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PERSPECTIVES ON HOW INTERNET ACCESS AFFECTS THE BROADCAST MARKET

HON. THOMAS J. DUNLEAVY*

WITH ELEANOR STEIN**

The contributors have covered the subject thoroughly – and provided insights from some very different perspectives. I feel a bit like Walter Cronkite’s director – there just is not much for me to do.

As you know, the New York State Public Service Commission (“PSC”) does not regulate broadcast media and has very limited involvement in wireless – or in the retail provision of Internet service.¹ My own involvement in and knowledge of broadcasting can be memorialized on the head of a pin and still leave room for the thousand dancing angels, but I do use e-mail. Nevertheless, I venture forth.

Kathy Brown raises the critical question. Kathy Brown is not only the former FCC Chief of Staff but the Former Director of Consumer Services, Managing Attorney for Telecommunications and Appellate litigator for the New York PSC – and now a partner at Wilmer, Cutler & Pickering. Ms. Brown goes right to the heart of the matter when she points out it is all about access.

There are no new services without access. This is the

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¹ See New York State Public Service Law § 90, which exempts cellular telephone services from Commission regulation, notwithstanding the regulatory authority’s applicability to “communication by telegraph or telephone between one point and another within the state of New York and to every . . . telephone corporation.” Public Service Law § 90 (1). As to Internet service, state commissions do not regulate retail Internet services, and the law is in considerable flux today as to what the respective role of state and federal regulators should be. However, states do have authority to establish rates and conditions, under the general regimen established by the FCC, for unbundled network elements, those parts of the telecommunications network owned by the incumbent provider which underlie all wireline and much other telecommunications technologies, including the Internet.

underlying theme we have heard: without affordable access, Internet is inhibited and that's not good!

The Internet is different from broadcast; that is obvious, as you've just heard from this panel of experts. The two technologies are driven by different dynamics and have different characteristics, different markets, and different customers. Yet no matter how new the medium, or how exotic the technology, access to and by the end user is the critical issue.

Without commercially viable access to end users, new market entrants will find that they have nothing to sell and, in the final analysis, it's all about reaching that customer, regardless of the technological platform. For CBS, NBC, Time Warner, or Yahoo, access to customers means sales, revenues, and profits. For New York's consumers, accessibility of all kinds of services and competitive choices means a healthy telecommunications marketplace of ideas, applications, and entertainment.

For technologies dependent upon a wireline network, that's still a problem. There is still a bottleneck: essential facilities of various kinds remain in the hands of the incumbent, whether that incumbent is an incumbent local exchange carrier, a network, or a cable TV provider.² And remember, we have heard broadcasting's death knell, but it is still very much with us. Nondiscriminatory access to bottleneck facilities remains a precondition for competition. I think Mr. Schwartzman made that point very well and in several different ways. But it's still an open issue.

Recently the FCC issued a declaratory ruling that classifies cable modem service as an interstate information service subject to its exclusive jurisdiction. They've determined that cable modem is not a cable service subject to Title 6 of the Act nor is it a telecommunications service subject to Title 2. To the extent it is regulated at all it will be regulated under Title 1.³

The Federal Communications Commission also released a

² An essential facility is one controlled by a monopolist that cannot reasonably be replicated by a competitor. The four elements necessary to establish liability under the essential facilities doctrine have been described in case law. *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132 (7th Cir. 1983) *cert. denied*, 464 U.S. 891 (1983). A monopoly claim can be proven via the essential facilities doctrine. *Paladin Associates, Inc. v. Montana Power Co.*, 97 F.Supp.2d 1013, 1037 (2000).

³ *In re Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities, Declaratory Ruling*, 2002 FCC Lexis 4534 (Mar. 15, 2002) (No-02-52).

Notice of Proposed Rulemaking which sought to determine whether wireline broadband and cable modem services – both connect customers to the Internet at higher speeds – should be treated identically or differently under the Act.⁴ Also pending is the FCC's triennial review of the incumbents' obligation to provide unbundled parts of the network at wholesale to competitors.⁵ These dockets contain a lot of critical issues and there is some cross-pollination among these proceedings. The FCC has asked some tough questions regarding state and local authority. This is a high impact realm for New York and for state regulators generally.

The results are a long way from being in. The New York Department of Public Service has commented on these FCC rulemakings, with the aim of retaining state authority where appropriate, because in telecommunications the states have been the laboratories for innovation and for competition for local services, in practice. The New York DPS urged the FCC to continue to recognize the states need flexibility to adopt policies that reflect local market conditions consistent with the 1996 Act.

Incidentally, for those in this audience, attorneys and law students, it's all good news. This uncertainty means full employment, long term, for the legal profession.

New York State's policy, reaching back long before passage of the 1996 Act, has been to ensure competitive access to customers through Open Network Architecture and we are continuing on that path.⁶ In January 2002 we reduced the prices – in some cases, dramatically – that competitors pay for unbundled network elements – the piece parts that make up a

⁴ *In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 2002 FCC Lexis 824 ¶ 80 (Feb. 15, 2002) (No. 02-33) (inviting comment on whether all facilities-based broadband Internet access providers should be subject to the same contribution obligations).

⁵ Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, No. 01-339, 16 FCC Rcd 22781 ¶ 1 (2001) (initiating triennial review of policies on unbundled network elements).

⁶ As the FCC has recognized in its Order approving the first petition by a local telephone company to offer in-region long distance service under the 1996 Act, the New York Commission "has pioneered measures to open the local exchange market to competition." See *In re* the Application by Bell Atlantic New York for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, No. 99-295, 15 FCC Rcd 3953 ¶ 6, n.5 (1999) for an extensive discussion of the New York Commission's leadership in opening local markets to competition for over fifteen years.

telecommunications offering, in the drive for competitive access.⁷ And in February we approved an incentive plan for Verizon to allow it to compete effectively in the market.⁸

As panelists pointed out, broadcasters are expected to address the needs of the markets they serve and so too are cable TV franchises, via their public access and public, educational, and governmental, "PEG" for short, channel obligations. But there is more: the Internet, the interactive service is not yet available over broadcast technology.

How the FCC will ultimately delineate the obligations, terms and conditions remains to be seen; as will the role of states and what, if any, state-specific policies will be carved out.

This is an issue near and dear to us. New York was the first jurisdiction to require line-splitting,⁹ so competitors can offer both voice telephoning and DSL over the incumbent's line; and we required physical and virtual collocation before that.

Again, access to the customer is a precondition for a competitive market and even as wireless and cable successfully compete with wireline, we want also to see a vibrant, innovative competitive struggle in the wireline arena. Today competitive local exchange carriers serve about 27% of access lines in New York State, one of the highest percentages of any state. But there's more to be done: building access may be the next hurdle.

Professor Plasencia gave us an important snapshot of the reach and use of the Internet and stressed its importance among specific demographic segments. We are all looking forward to realizing the mighty potential of broadband, but lets not forget that over 80% of Americans access the Internet using POTS: plain old telephone service, and it works. Professor Plasencia objected and said it's not enough. I agreed but pointed out it's evolutionary. POTS Internet access is not broadband, but it does provide a workable platform to build DSL.

⁷ Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements, Case No. 98-C-1357, 2002 N.Y. Puc Lexis 15, (N.Y.P.S.C. issued Jan. 28, 2002).

⁸ Proceeding on Motion of the Commission to Consider Cost Recovery by Verizon and to Investigate the Future Regulatory Framework, Case No. 00-C-1945, 2002 N.Y. Puc Lexis 80 (N.Y.P.S.C. issued Feb. 27, 2002).

⁹ Proceeding on Motion of the Commission to Examine Issues Concerning the Provision of Digital Subscriber Line Services, Case No. 99-C-0127, 2001 N.Y. Puc Lexis 587, (N.Y.P.S.C. issued Aug. 29, 2001) (stating that rates and regulations have been introduced for line splitting).

And I'm very proud to say that in New York State *every single* central office, from the tip of Manhattan to the northern Adirondacks, offers Internet access on a local calling basis. Most have available more than one carrier to take those calls to the Internet. This was not true as recently as three years ago.

Professor Plasencia's exposition of the range and growth of Internet services is especially meaningful to us in New York – the obligation of all media to address the needs of minorities and of all communities cannot be overemphasized. Our City and State have been, and will continue to be, a media center: a petri dish for new technologies and unlimited creativity in content.

We are constantly reinventing ourselves. One need only look at what has happened since the horrific events of September 11th to see New York's indomitable spirit for rebuilding and recreating itself. New York always will rise to a challenge.

Mr. Schwartzman reminded us of the local roots of broadcast: its responsibility and the centrality of local community communication. He told us that the Internet provides global links of mutual interest, of news, and of creative expression. But we can't afford to lose sight of how very important local communications is to the community in this era of globalization.

My friend, Vincent Thomas, spoke from the legislative prospective – eloquently and elegantly. He reminded us there's a need for responsible legislation that allows for growth and offers incentives for investment in new technology. The New York State Legislature has recently passed a bill instructing the Public Service Commission to study the availability of affordable advanced services and the Internet in rural areas in the State – something we monitor closely and are looking forward to continuing to monitor.

Ms. Seltzer makes some very important points regarding copyright law. It's another complicated element of this very complex issue, and I thought I heard a warning: be careful what you wish for, you may get it! I'm a regulator and I believe that where regulation is concerned, less is better. But we have a responsibility to protect the public interest – all of it. So, while I favor regulatory restraint, I am fully aware that history is a prologue. I believe in close monitoring. I think it was President Reagan who said, "Trust but verify."

The Broadcast industry would do well to keep a close eye on

the Internet. Somewhere out there is a young person, maybe with spiked hair and some pierced body parts, working on the killer app that just may make broadcasting yesterday's technology, unless it recognizes the need to address users not just eyeballs – and uses all that idle fiber that's in the ground.

It's a changing world. Public Television will not renew Louis Rukeyser after 32 years. Did the thundering hooves of the Internet have something to do with it? I'll let you decide.