Telecommunications, the Internet, and Convergence: Regulation and ISPs, ASPs, and ESPs

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Introduction

For decades, communications "convergence" has been a hot topic. Since at least the 1970s, policymakers, regulators, businesses, lawmakers, and futurists have been articulating a vision of a world in which traditional media like television, radio, and newspaper-style, text-based information could be merged with telecommunications services to create a "one stop shopping" outlet for all consumer information and entertainment needs. Prior to "broadband," prior to dial-up information services and the Internet, prior to the explosion of wireless services, prior even to the advent of the home video market and widespread adoption of fax machines, there were promises of a rich array of services all being delivered to consumers over an integrated

appliance, very possibly through a sole service provider. Today, at the dawn of the twenty-first century, this vision endures, informed by technological progress and marketplace evolution. Now, there is almost unanimous agreement—the Internet has emerged as the locus where the convergent "information highway" leads.

In considering the application of current law and precedent to this converged world, it is particularly noteworthy that even as technology has advanced and service providers have deployed services that are very different from the typical two-way voice or one-way video services of the past, the basic regulatory framework for the delivery of many services has remained largely unchanged. While the Telecommunications Act of 1996 and various policies and rules of the Federal Communications Commission and its counterparts at the state, local, and international levels have shifted the policy and legal focus to a more competitive paradigm, the fact is that much of the core regulatory model is fundamentally the same today as it was decades ago. Perhaps nowhere is this more evident than with respect to services that are not themselves "communications," but that depend upon communications services for their delivery. In the past, these services were called "data," "enhanced," or "information" services and were largely unregulated. These services today are arguably the most dynamic offerings in the market and part of the burgeoning class of services offered by Internet Service Providers (ISPs) and Application Service Providers (ASPs).

While these service providers are not regulated as carriers, they increasingly compete with carriers and their affiliates. Moreover, the services of these entities (who are legally "information service providers) depend on riding the rails of the telecommunications network to reach consumers. As such, it is vital to answer key questions to understand how these services can be deployed and how they will fare in the highly competitive market. How can an ASP get access to its customers? Can, for example, ASPs get access to critical network features and functions? On what terms and conditions? Must these providers align with or become carriers to compete effectively? This paper provides an overview of the regulatory treatment of this vital class of service providers and identifies the key issues that are likely to be encountered as ASPs and similar providers expand deployment and grow their customer base.

Background

The Federal Communications Commission (FCC) has not historically regulated Internet Service Providers, Application Service Providers or any other entity now classified as an "information service provider" (ISP) but many of its actions have impacted the nature and status of these entities. For example,

the FCC repeatedly investigated computer/ communications convergence in its **Computer Inquiries**,[1] examined the application of carrier access charges to these entities;[2] and elaborated on the nature and regulatory status of ISPs in the context of universal service.[3]

The Computer Inquiries: The FCC Examines Computer/ Communications Convergence

As the computer industry developed in the 1960s and began converging with traditional telecommunications services, the FCC initiated a series of proceedings to investigate the proper regulatory paradigm for services that involved both computers and communications.[4] The **Computer Inquiries,** were instituted to distinguish between computer usage strictly for data processing, which remains unregulated, and that used in common carrier communications, subject to regulation pursuant to Title II of the Communications Act.[5] These proceedings, initially commenced in 1966, have become one of the FCC's longest-running, and perhaps most far-reaching, proceedings, spawning a continuing series of regulatory decisions and litigation.[6]

[1] *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities, Tentative Decision, 28 FCC 2d 291, 295 (1970); (Computer I Tentative Decision)*; Final Decision and Order, 28 FCC 2d 226 (1971), (*Computer I Final Decision*) *aff'd in part sub nom. GTE Serv. Corp v. FCC*, 474 F. 2d 724 (2nd Cir.), decision *on remand*, 40 FCC 2d 293 (1973) (*Computer I Remand*).

[2] *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, (*First Report and Order,*) 12 FCC Rcd 15982 (1997) (*Access Charge Reform Order*) *aff'd Southwestern Bell Telephone Company v. FCC*, 153 F.3d 523 (8th Cir. 1998).

[3] *Federal-State Joint Board on Universal Service*, 13 FCC Rcd. 11501 (1998) (*Report to Congress*).

[4] *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Service and Facilities, Notice of Inquiry*, 7 FCC 2d 11 (1966) (*Computer I Inquiry*).

[5] *Id.*

[6] *Computer I Final Decision*, 28 FCC 2d (1971); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision*, 77 FCC 2d 384 (1980) (*Computer II Final Order*), recon., 84 FCC 2d 50 (1980), *further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom., Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (CCIA), *cert. denied*, 461 U.S. 9389 (1983); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Phase I, Report and Order*, 104 FCC 2d 958 (1986) (*Computer III Phase I Order*), *modified on recon.*, 2 FCC Rcd 3035 (1987), *further recon.* 3 FCC Rcd 1135 (1988), *second further recon.*, 4 FCC Rcd 5927 (1989); *Phase II, Report and Order*, 2 FCC Rcd 3072 (1987) (*Computer III Phase II Order), further recon.*, 4 FCC Rcd 5927 (1989), *rev'd in part sub nom., California v. FCC*, 905 F.2d 1217 (9th Cir. 1990), *on remand*, 6 FCC Rcd 7571 (1991), *vacated in part and remanded, California v. FCC*, 39 F.3d 919 (9th Cir. 1994); *cert.* denied, 115 S.Ct. 1427 (1995); *See also Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, Notice of Proposed Rulemaking*, CC Docket No. 95-20, 10 FCC Rcd 8360 (1995), *Computer III Further Remand Proceedings: Bell Operating Company Further Notice of Proposed Rulemaking*, 13 FCC Rcd. 6040 (1998) (*Computer III Further Remand Notice*), *In the Matter of Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards & Requirements, Report and Order,* CC Docket Nos. 95-20, 98-10, FCC 99-36 (rel. Mar. 10, 1999).

First Computer Inquiry

Through its **First Computer Inquiry**, the FCC addressed two questions: "(a) the nature and extent of the regulatory jurisdiction to be applied to data processing services; and (b) whether, and under what circumstances, and subject to what conditions or safeguards, common carriers should be permitted to engage in data processing."[7]

The twin goals of the FCC's proceeding were to allow telephone carriers to enter the competitive computer and data processing service markets, while simultaneously protecting their customers, and the nascent data service industry, from unlawful cross-subsidization and discriminatory behavior designed to drive competitors out of the market.[8]

To resolve these questions and serve these goals, the Commission decided to categorize services such that it would continue regulating the "basic physical transport layers" while deregulating the "virtual and content layers."[9] To do this, the FCC came up with several classifications of computer and communications services:

- "Data processing" encompassed the use of a computer for the processing of information rather than for circuit or message-switching;[10]
- "Communications" involved the use of the computer for operations such as circuit or message-switching;[11]and
- "hybrid" offerings included aspects of both data processing and communications.

Under this framework, communications would be regulated, data processing would not, and as to "hybrid services," the Commission would determine on a case-by-case basis whether these offerings belonged in the data processing or communications categories.[122]

As it would often repeat in the future, the FCC also declared that they had jurisdiction over data processing under the ancillary jurisdiction of Title I, but was "refraining from regulating."[13]

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[7] *Computer I Tentative Decision*, 28 FCC 2d at 295.

[8] *Computer I Tentative Decision*, 28 FCC 2d at 301-302.

[9] Peter W. Huber et al., *Federal Telecommunications Law* § 12.1, at 1076 (2nd ed. 1999).

[10] *Computer I Final Decision*, 28 FCC 2d at 268.

[11] *Id.* at 274.

[12] *Id.* at 276–278.

[13] *Computer I Final Decision*, 28 FCC 2d at 268–270. Section 152 of the Communications Act grants the FCC jurisdiction of interstate and foreign communication by wire and radio, and section 153 defines "communication by wire" as the "transmission of writing, signs, signals, pictures and sounds of all kinds... incidental to such transmission," the Commission found that enhanced services fall within its ancillary jurisdiction as incidental transmissions over the interstate telecommunications network.

Computer Inquiry II

Ultimately, the case-by-case determination of which category hybrid services fell into led to too much confusion and delay as the pace of technological development increased, leading to the **Computer II** proceeding. In this proceeding, the FCC devised the "basic" and "enhanced" regulatory structure, still largely in use today.[14] Significantly, the FCC in this proceeding required AT&T (and later the Bell Operating Companies or "BOCs") to provide these enhanced services only through structurally separate affiliates.[15]

Basic services included "the common carrier offering of transmission capacity for the movement of information" or simply, "pure transmission" of communication or information and are subject to Title II regulation.[16]

Enhanced services encompassed any services "offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, protocol or similar aspects of the subscriber's transmitted information," and are not regulated under Title II of the Act.[17]

The FCC's **Computer II** decisions required carriers to unbundle basic from enhanced services and to offer enhanced services through a separate subsidiary.[18] Under this regime, the parent company was required to offer to the subsidiary basic transmission services at the same tariffed terms and conditions as it offered to unaffiliated providers.[19]

Once again, although the FCC declined to regulate enhanced services under Title II, it concluded that it had ancillary jurisdiction under Title I as enhanced services involve communication over "the interstate telecommunications network" and decided to preempt state regulation of enhanced services.[20]

Through its **Computer II** decision, the FCC also unbundled and deregulated the installation of customer premises equipment (CPE).[21] Accordingly, providers of regulated telecommunications services, including the BOCs, were permitted to participate in the sale of CPE, although subject to certain public interest regulation.[22]

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[14] *Computer II Final Order*, 77 FCC 2d at 384 (1980). *See also* 47 U.S.C. §§ 152, 153.

[15] *See* Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications by the Bell Operating Companies, Report and Order, 95 FCC 2d 1117 (1983).

[16] *Computer II Final Order*, 77 FCC 2d at 419-20.

[17] *Id.* at 387. *See*, 47 U.S.C. § 64.702(a).

[18] *Computer II Final Order*, 77 FCC 2d at 475-488.

[19] *Id.* at 475.

[20] *Id.* at 428, 429, 432.

[21] *Id.* at ¶ 140-146.

[22] 47 C.F.R. § 64.702(e).

In general, the purpose of the Commission's regulation has been to prevent carriers from engaging in anticompetitive conduct, including improper cross-subsidization of the unregulated services with the regulated services and unlawful discrimination in favor of its CPE or information service. This restriction remains in effect today, although as noted below, it is the subject of a pending rulemaking.

Computer Inquiry III

In a stark shift in regulatory policy, in the **Computer III** proceeding the Commission eliminated the separate affiliate requirement and shifted to accounting[23] and nonstructural safeguards for BOC provision of enhanced services.[24]

Through these safeguards, the FCC sought to allow common carriers to provide enhanced services on an integrated basis, while preventing cross-subsidization and discriminatory network access or interconnection practices by the BOCs.

- The Commission did not want unaffiliated enhanced services providers to be disadvantaged as compared with affiliated enhanced service providers.[25]

Computer III introduced two new concepts: "comparably efficient interconnection" (CEI) and "open network architecture" (ONA).[26]

- Note, however, that **Computer III**, and the Commission's preemption of state authority over certain information/enhanced services, has been the subject of significant litigation, while an extant proceeding remains at the FCC.[27]

In **Computer III**, the FCC ordered the BOCs to unbundle their local networks and to interconnect with unaffiliated providers on "comparably effi-

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[23] These include accounting separation standards for cost allocation, cost allocation manuals, affiliate transaction rules, and annual independent audits.

[24] *Computer III Phase I Order*, 104 FCC 2d 958 (1986). The nonstructural safeguards include: accounting safeguards, nondiscriminatory access to basic network services; nondiscriminatory access to network information; and nondiscriminatory access to customer proprietary information (CPNI).

[25] *Id*. at 1126-28.

[26] *Computer III Phase I Order*, 104 FCC 2d 958 (1986); Computer III Phase II Order, 2 FCC Rcd 3072 (1987).

[27] In 1990, the Ninth Circuit Court of Appeals remanded the case back to the FCC in California v. FCC, 905 F.2d 1217 (9th Cir. 1990) (First Remand). The Commission adequately addressed the Court's concerns regarding its preemption of state authority over intraLATA information services, however, the Court remanded the case again as it found the FCC had not adequately explained its policy towards structural separation. *See California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (Second Remand Decision). *See also, Computer III Further Remand Proceeding: BOC Provision of Enhanced Services, Notice of Proposed Rulemaking*, 10 FCC Rcd 9360 (1995) (Computer III NPRM).

cient" terms as they offered to their own affiliated enhanced services providers.[28]

The CEI rules were intended to provide independent ISPs with the same interconnection to the incumbent LEC network as the incumbent LEC's affiliate.

The current CEI parameters involve:

1. interface functionality;
2. unbundling of basic services;
3. resale;
4. technical characteristics;
5. installation, maintenance, and repair;
6. end-user access;
7. CEI availability as of the date the BOC offers its own enhanced service to the public;
8. minimization of transport costs; and
9. availability of the offering to all interested ISPs.[29]

Following approval of their CEI plans, the BOCs were required to file detailed ONA plans with the FCC that offered various unbundled services to unaffiliated providers under tariff.[30]

- All basic network capabilities used by the carrier's enhanced service providers, including signaling, switching, billing, and network management, were to be unbundled and the BOC was required to purchase these same elements for its own ESP at the same tariffed rates and on the same terms as unaffiliated ESPs.[31]
- The FCC's ONA precedent is more broadly focused than the CEI rules, and its objective is to increase access to the incumbent LEC network and allow independent service providers to obtain the services, features, and functions needed to offer innovative services without buying network functionality that is unnecessary.
- The BOC ONA plans were required to include the "key" elements requested by unaffiliated ESPs, explain why they were or were not being provided, and describe the procedures for unaffiliated providers to request a new element.[32]

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[28] *Computer III Phase I Order*, 104 FCC 2d at 1027.

[29] *Computer III Phase I Order*, 104 FCC 2d 958 (1986).

[30] *Id.* at 1064.

[31] *Id.* at 1040.

[32] *Id.* at 1066.

- BOCs were required to file three-year deployment schedules for their initial ONA services, subject to FCC approval.[33]

Today, while the **Computer III** ONA and CEI requirements remain generally in effect, the Commission has eliminated certain aspects of these rules, including the network information disclosure rules.[34]

In a March 1999 decision, the FCC amended its rules and policies by eliminating the requirement that the BOCs and GTE file and obtain preapproval from the FCC of their CEI plans and by finding that the network information disclosure rules set forth in the FCC's **Computer II** and **Computer III** proceedings have been effectively superseded by the rules set forth in the Telecommunications Act of 1996 (1996 Act).[35]

- In a December 1999 **Order on Reconsideration** of this March 1999 order, the FCC explained that ISPs do have rights to network disclosure information and that the BOCs must post all of their CEI plans, including prior plans and amendments, to their Internet web sites so that ISPs have easy access to those plans.[36]

Defining Applications, Internet, and Information Service Providers: Regulatory Classifications and Consequences

Essential to understanding how Information Service Providers are treated under the law is an understanding of the regulatory pigeonhole they fall into, especially since the FCC still largely adheres to the basic/enhanced framework that was introduced in its **Computer II** decision. The fact is today that while ISPs and ASPs, such as USinternetworking, Into Networks, Corio, Applicast, and many others offer an ever-growing range of services, [37] including a range of functions and software, as a regulatory matter all of these

[33] *Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order*, 4 FCC Rcd. 1 (1988) (BOC ONA Order).

[34] *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, Further Notice of Proposed Rulemaking, 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements*, 13 FCC Rcd 6040 (1998) (*Computer III Remand Further Notice*), *In the Matter of the Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements, Report and Order*, CC Docket Nos. 95-20, 98-10, FCC 99-36 (rel. March 10, 1999) (*Computer III Remand Order*). This Biennial Review of Computer III does not fully respond to outstanding issues from the 1995 *Computer III Further Remand Notice*, which remain outstanding.

[35] *In the Matter of the Computer III Further Remand Proceedings*: *Bell Operating Company Provision of Enhanced Services, 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements, Report and Order,* CC Docket Nos. 95-20, 98-10, FCC 99-36 (rel. March 10, 1999) (*Computer III Review Report and Order*).

[36] *In the Matter of Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 95-20, 98-10, FCC 99-387 (rel. Dec. 17, 1999).

providers are treated as a homogenous class. Initially called "enhanced service providers," (ESPs), ASPs, and Internet Service Providers, as well as other entities offering a range of non-telecommunications services, are now within the group of entities called "information service providers."

The Telecommunications Act of 1996 (1996 Act): General Framework

Today, at the federal level in most states, the regulatory status and treatment of a service or product is based upon the nature of the product or service offering. In addressing the regulation of services, the 1996 Act established specific definitions for "information services," "telecommunications," and "telecommunications service" based upon the terms used in the Modification of Final Judgment (MFJ) that set forth the terms of the AT&T divestiture.[38]

Telecommunications
Means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[39]

Telecommunications Service
Is the offering of telecommunications for a fee directly to the public; and a "telecommunications carrier" is any provider of telecommunications services.[40]

Services that are basic telecommunications[41] are regulated as common carrier offerings and are subject to certain core interconnection, universal service, privacy, filing, disabled access, interoperability, disclosure,

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[37] "[a]n ASP loads your data and business logic onto a packaged application, customizes it, and operates it for you at a remote data center." David F. Carr, "*The Rise of the ASP*," *Internet World*, July 15, 1999. (http://www.iw.com/print/1999/07/15/webenterprise/19990715-asp.html) "Usi charges its clients one monthly fee for the lease of all the software, hardware, connectivity, consulting, and support services necessary for high-end applications such enterprise resource planning (ERP) and customer relationship management (CRM). Sarah L. Roberts-Witt, *A Network's Anatomy/Usinternetworking*, *Internet World*, Oct. 15, 1999 (http://www.iw.com/print/1999/10/15/infra/19991015-anatomy.html).

[38] *See* H.R. Rep. No. 204, Part 1, 194th Cong., 1st Sess. 125 (1995) ("'Information service' and 'telecommunications' are defined based on the definition [sic] used in the Modification of Final Judgment"); cf. *United States v. AT&T*, 552 F. Supp. at 229. In the House-Senate conference on the 1996 Act, the Senate receded to the House on the definition of information service. The House receded to the Senate on the definition of telecommunications, but the House and Senate bills contained similar definitions of this term. H.R. Conf. Rep. No. 458, 1104th Cong., 2d Sess. 116 (1996).

[39] *Id.* § 153(43).

[40] *Id.* §§ 153(46), (44).

[41] The term "telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent or received." 47 U.S.C. § 153(43).

Communication Assistance for Law Enforcement Act (CALEA) and anti-discrimination requirements. Regulation may also include tariff filing obligations and price regulation or other such requirements depending upon the carrier's status.

Information Service
Means "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of such capability for the management, control, operation of a telecommunications system or the management of a telecommunications service."[42]

- In other words, information services are provided by *using* telecommunications, but are not themselves telecommunications services. As such, providers of information services are not subject to the obligations or the rights of carriers, including with respect to interconnection, access, and other related indicia of telecommunications services.

While the exact parameters of what an "information service" is are not precise, the Communications Act itself makes clear that services that are "for the management, control, or operation of a telecommunications system or the management of a telecommunications service," are excluded from the definition of "information service."

- This "telecommunications management exception"[43] could prove useful for ASPs that offer products that are deployed in or on top of the network and that assist in managing the network or service.

In implementing the 1996 Act, the FCC has expressly recognized that this definitional structure parallels its basic/enhanced framework.[44] Under present law, therefore, all "enhanced services" are by definition "information services." These services include a range of communications-dependent services including Internet online services, voice mail, voice information services, directory search capabilities, as well as emerging application services such as software delivery, and others. As with "information services," the FCC does not generally regulate products that are classified as the offering of **customer premises equipment (CPE).**[45]

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[42] 47 U.S.C. § 153(20).

[43] 47 U.S.C. § 153(20).

[44] *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, FCC 96-489 (rel. Dec. 24, 1996), at ¶ 102 ("all of the services that the Commission has previously considered to be 'enhanced services' are 'information services.'"); *United States v. AT&T*, 552 F. Supp. at 178, n.198 (subsequent history omitted) ("'enhanced services'… are essentially the equivalent of the 'information services' described in the proposed decree.")

Customer Premises Equipment (CPE)
The FCC has long recognized that the purpose of keeping the CPE and information services markets largely unregulated is to spur innovation and competition so that the marketplace rather than regulators can determine the success or failure of a service or product.[46]

Under this scheme, ISPs, including all flavors of ASPs, Internet service providers and others, as well as CPE manufacturers and developers can enter the market and introduce innovative products without the regulatory burdens and delays associated with the telecommunications service market.

When an entity offers both regulated and unregulated services and products, the FCC has taken special care to ensure that the public interest will be served, and continues to adjust its review in this area today.

Telecommunications Carriers: Rights and Duties Under the 1996 Act

Pursuant to Section 251 of the 1996 Act, "telecommunications carriers" are bound by the duty to interconnect directly or indirectly and by obligations regarding access by persons with disabilities and interconnectivity. The 1996 Act distinguishes between these carriers and entities that provide "last mile" (local exchange) services.

Local Exchange Carriers (LECs)
Are subject to a greater degree of regulation than other telecommunications carriers and are subject to five additional obligations: resale, number portability, dialing parity, access to rights of way and reciprocal compensation.

Incumbent Local Exchange Carriers (ILECs)
Are subject to the most extensive unbundling and access requirements (with limited exception) including the duty to negotiate, interconnection obligations, the duty to provide unbundled network elements (UNEs), resale obligations, network disclosure, collocation, and number portability.

This regulation can involve a substantial degree of specific state regulation and oversight, including the interconnection negotiation, arbitration and dispute process. The ILECs also have an obligation to make certain disclosures regarding changes to their network in advance of making changes that could affect competing service providers and CPE manufacturers.[47]

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[45] CPE is defined by the Communications Act as "equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications." 47 U.SC. § 153(14); *See also Amendment of Section 64.702 of the Commission's Rules and Regulations*, *Final Decision*, 77 FCC 2d 384, 398 n.10 (1980) (*Computer II Final Decision*) (subsequent history omitted). While the FCC's Part 68 equipment registration process is a form of CPE regulation, it is intended to pre-screen equipment connecting to the public network to avoid harm or significant interference to the network.

[46] *Computer II Final Decision*, at ¶¶ 140-146.

[47] 47 U.S.C. § 251(c)(5); 47 C.F.R. §§ 51.325-335.

- The carrier must provide public notice[48] of any change in its network that would affect interoperability with another service provider or that would affect another provider's performance or ability to provide service.[49]
- The description of the network change should include "references to technical specifications, protocols, and standards regarding the transmission, signaling, routing, and facility assignment as well as references to technical standards that would be applicable to any new technologies or equipment, or that otherwise may affect interconnection."

Network changes that would trigger a disclosure obligation also include "changes that affect: transmission; signaling standards; call routing; network configuration; logical elements; electronic interfaces; data elements; and transactions that support ordering, provisioning, maintenance and billing."

The same public disclosure process applies to network changes that may affect how CPE is attached to the network. The purpose of this protection is "to give competitive manufacturers of CPE adequate advance notice when a carrier intends to alter its network in a way that may affect the manner in which CPE is attached to the network."[50]

The former **Bell Operating Companies** (BOCs) are subject to additional, specific statutory requirements, FCC rules, and regulatory policies including the interLATA restrictions, separate affiliate requirements, accounting obligations, and particular restrictions regarding manufacturing, electronic publishing, alarm monitoring and payphones.

Access Charges and Information Services: The "Modem Tax"

In its 1997 **Access Charge Reform Order**, the FCC decided that Information Service Providers would continue to be treated as end users entitled to acquire service at local business rates as do other local business users rather than as carriers subject to per-minute access charges.[51] The FCC decided to treat ISPs as end users instead of carriers for a number of reasons, most significantly because:

- The access charge system is not yet cost-based
- It is not clear that ISPs access the public switched network like interexchange carriers do; and

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[48] Notice may be given by filing a statement at the FCC, through an industry forum, or through the RBOC's public Internet website. 47 C.F.R. § 51.329(a).

[49] 47 C.F.R. § 51.325.

[50] 47 C.F.R. § 51.325(a)(3). *Computer III Remand Order*, at ¶ 52.

[51] *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, First Report and Order, 12 FCC Rcd 15982 (1997) (*Access Charge Reform Order*) *aff'd Southwestern Bell Telephone Company v. FCC*, 153 F.3d 523 (8th Cir. 1998).

- There is no evidence that incumbent local exchange carriers (ILECs) are bearing uncompensated costs for ISP-related use of the network.[52]

The U.S. Court of Appeals for the Eighth Circuit upheld the FCC's decision.[53] The appeals court found that the FCC's approach was justified, calling the balance struck by the rules appropriate and well within the agency's jurisdiction.

The characterization of one group of ISPs—Internet service providers—as analogous to carriers has nonetheless persisted, with several BOCs urging that these providers offer "communications."[54]

Universal Service: Where Do Information Services Fit in?

The Federal-State Joint Board Decision

In implementing Section 254 of the 1996 Act, the FCC, acting on a recommendation from the Federal-State Joint Board, established mechanisms to implement the universal service requirements of the 1996 Act, including the nature of services that are to be included within "universal service" and the obligations of entities to contribute to the support of such services.[55]

In this context, the FCC addressed which entities were eligible to provide certain "advanced services" including Internet access and enhanced services, to qualified schools and libraries.

After extensive comment, the FCC concluded that while ISPs can be eligible to receive funding for providing relevant universal service, ISPs are not required to contribute directly to funding for universal service support because Internet access services are not "telecommunications services" and ISPs are not "telecommunications carriers" as those terms are defined by the 1996 Act.[56]

- The FCC reached this conclusion by relying on the fact that ISPs alter the format of information through computer processing applications such as protocol conversion and interaction with stored data.

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[52] *Id.*

[53] *Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

[54] *See* Letter from Melissa Newman, Attorney for US WEST, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 99-68 (filed Nov. 15, 1999) and attached study by National Economic Research Associates, *An Economic and Policy Analysis of Efficient Intercarrier Compensation Mechanisms for ISP-Bound Traffic* (dated Nov. 12, 1999) ("US WEST Ex Parte Study").

[55] *In the Matter of Federal-State Joint on Universal Service, Report and Order*, 12 FCC Rcd 8776 (1997).

[56] 47 U.S.C. § 153(43), (44), (46).

- Consequently, Internet access services do not fit within the statutory definition of "telecommunications," because this definition includes transmissions that do not alter the form or content of the information sent.

The 1998 Report to Congress

After the FCC's decision regarding universal service, in late 1997, Congress directed the Commission to explore in greater detail and report on the Commission's implementation of universal service and explore, in particular, the regulatory status of "hybrid" services and those offered by Internet Service Providers.[57]

In an April 10, 1998 Report to Congress,[58] the FCC reiterated that ISPs provide information, not telecommunications, services and rejected firmly arguments that these service providers were telecommunications carriers or a third class of "hybrid" providers.

The FCC also noted that ISPs ride on telecommunications services and that by virtue of these services, indirectly contribute to universal service funding.

The Report to Congress concludes that "Internet-based offerings represent perhaps the most significant category of 'mixed or hybrid services'"[59] and recognized "the unique qualities of the Internet," and thus did not "presume that legacy regulatory frameworks are appropriately applied to it."

The FCC also stated that a telecommunications service retains that character regardless of whether the service is provided using "wireline, wireless, cable, satellite or some other infrastructure."

- The FCC also declined to address how its analysis applied to cable operators providing Internet access service, noting that "we have not yet established the regulatory classification of Internet access services provided over cable television facilities."

IP Telephony

As to **IP telephony**, the FCC noted that certain "phone-to-phone IP telephony" services seem to lack the characteristics of "information services" but rather bear the characteristics of "telecommunications services." [60]

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[57] Public Notice, *Common Carrier Bureau Seeks Comment for Report to Congress on Universal Service Under the Telecommunications Act of 1996*, CC Docket No. 96-45, DA 98-2 (rel. Jan. 5, 1998); Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2440, 2521-2522, § 623 (the "Appropriations Act).

[58] Report to Congress, 13 FCC Rcd. 11501 (1998).

[59] *Id.*

[60] *Id.* at ¶ 83.

- The FCC stated that it must address these questions regardless of the size of the market and stated that the "classification depends on the functional nature of the end-user offering."
- While referring to services that are "functionally identical," the FCC noted that "substitutability" is not sufficient under the 1996 Act to require a universal service contribution.
- Ultimately, the Commission found that it was not appropriate "to make any definitive pronouncements in the absence of a more complete record focused on individual service offering" although the FCC did raise several potential issues for future proceedings regarding these services, including the payment or nonpayment of access charges, universal service contributions, and the implications for the international telephony market.

Self-Provisioning

The FCC left open for re-examination in "an upcoming proceeding" whether an ISP that owns transmission facilities and engages in data transport over those facilities should be required to contribute to universal service.

The Policy and Regulatory Framework Governing ISPs and ASPs Today

Today, the key regulatory issues for all types of ISPs are still access, interconnection, and the regulatory classification of ISPs. Even as ISPs evolve well beyond the provision of voice mail, alarm services, and Internet access (the most common ISP services during the period the FCC developed its framework), the FCC's rulemaking decisions address generally all ISPs. Today, the FCC is examining access to network facilities and the ability of CPE providers and independent ISPs to reach their customers in an extant proceeding on anti-bundling restrictions;[61] its proceeding and orders regarding "advanced" services;[62] and through a variety of proceedings that again address the appropriate regulatory classification of ISPs in an evolving marketplace. Critically, the FCC has maintained that its regulatory framework remains essentially the same whether dealing with the broadband or narrowband world,[63] with the exception of high-speed, broadband cable modem

[61] *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act as Amended, 1998 Biennial Regulatory Review—Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets, Further Notice of Proposed Rulemaking*, CC Docket Nos. 96-91, 98-183, FCC 98-258, (rel. Oct. 9, 1998) (*CPE Further Notice*).

[62] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 99-48 (rel. Mar. 31, 1999) (*First Report and Order*).

Internet services, which the FCC has not yet definitively classified this as either a telecommunications or cable service.

Access to Facilities: Reaching the Customer Base

As the FCC has continually repeated, information services "ride" on telecommunications services, making access to and interconnection with the telecommunications network critical if ISPs and ASPs are to reach their intended customer base. While the 1996 Act, the FCC, and State Public Utility Commission (PUC) decisions have extensively addressed the rights and obligations of telecommunications carriers with respect to interconnection, the law concerning access for ISPs and ASPs is not as clear or well developed, especially in light of the plethora of new services and applications and the changing marketplace. As ASP services increase, regulatory and policy decisions will shape and affect how and under what terms consumers can access these services.

CPE and Enhanced Services Unbundling

The FCC is currently examining its regulatory stance with respect to the permissibility of "bundling." [64]

- Providers of regulated telecommunications are permitted to sell CPE and information services; they are, however, subject to certain public interest regulation.

FCC rule Section 64.702(e) and relevant orders do not allow telecommunications carriers to "bundle" a telecommunications service with either CPE or an information service.

- To determine whether an offering is "bundled," the FCC has adopted a case-by-case approach, so that the outcome depends to a great degree on the specific characteristics of the carrier's service offering.
- Bundling means "selling different goods and/or services together in a single package" and generally proscribes two forms of bundling: (1) selling distinct goods or services only on a bundled basis, and (2) package discounts less expensive than the aggregate of the separate goods/services bought separately.

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[63] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24012, (1998) (*Memorandum Opinion and Order and NPRM*), *First Report and Order.*

[64] *1998 Biennial Review—Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, Further Notice of Proposed Rulemaking, *13 FCC Rcd. 21531,* ¶ 1 (1998) (Further Notice); *See also Bundling of CPE and Cellular Service*, Report and Order, 7 FCC Rcd. 4028, ¶ 19 n.31 (1992) (bundling is the sale of CPE and telecommunications service as a "packaged offering").

The rule doesn't prohibit "one-stop shopping" as long as the goods or services are priced separately. The general purpose of this regulation is to prevent a telecommunications carrier, especially a BOC,[65] from engaging in anticompetitive conduct, including improper cross-subsidization of unregulated services with the regulated services; and unlawful discrimination in favor of its CPE or information service.

- The regulatory policy goal is to promote robust CPE and/or information service competition and forestall skewed competition that could work to the detriment of the public.
- Whatever the outcome more generally in the FCC's proceeding, it is highly unlikely that such restrictions will be eased or lifted as they apply to the BOCs.

Numerous parties filed comments in this proceeding in late 1998, with most carriers agreeing that the restrictions should be lifted, at least for themselves.

- Interexchange carriers argued that the restrictions should continue to apply to ILECs, while ILECs urged the FCC to lift the restrictions for all carriers, including themselves.
- ISPs generally urged the FCC to maintain the restrictions for ILECs to prevent ILECs and their affiliates from bundling local access services with CPE and/or information services.[66]

Broadband Access: Digital Subscriber Line (DSL) Services

In an effort to increase competition in the local exchange and spur rapid deployment of advanced services, in March 1999 the FCC adopted a First Report and Order, which clarified and strengthened its collocation requirements and was designed to enhance the ability of competitive local exchange carriers (CLECs) to offer services in competition with the ILECs.[67]

The order addressed such matters as cageless collocation, mandatory walkthroughs for competitors when the incumbent claims that space is unavailable in the central office, entranceways, and space construction, and other rules that are designed to eliminate the disputes that arise regarding collocation.[68]

Of particular interest to ISPs is that the FCC found that although it would retain its long-held position that does not require collocation for equipment

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[65] The BOCs are deemed to hold dominant market power over the local exchange and exchange access markets. *See* "Local Competition: August, 1999," at 1 (CCB, rel. August 31, 1999) (ILECs continue to hold well over 90% of the local telecommunications market.)

[66] *Carriers Seek End to Limits on Bundling CPE, Enhanced Services with Telecom Services*, Telecommunications Reports, Nov. 30, 1998.

[67] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 99-48 (rel. Mar. 31, 1999) *First Report and Order.*

[68] *Id.*

used to provide enhanced services, it recognized that as technology and services evolve, it would be contrary to the goals of the 1996 Act and its policy to allow ILECs to bar equipment that may have switching or enhanced services functionality, as long as it is used for access to unbundled network elements (UNEs) or interconnection.[69]

- Notably, the FCC also stated that it "may explore requiring such collocation in the future" although gave no indication that it would even consider such a requirement for any entity that was not also a telecommunications carrier.

While the rules have arisen in the context of advanced services (here meaning generally Digital Subscriber Line (DSL)), these provisions will be available to carriers offering both advanced and ordinary voice services.[70]

Setting the stage for its later decision to order line sharing[71], the FCC required ILECs to unbundle subloops in its **UNE Remand Order**.[72] The Commission concluded that lack of access to incumbent's subloops would preclude competitors form offering some broadband services, including DSL, and ordered ILECs to provide unbundled access to subloops nationwide, where technically feasible.[73]

- In its Line Sharing Order, the Commission established general guidelines regarding operational, pricing and other deployment issues to be implemented by the states.[744]

Significantly, the FCC has not yet resolved the issue raised in its August 1998 **Memorandum Opinion and Order, and Notice of Proposed Rulemaking,**[75] which would have required ILECs to provide advanced services through a separate subsidiary.

- This outcome could be significant insofar as treating affiliates of ILECs as CLECs could, absent express FCC statements to the contrary, relieve the ILECs of many of the obligations and regulatory safeguards that are designed to ensure that independent ISPs are not subject to anticompetitive discrimination.

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[69] *Id.* at ¶ 31.

[70] *Id.*

[71] *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98*, FCC 99-355, rel. Dec. 9, 1999 (*Third Report and Order*).

[72] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, CC Docket No. 96-98, FCC 99-238 (rel. Nov. 5, 1999) (*Third Report and Order*).

[73] *Id.*

[74] *Id.*

[75] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24012 (1998).

- Nevertheless, while not adopted in an order broadly applicable to all ILECs, the FCC has nonetheless moved towards requiring separate subsidiaries for ILEC provision of advanced telecommunications services, including DSL.

In its order approving the SBC-Ameritech Merger (SBC-Ameritech Merger Order), the FCC required SBC and Ameritech to transfer all of their data services (including ADSL, frame relay and ATM services) to a separate affiliate.[76]

Broadband Access: Cable Modems

In contrast to the regulatory framework that applies to telecommunications carriers, where the FCC and the states have repeatedly recognized the public interest benefits of just and reasonable access and nondiscrimination, as well as the economic, social and educational benefits of a robust, competitive information services market, the issue of access to the facilities of cable operators has not yet been settled. Instead, the emergence of cable's "last mile" broadband facilities as a mechanism to reach consumers of services that have not been traditionally offered by cable operators has evoked a torrent of interest and proceedings that have, as yet, not been resolved conclusively.

- The essential component of the so-called "open access" debate is whether the same framework that has governed the narrowband, dial-up environment—where any Internet Service Provider may be reached by any customer through the common carrier telephone network—should exist in the cable broadband network.
- Internet Service Providers, consumer groups, telephone companies, cities, and others have urged that there be a similar access requirement for cable Internet access as exists for telephone-based broadband (DSL) services, although the particulars of the positions of these parties has varied.
- Significantly, despite repeated requests from these parties, the FCC has yet to classify officially high-speed cable-based transport services used for Internet access as either telecommunications or cable services, increasing jurisdictional uncertainty.

When Did the Issue Arise?

The issue first arose formally in the context of AT&T's purchase of Tele-Communications, Inc. announced in 1998. At that time, not only did several local franchising authorities condition TCI's franchise transfers to AT&T through a requirement that the merged company provide unaffiliated ISPs

[76] *In re Applications of Ameritech Corp. and SBC Communications Inc. For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules, Memorandum Opinion and Order*, CC Docket No. 98-141, FCC 99-279 (rel. Oct. 8, 1999) (FCC SBC-Ameritech Merger Approval Order).

with access to the cable networks,[77] the issue was raised by numerous parties in the comments that were filed at the FCC.[78]

- While many of these cities did not pursue these conditions upon express threats from AT&T that it would not deploy cable modem services to communities that insisted upon such a condition, the City of Portland, Oregon retained the condition.[79]
- The issue of the lawfulness of such a condition was decided by the District Court, which upheld the City of Portland.[80]
- The case has been heard by the U.S. Court of Appeals for the Ninth Circuit and could potentially shape the debate in the coming year, depending upon the scope of the court's decision.[81]

At roughly the same time as the FCC and the cities were reviewing the AT&T/TCI merger, the FCC sought comments for its annual report to Congress on the status of the deployment of broadband services.[82]

- In their filings, ISPs and consumer groups, among others, urged the FCC to ensure "last mile" access to both ILEC and cable TV facilities. The cable industry argued that section 706 of the 1996 Act does not empower the FCC to impose new regulations on broadband providers.[83]
- The issue arose again with AT&T's proposed merger with MediaOne.

FCC Response

In contrast to its aggressive unbundling of incumbent telecommunications providers, the FCC has not yet ordered open access to cable last mile facilities, opting instead for a "wait and see" policy.

In its Section 706 Report to Congress in January 1999,[84] the Commission found that the deployment of broadband services was progressing in a

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[77] *Portland Wants the FCC to Examine Cable Modem Access Issue*, TR Daily, Feb. 2, 1999. *King County Takes Steps Toward Denying AT&T-TCI Transfer*, TR Daily, Feb. 11, 1999.

[78] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Notice of Inquiry*, 13 FCC Rcd. 15280 (1998) (*Section 706 Notice of Inquiry*).

[79] *Portland Challenges Lawsuit on Access to AT&T-TCI Network*, Telecommunications Reports, March 1, 1999.

[80] *AT&T Corp. v. City of Portland and Multnomah County*, CV 99-65-PA (D. Ore. June 3, 1999).

[81] *AT&T Corp. v. City of Portland and Multnomah County*, Case No. 99-35609 (9th Cir.).

[82] *Section 706 Notice of Inquiry*, 13 FCC Rcd. 15280 (1998).

[83] *FCC Told To Let Market Drive Deployment of Advanced Services, But Parties Differ on 'Last Mile' Issues*, Telecommunications Reports, Sept. 21, 1998 (http://www.tr.com/tronline/tr/1998/tr8038/tr803819.htm).

"timely" and "reasonable" manner and declined to adopt open access in this proceeding, or as a condition to the AT&T/TCI merger.[85]

In what it characterized as an effort to assist the state and local governments grappling with this issue, the FCC released a staff report by the Cable Services Bureau in October 1999.[86]

- There, the FCC staff (Cable Bureau) argued that the status of competition in the provision of broadband services is nascent and that the Commission should therefore continue to refrain from imposing "open access" regulation on cable modem platforms.[87]

While maintaining his view that the marketplace, not government regulation, should resolve this issue, Chairman Kennard has started to urge the cable industry to listen to consumers' desire for choice "before they throw the modern day version of the Boston Tea Party."[88]

- Chairman Kennard stressed in a recent speech that the cable industry must "make the tough decisions now on protocols, access, programming and pricing. Then go negotiate it, go design it, and go build it."[89]
- Kennard also stated that he viewed the AT&T and MindSpring agreement as "a positive first step… just a blueprint, a plan-in progress."[90]

State and Local Response

In the absence of a federal policy on cable open access, several cities and towns have ordered open access as part of the license transfer in the context of AT&T's purchases of TCI and MediaOne cable operators.

- Most notably, Portland required open access to the network for unaffiliated ISPs as a condition to the transfer of TCI's licenses to AT&T. AT&T refused, sued and the district court upheld the Portland City Council's right to order open access,[91] the case is now pending in the Court of Appeals for the Ninth Circuit.[92]

[84] *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 14 FCC Rcd. 2398 (1999) (Section 706 Report to Congress).

[85] *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from TCI to AT&T,* 14 FCC Rcd. 3160 (1999).

[86] *Broadband Today,* A Staff Report to William E. Kennard, Chairman Federal Communications Commission, on Industry Monitoring Sessions Convened by Cable Services Bureau, rel. October 1999.

[87] *Id.*

[88] "William E. Kennard, Remarks at the Western Show, California Cable Television Association, (Dec. 16, 1999) transcript available (http://www.fcc.gov/Speeches/Kennard/spwek944.html).

[89] *Id.*

[90] *Id.*

- The FCC filed an amicus brief in the case urging the court to resolve the dispute in a narrow fashion and noted that while parties to the case may have stipulated that cable Internet access is a cable service, that issue has not been decided yet.[93]

At the state level, several states (including, Minnesota, Vermont, and Pennsylvania) are currently considering legislative action to mandate open access, stating that such an outcome will serve consumers.[94]

Congressional Response

As with all such contentious issues, the issue has also gained attention in Congress and has not only been the subject of pending legislation,[95] but the subject of congressional inquiries and the focus of hearings.[96]

The Marketplace Reacts

At Chairman Kennard's urging, representatives from AT&T, Excite@Home, MindSpring, Media Access Project, the FCC's Local and State Government Advisory Committee and Atlanta Mayor Campbell, held a series of meetings to try to reach an agreement on the definition and possible terms of "open access" in the cable broadband environment.[97]

- These discussions culminated in the December 6, 1999 announced agreement by AT&T and MindSpring on a framework allowing access to AT&T's high-speed cable Internet access platform.[98]
- A critical feature of this announcement was that the arrangement will not be implemented until the expiration of AT&T's exclusive contract with Excite@Home in mid-2002.[99]
- In their joint letter to Chairman Kennard, AT&T and MindSpring agreed to work together to provide consumers a choice of ISPs; the ability to exercise their choice of ISPs without having to subscribe to another ISP; a choice of Internet connections at different speeds, and at prices reasonable

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[91] *AT&T Corp. v. City of Portland and Multnomah County*, CV 99-65-PA (D. Ore. June 3, 1999).

[92] *AT&T Corp. v. City of Portland and Multnomah County*, Case No. 99-35609 (9th Cir.).

[93] *FCC Court Brief Underscores Consumer Benefits from National Internet Policy of Unregulation; Urges Narrow Judicial Resolution*, FCC Press Release, Aug. 16, 1999.

[94] *See*, for example, Vermont Telecommunications Plan, Final Draft, May, 1999.

[95] *See, e.g.*, Internet Freedom Act, H.R. 1686, 106th Cong., introduced by Rep. Goodlatte (1999).

[96] Letter from John Dingell, Ranking Member, House Commerce Committee, to William E. Kennard, Chairman, Federal Communications Commission (Dec. 17, 1999) (http://house.gov/commerce_democrats/press/106/ltr72.htm).

[97] '*Open-Access' Push Continues Despite AT&T-MindSpring Pact*, TR Daily, December 6, 1999.

[98] *Id.*

[99] *Id.*

and appropriate to those speeds; direct access to all content available on the World Wide Web without any AT&T imposed charge to the consumer for such content; the continued ability to change or customize their "start page" and other aspects of their Internet experience; and the functionality of their ISP comparable to that which such ISP has on competing high-speed systems, subject to any technical constraints particular to, or imposed upon, all ISPs using AT&T's cable system to deliver high-speed Internet access.[100]

- The announcement was met with praise by some, including those who believe that this was "an important first step" or demonstrated that the "marketplace is working." Others, however, viewed the announcement with skepticism and urged that it was not truly open access.

On another front in the marketplace resolution of this debate, on January 10, 2000 AOL and Time Warner announced their merger plans.[101] In a deal resulting in a $350 billion company, AOL shareholders will own about 55% of the company while Time Warner shareholders own 45%.[102]

Clinton Administration

In its Second Annual Report, the U.S. Government Working Group on Electronic Commerce stated its support for consumer choice of ISPs.[103]

Non-Accounting Safeguards

Consistent with the statutory framework, in December 1996, the FCC's **Non-Accounting Safeguards Order**[104] established the regulatory structure under which the BOCs could provide interLATA information services.

- Under the order, BOC provision of in-region interLATA services is linked to gaining FCC approval to provide in-region interexchange service.[105]

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[100] Letter from David N. Baker, Vice President Legal and Regulatory Affairs, MindSpring et al. to William E. Kennard, Chairman, Federal Communications Commission, Dec. 6, 1999.

[101] *America Online and Time Warner Will Merge to Create World's First Internet-Age Media and Communications Company*, AOL Press Release, rel. Jan. 10, 2000.

[102] *Id.*

[103] *Towards Digital eQuality*, The U.S. Government Working Group on Electronic Commerce, 2nd Annual Report, (1999).

[104] *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*), *petition for review pending sub nom. SBC Communications v. FCC*, No. 97-1118 (filed D.C. Cir. Mar. 6, 1997) (held in abeyance May 7, 1997), *First Order on Reconsideration*, 12 FCC Rcd 2297 (1997) (*First Order on Reconsideration*), *Second Order on Reconsideration*, 12 FCC Rcd 8653 (1997) (*Second Order on Reconsideration*), *aff'd sub nom. Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997).

- Therefore, once the Commission decides a BOC has sufficiently opened its local telecommunications market to competition in a particular state, BOCs may then provide interLATA information services, but only through a separate affiliate.[106]
- The separate affiliate requirement is necessary in order to prevent improper cost allocation between the BOC and its affiliate and discrimination by the BOC in favor of its affiliate and requires separate accounting and booking systems.[107]
- Significantly, Internet access services and other enhanced services are not interLATA services and thus may not be offered without Section 271 approval.

Under the FCC's framework, the BOC must treat unaffiliated providers the same as it treats its affiliate with regard to rates, terms and conditions at which goods, facilities, or information are provided.[108]

The **Non-Accounting Safeguards Order** also implements Section 272's mandate that the separate affiliate "operate independently" from the BOC[109] by prohibiting the BOC and its affiliate from:

- Jointly owning switching and transmission facilities or the land and building on which such facilities are located; and
- Providing operation, installation, and maintenance services associated with each other's facilities[110]

Upon reconsideration, the Commission affirmed that the BOC's separate affiliate requirement applies equally to in-region and out-of-region interLATA information services.[111]

- This separate affiliate requirement, however, is due to expire on February 8, 2000 as called for in the Act,[112] although a request to extend this requirement has been filed with the FCC.[113]

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[105] *Non-Accounting Safeguards Order*, 11 FCC Rcd 21932-33. If a BOC's provision of Internet or Internet access services "incorporates a bundled, in-region, interLATA transmission component provided by the BOC over its own facilities or through resale, that service may only be provided through a section 272 affiliate, after the BOC has received in-region interLATA authority under section 271." *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.* 47 U.S.C. § 272(b)(1).

[110] *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended, Third Order on Reconsideration*, CC Docket No. 96-149, FCC 99-242, (rel. Oct. 1, 1999).

[111] *Id.* 47 U.S.C. § 272(a)(2)(c).

[112] 47 U.S.C. § 272(f)(2).

US WEST filed a petition January 10, 2000 at the D.C. Circuit Court of Appeals challenging the portions of two **Non-Accounting Safeguards Orders**[114] that apply to out-of-region information services and video programming services.

Computer III: Where Do These Safeguards Stand?

Under the 1996 Act and the still valid **Computer III** rules as referenced above, the BOCs are also subject to additional rules that apply when they offer information services.

- Thus, when an BOC offers an information service, it must post a plan for comparably efficient interconnection (CEI) of the telecommunications services used,[115] comply with certain open network architecture obligations and nondiscrimination reports, and meet other nonstructural and accounting safeguards.

The FCC's March 1999 decision amended the FCC's rules and policies by eliminating the requirement that the Bell Operating Companies (BOCs) and GTE file and obtain **pre-approval** of Comparably Efficient Interconnection (CEI) plans.[116]

- This decision also found that the network information disclosure rules set forth in the FCC's **Computer II** and **Computer III** proceedings have been effectively superseded by the rules set forth in the Telecommunications Act of 1996 (1996 Act).[117]

Rather than mandating the filing and approval of plans that set forth how the requirements will be met, the BOCs (and GTE) may now post such information on a publicly accessible Internet page and notify the FCC and the Common Carrier Bureau at the time of the posting.[118]

- The BOCs may post at the time they initiate service. Moreover, CEI requirements that the BOCs were obligated to undertake prior to initiating

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[113] *Request of the Commercial Internet Exchange Association (CIX) and the Information Technology Association of America (ITAA) for Extension of the Sunset Date of the Structural, Non-Discrimination, and other Behavioral Safeguards Governing Bell Operating Company Provision of In-Region, Inter-Lata Information Services*, CC Docket No. 96-149, (rel. Dec. 7, 1999).

[114] *US WEST Seeks Court Review of InterLATA Safeguard Ruling*, Telecommunications Reports, Jan. 17, 2000.

[115] *In the Matter of Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, Report and Order, CC Dockets 95-20, 98-10, FCC 99-36, at ¶¶ 18,19 (rel. March 10, 1999) (*Computer III Remand Order*).

[116] *In the Matter of the Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements, Report and Order*, CC Docket Nos. 95-20, 98-10, FCC 99-36 (rel. March 10, 1999) (*Computer III Remand Order*).

[117] *Id.*

[118] *Id.*

service, such as providing non-BOCs with testing opportunities, may now be undertaken simultaneously with initiating service.

The principal reasons that the FCC gave for eliminating the filing and approval obligations were the reduction of administrative burden and the elimination of delay in introducing new services.[119]

- The FCC did stress, however, that the CEI obligations remain and in fact have proved to be more valuable to competitive ISPs than the FCC previously thought.
- The FCC stated that in the future, it would rely on the continuing vigilance of the ISP industry to inform it of instances where the BOCs appear to be using their control over network elements to the disadvantage of unaffiliated entities.

The FCC has also made clear that all facilities-based carriers, whether dominant or nondominant, LECs or not, must offer the basic transport services on separately tariffed basis when they offers both an information service and the underlying transmission service.[120]

- This requirement traces back to **Computer II**.

The BOCs must also disclose "complete information about network design, technical standards and planned changes to the network,"[121] and must disclose information "to give competitive manufacturers of CPE adequate advance notice when a carrier intends to alter its network in a way that may affect the manner in which CPE is attached to the network."[122]

The FCC is still examining in an open proceeding exactly how its rules should operate, including whether to retain such rules at all.[123]

Regulatory Classification: What Are ISPs and ASPs and What Does It Get Them?

Today, as previously, the regulatory classification of a service and service provider drives regulatory rights as well as determines responsibilities. Despite decades of experience with the core regulatory classifications, new services and applications have required continued re-assessment by the FCC.

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[119] *Id.*

[120] *IDCMA*, at ¶ 59.

[121] In the Matter of Implementation of Local Competition Provisions of the Telecommunications Act of 1996, *Second Report and Order and Memorandum Opinion and Order*, 11 FCC Rcd. 19392, ¶¶ 188 (1996)).

[122] *Computer III Remand Order*, at ¶ 52. *See also* 47 C.F.R. §§ 51.325-51.335 (network disclosure obligations).

[123] *Computer III NPRM*, 10 FCC Rcd. 9360 (1995).

DSL and Retail Service Offerings

In its November 1999, **Bulk DSL Order**, the FCC affirmed once again that ISPs provide information, not telecommunications, services.[124]

At issue was whether the discounted resale obligation of Section 251(c)(4) applies to ILEC provision of bulk DSL services to ISPs.[125] This discount applies to services provided "at retail to subscribers who are not telecommunications carriers."

After a lengthy discussion into the proper meaning of "at retail," the Commission concluded that bulk DSL services provided to ISPs are not retail services as the DSL services are an "input" for the ISP, who then repackages and offers the service to the ultimate consumer.

- The FCC also noted that the non-retail nature of the offering to the ISP was underscored by the fact that the ISP maintains the billing and customer service relationship with the end users.[126]

The purpose of this decision was to help encourage the offering of advanced services to ISPs at the lowest possible price so as to encourage deployment of DSL service to residential and business on a wide scale.[127]

Significantly, as a result of this order, several carriers have begun to offer services that are designed for ISPs and argued that they are not subject to the resale discount.

- While the decision allowed the bulk DSL offerings, it could have some impact by segregating further ISPs from end users and potentially supporting treatment different than other entities.

Access by Persons with Disabilities

In its recent order implementing Section 255 of the Communications Act regarding **Access by Persons with Disabilities,**[128] the FCC adopted rules detailing the obligations of manufacturers and carriers, and provides for enforcement through formal and informal complaints.

Significantly, in its order, the FCC has asserted jurisdiction over two specific types of providers of information services—voicemail and interactive telephone menu services.

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[124] *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability Second Report and Order*, CC Docket No. 98-147, FCC 99-330, (rel. Nov. 9, 1999) (*Second Report and Order*).

[125] [25] *Id.*

[126] *Id.*

[127] *Id.* at ¶ 20.

[128] *In the Matter of Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996, Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities, Report and Order and Further Notice of Inquiry*, WT Docket No, 96-198, FCC 99-181, (rel. Sept. 29, 1999) (*Disabilities Order*).

While recognizing that voicemail and interactive telephone menu services are unregulated information services, the Commission nonetheless asserted its ancillary jurisdiction to regulate the providers of these services, in order for the disabled to truly obtain access to the public telephone network.[129]

The FCC also commenced at the same time a **Notice of Inquiry** (**NOI**) seeking comment on the application of its disabled access requirements on Internet telephony providers and telephony software installed in computers.[130]

These actions are a departure from the FCC's long-standing practice and policy of excluding information services from carrier regulation through the exercise of its ancillary jurisdiction.

- The application of the provisions of Section 255 may be viewed as the camel's nose of regulation under the tent of information services.
- In this sense, it is apparent that the FCC is willing to compromise on its practice of keeping a "hands off" stance with respect to information services should it conflict with other significant policy goals, as in this case with the disabilities access obligations.

Internet Telephony and Related Services

While the FCC has now started to ask general questions about Internet telephony services, in 1998, the FCC had previously stated in its universal service Report to Congress that certain "phone-to-phone" services lack the characteristics of "information services" and instead resemble "telecommunications services."[131]

While the FCC made such statements, as a practical matter Internet telephony services have evolved without any FCC regulation. Whether the FCC can continue to retain this stance remains to be seen, especially as Internet telephony begins to supplant in any significant measure traditional voice services.

The FCC's general reluctance to act is evident in its treatment of a Petition for Declaratory Ruling filed by US WEST in 1999.[132] There, US WEST sought a declaratory ruling that phone-to-phone IP telephony should be regulated as a telecommunications service.

The FCC has yet to act on this matter and does not appear likely to do so in the immediate future because of the specter of "regulating the Internet."

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[129] *Id.*

[130] *Id.*

[131] Report to Congress at ¶ 83.

[132] *US WEST Petition for Expedited Declaratory Ruling regarding IP-Based Telephony*, filed at the FCC, April 5, 1999.

Conclusion: Open Issues and the Future of ISPs and ASPs

Regulators will be confronted with dilemmas about how to balance the goal of a free, vibrant, and competitive marketplace with social policy objectives, plus ensuring that service provision is not unduly concentrated in the hands of the few, to the detriment of the public interest. For instance, will an affiliate of an incumbent local exchange carrier be able to act in a discriminatory manner in offering information services or CPE so as to justify continuing regulation or oversight? Or, are these newly certificated entities really the same as any other CLEC, albeit perhaps with deeper pockets? How should the balance be struck between allowing entities freedom to market in their preferred manner and the need to ensure that there is no anticompetitive cross-subsidization or discrimination? What is the FCC's role in mandating access and what level of detail is appropriate once a decision is made that access is in the public interest?

Similarly, ISPs will likewise need to assess and adjust their conduct as the market and the legal landscape are defined. Should an entity that was previously unregulated nonetheless seek to become a telecommunications carrier? While this step may offer ISPs significant advantages in areas such as access to unbundled network elements, rights to interconnection/collocation, the ability to obtain state regulatory enforcement of rights, and possible negotiating leverage with potential CLEC partners, there are certainly downsides. For example, the regulatory compliance process can be costly (in terms of both time and money) and brings obligations. In addition, CLEC rights may not be appropriate for ISP/ASP purposes especially since collocation rights may not permit router and data equipment and enforcement of rights may be slow and expensive. In fact, these regulatory rights and obligations may change and upset business plans and thus, there is no right answer to this question.

Perhaps the clearest point is that the only certainty is that the future of technological developments and market evolution is uncertain. As such, ISPs, ASPs, and other providers are wise to remain aware of the regulatory and legal landscape and ensure that their businesses not only avoid any potential regulatory landmines, but maximize all available rights.