



FCC and Brand X Internet Services **Part One**

The U.S. Supreme Court Takes on Broadband Cable Regulation

By Carl Kandutsch ■ *Esq.*

The Supreme Court agreed in December to consider whether cable companies must open their high-speed lines to rival Internet providers. Among the issues: Is cable wiring, used for non-cable services, a “telecommunications service” that makes it subject to Federal Communications Commission rules requiring phone companies to provide access to independent providers or resellers? In this two-part series, former FCC attorney Carl Kandutsch explains what those folks in Washington are arguing about, and where the chips may fall. His goal is to explain the law (which is certainly still evolving) and the logic behind it.

In accepting this case, the United States Supreme Court could decide whether and how this regulatory environment will change as broadband¹ replaces dial-up as the primary means by which consumers connect to the Internet. This series summarizes the issues at stake in the Supreme Court case²; Part 1 attempts to describe the recent historical context within which these issues arose, and Part 2, in the next issue, explores the topics in greater depth.

Introduction

The framework for contemporary American telecommunications policy was established when the FCC, the Department of Justice, and the federal courts dismantled the AT&T monopoly. The dismantling occurred over a period of time extending from the late 1960s³ and culminated in an order forcing the

giant telco to unbundle its long distance service from its local telephone service.⁴

The social harms caused by the AT&T monopoly all stemmed from the firm’s use of its ownership of a physical network to control how that network could be used, stifling competition and innovation on multiple levels. The solution, achieved by government regulation, was to isolate the “natural monopoly” component of AT&T’s network (the wiring infrastructure) from other components for which there could exist a competitive market. This principle is clearly expressed in Section 251 of the Telecommunications Act of 1996, which requires incumbent local exchange carriers (ILECs, or as consumers like to think of them, the telephone companies) to make their local networks available for use by competitive local exchange carriers (CLECs, the sellers of space on the electronic pathways to homes and businesses) on a nondiscriminatory basis.⁵

It is not a coincidence that the Internet blossomed to become a dominant and unprecedented economic and cultural force, in the United States and elsewhere, in the post-AT&T regulatory environment. Several influential commentators have argued that the tidal wave of innovation in hardware, software, and digital content that has characterized the Internet thus far was made possible precisely by the absence of any centralized control by network owners over how the networks were used.

As we enter the broadband era, the fundamental architecture of the Internet

may be changing, for better or worse, and the question of regulation inevitably takes center stage.

The Dispute Over Access to Cable Modem Platforms

In the world of narrowband (dial-up) Internet access, consumers may choose among thousands of information service providers (ISPs). These provide both connectivity to the Internet via ILEC last-mile facilities as well as a range of other services such as e-mail servers, customer support, content and server capabilities (the ability to build web pages on ISP servers).⁶ The market for narrowband ISPs is competitive, but their product offerings are limited by the access speed provided by the local telephone exchange; the next generation of Internet applications – such as high-quality video and audio – cannot be supported on the dial-up Internet platform.

In the emerging market for broadband Internet access, about 70 percent of consumers use cable modems, connecting to the Internet via the hybrid-fiber coaxial infrastructure provided by cable television firms (in telecom jargon, “multiple system operators” or MSOs), and most of the remaining 30 percent have digital subscriber line (DSL) connections using the upgraded copper networks of the former Bell telephone companies.⁷ These competing broadband platforms are based on video cable and local telephone networks respectively.

This produces the anomaly that the cable companies providing cable modem

services, and the telephone companies using DSL, are subject to entirely different regulatory structures despite the fact that each offers the same functionality, namely, broadband Internet access. While FCC rules require that local exchange carriers permit competing DSL providers to collocate their equipment on telephone company facilities (producing competition among DSL providers), most if not all of the major cable MSOs have their own proprietary ISPs. To the extent that the cable MSOs do not allow competing ISPs access to their networks, consumers' choice among cable modem service providers is limited in the same way as is their choice among cable television providers.⁸ The significance of vertically integrated cable companies for the future of broadband services depends in large part on the significance of competition among cable modem ISPs in emerging markets, a complex and hotly debated topic. Whatever one's views, there is little doubt that the cable companies themselves have much at stake: Integration of high-speed Internet access services with cable "last-mile" transport service⁹ provides the business model that drove the large cable mergers of the late 1990s, including AT&T's acquisitions of TCI and MediaOne (and its ISP, @Home), and AOL's buyout of Time Warner Cable (and its ISP, RoadRunner).

In the review proceedings for each of those mergers, the FCC was asked to require that the merged firms unbundle their cable modem services from their transport services by providing "open access" for unaffiliated ISPs to their last-mile cable networks. Although the term "open access" in this context is vague and therefore overly politicized, in essence it means a regulatory regime under which competitive ISPs would have a right to interconnect to a cable network in the same place and at the same price as the MSO's own affiliated ISP. The assumption is that ownership of a natural monopoly facility (the last-mile cable network) should not be leveraged to suppress competition in the ways the facility is used.

At the time, concerns were voiced by

the advocates of an open access condition for merger approval (including cable's competitors, the telcos, and satellite television companies, as well as public interest groups). These advocates worried that vertically integrated cable companies with market power might use their proprietary ISPs both to favor their own affiliated content (such as CNN for AOL

Time Warner) and to suppress applications (such as streaming video or downloadable music) perceived as a threat to their core business. While these worries may seem speculative, evolving technology makes it possible, for example, to program routers to favor certain data packets over others in terms of speed or Quality of Service. On the other side, the

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cable industry and its advocates argue not only that unrestricted ISP interconnection to cable networks presents insurmountable technical problems, but that such an open access requirement would destroy the industry's incentive to invest the billions of dollars needed to upgrade those networks to full broadband capability.

The Current Litigation

Requiring cable networks to provide access to multiple broadband ISPs would probably, but not necessarily, involve the regulatory classification of cable modem service as a "telecommunications service" within the framework of the Telecommunications Act of 1996, thus transforming the cable MSOs into "common carriers" for this particular purpose. Under Title II of the Act, common carriers are subject to a range of regulatory duties in addition to unbundling their networks for competitors. In each of the three cited mergers, the FCC studiously avoided any such regulatory classification and instead adopted a "wait and see approach."¹⁰ The Brand X Internet case currently before the Supreme Court is as much about the FCC's inaction as it is about how cable modem service ought to be regulated.

Just as the FCC was, in the context of its merger reviews, defending its policy of forbearance on broadband regulation, the Ninth Circuit Court of Appeals ruled that to the extent AT&T's cable ISP, @Home, provides, in addition to the services of a traditional dial-up ISP, Internet transmission via its own proprietary last mile network linking the consumer to the Internet, cable modem service constitutes a "telecommunications service."¹¹

Classification of cable modem service as a "telecommunications service" under Title II of the 1996 Telecommunications Act meant that AT&T, like a local telephone monopoly, must unbundle its last mile network from its ISP service and allow competitive ISPs to interconnect with that network on a nondiscriminatory basis.

The FCC quickly reacted to the Ninth

Circuit's "open access" mandate by issuing a Notice of Inquiry on the regulatory classification of cable modem service¹² and then a Declaratory Ruling¹³, holding that cable modem service, even when offered by a cable company that owns the last mile transmission network connecting the customer to the ISP, is a single unified "information service" not subject to regulation as a common carrier of "telecommunications service," or as a "cable service."

Various parties challenged the FCC Ruling in court, and the Ninth Circuit, relying on its previous holding, again ruled that cable modem service must be regulated as a telecommunications service.¹⁴ The United States Supreme Court granted certiorari and agreed to hear the case.

The Brand X case will require the Court to decide two questions: First, whether a government agency with expertise in the field, or a United States Court of Appeals, has greater authority in interpreting the statutes that establish national policy on broadband Internet access; and secondarily, whether cable modem service is an unregulated "information service" as urged by the FCC, or a regulated "telecommunications service" as the Ninth Circuit has held. The result could well determine the nature and structure of the Internet, as well as that of network economies, for the foreseeable future.

Next month, we will examine in more detail the regulatory options for cable modem services, and speculate on the direction the Court might choose. ♦

1. "Broadband" Internet access refers to high-speed Internet access provided over cable modems, high-bandwidth satellite transmissions or Digital Subscriber Line (DSL) configured telephone wire. Broadband Internet access permits the delivery of high-bandwidth applications and content (interactive games, video, audio, etc.) that have the potential to permanently alter the media landscape in ways that can scarcely be imagined.

2. There are actually two consolidated cases before the Court, NCTA v. Brand X Internet Services, No. 04-277, and FCC v. Brand X Internet Services, No. 04-281.

3. In re Use of the Carterfone Device in Message Toll Tel. Serv., 13 F.C.C. 2d 420 (1968).

4. United States v. AT&T, 522 F.Supp. 131 (D.D.C. 1982), aff'd sub nom., Maryland v. United States, 460 U.S. 1001 (1983).

5. 47 U.S.C. §§ 151-614.

6. See, for example, Lawrence Lessig, Code and Other Laws of Cyberspace (New York: Basic Books, 1999). The absence of centralized control is a consequence both of the Internet's physical and logical architecture, Kevin Werbach, "The Architecture of the Internet 2.0," Release 1.0 (Feb. 19, 1999) and the regulatory framework for telephony, under which dial-up ISPs collocate their equipment on the facilities of CLECs, which in turn are connected to ILEC switches according to the unbundling requirements of the Telecommunications Act.

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9. Popular narrowband ISPs include AOL, the Microsoft Network, CompuServe and Prodigy. It is important to note that most of the world still accesses the Internet by means of narrowband dial-up connections.

10. As of this writing, about 3 percent of broadband users connect to the Internet via satellite and fixed-wireless technologies.

11. For example, the only cable television service offered in the author's geographical area is Adelphia; hence, the only cable modem service choice is Adelphia's Powerlink. Of course, the author could choose satellite video (DISH or DirecTV) over Adelphia's cable, and, with regard to high-speed Internet, there are a variety of DSL providers available including those offered by the ILEC, Verizon, and various CLECs.

12. The portion of the public network from the telco central office (or cable headend) to the end user's location is the access network or "last mile."

13. The Federal Trade Commission (FTC), in its own review of the AOL/Time Warner merger, chose not to wait and imposed a minimal open access condition on the merged firm. The condition required AOL Time Warner to make its cable transport network available to at least one unaffiliated ISP before it could offer its own service, and at least three other ISPs within ninety days. The company was also required to offer, market and price AOL DSL service the same way in markets with AOL Time Warner cable modem services as in areas without cable modem service. The FTC condition demonstrates that "open access" for cable modem ISPs does not necessarily imply full blown common carrier regulation.

AT&T Corp. v. City of Portland, 216 F.3d 871 (9th Cir. 2000).

14. FCC Rcd 19287 (2000), available at 2000 WL 1434689.

15. FCC Rcd 3019 (2002), available at 2002 WL 252714.

16. Brand X Internet Services v. FCC, 345 F.3d 1120 (9th Cir. 2003).

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