundling of network elements was preempted, *Verizon New England* is perhaps a strong warning to other states that implementing local telecommunications policy that is incongruent with the 1996 Act or Federal Communications Commission (FCC) decisions implementing the 1996 Act will likely not pass constitutional muster.

Verizon New England examined whether states can administratively shape local telecommunication policy by using Section 271 of the 1996 Act to add additional requirements not listed in the text of the statute. Section 271 requires carriers that are or were Bell Operating Companies (BOCs) to comply with various conditions in order to obtain permission to provide long distance service, including a delineated list of network elements that must be made available to competitors. The Federal Communications Commission (FCC) has interpreted Section 271 to require BOCs to provide those network elements to competitors at just and reasonable rates -- essentially market rates.

Sections 251252 of the 1996 Act, on the other hand, mandate that incumbent local exchange carriers (ILECs) -- a larger universe of carriers than those BOCs falling under Section 271 -- provide unbundled access to its network elements (UNEs) at cost-based rates, considerably lower than Section 271s just and reasonable rates. Moreover, Section

251(d) of the 1996 Act confines the FCCs discretion in implementing the UNE requirement by requiring an *impairment analysis* before unbundling is mandated (i.e., the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer). Section 271, in contrast, specifically lists the network elements required to be leased to competitors at just and reasonable rates and leaves no role for the FCC to conduct an impairment analysis or otherwise limit the network elements availability.

The FCC has used the impairment analysis under Section 251 to increasingly restrict the availability of certain UNEs. In reaction, some states have attempted to enact administrative or statutory provisions that ostensibly allow a greater role for state policy preferences. The courts have looked upon such attempts unfavorably. *Illinois Bell*, for example, examined whether a state statutory provision that requires the unbundling of certain UNEs without the *impairment analysis* -- and therefore goes beyond what the FCC has required to be unbundled pursuant to Section 251 -- is preempted by or violates the 1996 Act. *See Ill. Bell Tel. Co. v. OConnell-Diaz*, No. 05C1149, 2006 U.S. Dist. LEXIS 70221 (N.D. Ill. Sept. 28, 2006); *Illinois Bell Telephone Co. v. Illinois Commerce Commission, et al.*, No. 05C1149, 2008 U.S. Dist. LEXIS 6326 (January 28, 2008). The district court held in *Illinois Bell* that such provisions are preempted.

Verizon New England. Other states, instead of enacting statutes, have administratively attempted to shape local telecommunications policy by using Section 271 of the 1996 Act. The First Circuit addressed such an attempt in *Verizon New England*, where the Maine and New Hampshire Public Utility Commissions (PUCs) had both attempted to add additional unbundling obligations under Section 271 that conflicted with FCC decisions implementing Section 251 of the 1996 Act. Each case involved an application by Verizon under section 271 to enter the long-distance market. The PUCs agreed to recommend that the FCC approve Verizons application to provide long-distance service under Section 271, assuming Verizon agreed that it would file with the PUCs a tariff laying out its Section 251s UNE offerings. As the FCC gradually restricted the availability of certain UNEs under Section 251, and held that the higher just and reasonable pricing standard applied to Section 271 network element offerings, Verizon attempted to modify its tariff to reflect such changes.

Both PUCs instead ruled that Verizon was obligated to provide various UNEs that were already restricted under Section 251 -- and to do so at cost-based rates (i.e., the Section 251 standard) until the PUCs ordered otherwise. Verizon brought suit in the states respective federal district courts for injunctive relief, arguing that the PUC decisions conflicted with those promulgated by the FCC and therefore federal preemption under the Supremacy Clause of the U.S. Constitution is triggered. The New Hampshire district court ruled in favor of Verizon, while the Maine district court ruled in favor of the Maine PUC. The resulting appeals at the First Circuit, one by Verizon and the other by the New Hampshire PUC, were consolidated under *Verizon New England*.

Limited Role for States in Section 271. The First Circuit held that states have merely a consultative role in the Section 271 process, and therefore are prohibited from requiring additional UNEs and instituting pricing principles under the provision. The court explained that authority under section 271 is granted exclusively to the FCC. The FCC decides whether to grant section 271 approval; states have no more than a right to express views. 47 U.S.C. § 271(d)(3). The power to enforce the provision falls under the FCCs general powers, id. § 271(d)(6); and the right to set prices for the [network] elements flows from the FCCs power to set just and reasonable rates, id. §§ 201202. The First Circuit also referenced various cases holding that Section 271 is within the FCCs exclusive authority. *See Indiana Bell Telephone Co. v. Indiana Utility Regulatory Commission*, 359 F.3d 493 (7th Cir. 2004); *Southwestern Bell Tel., L.P. v. Mo. PSC*, 461 F. Supp. 2d 1055 (E.D. Mo. 2006). The court also noted that most of the state commissions that have spoken appear to disclaim power to determine section 271 elements or fix pricing principles.

Because there is little role for states in the Section 271 process, the court went on to address whether the PUCs could independently require additional UNEs and pricing principles pursuant to state law. The court noted that both policies the PUCs sought to adopt -- additional UNEs and cost-based pricing for Section 271 elements -- directly conflict with FCC orders implementing the 1996 Act. Regarding the additional UNEs, the court explained that the FCC has already delisted various UNEs under Section 251s impairment analysis. The PUCs policy of requiring already

delisted UNEs directly contradicts the FCC and therefore is preempted, according to the First Circuit. The other issue is whether the states can require cost-based rates for Section 271 elements. The court explained: the FCC orders provide carriers the authority to charge the potentially higher just and reasonable rates, in order to limit subsidization and to encourage investment by the competitors. To allow the states to require the lower TELRIC rates directly conflicts with, and undercuts, the FCC's orders. Under preemption principles the state orders must in this respect give way.

Voluntary Agreements. The First Circuit also rejected the contention that Verizon had agreed voluntarily with the PUCs to provide the delisted network elements and to use cost-based pricing principles. The court acknowledged that [a]rguably, the FCC did not explicitly forbid the [regional] BOCs from providing more elements than required or charging them lower prices and arguably legitimate, is a states refusal to support a section 271 application unless the [regional] BOC agreed to provide extra elements. Nevertheless, the court held that Verizon made no such commitments: Verizons commitments were merely representations made to obtain state support for a federal filing seeking federal approval under a federal statute.

Definition of Section 271 Elements. A final issue concerns the definition of various elements listed in Section 271. The Maine PUC held that the terms loops and transport from Section 271 include line sharing and dark fiber, whereas Verizon claims that those elements are separate and distinct from loops and transport and therefore not required by Section 271. The Court refused to rule on this issue because the statutory language, according to the courts, is uninformative and the FCC has yet to opine on the issue: The arguments are complicated and technical and, in the first instance, they are matters that ought to be resolved by the expert agency charged with administering section 271, namely, the FCC. Verizon offers statements from FCC orders that it reads as favoring its position, as well as other arguments; the competitors rely on other evidence. But these are hardly matters on which we should be reduced to reading tea leaves. Therefore, unless the parties come to an agreement, the court instructed the district court to refer the matter to the FCC or, alternatively, to stay the proceedings in order for the parties to seek a reference.

For additional information, see Charles D. Ferris and Frank W. Lloyd, *Telecommunications Regulation: Cable, Broadcasting, Satellite, and the Internet; and the Telecommunications Law* page.

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26 of 33 DOCUMENTS

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Garvey on Quick Communications V. Michigan Bell Telephone Company

2008 Emerging Issues 1965

Garvey on Quick Communications V. Michigan Bell Telephone Company

By John M. Garvey

February 28, 2008

SUMMARY: In this expert commentary, John Garvey looks at the Sixth Circuit decision in *Quick Communications, Inc V. Michigan Bell Telephone Company et al.*, 2008 U.S. App. LEXIS 3101 (6th Cir. 2008). Quick sought declaratory and injunctive relief, arguing that the Michigan Public Service Commission's requirement that price terms be immediately reflected in extant interconnections agreements violated the Telecommunications Act of 1996, the Sierra-Mobile doctrine, and the Contract Clause of the United States Constitution.

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ARTICLE: 6th Circuit Ruling Clarifies State Commissions Ability to Modify Pricing Terms in Interconnection Agreements

Introduction. The Telecommunications Act of 1996 (the 1996 Act), 47 U.S.C. § 151 et seq., mandates that incumbent local exchange carriers (ILECs) provide unbundled access to its network elements (UNEs) at cost-based rates. The rates, enshrined in interconnection agreements--a creature of the 1996 Act--negotiated by the ILEC and competitor, are established by state utility commissions through the use of the Total Service Long Run Incremental Cost (TELRIC) methodology. The TELRIC methodology is dependent on cost studies provided by the ILEC and reviewed by state commissions in usually lengthy proceedings. Once these rates are established and approved, they are then incorporated into extant interconnection agreements--which regulate the relationship between the two competitors by, *inter alia*, laying out the specific terms and conditions for a competitors access to UNEs. The issue at hand in the *6th Circuit Interconnection Decision* is how are these new rates incorporated into extant interconnection agreements--are they negotiated into the agreement pursuant to provisions in the contract or are they immediately incorporated without the opportunity for the parties to negotiate?

The significance of this decision derives from the regulatory lag in determining UNE rates, which can result in interconnection agreements having interim or arbitrated rates--which may or may not be lower than the new UNE rates. Are the new UNE rates incorporated *immediately* into the extant agreement, or do the parties reopen the contract for amendment pursuant to governing provisions within the existing contract--which would then include the possibility of no change in the rates if the parties so decide. Interconnection agreements almost always contain detailed regulatory change or change of law provisions that lay out the procedural and substantive perimeters of subsequent amendments to the contract as a result of changes in federal or state law or regulation. As a result, a state commission requiring

incorporation of new price terms by operation of law may violate those provisions in extant agreements, and therefore a host of significant issues arises concerning the violability of contracts.

The issue addressed in the *6th Circuit Interconnection Decision* is but one of many that proliferates with interconnection agreements, and generally reflects the quasi-governmental nature of these contracts. Since ILECs have inordinate bargaining power in negotiating access to its network, the terms and conditions of these agreements are highly specified by federal and state policy. For example, Sections 251 and 252 of the 1996 Act regulate the process of creating and modifying an interconnection agreement, and subjects them to state commission approval, Federal Communications Commission (FCC) review, and federal court jurisdiction. In rejecting a challenge to the Michigan Public Service Commissions requirement that price terms be immediately reflected in extant interconnections agreements, the 6th Circuit relied heavily on its explanation of the distinctions between interconnection agreements and regular contracts--with only the latter enjoying the traditional protections associated with contract law, such as the Contract Clause of the U.S. Constitution and the *Sierra-Mobile* doctrine. As the court pointed out in the *6th Circuit Interconnections Decision*, interconnection agreements are quasi-governmental agreements used to accomplish the goal of the [1996] Act by fostering competition in local telecommunications markets.

6th Circuit Interconnection Decision. The *6th Circuit Interconnection Decision* examined whether the Michigan Commission can require an existing interconnection agreement between Quick Communications, Inc. and AT&T be amended immediately upon determination of new UNE rates, rather than through negotiation by the contractual parties pursuant to terms of the existing contract. AT&T had filed an application with the Commission on August 30, 2002, seeking higher UNE rates. A year and half later, the Michigan Commission approved the higher rates, with certain modifications, and ordered Quick and AT&T to amend their interconnection agreement to conform with the new rates.

Quick sought declaratory and injunctive relief, arguing that the Michigan Commission violated the 1996 Act, the *Sierra-Mobile* doctrine, and the Contract Clause of the United States Constitution. Specifically, Quick argued that the 1996 Act precludes the Michigan Commission from overriding the interconnection agreements after promulgating new rates pursuant to statute. Quick contended that new TELRIC rates require renegotiation of its interconnection agreement with AT&T pursuant to the relevant provisions of the agreement, rather than having the rates be incorporated immediately upon decision by the Michigan Commission. The lower court granted summary judgment to the Michigan Commission on all of Quicks claims.

In rejecting Quicks argument that the Michigan Commission violated the 1996 Act, the 6th Circuit noted that the Michigan Commission can enforce state law regulations that differ from the terms of the interconnection agreement or provisions of the 1996 Act so long as the regulations do not interfere with the ability of new entrants to obtain services, or reduce or cut-off competition. The court noted: The FCC has ruled that states may set TELRIC-based prices in a consolidated proceeding, then replace the rates set in prior arbitrations, and apply the results of the consolidated proceeding in subsequent arbitrations The Act itself contains no language mandating a particular implementation procedure for rate revision. Nor does the Act contain any restraint on a state commissions authority to require parties to amend their interconnection agreement to incorporate new or revised pricing information.

Interconnection Agreements are Not Traditional Contracts. The 6th Circuits treatment of Quicks final two arguments are noteworthy for regulatory and contract attorneys because of its elaboration of the distinctions between traditional contracts and interconnection agreements. Quick argued that the Michigan Commissions requirement that the new UNE rates be immediately incorporated into extant interconnections agreements violated the *Sierra-Mobile Doctrine* and the Contracts Clause of the U.S. Constitution. The *Sierra-Mobile Doctrine* prohibits federal agencies from allowing regulated entities to abrogate private contracts by filing tariffs that alter the terms of those agreements. *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348, 76 S. Ct. 368, 100 L. Ed. 388 (1956); *United Gas Pipe line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 76 S. Ct. 373, 100 L. Ed. 373 (1956); *Bell Tel. Co. of Pennsylvania v. Federal Communications Commission*, 503 F.2d 1250 (3rd Cir. 1974). The 6th Circuit held that interconnection agreements are atypical contracts and the outgrowth of state and federal regulations. Consequently, the *Sierra-Mobile* doctrine is inapplicable: AT&T did not unilaterally do anything, let alone unilaterally abrogate the interconnection

agreement with Quick. Rather, the Commission ordered Quick and AT&T to amend their interconnection agreement pricing index to conform to the January 25 Order.

The 6th Circuit seemed to further take interconnection agreements out of the ambit of traditional contract law protections by holding that Article I, § 10 of the U.S. Constitution affords it no protection. The Contracts Clause provides: No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . Courts have required that in order to fall under the Contracts Clause umbrella, petitioners must demonstrate that a change in state law has substantially impaired a contractual relationship. *Mascio v. Public Emples. Retirement Sys.*, 160 F.3d 310, 313 (6th Cir. 1998). The 6th Circuit reiterated its belief that interconnection agreements are quasi-governmental agreements used to accomplish certain public policy goals. The implication of such reasoning seems to suggest that the contractual relationship element of the Contract Clause is not satisfied. The 6th Circuit also held that other elements of the Commerce Clause test were unsatisfied. The court noted that the Michigan Commission has the authority under the 1996 Act to approve the new UNE rates in order to advance the goal of local competition, and Quick was likewise required to abide by the new rates. Consequently, the Michigan Commissions requirement that Quick and AT&T incorporate those new rates immediately into their interconnection agreement was not a change in state law that operated as a substantial impairment to AT&T and Quicks contractual relationship, rather, the Commissions order merely enforced existing state and federal law.

For additional information, see Charles D. Ferris and Frank W. Lloyd, Telecommunications Regulation: Cable, Broadcasting, Satellite, and the Internet; and the Telecommunications Law page.

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27 of 33 DOCUMENTS

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Garvey on In Re Provision of Video Services

2008 Emerging Issues 1859

Garvey on In Re Provision of Video Services

By John M. Garvey

February 5, 2008

SUMMARY: John M. Garvey on In re Provision of Video Servs. in *Multiple Dwelling Units, 22 FCC Rcd 20235 (FCC 2007)*. In this Expert Commentary, John M. Garvey looks at the recent Cable Exclusivity Order, which banned most exclusive access arrangements between cable providers and property owners of multiple dwelling units (MDUs).

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: FCC Bans Cable Exclusivity Contracts in Apartment Buildings and Other Multiple Dwelling Units

Introduction. According to the Federal Communications Commissions (FCCs) most recent Cable Price Survey Report, the monthly price for basic-plus-expanded basic cable television service has increased by 93 percent over the past 10 years. In contrast, cable rates in areas where competition exists from telephone companies providing video services were 17 percent lower. The FCC cited these two figures in its recent *Cable Exclusivity Order*, which banned most exclusive access arrangements between cable providers and property owners of multiple dwelling units (MDUs)--where approximately 30 percent of the entire U.S. population lives. These arrangements were mostly between cable companies and MDU owners and prohibited wireline competitive video providers from providing service in these buildings. n1

Importantly for counsel representing tenants or competitive video providers, the *Cable Exclusivity Order* prohibits both the execution of new exclusivity clauses in addition to the enforcement of existing ones. In *In re Provision of Video Servs. in Multiple Dwelling Units, 22 FCC Rcd 20235, 20236 (FCC 2007)*, the Commission explained that contractual terms granting cable companies sole access to MDUs are harmful to competition by creating a barrier of entry for competitive video providers. Specifically, the FCC found that such clauses are proscribed by Section 628 of the Communications Act of 1934, as amended. Section 628 prohibits unfair methods of competition that hamper competitors from providing certain video services. According to the FCC, clauses that grant cable operators exclusive access to MDUs and other real estate developments fall within the scope of Section 628(b) because those clauses effectively prohibit new entrants into the video market from providing programming to consumers who live in MDUs and other real estate developments. Perhaps anticipating the likelihood of a legal appeal, particularly as it relates to the decision to ban exclusivity provisions in existing contracts, the FCC attempted to bolster the legal basis for its order by

also using its ancillary Title I and III statutory authority over cable providers to justify its decision.

Cable Companies Only. The *Cable Exclusivity Orders* focus on cable companies was due to the FCCs finding that most exclusivity contracts were negotiated by cable companies--and those numbers were growing as a result of telephone companies accelerating their deployment of fiber-based infrastructure in order to provide video services. n2 The FCC cited approvingly comments indicating that cable companies were trying to lock-up buildings using exclusivity clauses in anticipation of the telephone companies providing video services in the near future. For example, AT&T commented: [E]fforts to lock-up MDUs have occurred in California, Texas, and virtually every market where AT&T has begun to enter the video service market[and those efforts are] plainly intended to block competition and . . . not designed to address aesthetics or congestion in a MDUs common areas. Verizon has similarly encountered these agreements in rolling out its FiOS service, which have prevented it from providing cable services to significant numbers of residents...totaling tens of thousands of units in five separate states.

Other Provisions Unaffected. While the *Cable Exclusivity Order* is a substantial policy shift for the Commission, since it held just in 2003 that cable exclusivity provisions were lawful, it does not go far enough for some, including a few of the FCC Commissioners. The order prohibits clauses that serve as a bar to competitive video providers that seek to provision services to an MDU. Other provisions of access agreements between cable companies and MDU owners will remain enforceable, subject to the existence of a regulatory change clause or other similar provision in the access agreement. Exclusive marketing arrangements, for example, between MDU owners and video providers, are unaffected. Such arrangements to varying degrees prevent a competitor from marketing its services to the MDU units, thus making it difficult to acquire customers.

Wire exclusivity clauses, which prohibit competitors from using existing wires in the MDU, are also unaffected. Moreover, the FCCs decision does not prevent an MDU owner from negotiating a bulk discount for its residents. In this type of arrangement, the MDU owner contracts with the video company to provide service to all residents, and subsequently charges all residents for such services, whether utilized or not. Residents would therefore have to pay twice if service from a competitor was preferred. Nor does the *Cable Exclusivity Order* deny an MDU owners right under certain state law to prevent a particular provider the right to provide service to its property. n3

Notice of Proposed Rulemaking. The FCC coupled the *Cable Exclusivity Order* with a *Notice of Proposed Rulemaking (NOPR)* that will explore whether these other provisions in access agreements should be banned, as well as whether non-cable providers of video service such as satellite and private cable companies should also be prohibited from using exclusivity clauses. The FCC noted that various telephone companies have requested exclusivity clauses from MDUs, while adding that there was no evidence in the record indicating that providers of DBS n4 service use exclusivity clauses. Importantly, the *NOPR* indicated that a decision would be made on these, as well as other, issues within six months of the publication (presumably in the *Federal Register*) of the *Cable Exclusivity Order*. n5 FCC Commissioner Michael J. Copps noted his concern about this uneven playing field in the meantime, and obliquely warned other companies not to take advantage of this regulatory lag by attempting to use exclusivity contracts for their own benefit while cable companies are prevented from similarly taking advantage of these clauses.

Another topic of the *NOPR* will address the definition of MDU, and whether broadening its scope is appropriate. The *Cable Exclusivity Orders* definition of *MDU* includes apartment, cooperative, and condominium buildings, gated communities, mobile home parks, garden apartments, and other centrally managed residential real estate developments. The FCC explained that all of these are collections of private individual households with residents remaining for lengthy, indefinite periods of time, each in a dwelling space that is distinctly separate but shares some common spaces requiring central management. The FCC noted that facilities falling outside the definition, and therefore where exclusivity provisions by cable companies can still be enforced and executed, include time share units, academic campuses and dormitories, military bases, hotels, rooming houses, jails, prisons, halfway houses, hospitals, nursing and other assisted living places, and other group quarters characterized by institutional living, high transience and, in some cases, a high need for security. These institutions, according to the FCC, do not have most of the key defining attributes of MDUs that we have just described, including voluntary long-term residency and significant control by the resident

over uses of the private dwelling space.

Cable Industry Appeal. The National Cable and Telecommunications Association (NCTA) has appealed the Cable Exclusivity Order, asking the District of Columbia Circuit to review the entire order and stay the rule that invalidates exclusivity provisions in existing access agreements. The NCTA argues that the FCC was arbitrary and capricious and lacked the statutory authority to declare existing exclusivity provisions to be null and void.

For additional information, *see* Charles D. Ferris and Frank W. Lloyd, Telecommunications Regulation: Cable, Broadcasting, Satellite, and the Internet; and the Telecommunications Law page.

Return to Text

n1 . MDU residents could still install satellite dishes and receive Direct Broadcast Satellite (DBS) service in most areas, pursuant to extant FCC rules.

n2

[2]. The FCC also explained that confidentiality provisions in access agreements prevent many MDU owners from disclosing the existence of exclusivity contracts, and therefore the number of exclusivity clauses is probably understated.

n3

[3]. Approximately 15 states prohibit such exclusivity though, including New York, Illinois, Florida, and New Jersey.

n4

[4]. FCC rules generally prohibit MDU owners from restricting use of satellite dishes. *See 47 CFR 1.4000.*

n5

[5]. Providers of residential telecommunications services exclusivity arrangements in MDUs are the subject of a pending rulemaking proceeding. The FCC committed to rule on this issue within two months. Providers of commercial telecommunications services are already prohibited from using exclusivity provisions in MDUs.

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28 of 33 DOCUMENTS

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Garvey on Verizon Petition for Forbearance

2008 Emerging Issues 1858

Garvey on Verizon Petition for Forbearance

By John M. Garvey

February 1, 2008

SUMMARY: In this Expert Commentary, John M. Garvey looks at why the Federal Communications Commission denied Verizons request for forbearance because of Verizon's market share and the lack of evidence of facilities-based competition in switched access services for mass market consumers. Further, this commentary shows how the denial of forbearance is instructive for clarifying of the parameters for future forbearance requests, particularly as those requests relate to traditional telecommunication services.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: FCCs Rejection of Verizons Petition Illustrates Perimeters of Statutory Forbearance Analysis

Introduction. The Federal Communications Commission (FCC or Commission) has generally reacted favorably towards requests by local exchange carriers (LECs) for the Commission to forbear from enforcing various statutory and regulatory provisions, pursuant to section 10 of the Communications Act of 1934, as amended (the 1934 Act), particularly if the services at issues are broadband-related. The Commission has granted such relief to a number of carriers for services such as packet-based advanced telecommunications, Internet access, and, more rarely, switched access telecommunications. The latter service is the ability to originate and terminate long distance calls, and is the subject of the *Verizon Forbearance Order*. The Commission denied Verizons request because of its market share and the lack of evidence of facilities-based competition in switched access services for mass market consumers.

The FCCs decision in *In re Petitions of the Verizon Telephone Companies for Forbearance*, 22 FCC Rcd 21293 (2007) is instructive for its clarifying of the parameters for future forbearance requests, particularly as those requests relate to traditional telecommunication services--which the Commission has been more reluctant to grant *vis vis* broadband and advanced telecommunications services. The Commission had in the past granted forbearance for services similar to those at issue in the *Verizon Forbearance Order*, to Qwest Corporation in the Omaha Metropolitan Statistical Area (MSA) and to ACS of Anchorage in Alaska. See *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, *Memorandum Opinion and Order*, 20 FCC Rcd 19415 (FCC 2005) (*Quest Omaha Forbearance Order*); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and*

252(d)(1) in the Anchorage Study Area, WC Docket No. 05-281, *Memorandum Opinion and Order*, 22 FCC Rcd 1958, 1959-1960, paras 1-2 (FCC 2007) (*ACS Dominance Forbearance Order*). The Commission in these proceedings based its decision on evidence that, *inter alia*, the incumbent LEC had lost significant market share to facilities-based competitors, which had substantial deployment of facilities capable of serving the end-user locations in the wire center service areas for which forbearance was granted.

Verizon Forbearance Order. Section 10 of the 1934 Act allows the Commission to forbear from applying any of its provisions, or any of the FCC's regulations, if the Commission makes certain findings related to the competitiveness of the market and whether such forbearance is in the public interest and protects consumers. Specifically, the Commission is required to forbear if it determines that the regulation is not needed to protect consumers or to ensure just and reasonable rates. An additional provision requires the Commission to ensure that forbearance is in the public interest and will promote competitive markets. The FCC must respond to petitions for forbearance within one year (which can be extended for an additional 90 days).

Verizon sought forbearance relief from certain unbundling obligations pursuant to section 251 of the Telecommunications Act of 1996 (the 1996 Act), dominant carrier regulation of its mass market switched access services, and its *Computer III* obligations in the six MSAs that include Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach. Verizon claimed that competition in these six MSAs is even more substantial than competition in the Omaha MSA. Because of this competition by mostly facilities-based providers, Verizon argued, the regulations at issue are no longer required.

Section 251 of the 1996 Act imposes on incumbent LECs the duty to provide unbundled access to loops, various subloops, and back-office transport at cost-based rates. Dominant carrier regulations include, *inter alia*, transfer of control and discontinuance proscriptions, cost-supported tariffing, and rate regulation. *Computer III* regulations were promulgated pursuant to the FCC's Title I jurisdiction from the 1934 Act, and allows the Bell Operating Companies (BOCs) providing data services to choose between structural separation requirements or nonstructural safeguards. The *Computer II* obligations have for decades allowed competitors to access the incumbent LECs underlying telecommunication functionality in order to provide data-based services to end-users. The FCC has recently granted forbearance relief from various *Computer Inquiry* requirements for various residential and enterprise broadband services.

Lack of Competition. In rejecting Verizon's petition, the Commission noted that while a number of competitive LECs compete with Verizon for mass market customers in some of the six MSAs, many of these carriers piggyback on Verizon's network using unbundled network elements (UNEs) and other wholesale services. Competition that relies on Verizon's wholesale inputs is, according to the FCC, not a sufficient basis to grant forbearance. And competition from cable companies is problematic due to their minimal build-out outside the residential space. The FCC excluded voice over Internet Protocol (VOIP) services in its competitive analysis since, according to the FCC, there are no data in the record that justify finding that these providers offer close substitute services.

While cable operators are deploying a significant amount of infrastructure used for provisioning mass market service for residential customers in the six MSAs, the Commission noted that Verizon's market share is not less than 50 percent and it consequently does not face significant facilities-based competition, which is the standard used in past orders by the Commission. The FCC noted, we find it significant that in granting forbearance from dominant carrier regulation of mass market switched access services in the Qwest Omaha Forbearance Order, and ACS Dominance Forbearance Order, the Commission similarly emphasized the evidence of the competitive gains of facilities-based competitors, in conjunction with the incumbent LECs overall market shares, in its marketplace analysis. The Commission also added that it has not limited its analysis to market share alone in its competitive analysis, but also looks at factors such as elasticity of demand, supply substitutability, firm cost, resources and size.

Inadequacy of Verizon's Data. The Commission was highly critical of Verizon's data in support of its petition. One way that Verizon attempted to demonstrate competitiveness in the six MSAs was by calculating reductions in retail

lines. The Commission noted that the abandonment of a residential access line does not necessarily indicate capture of that customer by a competitor, but, for example, may indicate that the consumer converted a second line used for dial-up Internet access to an incumbent LEC broadband line for Internet access. The record in this proceeding also indicates that there are other possible reasons for such decrease. The Commission also rejected Verizons submittal of competitive fiber network maps because the data only cover a small proportion of Verizons territory and thus have little probative value. The Commission moreover rejected the lists of lit buildings submitted by Verizon since Verizon does not provide any comparative data for the number of buildings with demand for high-capacity services or lit buildings that Verizon serves, and the percentage of all commercial buildings that competitors light is extremely small on a relative basis only 0.25 percent in the 6 MSAs, with the highest percentage in Virginia Beach of only 1.9 percent.

For additional information, *see* Charles D. Ferris and Frank W. Lloyd, Telecommunications Regulation: Cable, Broadcasting, Satellite, and the Internet; and the Telecommunications Law page.

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29 of 33 DOCUMENTS

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Petition to Establish Procedural Requirements to Govern Proceeding Forbearance

2008 Emerging Issues 1816

Garvey on Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance

By John M. Garvey

January 24, 2008

SUMMARY: With Notice of Proposed Rulemaking, WC Docket No. 07-267, 2007 FCC LEXIS 9029 (November 27, 2007), the FCC considers revising its approach to forbearance procedures. In this commentary, John M. Garvey examines the issues regarding the forbearance procedures and criteria and looks at the NOPR.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: FCC Considers Revising its Approach to Forbearance Proceedings

Introduction. In recent years, the number of petitions from telecommunications carriers seeking forbearance from the Federal Communications Commission (FCC), pursuant to section 10 of the Communications Act of 1934, as amended (the 1934 Act), 47 USCS §§ 151 et seq., has increased significantly. Forbearance allows the Commission to waive certain statutory or regulatory provisions, thus allowing requesting carriers to avoid those proscriptions if the petition is successful. The FCC has generally reacted favorably towards forbearance requests for the provision of broadband services and other advanced telecommunication capabilities, granting waivers of specific regulatory requirements to most of the carriers requesting such relief.

However, the FCC has been relatively reluctant to grant forbearance on non-broadband services for extant Commission rules and the market-opening requirements of the Telecommunications Act of 1996 (the 1996 Act), Pub. L. No. 104-104, 110 Stat. 56--such as Section 271's market opening requirements, Section 251 interconnection requirements, and other public policy requirements such as 911. Nevertheless, the FCC's largely favorable stance towards forbearance requests as they relate to broadband and other advanced telecommunication capabilities has exposed the agency to criticism from various members of Congress who are concerned that forbearance is being used as an end-run around the legislative process.

One Year Limitation. Feeding this fire is the one year (plus 90-day extension) statutory deadline governing the FCC's response to such forbearance requests. Section 10(c) states that a forbearance petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one year after the Commission receives it, unless the one-year period is extended [for 90 days] by the Commission. Consequently, petitions may be deemed granted before a consensus among Commissioners is accomplished. This is precisely what occurred with Verizon's recent forbearance petition.

On December 20, 2004, Verizon asked the Commission to forbear from applying Title II of the 1934 Act and the Computer Inquiries to certain broadband services. A consensus among FCC Commissioners failed to develop on a *Memorandum Opinion and Order* that granted a significant degree of forbearance to Verizons packet services, such as ATM and Frame Relay. Two Commissioners, including the Chairman, were in favor and two opposed. On March 20, 2006, the FCC issued a news release announcing that by operation of law, the petition was deemed granted. Soon after, the Commissioners issued separate, and in some cases harsh, statements expressing their views on the forbearance petition and the procedural history that lead to the divided vote.

Forbearance Criteria. Section 10 of the 1934 Act allows the Commission to forbear from applying any of its provisions, or any of the FCCs regulations, if the Commission makes certain findings related to the competitiveness of the market and whether such forbearance is in the public interest and protects consumers. Specifically, the Commission is required to forbear if it determines that the regulation is not needed to protect consumers or to ensure just and reasonable rates. An additional provision requires the Commission to ensure that forbearance is in the public interest and will promote competitive markets. The FCC must respond to petitions for forbearance within one year (which can be extended for an additional 90 days).

Along with section 10, section 332(c)(1)(A) of the 1934 Act grants the FCC the authority to forbear from applying many of the provisions of Title II to commercial mobile radio service (CMRS) providers if certain criteria are satisfied, 47 U.S.C. § 332(c)(1)(A). The FCC must first determine that: (1) enforcement of the requirement is unnecessary to ensure that rates are just, reasonable, and non-discriminatory; (2) the requirement is not needed to protect consumers; and (3) forbearance is consistent with the public interest. As with Section 10, the Commission must consider whether the forbearance will promote competition among CMRS providers.

Forbearance NOPR. The *Notice of Proposed Rulemaking (NOPR)* addresses a petition filed on September 19, 2007, by Covad Communications Group, NuVox Communications, XO Communications, LLC, Cavalier Telephone Corp., and McLeod USA Telecommunications Services, Inc. These competitive telecommunications carriers asked the Commission to adopt certain procedural rules to govern the Commissions evaluation of forbearance requests. The NOPR seeks comment on those proposed changes, including whether (1) forbearance is the appropriate mechanism for modifications to FCC regulations; (2) the format and content of forbearance petitions should be standardized and modified; (3) certain rules should be modified to facilitate the participation of state commissions as well as other stakeholders; (4) the forbearance petitioner has the burden of proof; (5) Administrative Procedures Act notice and comment rules and time limits on *ex parte* filings should be adopted; and (6) new rules governing the scope and interpretation of protective orders in forbearance proceedings should be adopted.

The *Forbearance NOPR* also seeks comment on whether additional rules are needed for section 251 or section 271 forbearance petitions, including whether petitioners must provide supporting data at the wire center level, and whether states should be invited to report to the Commission on the potential effects of Sections 251 and 271 forbearance in their states. As previously indicated, the FCC has been heretofore cautious in granting forbearance requests on these market-opening provisions of the 1996 Act, although petitioners are perhaps concerned that such restraint may not be the *modus operandi* in the future.

The FCC also sought comment on more substantive effects of forbearance petitions: whether forbearance is being used for the purposes intended by Congress. Are there unintended consequences of forbearance, such as a focus on these petitions at the expense of other industry-wide proceedings? What are the burdens on stakeholders from forbearance proceedings, including administrative and financial costs? Are there additional burdens placed on stakeholders due to the fact that there is a statutory deadline on the completion of forbearance petitions? What are the effects of having a company-specific petition drive agency decisions, rather than the Commission deciding to take industry-wide actions?

Comments are due 30 days after publication in the Federal Register, and reply comments are due 60 days after publication.

For additional information, see Charles D. Ferris and Frank W. Lloyd, Telecommunications Regulation: Cable, Broadcasting, Satellite, and the Internet; and the Telecommunications Law page.

For past forbearance decisions by the FCC, see, e.g., *In re Petitions of At&T Inc. & BellSouth Corp. for Forbearance*, 22 FCC Rcd 18705, 2007 FCC LEXIS 7322 (FCC 2007); *Verizon Telephone Companies Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law*, WC Docket No. 04-440, News Release (rel. Mar. 20, 2006); *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*; *SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c)*; *Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*; *BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket Nos. 01-338, 03-235, 03-260, 04-48, *Memorandum Opinion and Order*, 19 FCC Rcd 21496 (FCC 2004), *affd*, *Earthlink, Inc. v. FCC*, 373 U.S. App. D.C. 202 (D.C. Cir. 2006); *Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services, Petition for Forbearance Under 47 U.S.C. Section 160(c) from Pricing Flexibility Rules for Fast Packet Services*, WC Docket No. 04-246, *Memorandum Opinion and Order*, 20 FCC Rcd 16840 (FCC 2005); *Petition for Forbearance Filed by the Verizon Telephone Companies with Respect to Their Broadband Services*, WC Docket No. 04-440, *Order*, 20 FCC Rcd 20037 (FCC 2005).

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30 of 33 DOCUMENTS

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Garvey on Petition of AT&T for Forbearance Under 47 USCS § 160

2008 Emerging Issues 1803

Garvey on Petition of AT&T for Forbearance Under 47 USCS § 160

By John M. Garvey

January 22, 2008

SUMMARY: In an expert commentary on Petition of AT&T Inc. for Forbearance Under *47 USCS § 160*, John M. Garvey discusses how the FCC addresses petitions filed by AT&T and Legacy BellSouth (collectively AT&T), and that the FCC agreed to partially forbear from applying various Title II and Computer Inquiry rules to certain packet services provided by AT&T, pursuant to section 10 of the Communications Act of 1934, as amended (1934 Act).

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Introduction. The FCC has over the years limited the regulatory requirements for various high-capacity telecommunications technologies that can be used as on/off ramps to the Internet or other data networks. For example, beginning in 2003 the Commission eliminated unbundling requirements for new fiber-to-the-home (FTTH) loops, broadband capabilities of existing FTTH loops, packet-switched capacities of hybrid loops, packet switching generally, fiber loops serving residential multiple dwelling units, and fiber-to-the-curb loops (FTTC). In addition, the FCC unified the deregulatory framework by which broadband Internet platforms such as cable modem service, wireline (i.e., telephone lines), power lines, and wireless technologies are subjected to. Understanding the wireline framework in particular--the background of which is necessary to appreciate the significance of the *AT&T Forbearance Order*--is crucial for counsel representing competitors and enterprise customers in negotiating service and access agreements for wireline service.

In the *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (FCC 2005)*, the Commission classified wireline broadband Internet access service an information service, and therefore outside the scope of common carrier regulation found in Title II of the Communications Act of 1934 (1934 Act), *47 USCS § 160*. This service includes two elements: the Internet access and the underlying telecommunications transmission component. The FCC deregulated both the Internet access service itself, along with the underlying telecommunications transmission component--which could include copper loops, hybrid loops, and FTTC or FTTH. These services are mostly marketed towards the residential and small business space. For technologies used by larger customers, such as Gigabit Ethernet, Asynchronous Transfer Mode (ATM), Frame Relay, and other high-capacity technologies (collectively packet services), the Commission explained that these services are telecommunications services under Title II of the 1934 Act. Consequently, packet services continued to be subject to the significant regulatory framework applicable to common carriers. In the *AT&T Forbearance Order*, AT&T asked the FCC to forbear from regulating its packet services.

Previous to the *AT&T Forbearance Order*, the Commission began eliminating various regulatory requirements for these packet services as well. The Commission granted waivers of specific regulatory requirements applicable to Verizon (2005), AT&T (2007), and Qwest (2007), allowing these carriers to provide certain high-capacity services that rely on packet technology at volume and term discounts. Moreover, a Verizon petition requesting that the Commission forbear from applying Title II of the 1934 Act and the Computer Inquiry rules to its packet services was granted by the FCC on March 19, 2006. AT&T sought relief similar to that granted Verizon, which is the subject of the *AT&T Forbearance Order*.

AT&T Forbearance Order. In addressing petitions filed by AT&T and Legacy BellSouth (collectively AT&T), the FCC agreed to partially forbear from applying various Title II and Computer Inquiry rules to certain packet services provided by AT&T, pursuant to section 10 of the Communications Act of 1934, as amended (1934 Act). Section 10 allows the Commission to forbear from applying any of its provisions, or any of the FCC's regulations, if the Commission makes certain findings related to the competitiveness of the market and whether such forbearance is in the public interest and protects consumers. The FCC partially granted AT&T's forbearance request for its packet-switched and optical transmission services, including ATM, Frame Relay, LANs, Ethernet, Video Transmission, Optical Network, and Wave-Based services, and excludes all time division multiplexing (TDM)-based DS1 and DS3 services.

By granting forbearance, the FCC relieved AT&T from the more onerous requirements as they pertain to packet-based services, including: dominant carrier tariff filing, cost support, discontinuance, domestic transfer of control and certain Computer Inquiry requirements. The elimination of these requirements will allow AT&T more flexibility in its contract terms for these services, particularly as it relates to pricing and service parameters. However, because AT&T seems to offer these packet services on a common carrier basis, they still remain subject to nondominant carrier Title II Regulations, which includes limited notice requirements before discontinuance and just and reasonable rates.

The FCC denied certain aspects of AT&T's forbearance request. It denied the forbearance petition as it relates to various other statutory or regulatory requirements, including those that apply to common carriers generally, local exchange carriers (LECs), incumbent LECs (ILECs) or Bell Operating Companies (BOCs). AT&T must therefore continue to satisfy various Title II and public policy obligations, including Section 271 market opening requirements, Section 251 interconnection, 911, emergency preparedness, customer privacy, and universal service. The Commission noted that AT&T has not shown that forbearance from these and the other public policy requirements in Title II and the Commission's implementing rules meets the statutory forbearance criteria. The FCC also noted that the forbearance relief does not affect the merger conditions adopted in the *AT&T/BellSouth Order*.

Of particular note for counsel representing competitive carriers and large enterprise customers, AT&T's forbearance request specifically excluded TDM-based DS1 and DS3 services, which are rate regulated and tariffed as special access services, and the subject of various outstanding proceedings, *see, e.g., Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking*, WC Docket No. 05-25, RM-10593, Public Notice, FCC 07-123 (rel. July 9, 2007). Many competitive carriers rely on special access inputs to serve broadband services to commercial customers as an avenue to avoid the more expensive self-deployment build-out. Consequently, these special access services from AT&T and other incumbents remain rate regulated under Title II of the 1934 Act. While various competitive carriers commented to the FCC on the service problems of providing extremely popular Ethernet services over TDM-based facilities, the Commission nevertheless rejected their arguments and noted that competitive carriers are successfully offering Ethernet services over TDM-based facilities. Moreover, the FCC noted that competitive carriers are able to economically self-deploy optical facilities where there is demand for such services.

Marketplace for Packet Services. A noteworthy aspect of the *AT&T Forbearance Order* is the Commission's analysis of the marketplace for packet services. A condition precedent before granting forbearance is a determination of whether forbearance from enforcing the provision or regulation will promote competitive market conditions. Consequently, the Commission analyzed marketplace conditions for packet services, but chose to do so on a broad scale--from the perspective of the larger trends that are shaping the marketplace without regard to specific, identified

geographic markets. The FCC explained that relying on specific geographic markets would force the Commission to premise findings on limited and static data that failed to account for all of the forces that influence the future market development.

The FCC noted, while not relying on specific marketplace data, that the market for packet services appears to be highly competitive nationwide. The Commission explained that many customers that purchase these types of commercial services have national and even international footprints, and thus request services from a national marketplace. The Commission further noted that the large recurring revenues and high quality of service these customers generate and demand, provide a significant incentive to self-deploy facilities instead of relying on reselling those of the incumbents. Even small- and medium-sized customers, the FCC noted, still have a large number of competitors to choose from. Providers of these services, the Commission explained, are able to either self-deploy or obtain from competitive LECs the telecommunications inputs needed to provision the requested telecommunications services. Where these options are limited, providers may use unbundled network elements (UNEs) from the ILEC to provision the services. Competitive LECs market integrated voice and data services to enterprise customers, primarily through leasing high-capacity loops from the incumbent LECs as unbundled network elements (UNEs) and then using the leased loops to provide a bundled offering including voice, data, and Internet access.

The FCC explained that in this highly competitive environment, regulation impedes AT&T's efforts to compete effectively with competitors by inhibiting its ability to respond quickly and efficiently to pricing and other contractual terms offered by competitors, including volume and term discounts. Specifically, the FCC accepted AT&T's contention that regulation makes it difficult for it to negotiate contractual arrangements tailored to the needs of large domestic and international enterprise customers because its tariff filings provide notice to competitors of its pricing and other strategies.

The FCC anticipates that in this deregulatory marketplace, opportunities for discriminatory behavior or uncompetitive pricing for these services by AT&T will be limited: the Commission's enforcement authority, along with market forces, will serve to safeguard the rights of consumers. AT&T will continue to be subject to sections 201 and 202 of the Act in its provision of its specified broadband services, which, among other things, mandate that AT&T provide interstate telecommunications services upon reasonable request and prohibit it from acting in an unjust or unreasonable manner or otherwise favoring particular entities in the provision of like services provided to other entities. We expect that any complaint pertaining to services covered by this Order will be resolved within five months, as prescribed by Section 208 (b)(1) of the Act. The Commission also noted that, because of the competitiveness of the marketplace for these services, AT&T will have every business incentive to offer the transmission component of these services under just, reasonable, and nondiscriminatory rates, terms, and conditions in order to spread network costs over as much traffic and as many customers as possible.

File Rate Doctrine. Of particular import to legal practitioners, the FCC conditioned forbearance on AT&T not filing interstate tariffs for its packet services. By not filing tariffs, AT&T is limited in relying on the filed rate doctrine in disputes related to contract terms. Under the filed rate doctrine, if a rate, term, or condition in a carrier-customer contract differs from a rate, term, or condition in a filed tariff, the tariff terms apply. *See, e.g., American Broadcasting Cos. v. Federal Communications Com., 207 U.S. App. D.C. 68 (D.C. Cir. 1980)*. Thus, a carrier can modify an existing rate from a carrier-customer contract by filing a tariff revision. *See Maislin Indus., U.S. v. Primary Steel, 497 U.S. 116 (U.S. 1990)*.

For additional information, see Charles D. Ferris and Frank W. Lloyd, Telecommunications Regulation: Cable, Broadcasting, Satellite, and the Internet; and the Telecommunications Law page. For more information on the AT&T/BellSouth merger conditions, see *AT&T Inc. and BellSouth Corporation Application for Transfer of Control, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662 (FCC 2007)*.

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31 of 33 DOCUMENTS

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Garvey on Appropriate Regulatory Treatment for Wireless Internet Access

2008 Emerging Issues 1760

Garvey on Appropriate Regulatory Treatment for Wireless Internet Access

By John Garvey

January 9, 2008

SUMMARY: In his Expert Commentary on *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, Declaratory Ruling, 2007 FCC LEXIS 2340* (March 23, 2007), John M. Garvey, Esq., discusses how FCC Continues Deregulating Broadband by Declaring Wireless Broadband Outside the Ambit of Common Carrier Regulation.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Introduction. In proceedings over the last few years, the Federal Communications Commission (FCC or Commission) has adopted regulatory classifications for the three most dominant broadband technologies that significantly deregulate those platforms from most of the regulatory and legal requirements associated with the provision of common carrier telecommunications services. These Internet access platforms are consequently outside the ambit of Title II regulations pursuant to the Communications Act of 1934, 47 U.S.C. § 224 (1934 Act), and enjoy a relatively minimal legal and regulatory environment.

In particular, the Commission has classified broadband Internet access an information service--and therefore outside the scope of common carrier regulation--for the following platforms: (1) cable, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (Cable Broadband Declaratory Ruling)*; (2) telephone lines, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (Wireline Broadband Order)*; and (3) power lines, *In the Matter of United Power Line Councils Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006) (Power Line Broadband Order)*.

With the more recent *Declaratory Ruling* on broadband wireless, which includes technologies such as Wi-Fi and advanced versions of CDMA that transmit data at speeds greater than 200 kbps in at least one direction, the FCC has placed the other notable broadband technology--and the most promising for paradigm shifting the dominant platform for Internet access--on the same deregulatory footing, thus mostly unifying the regulatory and legal framework for all broadband technologies. The practical effect of the FCC's deregulatory classifications for counsel negotiating wholesale

contracts with incumbent carriers in order to piggyback or access last-mile infrastructure in order to provide broadband Internet service is a significant diminution in bargaining power, with the outcome continuum being denial of access on the one end, and much higher negotiated market rates on the other. And assistance from states is mostly precluded since the FCC also held--as it did in its telephone, cable and power line classifications, *see 17 FCC Rcd 4798, 4832 at para. 59 (FCC 2002); Wireline Broadband Order, 20 FCC Rcd 14853 (FCC 2005); Power Line Broadband Order, 21 FCC Rcd 13281, 13288 at para. 11 (FCC 2006)*--that wireless broadband is interstate in nature. Consequently, a facilities-based broadband business strategy is increasingly become *de rigueur* if competition with incumbent carriers is contemplated.

Broadband Wireless Declaratory Ruling. As noted, the FCC found that wireless broadband service is entirely an information service without any telecommunication service component--thus eliminating any common carrier requirements pursuant to Title II of the 1934 Act. Under the 1934 Act, a service is subject to different regulatory frameworks depending on whether it constitutes an information service (unregulated) or a telecommunications service (regulated). In its determination, the FCC focused, as it did in the other classification proceedings, on the end-users experience, finding that that the transmission component of the service is part of a functionally integrated, finished Internet access service offering and therefore not a separate telecommunication service. The FCC explained that Internet access inextricably combines the transmission of data with computer processing, information provision, and computer interactivity, for the purpose of enabling end users to run a variety of applications.

The Commission further found that neither FCC precedent nor the 1934 Act requires that broadband transmission be classified a telecommunications service when provided as a wholesale input to a competitors own wireless broadband service. The FCC further eliminated any uncertainty regarding the regulatory status of wireless broadband by declaring the service outside the scope of the Computer Inquiries, which for decades allowed competitors access to the incumbent telecom carriers underlying telecommunication functionality in order to provide data-based services to end-users. The FCC made clear that no provider of wireless broadband Internet access service has an obligation to provide the transmission component of that service as a common carrier service, regardless of whether the provider is otherwise a common carrier. Finally, the Commission clarified that *mobile* wireless broadband service is not a commercial mobile service under section 332 of the 1934 Act, thus eliminating an additional regulatory uncertainty and cementing broadband wireless deregulatory framework.

Section 706. The *Declaratory Ruling* is notable for regulatory attorneys in that it reinforces the legal preeminence of Section 706 of the Telecommunications Act of 1996, *104 P.L. 104, 110 Stat. 56 (1996)* (1996 Act), which directs the FCC to promote broadband availability throughout the U.S. As it did in the other broadband classification orders, the Commission explicitly relied partially on Section 706s mandate and noted the regulatory certainty needed to help spur investment in broadband services. The relatively amorphous language in Section 706, in a statute packed with perhaps the most detailed and comprehensive legal and regulatory framework ever created to promote competition in any industry, has been used by the FCC to help bolster its deregulatory policy preference for broadband deployment in a market structure comprising of dominant facilities-based carriers competing against each other, rather than a larger number of smaller companies piggybacking on existing network providers to access end-users at FCC-regulated wholesale rates.

The FCCs use of Section 706, and its broadband deregulatory policies generally, have been largely backed by the courts, with a rock-solid high court win regarding its cable platform classification, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, *545 U.S. 967, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005)* (*Brand X*), and a similarly solid appellate decision (which relied heavily on the *Brand X* decision) upholding its classifications for telephone wires, *Time Warner Telecom et al. v. FCC*, *2007 U.S. App. LEXIS 24204, 42 Comm. Reg. (P & F) 1186 (3rd Cir. 2007)*. An appeal of the FCCs decision on broadband over power lines was filed in May 2007 with the U.S. Court of Appeals for the District of Columbia Circuit.

For additional information, see Charles D. Ferris and Frank W. Lloyd, *Telecommunications Regulation: Cable, Broadcasting, Satellite, and the Internet* (Matthew Bender 1983); and the Telecommunications Law page.

The views of the author are his own and do not represent those of the New Jersey Board of Public Utilities.

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32 of 33 DOCUMENTS

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Garvey on In the Matter of Implementation of Section 224 of the Act

2008 Emerging Issues 1546

Garvey on In the Matter of Implementation of Section 224 of the Act

By John M. Garvey

December 17, 2007

SUMMARY: The FCC recently issued a Notice of Proposed Rulemaking that tentatively concluded that all attachments used for Internet access service should be subject to the same rate. This Emerging Issues Analysis discusses this move by the FCC to promote broadband development and regulatory parity among broadband providers using different technological platforms.

PDF LINK: [Click here for enhanced PDF of this Emerging Issues Analysis at no additional charge](#)

ARTICLE: FCC Tentatively Concludes that Fees for Pole Attachments Should be Similar for All Broadband Providers

Introduction. In an additional move to promote broadband development and regulatory parity among broadband providers using different technological platforms, the Federal Communications Commission (FCC or Commission) released a *Notice of Proposed Rulemaking (NOPR)* on November 20, 2007, which tentatively concludes that all attachments used for Internet access service should be subject to the same rate--higher than the existing, statutorily-imposed cable rate but no higher than the existing telecom rate. Moreover, the FCC hinted at its determination to limit the use of the lower cable rate by implying that the rate is subsidized at the expense of electricity ratepayers. If the FCC's tentative conclusion is sustained in a subsequent order, cable providers also providing broadband Internet access service would likely encounter higher pole attachment rates in the future.

Section 224. The import of the *NOPR's* tentative conclusion results from the ambiguity in the text of section 224 of the *Communications Act of 1934*, 47 U.S.C. § 224 (1934 Act), which does not specify which rate--the lower cable rate or the higher telecom rate--should apply to Internet access. Section 224 sets forth standards for cable and telecom rates, with the lower cable rate applying to attachments for cable service only, and the telecom rate applying to attachments by a competitive telecommunications carrier for the provision of a telecommunications service. Over the years, the FCC adopted specific formulas implementing the cable and telecom rates, 47 C.F.R. § 1.1409(e)(1),(2), with the cable rate being lower because its formula does not include cost allocations associated with unusable space. The FCC had held previously in the *Implementation of Section 703(e) of the Telecommunications Act, Amendment of the Commissions Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report and Order, 13 FCC Rcd 6777 (1998) (1998 Implementation Order), that cable providers offering bundled video and Internet access service should pay the lower cable rate, while wireless providers fall under the statutory definition of telecommunications carrier and therefore

should pay the telecom rate. The Supreme Court upheld much of this decision in *Natl Cable & Telecommunications Assn v. Gulf Power*, 534 U.S. 327 (2002). The Court held, *inter alia*, that section 224 gives the Commission broad authority to adopt rates that are just and reasonable, and rejected the view that section 224 limits the universe of just and reasonable rates to the heretofore cable and telecom rate dichotomy. The Court also rejected the argument that the text of section 224 precludes wireless carriers from enjoying the pole attachment rate protections under the *1934 Act*.

The *NOPRs* tentative conclusion would seemingly reverse the policy of allowing cable providers offering bundled services to pay the lower cable rate, and instead recommends that:

With regard to rates, we tentatively conclude that all attachments used for broadband Internet access service should be subject to a single rate, regardless of the platform over which those services are provided, and that that rate, for reasons discussed herein, should be greater than the current cable rate, yet no greater than the telecommunications rate.

The *NOPR* also hints at the FCC's skepticism of the cable rate itself, asking for comments on the extent to which the current cable rate formula results in a subsidized rate, and, if so, whether cable operators should continue to receive such pole attachment rates at the expense of electric consumers. Similarly, the Commission seeks comment on whether cable operators should continue to qualify for the cable rate where they offer multiple services in addition to cable service.

In addition to the tentative conclusion noted above, the *NOPR* seeks an extensive amount of information on pole attachment rates and practices, and seeks comment with regard to other issues related to pole attachments, including whether section 224 affords rights to incumbent telecom carriers to regulated pole attachment rates, and whether non-price terms and conditions should be prescribed by the FCC. Incumbent telecom carriers such as Verizon and AT&T are included along with traditional electric utilities within the statutory definition of utility for purposes of section 224, and therefore fall outside the pole attachment rate protections under the *1934 Act*--and must instead negotiate market-based rates with electric utilities. The Commission, moreover, asks for clarification on the rights of wireless carriers to attach equipment. In the *1998 Implementation Order*, the Commission found no clear indication that the rules could not accommodate wireless attachers use of poles. The FCC seeks comment on whether wireless providers are entitled to the telecom rate as a matter of law, or whether a specific rate should be adopted for wireless pole attachments.

For practitioners. From a legal practitioners perspective, it is important to note that section 224 of the *1934 Act* provides for Commission regulation of pole attachments except where such matters are regulated by a state. Eighteen states and the District of Columbia have certified that they regulate pole attachments, and thus the FCC does not regulate pole attachments in those states. The following states have certified that they regulate pole attachments: Alaska, California, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Michigan, New Jersey, New York, Ohio, Oregon, Utah, Vermont, and Washington. State and perhaps local regulations should be consulted in these jurisdictions. Maine, in particular, was cited a number of times in the *NOPR* as potentially having a model pole attachment rate formula.

This *NOPR* highlights the Commission's policy in recent history to confront the blurring distinction between cable television and telecommunications, as each industry begins to meaningfully enter each others market. In addition to the *NOPRs* preference for a singular pole attachment rate for broadband Internet access service--irrespective of the technological platform used--the FCC recently held in *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, *Memorandum Opinion and Order*, 22 FCC Rcd 3513 (WCB 2007), that companies providing wholesale telecommunications services to cable operators who are providing Voice over Internet Protocol (VoIP) are telecommunications carriers under the *Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56 (1996) (*1996 Act*) and therefore are afforded section 251 interconnection rights with incumbent telecom carriers. The Commission has also attempted to remove barriers to entry for telecom carriers providing video services in the *Implementation of*

Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311, Second Report and Order, FCC 07-190, 2007 FCC LEXIS 8156 (FCC 2007) (rel. Nov. 6, 2007).

Conclusion. In sum, the *NOPR* generally represents the FCC's policy priority of promoting broadband deployment and technological neutrality in that deployment. Section 706 of the *1996 Act* directs the Commission to promote the deployment of broadband infrastructure. This directive, according to the FCC, leads us to separate out those pole attachments that are used to offer broadband Internet access service from those used for other services. As a policy matter, we tentatively conclude that the critical need to create even-handed treatment and incentives for broadband deployment would warrant the adoption of a uniform rate for all pole attachments used for broadband Internet access service. Comments are due 30 days after publication in the Federal Register, and reply comments are due 60 days after publication.

For further information on the regulation of pole attachments, see Charles D. Ferris and Frank W. Lloyd, *Telecommunications Regulation: Cable, Broadcasting, Satellite, and the Internet*, Chapter 16: Cable Systems-Utility Company Negotiations for Pole Attachments; the Telecommunications Law page; and the following FCC documents: *Adoption of Rules for the Regulation of Cable Television Pole Attachments, CC Docket No. 78-144, First Report and Order, 68 FCC 2d 1585 (1978)*; *Adoption of Rules for the Regulation of Cable Television Pole Attachments, CC Docket No. 78-144, Memorandum Opinion and Order, 77 FCC 2d 187 (1980)*; *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, CC Docket No. 86-212, Report and Order, 2 FCC Rcd 4387 (1987)*.

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33 of 33 DOCUMENTS

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Garvey on Time Warner Telecom et al. v. FCC

2008 Emerging Issues 1548

Garvey on Time Warner Telecom et al. v. FCC

By John M. Garvey

December 17, 2007

SUMMARY: In his *Emerging Issues Analysis on Time Warner Telecom et al. v. FCC, 2007 U.S. App. LEXIS 24204, 42 Comm. Reg. (P & F) 1186 (3rd Cir. 2007)*, John M. Garvey, Esq., discusses the Third Circuit's decision upholding an FCC order that classified broadband Internet service provided over traditional telephone wires as an information service and therefore outside the ambit of its regulatory jurisdiction under Title II of the 1934 Act.

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ARTICLE:

Third Circuit Upholds FCC Order Deregulating Internet Service Over Traditional Telephone Wires

Introduction. In its quest to promote broadband Internet development as mandated by Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, *110 Stat. 56 (1996)* (1996 Act), the FCC has issued a number of decisions over the past few years that significantly deregulate the telecom and cable industries. These decisions reflect the FCC's recent policy preference for broadband deployment in an oligopolistic market structure of facilities-based carriers, rather than a larger number of smaller companies piggybacking on existing network providers to access end-users at regulated wholesale rates.

A significant step in this direction was the FCC's *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 F.C.C.R. 4798 (2002)* (*Cable Modem Declaratory Ruling*), which concluded that broadband Internet service provided by cable companies is an information service--a statutory classification under the 1996 Act, and generally synonymous with the enhanced services category from the *Computer Inquiries*--and therefore outside the ambit of Title II common carrier regulation under the Communications Act of 1934, *47 U.S.C. § 224* (1934 Act). In addition, the FCC declined to apply the *Computer Inquiries* to broadband cable operators, even though incumbent telecom companies providing enhanced services were required to provide independent information service providers (ISPs) nondiscriminatory access to the underlying telecommunications functionality of the local network. The Supreme Court upheld the *Cable Modem Declaratory Ruling* in *Natl Cable & Telecomm. Assn v. Brand X Internet Svcs.*, *545 U.S. 967, 974, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005)* (*Brand X*).

Time Warner Telecom et al. v. FCC. But perhaps most emblematic of the FCC policy preference for facilities-based broadband competition was the FCC's September 2005 order in *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 F.C.C.R. 14853 (2005) (*Wireline Broadband Order*), which was the subject of the Third Circuit's August 2007 review in *Time Warner Telecom et al. v. FCC*. Unlike the *Cable Modem Declaratory Ruling*, which was somewhat of a first impressions look at a relatively new service that was already mostly unregulated, the *Wireline Broadband Order* was a paradigm shift of sorts that eliminated decades-old access regulations for telephone wires. In the order, the FCC classified broadband Internet service provided over traditional telephone wires as an information service and therefore outside the ambit of its regulatory jurisdiction under Title II of the 1934 Act. Moreover, the FCC also eliminated an ISPs last hope and regulatory backstop--the almost iconic *Computer Inquires* regulations which for decades allowed ISPs to access the incumbent telecom carriers underlying telecommunication functionality in order to provide data-based services to end-users. Now, ISPs must negotiate with incumbent telecom carriers marketbased access to its networks, which is likely to increase ISP costs significantly.

In *Time Warner*, the FCC, heavily citing *Brand X*, argued that its categorization of wireline broadband service as an information service--and therefore outside the ambit of its Title II regulatory jurisdiction--is sufficiently analogous to its decision in the *Cable Modem Declaratory Ruling* categorizing cable broadband service as an information service. Moreover, the FCC argued that the *Computer Inquiries* requirements impeded innovation and investment in new broadband technologies and services because they imposed significant costs on incumbent telecom companies. Petitioners, who were ISPs, competitive telecom and cable providers, and various public interest groups, argued that the FCC's order decreases competition in the wireline broadband service market, and attempted to distinguish wireline broadband service from cable modem service.

Chevron Analysis. The Third Circuit's review was generally a straightforward Chevron deference analysis, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), holding that the FCC's order is based on a reasonable interpretation of the [1934 Act], and a proper exercise of agency discretion. In cases of an ambiguity in the text of a statute, *Chevron* requires federal courts to defer to an agency's reasonable interpretation. The Court acknowledged that the term telecommunication service from the 1996 Act was ambiguous since, quoting from *Brand X*, the term offer can sometimes refer to a single, finished product and sometimes to the individual components in a package being offered. The FCC had held that wireline broadband service is an integrated information service like cable broadband service and therefore has no telecommunications service component, thereby taking it out of the Article II domain. The court cited heavily to the *Brand X* decision, holding that the record adequately supported the FCC's conclusion that wireline broadband service and cable modem service are sufficiently analogous that they should be subject to the same regulatory paradigm under the 1934 Act.

For additional information on the Computer Inquiries, see Charles D. Ferris and Frank W. Lloyd, Telecommunications Regulation: Cable, Broadcasting, Satellite, and the Internet; the Telecommunications Law page; and the following FCC documents: *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, 28 F.C.C.2d 267, P 2 (1971); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 F.C.C.2d 384, P 2 (1980); *Amendment of Sections 64.702 of the Commission's Rules and Regulations*; and *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations*, 104 F.C.C.2d 958 (1986).

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