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Regulatory Updates: Telephone Carriers Headed Toward Cable Market

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Recent court rulings and legislation introduced in the United States Senate are clearing the way for telephone carriers to move into cable television markets. Where it will all lead from a regulatory perspective is still very much up in the air.

A brief historical perspective helps to understand the recent events. The Cable Communications Policy Act of 1984 ("1984 Cable Act") included a provision prohibiting local telephone companies from offering any cable television services to their subscribers. [47 U.S.C. § 533(b)] The origin of this provision traces back to the early days of cable television, when the Federal Communications Commission (FCC) was concerned that telephone companies could exercise their monopolistic powers to obstruct the development of cable services. The FCC's two primary concerns—utility pole access discrimination and cross-subsidization of cable operations by telephone carriers with superior resources and market access—led Congress to adopt Section 533(b), which prohibited such practices by keeping the phone companies out of cable television altogether.[1]

By the late 1980s, the FCC had moved toward the view that a total prohibition was perhaps no longer justified. As the telephone companies' technology began to catch up to video programming, their clamor to enter the cable television arena grew louder. It came as no surprise, then, that the phone companies began to look for arguments to get around Section 533(b)'s prohibition.

The argument of choice became a constitutional claim based upon the First Amendment. If the only way a telephone company could gain access to video programming was through an unaffiliated entity, the argument went, then a phone company really had no way to ensure that its message (programming) would actually reach the viewers. The argument's conclusion was that Section 533(b) thus violated the telephone carriers' right of free speech under the First Amendment to the United States Constitution.

Within the past two years, at least five federal district courts and two United States courts of appeal have agreed with the phone companies' arguments that Section 533(b) is unconstitutional.[2] Notably, one of those district court decisions was issued by the United States District Court for the District of Maine, in the case of NYNEX Corp. v. United States, No. 93-323-P-C (D. Me. Dec. 8, 1994). Judge Gene Carter, Maine's Chief Judge, agreed that Section 533(b) was unconstitutional because its ban on telephone company provision of video

programming—although serving a significant governmental interest—was not "narrowly tailored" as required by the First Amendment.

Most recently, legislation (Senate Bill 652) has been introduced in the United States Senate that would eliminate the restriction on cross-ownership of cable and telephone companies and would allow cable operators and phone companies to compete head to head. Titled the "Telecommunications Competition and Deregulation Act of 1995," the bill's intent is stated as follows:

To provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for other purposes.

Senate Bill 652 (S. 652), if enacted, could result in sweeping changes to the way cable television is provided. But as telephone and cable television services begin to overlap, what will happen on the regulatory scene? Will cable become more regulated, like telephone service or will telephone service become less regulated, like cable service? The answer appears to lie in the "purpose" section of S. 652 (sec. 3), which states:

It is the purpose of this Act to increase competition in all telecommunications markets and provide for an orderly transition from regulated markets to competitive and deregulated telecommunications markets consistent with the public interest, convenience, and necessity.

S. 652 does attempt to build in some safeguards for the consumer. For example, Section 301(a)(2) mandates that the FCC and state governments "ensure that rates for residential telephone service remain just, reasonable, and affordable. . ." Section 310 requires that telecommunications services for certain providers (schools, libraries, and health care providers in rural areas) will have to be offered at "reasonable" or "affordable" rates.

Such safeguards, however, may offer little comfort to consumers who feel their cable companies have been less than reasonable in setting rates over the past several years. S. 652 does not seem to square very well with the flood of consumer complaints that have been voiced about cable service and rates to lawmakers across the country.

One thing does seem clear, however. As the technologies for telephone and cable television service merge, policy makers will have to grapple with the question of whether cable television is an essential service which should be regulated, or whether telephone service is a luxury which can be left to compete on the open market. The answers will have significant implications for state utility regulators, state and local governments, and—most of all—consumers.

Endnotes

1. The text of Section 533(b) reads as follows: (1) It shall be unlawful for any common carrier...to provide video programming directly to subscribers in its telephone service area, either directly or indirectly through an affiliate owned by, operated by, controlled

by, or under common control with the common carrier. (2) It shall be unlawful for any common carrier...to provide channels of communication or pole line conduit space, or other rental arrangements, to any entity which is directly or indirectly owned by, operated by, controlled by, or under common control with such common carrier, if such facilities or arrangements are to be used for, or in connection with, the provision of video programming directly to subscribers in the telephone service area of the common carrier. 47 U.S.C. § 533(b).

2. See Chesapeake & Potomac Telephone Company v. United States, 42 F.3d 181 (4th Cir. 1994), affirming 830 F. Supp. 909 (E.D. Va. 1993); U.S. West. Inc. v. United States, F.3d [1994 WL 719064] (9th Cir. 1994), affirming 855 F. Supp. 1184 (W.D. Wash. 1994); Ameritech Corp. v. United States, F. Supp., 1994 WL 635008 (N.D. Ill. Oct. 28, 1994); Bell South Corp. v. United States, _ F. Supp. _ , 1994 WL 656704 (N.D. Ala. Sept. 23, 1994); NYNEX Corp. v. United States, 93-323-P-C (D. Me. Dec. 8, 1994).

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