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Ops Again Face Forced Access

By Ted Hearn

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Washington— It's "what if" time for the cable industry.

Cable operators are facing a legal endgame that could require them to open their lines to competing Internet-service providers under regulations that have applied to the Baby Bells for decades.

Perhaps in only a few months, open access could be the law of the land if the Supreme Court refuses to disturb a lower court ruling that found cable-modem service is partly a telecommunications service subject to common carrier regulation.

The high court is reviewing a Justice Department request that it should overturn a ruling by the U.S. Court of Appeals for the 9th Circuit in a case called *Brand X Internet Services v. Federal Communications Commission*, which struck down an FCC order from March 2002 that classified cable-modem service as solely an information service.

There are more than legal semantics at stake.

Through the years, telecommunications services have been heavily regulated but information services have been largely untouched. The FCC, under Michael Powell, opted for the information-service category in an effort to use deregulation to promote broadband investment and innovation.

SAME TERMS APPLY

Open-access rules that cable could face are designed to ensure that network owners can't distort competition in adjacent markets.

Under current FCC regulations, facilities-based common carriers that provide enhanced services — Internet access, for example — are required to provide telecommunications transport to competing enhanced service providers on the same terms and conditions as they offer themselves, a source at the FCC said.

"Whatever rates terms and conditions they apply to their own, they would provide to us," said David Baker, vice president of law and public policy of EarthLink Inc., a national ISP that has demanded regulated access to cable broadband facilities and took the FCC to court.

Telecommunications service providers face an array of other regulations, such as compliance with wiretapping laws, universal-service contributions at the federal level and consumer-protection rules at the state level.

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Cities could invoke provisions in federal law allowing them to charge right-of-way fees. In the private sector, utility companies might be able to start charging cable companies more for access to their poles and conduits — a financial hit that could cost hundreds of millions of dollars per year.

The mechanics of open access are not complicated, but litigation always threatens to prolong the outcome.

Cable operators would likely have to provide the FCC with a rate card — a tariff — that specified the terms and conditions of ISP carriage. Providers that object to the wholesale rate could file a complaint with the FCC, or sue the cable company in federal court.

TIME WARNER LEG UP

Phone companies have a long tradition with open access, but cable companies do not, except for Time Warner Cable. That MSO was forced by the Federal Trade Commission to open its data lines in December 2000, as a condition of parent Time Warner Inc.'s merger with America Online Inc.

Time Warner was barred from launching AOL on its cable systems until it made an unaffiliated ISP available to all subscribers. After launching AOL, Time Warner had 90 days to add at least two more unaffiliated ISPs.

As of January 2002, Time Warner Cable offered three national ISPs — AOL, Road Runner (also affiliated with the MSO) and EarthLink — in its top 20 divisions. It added four more markets in March. Time Warner also announced FTC-approved access deals with nine local or regional ISPs between December 2001 and February 2002.

Lawrence J. Spiwak, president of the Phoenix Center for Advanced Legal & Economic Public Policy Studies, said applying open-access rules to cable could get messy — mainly because cable's networks have not been configured to match the design of phone networks.

"It's a different type of network design. I am not quite sure how they would do it," said Spiwak, an FCC attorney from 1994 to 1998.

Cable's open-access woes began in 1998, when AT&T Corp. agreed to buy Tele-Communications Inc., then the U.S.'s largest cable company and one that was beginning to roll out high-speed data through its affiliate @Home Corp.

At the time, AOL chairman and CEO Steve Case urged then-FCC chairman William Kennard to adopt rules that would require AT&T Broadband and other cable companies to sell wholesale access to ISPs.

Kennard refused, saying the broadband market was a "no-opoly," for which traditional open-access rules were inappropriate.

PORTLAND REBELLION

The city of Portland, Ore., objected, refusing to transfer TCI's franchise to AT&T unless AT&T agreed to open access for ISPs.

AT&T lost a challenge in district court but won on appeal, when the 9th Circuit said a city could not force a franchised cable company to offer telecommunications service.

After the *Portland* decision, the FCC adopted its cable-modem classification, which also reached the 9th Circuit on appeal.

Last October, the 9th Circuit voided the FCC's order, saying it was bound by

Portland's holding that cable-modem service is partly a telecommunications service.

That set up a potential clash in the Supreme Court.

Should the Supreme Court refuse to hear the case, open-access rules for cable would not be the automatic result.

The FCC could use its statutory forbearance authority to ensure that cable-modem service remains deregulated.

The agency can refrain from regulation after determining that three statutory factors have been met. Among other things, it would have to demonstrate regulation was unnecessary because market forces were adequately protecting consumers from paying unjust and unreasonable rates.

In asking the Supreme Court to review the *Brand X* case, the Justice Department said forbearance was not a realistic escape route for the FCC to take. It noted the FCC had never experimented with forbearance in connection with cable modem service.

"Forbearance proceedings would be time-consuming and hotly contested, and would assuredly lead to new rounds of litigation, and there is no way to predict in advance the ultimate outcome of such proceedings," Justice said.

The FCC has to act on forbearance requests within 12 months or they are deemed approved, a cable attorney said.

The agency has another option at its disposal. It could continue to keep cable-modem service deregulated by classifying transport of third-party ISPs as "private carriage" arranged through private negotiations.

The FCC has said Time Warner Cable's present carriage of third-party ISPs was effectively a form of private carriage.

SPLIT CONTENT FEE?

One source propounded another option: the FCC could decide to leave ISP choice in the hands of the consumer.

Today, a cable operator that charges \$45 a month for modem service would have to divide the bill into two parts, charging \$40 for the telecommunications service and \$5 for various Internet-content services.

Consumers that purchased the broadband connection would have the option of paying \$5 to the cable company or looking to another ISP for service.

EarthLink's Baker said that approach was a non-starter.

"We are not selling content. That is just wrong. We are selling Internet access, which includes products, services, features and, yes, some content as well. That just reeks of the old click-through argument they put forth six years ago."

Access Milestones

Other than Time Warner Cable's forced addition of EarthLink and several other competing ISPs, there have been a few flirtations between cable companies and ISPs.

November 2000: Comcast announces ISP trial with Juno in Philadelphia. It did not occur.

March 2001: Comcast announces ISP trial with EarthLink in Philadelphia.. It did not occur.

April 2001: Cox announces sixth-month trial with EarthLink in El Dorado, Ark.

February 2002: Comcast announces launch of NetZero and Juno high-speed Internet service in Nashville and Indianapolis.

Source: *Multichannel News* research



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