WILMER, CUTLER & PICKERING

Washington • Baltimore • New York • London • Brussels • Berlin

April 6, 2000

TELECOMMUNICATIONS LAW UPDATES

D.C. CIRCUIT OVERTURNS FCC COLLOCATION RULES

The U.S. Court of Appeals in Washington, D.C. recently vacated and remanded an order of the Federal Communications Commission that granted new local carrier entrants broad rights to collocate equipment on the premises of incumbent local exchange carriers ("LECs"). The decision in *GTE Service Corp. v. FCC* was a significant victory for incumbent LECs, which had maintained that the FCC overstepped its bounds by effectively authorizing competitors to set up shop in the incumbents' central offices. The FCC now must rewrite its collocation rules to conform to the court's interpretation of section 251(c)(6) of the Telecommunications Act.

Section 251(c)(6) gives new entrants a right of "physical collocation" — *i.e.*, a right to install equipment on the incumbent's premises — so long as the equipment is "necessary" for interconnection with the incumbent's network or for access to unbundled elements of the incumbent's network. When the FCC first interpreted this provision in its massive Local Competition Order in 1996, the agency ruled that new entrants may collocate transmission equipment, because such equipment is clearly "necessary" for interconnection and access to network elements. The FCC further ruled that competitors may *not* collocate switching equipment or equipment used to provide enhanced services (such as voicemail or call-waiting), because such equipment does not meet the statutory test, even under a broad reading of the term "necessary." But the FCC did not have occasion in its Local Competition Order to address the fate of hybrid equipment that is used *both* for transmission *and* for switching or the provision of enhanced services.

In March 1999, at the urging of new entrants, the FCC revisited its collocation rules and decided that competitors may collocate *any* equipment that is "used *or* useful" for interconnection or access to incumbent's network elements, including equipment that performs switching, routing, and/or enhanced services functions in addition to transmission. For example, the FCC's rule for the first time allowed new entrants to collocate "advanced services" equipment such as DSLAMs, routers, ATM multiplexers, and remote switching modules, because such equipment is either "used or useful" for interconnection or access to unbundled network elements. The FCC deemed it irrelevant that the primary function of such equipment may entail something else entirely. The agency reasoned that upstart telecommunications providers would benefit from being able to use multifunction equipment in competing with incumbents. The FCC further sought to reduce new entrants' costs by ruling that incumbents must permit multiple competitors to cross-connect their collocated equipment within the incumbent's central office.

Incumbent LECs appealed these and several other aspects of the new collocation requirements. Their principal argument was that, by defining the statutory term "necessary" to mean "used or useful," the FCC had drained the restriction of all meaning. Because physical collocation necessarily appropriates the incumbent's property, the incumbents argued, Congress intended that new entrants be allowed to install equipment in incumbents' offices only if it is *indispensable* for interconnection or access to network elements. The incumbent LECs also argued that many of the FCC's new rules gave competitors too much say over the placement of their equipment in an incumbent's central office.

The D.C. Circuit agreed with the incumbents that the FCC's interpretation of "necessary" in section 251(c)(6) was impermissibly broad. Even though the court found that, in light of the ambiguity of the statutory language, it had to apply a highly deferential standard of review, it held that the FCC's open-ended definition "necessary" diverged from any realistic reading of the statute. The court noted that the Supreme Court recently had chastised the FCC for giving the term "necessary" (in a different provision of the Act) an

overly broad reading that was unmoored from the goals of the Act. Here, again, the D.C. Circuit concluded, the FCC's failure to apply some limiting standard doomed its interpretation of that term. For example, the FCC's requirement that incumbents allow collocating carriers to cross-connect their equipment did nothing to further the statutory purpose of enabling new entrants to connect to the *incumbent's* network. The mere fact that cross-connects may be efficient cannot justify evasion of statutory limitations.

Similarly, the FCC failed utterly to justify its requirement that incumbents permit the collocation of equipment that included *unnecessary* multipurpose features. While the FCC asserted that it would be efficient to allow new entrants to collocate transmission equipment that also could provide switching or enhanced services functions, the agency was forced to concede that its rule would permit a competitor to collocate equipment that performed functions wholly unrelated to the provision of telecommunications services, such as payroll or data collection functions. Because the agency could articulate no rational limit on a competitor's ability to integrate unnecessary features into equipment used (or merely useful) for obtaining interconnection or access to unbundled network elements, the court remanded the case to the agency for further consideration.

Although incumbents scored a significant victory in persuading the court to overturn the requirement to permit collocation of virtually all types of equipment, the court upheld the remainder of the FCC's collocation rules. These include the requirements that incumbents:

- refrain from insisting on the placement of collocated equipment in one-size-fits-all cages and instead allow competitors to choose among (1) shared collocation cages, (2) collocation cages of varying sizes, and (3) "cageless" collocation in "any unused space" within the incumbent's office;
- charge competitors only a portion of the total costs for space preparation, security, and the like, based on the assumption that other competitors will later request collocation and thereby help defray such costs (even if that assumption proves wrong);
- not take an "unreasonable" period of time to process requests for collocation space;
- allow new entrants to tour incumbents' central offices in search of usable collocation space;
- remove obsolete equipment from their central offices to create more collocation space;
- provide detailed proof of any claim that collocation space is lacking; and
- allow competitors to collocate equipment in "controlled environmental vaults" adjacent to the central office if space has been shown to be legitimately exhausted.

Regardless of whether the FCC seeks to reinstate its rule regarding the collocation of multifunction equipment on remand, these additional requirements will stand. The victory for incumbent LECs therefore will at most be a partial one.

John H. Harwood II
Matthew A. Brill