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Legal Update

Broadband Internet Access: AT&T's Fight to Keep Its Cable Wires "Closed"

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Introduction

In June 1998 and April 1999, AT&T Corp. ("AT&T") agreed to mergers with Tele-Communications Inc. ("TCI") and MediaOne, respectively, transforming AT&T into the largest cable operator in the United States virtually overnight.^[1] With this \$150 billion dollar gamble, AT&T has set its sights on dominating the broadband Internet access market, with an eye towards offering consumers local and long distance telephone service, cable television, and the Internet in one neat package.^[2]

To accomplish this, however, AT&T, TCI and MediaOne have had to overhaul their cable infrastructures. Additional billions of dollars have been invested to refit cable wires to enable subscribing homes to both receive and send data, as full Internet service requires.^[3] Excite@Home, of which AT&T controls fifty-eight percent of the voting stock, is the exclusive Internet service provider ("ISP") for AT&T's broadband network.^[4]

By signing an exclusive contract with Excite@Home, AT&T effectively "closed" access to its broadband cable network to conventional ISPs, which connect subscribers to the Internet through telephone wires.^[5] ISP coalitions strongly oppose this move.^[6] They fear that consumers opting for broadband will choose to cancel their subscriptions to conventional ISPs rather than pay double fees to maintain them.^[7]

Specifically, America Online ("AOL") and the Baby Bells, acting through OpenNET, a coalition formed to fight closed access to broadband, have fought AT&T at the local level.^[8] Arguing to municipalities that closed access hurts local consumers by decreasing competition, the ISP industry has succeeded in convincing local cable boards to condition cable license transfers, from MediaOne and TCI to AT&T, on AT&T opening access to its broadband cable system to all ISPs.^[9] AT&T has challenged some of these local actions by filing suits seeking to have such conditions declared invalid.^[10] To date, only one United States District Court has ruled on the matter, deciding in favor of local authorities.^[11]

Lying in wait, the FCC has avoided taking action, preferring to maintain its laissez-faire stance regarding the Internet in the hope of fostering development.^[12] Rather, it has encouraged remediation through private agreements.^[13] Such a private agreement between MindSpring and AT&T was announced, in which AT&T agreed to allow MindSpring nondiscriminatory access to its broadband network following the expiration of AT&T's contract with Excite@Home.^[14] However, it is questionable whether this agreement will help resolve the conflict.^[15]

AT&T v. City of Portland^[16]

In December 1998, following the recommendation of the Mt. Hood Cable Regulatory Commission, the City of Portland and Multnomah County, as a condition precedent to approving the change in control of TCI's cable franchise to AT&T, required AT&T to provide non-discriminatory access to its cable modem platform.^[17] On January 7 and 8, 1999, after AT&T rejected the open access condition, Portland and Multnomah County denied the request for the change in control.^[18] AT&T then filed an action in federal court in Oregon seeking a court order declaring the open access condition invalid.^[19]

The court ruled that the condition imposed by the defendants City of Portland and Multnomah County was a proper exercise of their authority to regulate cable franchising.^[20] As an initial matter, the court held that the condition was not preempted by federal law.^[21] It then concluded that the municipalities' authority to prohibit control of a franchise by any person, where competition would be detrimentally affected, implicitly contains the authority to attach a condition on the change of control.^[22] Furthermore, the court held that the open access condition did not render the cable franchise a common carrier^[23] and that the condition was content neutral.^[24] Nor did the court agree with AT&T that the municipalities had overstepped their franchising authority by conditioning or restricting its use of "subscriber equipment" or "transmission technology."^[25]

As to AT&T's federal constitutional claims, Judge Panner held that the condition was an "economic regulation" which did not violate the First Amendment, and that the City of Portland and Multnomah County did not act in violation of the Commerce Clause, because the area in question was too small and the additional expenses created were too minor to outweigh the increase in local competition.^[26] The court also ruled that the municipalities did not violate the Contract Clauses of either the United States or Oregon Constitutions in mandating open access as a prerequisite to the transfer of control.^[27]

As a final matter, the court held that the open access condition did not breach the franchise agreement.^[28] The court ruled that the franchise agreement conveyed no rights to AT&T to close access to competitors and that the agreement did not limit the municipalities' discretion in weighing approval of the change in control.^[29]

AT&T and TCI have appealed the decision. The Ninth Circuit heard oral argument on November 1, 1999, focusing on the issue of whether broadband Internet access is a cable or telecommunication service.^[30]

Related Decisions

Over the past year, courts have issued few decisions directly bearing on the scope of a municipality's franchising authority or on whether broadband Internet access is a cable or telecommunication service. In *In re United States*, the court intentionally avoided determining whether broadband constitutes a cable or telecommunication service for the purpose of resolving a statutory conflict.^[31] In *City of Chicago v. Federal Communications Commission*, the Seventh Circuit denied a petition to review a ruling by the FCC that exempted services provided by Entertainment Connections, Inc. ("ECI") from the cable franchise requirement.^[32] The FCC had ruled that ECI's method of delivering video transmissions did not render them a "cable

operator” of a “cable system.”^[33]

State Action

A number of legislatures have addressed AT&T’s closed access policy. Current state legislation regarding mandatory open access includes bills in California,^[34] Delaware,^[35] Illinois,^[36] Michigan,^[37] and Pennsylvania.^[38]

The California bill, the Internet Access Enhancement Act of 1999 (“IAEA”), is representative of state efforts.^[39] The IAEA essentially requires that “[e]ach wireline broadband Internet access transport provider that is, or is an affiliate of, an Internet service provider” provide access to any requesting ISP on terms that are “just, reasonable, and nondiscriminatory.”^[40] The IAEA directs that access be implemented “at any technically feasible point selected by the requesting [ISP].”^[41] The Delaware Bill goes further in its efforts to ensure open access of broadband networks. It contains language similar to that contained in California’s IAEA.^[42] However, violation of the Delaware Bill is a criminal offense.^[43]

The Massachusetts Department of Telecommunications & Energy will rule on the lawfulness of open access conditions within Massachusetts communities.^[44] Massachusetts voters will also decide the issue in a November 2000 ballot initiative.^[45]

The FCC

The fate of broadband on the local level will be impacted by federal action. Indeed, against the above backdrop the FCC has yet to take official action on the issue; however, the Commission, including Chairman Kennard, have not remained silent. The FCC, in studies conducted by the Cable Services Bureau, has found that even the threat of regulation would slow broadband’s deployment, which is still in its “infancy,” and that questions of access should be determined by market forces.^[46] Accordingly, the FCC strongly disfavors the setting of Internet access policy by local communities.^[47] Yet, in a December 17, 1999 letter to FCC Chairman Kennard, Rep. John Dingell, D-Mich., the ranking member of the House Commerce Committee, demanded that the FCC conduct inquiries, to be concluded by March 30, 2000, into the open access issue.^[48]

Congress

Congress is currently considering two bills related to the provision of broadband cable service. The Internet Freedom Act would prohibit anticompetitive contracts, presumed to exist where a broadband access provider offers access to an unaffiliated ISP on less favorable terms than it does “to itself, to an affiliated service provider, or to another service provider”^[49] The Internet Freedom Act would also proscribe anti-competitive or discriminatory behavior, including “unfair methods of competition or unfair or deceptive acts or practices,” which serve to “restrain unreasonably” the ability of unaffiliated ISPs to compete.^[50]

The Internet Freedom and Broadband Deployment Act of 1999 aims to bar the FCC and states from “regulat[ing] the rates, charges, terms, or conditions for, or entry into the provision of, any high speed data service or Internet access service, or . . . [from regulating] the facilities used in the provision of either such service.”^[51] The Act preserves the right of cable franchise authorities “to establish requirements that are otherwise consistent with this Act.”^[52]

Conclusion

Thus, the events of the past year have shown that, with respect to closed broadband Internet access, progress through the courts has been slow in the shadow of sporadic Congressional and FCC action. Ultimately, the controversy may be moot, for as Geoffrey Underwood, president of Think Tanks Network noted, “technology will outpace the ability of Congress or regulators to deal with the issue of broadband connectivity.”^[53]

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[1] See Ronald Grover, *Assignment: Rewire America*, BUS. WK., June 14, 1999, at 84; Steven V. Brull, *What’s on Cable? The Net*, BUS. WK., Dec. 27, 1999, at 64.

[2] See Peter J. Howe, *AT&T’s \$150 Billion Dollar Bet: The Future is Broadband*, BOSTON GLOBE, Dec. 12, 1999, at E1. For \$64 per month, AT&T hopes to provide 1.5-megabit-per-second Internet access, long-distance service, and three phone lines. See *id.*

Conventional “dial-up” access transmits data over telephone wires at a maximum speed of fifty-six kilobytes per second. See Marcus Maher, Comment, *Cable Internet Unbundling: Local Leadership in the Deployment High Speed Access*, 52 FED. COMM. L.J. 211, 214-15 (1999) (providing more in depth analysis of many of the topics discussed here). By comparison, “broadband” access over cable lines likely will reach transmission speeds of between two and five megabytes per second. See *id.*

[3] See Howe, *supra* note 2 (“In Massachusetts and New Hampshire alone, MediaOne is spending about \$1.5 billion to upgrade most of its 225 local cable franchises . . .”).

[4] See Dinesh Kumar et al., *FCC is Lobbied Hard on AT&T-MindSpring Access Deal*, COMM. DAILY, Dec. 7, 1999, available in 1999 WL 7580937. Internet portal Excite merged with @Home following AT&T’s buyout of TCI. See Kevin Werbach, *Cable Operators v. ISPs*, INTERNET WORLD, Dec. 15, 1999, available in 1999 WL 15788930.

[5] See Werbach, *supra* note 4.

[6] See *id.*

[7] See, e.g., Bernard Dagenais, *Fairfax City Cable Stand Stands Out*, WASH. TIMES, Oct. 11, 1999, at D3, available in 1999 WL 3095953 (“[American Online], and its smaller competitors, are rightly concerned that [closed cable Internet access] would freeze them out.”).

[8] See Kathy Chen, *AT&T Used Carrot-and-Stick Lobbying Efforts in Local Debates over Access to Cable-TV Lines*, WALL ST. J., Nov. 24, 1999, at A20. In January 2000, AOL agreed to merge with Time-Warner, Inc., potentially creating a second behemoth “closed” broadband system and clouding AOL’s incentives to challenge closed access. See generally Ariana Eunjung Cha, *Case, Levin Again Face Senators’ Skepticism*, WASH. POST, Mar. 3, 2000, at E2 (“[S]enators yesterday quizzed America Online Inc. chief Steve Case and his Timer Warner Inc. counterpart, Gerald Levin, about . . . sundry topics ranging from consumer privacy to ‘open access,’ allowing AOL’s competitors access to Time Warner’s cable-TV lines.”).

[9] See Werbach, *supra* note 4. As of December 1999, 1,564 franchising authorities had approved the license transfers between TCI and MediaOne and AT&T; only eight had imposed open access conditions. See Patrick Ross, *NCTA’s Sachs Predicts Forced Access Legislation is Dead*, COMM. DAILY, Dec. 8, 1999, available in 1999 WL

7580949.

[10] See K.C. Neel, *Lawsuit #3 for AT&T*, CABLE WORLD, Jan. 10, 2000, available in 2000 WL 12302253.

[11] See *AT&T v. City of Portland*, 43 F. Supp. 2d 1146, 1155 (D. Or. 1999).

[12] See Werbach, *supra* note 4 (“FCC Chairman William Kennard argues any action is premature: ‘We cannot regulate against problems that have yet to materialize in a market that has yet to develop.’”).

[13] See Kumar et al., *supra* note 4. It was FCC Chairman Kennard who spurred the talks that resulted in the AT&T-MindSpring deal. See *id.* Chairman Kennard called the AT&T-MindSpring open access agreement a “good first step toward providing consumers with a choice of [ISPs] without paying twice.” See *id.*

[14] See *id.* Excite@Home’s exclusive contract expires in 2002. See *id.*

[15] The announcement of the agreement spurred no settlement talks between AT&T, Multnomah County, and the City of Portland, and AT&T has insisted it is intent on clarifying the power of local authorities to dictate the terms of access. See *Chances Seen Bleak for Settlement of Portland Access Case*, COMM. DAILY, Dec. 27, 1999, available in 1999 WL 7581055 [hereinafter *Chances*].

[16] 43 F. Supp. 2d 1146.

[17] See *id.* at 1150. The open access provision stated: “Transferee [i.e., AT&T] shall provide . . . nondiscriminatory access to Franchisees’ cable modem platform for providers of internet [sic] and on-line services, whether or not such providers are affiliated with Transferee or Franchisees” *Id.* (first alteration in original).

[18] See *id.*

[19] See *id.* at 1146, 1150.

[20] See *id.* at 1155.

[21] See *id.* at 1151-52 (“Congress intended to interfere as little as possible with existing local government authority to regulate cable franchises.”) (citing *City of Dallas v. FCC*, 165 F.3d 341, 347 (5th Cir. 1999)).

[22] See *id.* at 1152 (citing *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 836 (1987)). The court construed 47 U.S.C. § 533(d)(2), which provides:

Any state or franchising authority may not prohibit the ownership or control of a cable system by any person because of such person’s ownership or control of any other media of mass communications or other media interests. Nothing in this section shall be construed to prevent any state or franchising authority from prohibiting the ownership or control of a cable system in a jurisdiction by any person . . . (2) in circumstances in which the State or franchising authority determines that the acquisition of such a cable system may eliminate or reduce competition in the delivery of cable service in such jurisdiction.

47 U.S.C. § 533(d)(2) (1994).

[23] See *AT&T*, 43 F. Supp. 2d at 1153 (interpreting 47 U.S.C. § 541(c)). The court compared Portland’s and Multnomah County’s mandate to those at issue in *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 n.16 (1979), reasoning that access need only be provided to competing ISP’s as opposed to the general public. See *id.*

47 U.S.C. § 541(c) provides: “Any cable system shall not be subject to regulation as a common carrier or

utility by reason of providing any cable service.”

[24] *See AT&T*, 43 F. Supp. 2d at 1153 (“As applied, the open access requirement is content-neutral, affecting only economic arrangements.”).

The court also rejected AT&T’s claim that the open access mandate requires them to carry certain “programming,” other than those programming channels required by Congress under 47 U.S.C. §§ 531, 532, 534, and 535, which AT&T claimed preempts local cable programming regulations. *See id.* The court stressed that AT&T already had agreed to carry such “programming” indirectly when it allowed consumers to access competing ISP’s after traveling through Excite@Home. *See id.* at 1153-54.

[25] *See id.* at 1153 (“The provision does not tell AT&T how to implement open access, nor does it require that AT&T use any particular transmission technology.”) (interpreting 47 U.S.C. § 544(e)).

47 U.S.C. § 544(e) provides: “No state or franchising authority may prohibit, condition, or restrict a cable system’s use of any type of subscriber equipment or any transmission technology.” 47 U.S.C. § 544(e) (Supp. III 1998).

[26] *See AT&T*, 43 F. Supp. 2d at 1154. The court also held that because AT&T allowed subscribers to access competing ISP’s, the open access condition did not violate their First Amendment rights. *See id.* (citing *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980)). Alternatively, the court held that the condition passes the reasonableness test for regulations which infringe upon the First Amendment, as set out in *United States v. O’Brien*, 391 U.S. 367, 377 (1968). *See id.*

[27] *See id.* at 1155. The franchise agreement had authorized the defendants to condition transfers of control on the transferee’s “technical, legal or financial qualifications . . .” *Id.* The court reasoned, under both constitutions, that the municipalities’ actions were consistent with the franchise agreement, as the open access condition related to AT&T’s “legal” qualifications, i.e., the change of control implicated antitrust concerns. *See id.*

[28] *See id.*

[29] *See id.*

[30] *See Appeals Court Asks Whether AtHome Is Cable or Telecom Service*, WARREN’S CABLE REG. MONITOR, Nov. 8, 1999, available in 1999 WL 6826273. This issue is significant because the FCC has sole jurisdiction over telecommunication services; local communities can only regulate cable services. *See id.* Notably, the FCC filed an amicus brief “arguing that only the commission has nationwide authority over broadband providers.” William E. Kennard, *How to End the World Wide Wait*, WALL ST. J., Aug. 24, 1999, at A18.

[31] 36 F. Supp. 2d 430, 432-33 (D. Mass. 1999). The case involved whether the Electronic Communications Policy Act of 1986, 18 U.S.C. § 2701 *et seq.*, or the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.*, governed Internet services provided over cable wires. *See id.* at 432. The judge also held that the statutory conflict was not sufficiently ripe. *See id.* at 433.

[32] 199 F.3d 424, 429 (7th Cir. 1999).

[33] *See id.* at 426. ECI’s system of delivering video transmissions employs a “satellite master antenna system,” fixed to the top of a subscribing building, which relays signals to customers via Ameritech’s fiber optic and coaxial cables. *See id.* at 426-27. ECI pays a monthly fee to Ameritech for use of its cables. *See id.*

[34] S. 1217, 1999-2000 Reg. Sess. (Cal. 1999).

[35] S.B. 285, 140th Gen. Ass., 2d Sess. (Del. 1999).

[36] H.B. 4152, 91st Gen. Ass., 1999-2000 Reg. Sess. (Ill. 2000).

[37] S.B. 667, 90th Leg., 1999 Reg. Sess. (Mich. 1999).

[38] H.B. 1516, 183d Gen. Ass., 1999-2000 Reg. Sess. (Pa. 1999).

[39] S. 1217, 1999-2000 Reg. Sess. (Cal. 1999) (proposing amendment to CAL. PUB. UTIL. CODE § 709.9).

[40] *Id.* § 1(c) (proposing amendment to CAL. PUB. UTIL. CODE § 709.9(c)).

[41] *Id.* § 1(c)(4) (proposing amendment to CAL. PUB. UTIL. CODE § 709.9(c)(4)).

[42] *Compare* S.B. 285, 140th Gen. Ass., 2d Sess. § 3 (Del. 1999) (prohibiting access to broadband networks “under terms and conditions, or at rates, that are less favorable than those on which it provides such access to itself, its affiliates, or any other person . . .”), *with* S. 1217, 1999-2000 Reg. Sess. § 1 (Cal. 1999) (“Each wireline broadband Internet access transport provider that is, or is an affiliate of, an Internet service provider shall provide any other requesting Internet service provider . . . access . . . on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.”).

[43] *See* S.B. 285, 140th Gen. Ass., 2d Sess. § 3 (Del. 1999) (“Discriminatory provision of broadband access transport services is a Class A Misdemeanor.”).

[44] *See Chances*, *supra* note 15. The communities of Cambridge, Somerville, Quincy and North Andover have requested consolidation of their hearings in the matter. *See id.*

[45] *See* Brian C. Mooney, *Hired Guns Take Aim with Ballot Questions*, BOSTON GLOBE, Dec. 8, 1999, at B3.

[46] *See FCC Chairman Kennard Releases Cable Staff Report on the State of the Broadband Industry* (last modified Oct. 14, 1999) <http://www.fcc.gov/Bureaus/Cable/News_Releases/1999/nrcb9017.html>. The report did acknowledge that if broadband takes a dominant position in the Internet industry, regulation may be required. *See id.* However, to protect competition in Internet access services, the FCC has freed up spectrum for wireless operators and allowed local telephone companies access to the phone network to facilitate the deployment of digital subscriber lines, a prime competitor of broadband. *See Kennard*, *supra* note 30.

[47] *See Kennard*, *supra* note 30.

[48] *See Dingell Calls for FCC Review of Cable Open Access by March 30*, WARREN’S CABLE REG. MONITOR, Dec. 27, 1999, *available in* 1999 WL 6826386. In a letter to AT&T Chairman Michael Armstrong, Dingell stated that AT&T’s agreement with MindSpring contradicted AT&T’s assertion that open access was not technologically feasible, thus raising the possibility of Congressional action. *See id.*

[49] H.R. 1686, 106th Cong. § 102 (1999). The Act defines “broadband” as “transmission capability in excess of 200 kilobits per second in at least one direction.” *Id.* § 105(1). NCTA President Robert Sachs commented that the bill has failed to win support and is unlikely to pass. *See Ross*, *supra* note 9.

[50] H.R. 1686, 106th Cong. § 103.

[51] H.R. 2420, 106th Cong. § 4(a) (1999). The Act defines “high speed data service” as service able to “transmit, using a packet-switched or successor technology, information at a rate that is generally not less than 384 kilobits per

second in at least one direction.” *Id.* § 3(a)(3).

[52] *Id.* § 4(a) (proposing amendments to 47 U.S.C. § 232(b)).

[53] Richard Morin & Claudia Deane, *The Ideas Industry: WTO Remains a Hot Topic for 2000*, WASH. POST, Dec. 21, 1999, at A39.