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Telecommunications Alert: D.C. Circuit Finds FCC's Elimination of Dominant Carrier Regulation for Certain ILECs' Special Access Broadband Lines Reasonable, but Subject to Review in Current Special Access Docket

7/22/2009

Last week, the U.S. Court of Appeals for the District of Columbia Circuit rejected[1] an effort by a coalition of competitive broadband service providers and business users of special access services to overturn two 2007 FCC decisions that partly deregulated three incumbent local exchange carriers (ILECs): AT&T, Embarq, and Frontier. The FCC decisions granted forbearance from dominant carrier pricing controls and tariffing requirements for high-speed special access lines used by competing local exchange telecommunications carriers (CLECs) and by businesses. The D.C. Circuit emphasized the discretion that Section 706 of the 1996 Telecommunications Act had given the FCC to facilitate broadband deployment. It found, in applying the deferential "arbitrary and capricious" standard under the Administrative Procedure Act, that the FCC's decision to "recalibrate the degree of regulation imposed on the ILECs' special access lines," while "hotly debated and eminently debatable," was "reasonable and reasonably explained."

Background: Regulation of Special Access Broadband Lines

Unlike residential customers who typically rely on their telephone or cable wires to obtain broadband Internet service, business customers ordinarily utilize broadband services (such as Ethernet, LAN, and Optical Network) through a dedicated high-capacity special-access line owned by an ILEC. Because generally one ILEC controls the only special access line to an individual business, consumer groups and CLECs, as well as some businesses, regularly express their concern to the FCC that ILECs can charge excessive rates or improperly discriminate against unaffiliated broadband service providers seeking to lease ILEC lines.

Title II of the Communications Act imposes certain mandatory common carrier regulations on *interstate* telecommunications carriers, such as the requirements that these carriers must charge just and reasonable rates, not engage in unreasonable discrimination, and allow other carriers to interconnect with their networks.[2] *Dominant* carriers—telecommunications service providers that have control over a large segment of a particular market—have additional statutory burdens in the form of price caps and stringent advance filing tariff rules.[3]

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ILECs traditionally were subject to both basic common carrier and dominant carrier pricing regulation with respect to their special access lines. In 2007, the FCC granted AT&T, Embarq, and Frontier partial forbearance by exempting them from dominant carrier regulation but not from common carrier regulation. The FCC found such additional obligations unnecessary to ensure that ILECs' special access charges were not unjustly or unreasonably discriminatory, and that these requirements could in fact create market inefficiencies. The FCC predicted that taking this step would increase competition and allow ILECs to "respond to technological and market developments without the Commission reviewing in advance the rates, and terms, and conditions" under which special access services were offered.

D.C. Circuit's Rationale for Upholding the FCC

Judge Brett Kavanaugh, joined by Chief Judge David Sentelle and Senior Circuit Judge Harry Edwards, rejected the petitioners' claim that the FCC was wrong to use a nationwide market analysis when it looked at special access services, rather than analyzing special access lines in identified local markets. The unanimous panel held that given the rapidly changing state of the overall broadband market, and the discretion to shape broadband policy given to the FCC by Section 706, "the law does not 'compel a particular mode of market analysis or level of geographic rigor' when the agency forbears from imposing certain requirements on broadband providers."[4]

Judge Kavanaugh also found that the FCC's decisions were reasonable because they were limited in important ways. First, the ILECs remain subject to basic common carrier regulation, including the requirements to interconnect, to offer just and reasonable rates, and to offer services on a nondiscriminatory basis. Second, business end-users and competitive broadband service providers who lease or use ILECs' special access lines may still bring complaints under 47 U.S.C. § 208 to challenge the reasonableness of a rate charged, and such complaints must be resolved within five months.

Third, in its 2007 decisions, the FCC declined to grant dominant carrier forbearance for ILECs' time division multiplexing (TDM)-based special access services. Forbearance was thus granted only for ILECs' non-TDM-based special access services, such as packet-switched broadband and optical transmission service. The effect of this is that competitive carriers can also obtain access to ILECs' price-regulated TDM-based services—DS1 and DS3 connections—to compete with the ILECs. Judge Kavanaugh rejected claims that requiring competitors to buy TDM services that they in turn used to provide a retail Ethernet product was inefficient. He noted carrier advertisements claiming an ability to provide competitive service using the ILECs' TDM-based services.

Fourth, the court relied on the FCC's 2007 view that in removing dominant carrier regulation, it could actually have the effect of encouraging infrastructure investment and spurring CLECs to deploy their own facilities, and thus reduce their reliance on ILECs altogether. Despite the significant upfront construction costs of replicating ILECs' last-mile connections to individual businesses, these costs, the FCC had contended, could be recouped by the sizable revenues competitive carriers could obtain. The FCC, the panel found, reasonably considered the

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existence, consequences, and desirability of such self-deployment in deciding to eliminate ILEC dominant-carrier regulation of these services.

FCC Given Green Light To Change Forbearance Approach Based on More Recent Facts

Although the decision is a loss for supporters of special access regulation, the D.C. Circuit nonetheless hinted that other avenues remain for special access proponents, and noted that "the FCC's forbearance decision in this particular matter…is not chiseled in marble." Judge Kavanaugh observed that the FCC has a currently active special access proceeding,[5] and is able to reassess special access line regulation as the Commissioners reasonably see fit "based on changes in market conditions, technical capabilities, or policy approaches to regulation in this area." Following the D.C. Circuit's decision last week, CLECs and other commentators urged the FCC to find market failure in its special access docket. Thus, although the regulatory terrain for ILECs' provision of special access broadband lines to individual businesses has been further shaped by last week's decision, the landscape is by no means static.

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Please contact your Mintz Levin telecommunications attorney, or any attorney listed in the left column of this Alert, for more information as we continue to follow these developments.

Endnotes

[1] Ad Hoc Telecommunications Users Committee, *et al.* v. FCC, Case No. 07-1426 (D.C. Cir. Jul. 17, 2009) ("*Ad Hoc Telecom*").

[2] *See* 47 U.S.C. §§ 201(b); 202(a); and 251(a)(1).

[3] *See id.* & 47 C.F.R. 61.58.

[4] *Ad Hoc Telecom* at 11 (citing *EarthLink, Inc. v. FCC*, 462 F.3d 1, 8 (D.C. Cir. 2006)).

[5] *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25. The FCC is currently assessing, as part of this proceeding, whether to collect additional market information.

For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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