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TELECOMMUNICATIONS LAW UPDATES

FCC Backs Away From DSL Decision

One of the hotly contested issues raised by the FCC's implementation of the Telecommunications Act of 1996 is whether and to what extent the Act's onerous unbundling, resale, and other requirements apply to DSL and other advanced services offerings by incumbent local exchange carriers (ILECs). The FCC first determined in August 1998 that ILECs' advanced services offerings are subject to such requirements. But after reading the appeal brief of U S WEST, the FCC asked a federal appeals court to remand the case and let the FCC reconsider its decision.

In its *Advanced Services Order*, the FCC determined that ILECs are subject to the requirements of section 251(c) of the Act when they offer advanced services that employ digital subscriber line (DSL) technology. DSL enables a subscriber to use existing telephone lines to send and receive data at extremely high speeds to and from information service providers located around the world, while simultaneously carrying on a traditional voice telephone call. A modem is installed at each end of the pair of copper wires — the loop — that connect a subscriber's home or business to the local telephone company switching office. The modem at the subscriber's end divides data traffic into individual packets and loads them onto the loop, while sending voice over the loop in the traditional manner. At the other end of the loop, the second modem splits the channels and sends them in separate directions: voice calls are sent over the ordinary public switched telephone network, while data packets are transmitted over a separate packet-switched network to the subscriber's chosen Internet service provider (ISP).

Section 251(c) of the Act imposes a number of obligations on ILECs, including the duty to interconnect with other carriers (251(c)(2)), provide unbundled access to network elements (251(c)(3)), offer for resale at wholesale rates any services that it provides at retail (251(c)(4)), allow collocation of other carriers' equipment on the ILECs' premises (251(c)(6)), and negotiate in good faith to fulfill these duties (251(c)(1)). Whether an ILEC is subject to these obligations depends on the services it is providing: the obligations apply to the provision of either "telephone exchange service" or "exchange access." In determining that DSL services are subject to section 251(c)'s requirements, the FCC found that DSL is *either* "telephone exchange service" *or* "exchange access," but did not decide which.

U S WEST appealed the *Advanced Services Order* to federal court. In the appeal, U S WEST argues that the FCC violated the Act by subjecting advanced services to the requirements that Congress designed for traditional telephone service alone. In U S WEST's view, a carrier providing DSL services should not be subject to the obligations of section 251(c), because in providing such services the carrier is providing *neither* "telephone exchange service" *nor* "exchange access," but instead "information access," to which the requirements of section 251 do not apply:

- The Act defines "telephone exchange service" as service *within* a local exchange that permits all subscribers to call each other for a basic local calling charge. According to U S WEST,

DSL services do not meet this definition. Internet-bound DSL communications do not stay “within” a local exchange. They leave the local network and travel over a separate, packet-switched network to an Internet service provider. Nor are DSL services included in a subscriber’s basic local calling charge; subscribers pay an additional charge for DSL.

- “Exchange access” under the Act is defined as the access to a local exchange that is provided to a long distance carrier in order to complete a long distance “toll” call. In U S WEST’s view, a call to an Internet service provider using DSL services simply is not a traditional long distance “toll” call.

In light of these arguments, the FCC has now asked the federal court not to decide the pending appeal but rather to remand the case so that the agency can “consider further” the issues raised in U S WEST’s brief. Conceding that the discussion of these issues in its *Order* was “lean,” the FCC also noted that the *Order* fails to “make a detailed affirmative case for the conclusion that advanced services fall within the scope of either telephone exchange service or exchange access.”

The FCC’s motion for a voluntary remand in the *U S WEST* appeal has implications for an appeal involving another FCC order, as well. At issue in *Bell Atlantic v. FCC* is the Telecommunications Act’s requirement of reciprocal compensation for the completion of local calls. Under section 251(b)(5) of the Act, when a customer of one LEC calls a customer

of a different LEC, the LEC originating the call must compensate the called party’s LEC for carrying the call to completion.

In the regulatory order on appeal in the *Bell Atlantic* case, the FCC determined that section 251(b)(5) does not require reciprocal compensation between local exchange carriers when they jointly deliver traffic to an Internet service provider. In the appeal, MCI argues that, since under the *Advanced Services Order* delivery of Internet-bound traffic to an ISP constitutes either telephone exchange service or exchange access, then reciprocal compensation must be due for that traffic. The FCC’s voluntary remand request to reconsider the *Advanced Services Order* appears to rob MCI’s argument of some of its weight.

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In sum, the FCC and the D.C. Circuit are addressing issues critical to the provision of advanced services by both incumbent and competitive LECs. The FCC has acknowledged that imposing heavy regulatory requirements on incumbent LECs will reduce their incentive to provide advanced services. On the other hand, competitive LECs continue to insist that their ability to provide advanced services hinges on the existence of such requirements. We will be watching these issues closely.

This letter is for general informational purposes only and does not represent our legal advice as to any particular set of facts, nor does this letter represent any undertaking to keep recipients advised as to all relevant legal developments. For further information on these or other telecommunications matters, please contact one of the lawyers listed below:

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