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Open Access To Cable Systems for Internet Access Providers

Kathleen Hawkins Berkowe

OPEN ACCESS TO CABLE SYSTEMS FOR INTERNET ACCESS PROVIDERS

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Cable subscribers in the United States access "broadband", interactive service at a speed greater than 200 kilobits per second ("kbps") largely through proprietary services such as AT&T's @Home and Time Warner's Roadrunner, or by services that enter into agreements with the cable companies. The broadband networks achieve their speed because of the cable companies' upgraded infrastructures that connect the customer with the transmission source.[1] Competitive Internet access providers ("ISPs") are apparently offered uneconomic terms for access to the cable system. As a result, residential Internet access in the U.S. is generally through dial-up connections, at 56 to 90 kbps.

"Open access" requires a cable operator to allow competing ISPs to access the broadband network on nondiscriminatory terms. Local authorities are divided on whether to mandate "open access" for ISPs to the cable transmission source on non-discriminatory terms. The District Court of the District of Oregon has found that the local authorities may impose open access requirements as a condition for transfer of a cable license if necessary to promote competition.[2] The FCC, the national regulatory authority that implements the federal communications regulation, has declined to regulate, citing the growth of the Internet and the potential for competitive Internet access technologies.[3] In contrast, the marketplace has generated transactions that will potentially limit access to broadband services through cable systems.

This article will review the open access debate, and the *AT&T v. Portland* case, which resulted in the imposition of open access as a condition

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[1] *FCC Cable Services Bureau Staff Report to the Chairman on Industry Monitoring Sessions Convened by the Cable Services Bureau*, October 1999, p. 24.

[2] AT&T Corp. v. City of Portland, 43 F. Supp. 2d 1146 (1999).

[3] *See* In the Matter of Applications for Consent to the Transfer of Control of Licenses, *Memorandum and Order*, CS Docket No. 98-178, 14 F.C.C.R. 3160 (1999).

for approval of transfer of cable licenses from TCI to AT&T. It will comment on the market transactions that have so far resulted in limiting, rather than opening, access.

Background of AT&T v. Portland

AT&T Corp., a long distance service provider in the U.S., has acquired Tele-Communications, Inc., (TCI) a nationwide cable service operator and, as of this writing was attempting to secure regulation approval to buy Medinone. Acquisitions of these two large systems would give it 30-40 percent of U.S. cable subscribers. AT&T owns a proprietary Internet network and Internet access service, @Home. Once @Home establishes an agreement with the cable operator, individual customers can connect a cable modem to the television and access the Internet through the television set. The rate per household for a cable operator are apparently well below retail rates offered to individual households. Competing Internet access providers, by contrast, must pay retail rates for the access service. This access fee makes ISPs' use of the service economically impossible.[4] AT&T had requested permission to transfer cable licenses from TCI to AT&T.

The City and County Open Access Conditions

The local cable franchising authorities, the City of Portland, Oregon and Multnomah County imposed an open access requirement on AT&T as a condition of approval of transfer of TCI's local cable licenses. The City and County relied on the advice of the Mt. Hood Cable Regulatory Commission, which had held hearings on the effect that the change of control of the cable licenses to AT&T would have on local cable service and competition. The Commission found that "@Home had no viable competitors in the local retail market for residential Internet access service". The Commission relied on testimony of Internet access competitors that "they would be driven out of business eliminating several hundred jobs and costing the local economy $20 million".[5]

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[4] *See* FCC Staff Report *supra* note 1, at 13.

[5] *AT&T Corp.*, 43 F. Supp. 2d at 1149.

The Commission suggested that the local regulatory authorities regulate AT&T's cable modem platform as an "essential facility." This term in U.S. antitrust law refers to a bottleneck facility that is essential when the conduct of business is under monopoly control, and cannot practically be duplicated. In U.S. antitrust law a business that controls an essential facility is required to provide non-discriminatory access to it. AT&T rejected the open access condition. The City and County rejected AT&T's request for transfer of the licenses. AT&T filed for declaratory judgment in the District Court for the District of Oregon.

The District Court's Decision

In the absence of controversy over the findings of fact, the court's analysis was limited to whether the City and County have the authority to impose such conditions. If the regulators had the authority, the court would have to affirm their decision. The court found that the proposed acquisition of TCI by AT&T and the accompanying transfer of licenses were properly subject to approval and conditioning by the City and County regulators.

The court held that the Cable Act authorizes local regulators to protect local competition. Citing Section 556(a) of the Act, which reserves the authority of local regulators in matters of "public health, safety and welfare" the court rejected the argument that the Cable Act preempted local regulators from imposing such conditions on the transfer of licenses. The court held that Section 556(b) reserves state authority to exercise jurisdiction over cable services not inconsistent with the Act, and 556(a) preserves local regulators' preexisting authority to regulate to promote local competition and economic welfare. Section 556(c) limits federal preemption in cable regulation to matters inconsistent with Sections 556(a)(b). The court affirmed that the power of local authorities to regulate includes the lesser power to impose conditions on transfer of control of licenses.

The court rejected AT&T's argument that imposing open access conditions on a transfer of licenses has the effect of regulating its cable activities as common carrier activities. A common carrier, as developed in English and American jurisprudence, offers transmission or carriage services to all members of the public or all members of a category of potential customers. The Court correctly stated that requiring a business to allow access to an essential facility does not create a common carrier.

The FCC's Position

The Federal Communications Commission ("FCC") classifies Internet access as broadband service under Section 706 of the Telecommunications Act. The regulatory policy of Section 706 is non-regulation. The FCC supports that policy, as outlined by the Chairman in a number of speeches.[6]

Moreover, the FCC heard evidence that competing technologies such as wireless and satellite were being developed for broadband access. The FCC concluded that the alternative technologies would offer competitive access to broadband the broadband network.[7] The FCC hinted that the Cable Act would permit it to mandate open access if necessary to promote or preserve competition.

The Market

So far, there have been no challenges to the cable operators' ability to control Internet access by selecting exclusive providers with privileges to connect to the head end. Instead, large companies have tried to consolidate their means of access. AT&T provides local, long distance and wireless service and claims to be the largest provider of Internet access service.[8] It also owns and controls networks for all of these services. It owns an interest in Cablevision, and recently acquired Tele-Communications, Inc., ("TCI"), the largest nation-wide cable operator. In a more recent announcement, Time Warner, owner of a nationwide cable operator, plans to merge with America Online ("AOL"), an Internet service provider and the owner of a vast

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[6] *See*, FCC Press Release dated January 11, 2000 outlining the points made in Chairman Kennard's Speech to the National Cable Television Association, June, 1999, (William Kennard, *The Road not Taken: Building a Broadband Future for America* (June 15, 1999) <http: //www.fcc.gov/Speeches/
Kennard/spwak921.html> and the speech to National Association of Telecommunications Officers and Advisors, September 17, 1999, (*See* William Kennard, *Consumer Choice Through Competition* (Sept. 17, 1999) <http: //www.fcc.gov/Speeches/Kennard/spwek931.html>. The FCC credits the economic success of the Internet largely to the lack of regulation. *See* William Kennard, *Internet: The American Experience*, (Jan. 28, 2000) <http: //www.fcc.gov/commissioners/Kennard/ speeches.html>.

[7] *See* 14 F.C.C.R. 3160.

[8] *See generally*, <http: //www.att.com/att>.

proprietary Internet network service.[9] This will result in the combination of the largest or second largest cable system with another company that claims to serve the largest number of Internet customers. The two merged companies in the Internet access business, AOL and AT&T, will together provide interest access to a substantial percentage of U.S. Internet customers, suggesting that competition from other cable operators may be limited. AOL/Time Warner has indicated informally that it will provide open access. The form of such access has not been announced at this time; and the results of this approach cannot be anticipated.

An Assessment

The FCC hinted that the Cable Act would permit it to mandate open access if it were necessary to promote or preserve competition. While the competitive market may yield competing technologies in the future, that possibility seems so far in the future that the issue is whether the current technology should be accessible to competitors. The FCC hesitates to act because it finds that the absence of regulation has stimulated competition.

Yet even where there has been a basis for advancing specific regulation for opening networks, in the telecommunications area, the courts have cut back the FCC's regulatory initiatives *mandating* access to the networks of Incumbent Local Exchange Carriers (ILECs). "Unbundling" is the process of isolating "network elements"- distinct services and equipment – into discrete, individually priced units. It is required by the 1996 Act, and implemented by the FCC. These units are then to be made available to competitors on a non-discriminatory basis. The implementation of the unbundling requirements had been hotly contested by the ILECs, who favored less unbundling, and the Competitive Local Exchange Carriers, who favored more unbundling.

The FCC had issued detailed regulations to force the unbundling of additional network elements to be offered to CLECs. The Supreme Court ultimately sustained challenges to the unbundling requirements, and threw out the FCC's regulations.[10] Subsequent regulations were substantially less demanding. The burden of proof shifted to the carrier requesting and unbundled service to satisfy several tests of need, unavailability, and that the

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[9] *See* Form 8A12B/A, Time Warner (filed Jan. 1, 2000) <http://www.sec.gov>.

[10] *See* AT&T Corp. v. Iowa Utilities Board, 119 S.Ct. 721 (1999).

requested element is not proprietary to the ILEC. The regulatory trend in the telecommunications area has been against opening access.[11]

The laxity of regulation led to greater expansion on the part of the larger, more entrenched dominant carriers.

The cable industry enjoyed monopoly status for a long time, supported by the FCC and local governments. During this protected period the cable companies were able to build their initial networks, consolidate, invest in other businesses, and grow to their current dominance. The infrastructures that were developed are as much a part of the public domain as are the infrastructures of the ILECs. And, in the interest in preserving and strengthening the existing infrastructure, the cable systems should be required to provide open access to all competitors.

The FCC may wish to revisit the issue of open access in light of market developments limiting competitive potential.

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[11] Kathleen Hawkins Berkowe, *High Court Decision Poses Threat to CLEC's Profitability*, CABLE TV AND NEW MEDIA, June 1999. Two other interesting articles in this area which she recommends are: Marcus Maher, *Cable Internet Unbundling: Local Leadership in the Deployment High Speed Access*, 52 FED. COMM. L.J. 211 (1999) and Steve Bickerstaff, *Shackles on the Giant: How the Federal Government Created Microsoft, Personal Computers, and the Internet*, 78 TEX. L. REV. 1 (1999).