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TELECOMMUNICATIONS LAW UPDATES

FCC ADOPTS NEW COLLOCATION AND OTHER LOCAL COMPETITION RULES

The FCC released its much-anticipated "Advanced Services Order" on March 31, 1999, setting new ground rules for the provision of digital subscriber line ("DSL") and other advanced services by competitive local exchange carriers ("CLECs") using incumbent LECs' facilities. Principally, the Advanced Services Order expanded the scope of CLECs' right to collocate equipment on incumbent LEC premises. The Order also established new rules concerning the interference that may occur when competing carriers use different technologies to provide advanced services over adjacent loops. In addition, the FCC launched a further rulemaking to explore these interference-related issues in more detail and to examine the controversial question whether to require "line sharing," which entails the simultaneous use of the same loop by a CLEC and an incumbent — the CLEC provides DSL service while the incumbent provides analog voice service. While the FCC's heavy regulation of DSL service is noteworthy in its own right, its impact is especially dramatic in light of the FCC's treatment of cable modem service: Although cable companies have approximately 600,000 broadband customers to the telephone companies' 40,000, the FCC nevertheless has declined to impose *any* regulation on cable operators' exclusive control of cable modem facilities.

New Collocation Rules

Ever since Congress's enactment of the landmark Telecommunications Act of 1996, CLECs have complained that incumbents have stymied their efforts to compete — in the provision of both traditional voice service and newer advanced data services. According to CLECs, incumbents place unreasonable restrictions on the types of equipment that may be collocated, unnecessarily require CLECs to use expensive collocation cages, and clog up central offices with obsolete equipment so that they can assert that collocation space is unavailable. Incumbents vigorously dispute these assertions. In their view, the process of situating competitors' equipment on incumbent LEC property inevitably produces some measure of conflict, which the state-by-state arbitration process was designed to handle, and the CLECs have wrongly characterized reasonable and necessary business practices as anticompeititve.

In its March 31 Advanced Services Order, the FCC unquestionably sided with the CLECs. That Order includes numerous collocation requirements, at least some of which incumbent LECs can be expected to challenge in the courts:

- Incumbent LECs must allow CLECs to collocate all equipment used for intercon nection or access to unbundled network elements ("UNEs"), regardless of whether such equipment also performs a switching or advanced services function. (Most incumbent LECs have refused to permit collocation of any equipment that performs these functions, on the ground that the 1996 Act requires collocation only of equipment that is *necessary* for interconnection or access to UNEs, and collocation of switching and advanced services equipment does not meet that test.)

- Incumbent LECs must make shared-cage and cageless collocation arrangements available. A collocation method used by one incumbent LEC or mandated by a state commission is presumptively technically feasible for any other incumbent.

- Incumbent LECs may not require CLEC equipment to meet more stringent safety or security requirements than those the incumbent LEC imposes with respect to its own equipment or employees.

- When an incumbent denies collocation space, it must permit the requesting CLEC to tour the pertinent premises and must re move obsolete, unused equipment, in order to facilitate the creation of additional collo cation space. When collocation space is in fact exhausted at a particular incumbent LEC location, the incumbent must permit collocation in adjacent controlled environmental vaults or similar structures to the extent technically feasible.

- Incumbent LECs must allocate costs asso ciated with space preparation, security mea sures, and other aspects of collocation on a prorated basis, sothat the first collocator is not charged the entire amount for site preparation.

New Rules for Interfering Technologies

The Advanced Services Order also addressed several questions relating to interference caused by incompatible technologies. CLECs have complained to the FCC that incumbents unjustifiably rely on assertions of technical incompatibility to block CLECs' efforts to introduce new services over the incumbent's facilities. The FCC tentatively concluded that incumbent LECs may not unilaterally determine what technologies they and CLECs may deploy. Although the FCC recognized a need for further study of these issues, for now it has established that any loop technology is presumed acceptable for deployment if it (1) complies with existing industry standards, (2) has been successfully deployed by any carrier without significantly degrading the performance of other services, *or* (3) has been approved by the FCC (or a state commission or industry standards body). An incumbent LEC may not deny a carrier's request to deploy technology that is presumed acceptable unless the incumbent demonstrates to the appropriate state commission that deployment of the particular technology within the incumbent's network will significantly degrade the performance of other services. Incumbent LECs also must provide CLECs with nondiscriminatory access to their spectrum management procedures and policies, and must provide a specific reason before rejecting a CLEC's request to provide advanced services over the incumbent's facilities.

The FCC seeks comment on proposed measures to facilitate timely development of long-term industry standards and practices to manage potentially interfering technologies. Specifically, the FCC is considering whether to grandfather interfering technologies and how to resolve disputes regarding claims that a particular technology is significantly degrading performance, among other issues.

Line-Sharing Issues

The FCC's further rulemaking also focuses on the controversial CLEC proposal to require line sharing. Incumbent LECs already use a single loop to provide advanced and voice-grade services simultaneously. The question is whether *two* carriers can (as a practical matter) and should (as a legal and policy matter) share a loop's capacity. Under the FCC's existing rules, CLECs must lease — and pay for — the entire capacity of an incumbent LEC's loop. Some CLECs argue that they will be unable to break into the advanced services market unless they are permitted to lease a *portion* of the loop's capacity — only those frequencies used to provide DSL service — and leave the remainder to the incumbent to use in providing analog voice service. Incumbents strongly oppose changing the rules to require line sharing, citing a number of practical concerns and legal/policy arguments.

The FCC seeks comment on whether it has the authority to require line sharing, and whether it should do so. In particular, would CLECs' ability to provide advanced services be hampered without a line-sharing requirement? Is line sharing technically feasible? And how can potential operational difficulties relating to billing and repair systems, loop conditioning responsibilities, pricing, and cost allocation be resolved?

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The Advanced Services Order is as significant for what it did *not* do as for what it did. The FCC did not decide whether incumbent LECs may offer advanced services free from unbundling and resale obligations if they do so through an entirely separate subsidiary. Nor did the FCC establish new unbundling rules for equipment used to provide advanced services — something many CLECs had advocated. The FCC should address these issues when it revisits unbundling duties generally, in the wake of the Supreme Court's recent decision in *AT&T v. Iowa Utilities Board*. That decision vacated the FCC's unbundling rules because the agency had adopted them without adequately considering whether new entrants actually would be impaired if denied access to an incumbent's facility — that is, whether access to a particular facility is truly necessary to new entrants' ability to compete.

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