

RICA REPORT

News and Views for the Rural CLEC Community

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RICA Report is published semi-monthly by RICA, exclusively for RICA's CLEC members. With 80+ carrier members, RICA is the premier trade association representing the independent rural competitive local exchange carrier industry. *RICA Report* concisely captures regulatory and legal news, commentary, and insight relevant to rural CLECs.

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1. ABERNATHY: "CONSENSUS" THAT SOME FEDERAL VOIP REGULATION NECESSARY

In a speech last week, FCC Commissioner Kathleen Abernathy stated her belief that at the FCC's December 2003 forum on Voice over Internet Protocol (VoIP) services consensus emerged that VoIP providers "will need to contribute to universal service, ensure access to 911 services, enable law enforcement agencies to intercept communications, and ensure that persons with disabilities are not denied access." She stressed that when referring to a "new" regulatory framework for VoIP, she meant where the VoIP service provider was providing service over the last mile, on at least one end of a communication.

So, where an IXC uses IP while transporting a call that begins and ends on the public switched telephone network (PSTN), the Commissioner argued that one "should not assume" that a circuit-switched service has been "transformed" into VoIP. The Commissioner also declared herself in favor of placing VoIP under federal, rather than state, jurisdiction, and then applying a light regulatory touch to the "nascent" technologies and services involved (e.g., no regulation of pricing or service). She favorably cited the Commission's wireless policy as a model.

Though declaring herself undecided on specific items before the Commission, Comm. Abernathy gave strong indication of where she may come out on particular VoIP petitions. That is, she appears likely to vote to deny AT&T's petition to avoid access charges for their use of IP in their networks for PSTN-to-PSTN calls; but grant Free World Dialup's petition to be declared not a telecommunications service; and grant Vonage's petition to preempt state law on the matter (In a related development, a federal district court in Minnesota has denied petitions to review its earlier decision declaring Vonage an information service not subject to telecommunications service regulation.)

The Commissioner's comments echo in important aspects those of Chairman Michael Powell, made January 14 in a speech at the National Press Club. Chairman Powell seemed to have backed away from his earlier apparently off-the-cuff remark suggesting, essentially, that with VoIP, who needs universal service? He too acknowledged that VoIP policy must address societal goals such as public safety, law enforcement and universal service. And as Commissioner Abernathy noted, broadband access is not yet ubiquitous, but rather it is "critical for the FCC [to] continue to work on facilitating the deployment of broadband infrastructure."

Meanwhile, according to reports, the much-anticipated VoIP notice of proposed rule making should issue either at the FCC's meeting February 12 or in March.

2. SUPREME COURT CURTAILS ANTITRUST SUITS AGAINST RBOCS

After a ruling by the Supreme Court, competitors and consumers have one less means of challenging RBOC anti-competitive behavior. The Court voted 6-0 in *Verizon v. Trinko* that the regional Bells cannot be sued under federal antitrust law (Section 2 of the Sherman Act) for failing to provide competitors nondiscriminatory access to unbundled network elements (UNEs). The decision, overturning an appeals court ruling, will undermine the multiple pending antitrust cases that competitors and consumers have lodged against the regional Bells in federal court.

With few exceptions, firms have no obligation to aid their rivals. The central question in this case was whether the Sherman Act, as applied to the telecommunications UNE market, requires incumbents to aid competitors. The Court determined that it does not. The Court indicated that the Telecommunications Act of 1996 (1996 Act) preserves antitrust claims in its Section 601(b) "savings clause," but does not create "new claims that go beyond existing antitrust standards." It reasoned that the 1996 Act attempts to eliminate monopolies, whereas antitrust law seeks only to prevent unlawful monopolization, and that it would be a "serious mistake to conflate the two goals."

Having determined that the 1996 Act created no new antitrust claims, the Court turned to whether Verizon's actions violated existing antitrust law. Specifically, it addressed whether Verizon's refusal to cooperate with competitors was conduct that either fit within an antitrust exception, or provided grounds to create a new exception to the general principle that firms have no obligation to aid their competitors. The court concluded that Verizon's actions fit into no current antitrust exception and provided no basis to create a new exception. Distinguishing prior antitrust cases, the Court determined that Verizon was *compelled* to deal with its rivals, and so it could not be argued that Verizon was terminating *voluntary* cooperation with rivals to achieve anti-competitive ends. The Court

also indicated that what made the Verizon case fundamentally different from prior antitrust cases was that the services “allegedly withheld” —UNEs— were not marketed or sold at retail to the public, but rather only at wholesale to competitors by statutory compulsion, and then only after the creation of entirely new systems to facilitate their availability to competitors.

The Court then declined to create a new exception to the general principle that firms need not aid competitors. Describing the need for industry-by-industry analysis, it cited the fact that a detailed regulatory structure exists to deter and remedy anti-competitive harm. It described at length efforts of the New York Public Service Commission and FCC to curtail Verizon’s objectionable behavior. The Court also cited a “realistic assessment” of the costs of the judicial oversight necessary to identify and correct antitrust violations in the UNE marketplace, including the danger of “false positives.” It embraced the general notion that “no court should impose a duty to deal that it cannot explain or adequately and reasonably supervise,” and indicated, “an antitrust court is unlikely to be an effective day-to-day enforcer of these detailed sharing obligations.”

The three remaining justices concurred in the outcome, but believed that the plaintiffs in the case, users of AT&T’s CLEC services, had no standing to sue Verizon. They believed that AT&T or another CLEC would have been a more proper plaintiff.

Congressman Jim Sensenbrenner (R.-Wisc.), Chairman of the House Judiciary Committee, had promised swift legislative action if Verizon were to prevail. Reacting to the decision, he indicated that he feared the decision “will be perceived as giving a green light to all manner of anticompetitive behavior by the Bells” and indicated that he would “not hesitate to develop legislative responses to competitive problems” resulting from the decision.

3. FEDERAL COURT UPHOLDS KY-PSC ORDER REQUIRING BELL SOUTH TO OFFER WHOLESALE DSL; TN TRA SAYS NO LINE-SPLITTING; GA PSC PRESERVES LINE-SHARING

A federal district court in Kentucky upheld a Kentucky Public Service Commission (PSC) directive to BellSouth to end its practice of tying the provision of wholesale DSL service to the provision of voice service. Resolving an interconnection dispute between BellSouth and Cynergy Communications, the PSC had ordered BellSouth to provide wholesale DSL service to requesting Internet service providers (ISPs) serving voice customers of CLECs —such as Cynergy— providing service via the unbundled network element platform, or UNE-P (a practice known as “line splitting”).

The district court rejected BellSouth’s arguments that the PSC order went beyond the issues being arbitrated, was preempted by federal law, or was “arbitrary and capricious.” The court footnoted the fact that to resolve a proceeding in 2000, BellSouth promised the PSC to invest millions of dollars of over-earnings in Kentucky into broadband networks and make such facilities available to competitors on a wholesale basis, and that BellSouth never contested a 2001 PSC conclusion that BellSouth must “line split.”

Following on the heels of the court’s ruling and earlier contrary rulings by state regulators in Kentucky, Georgia and Louisiana, however, state regulators in Tennessee

determined that BellSouth is not required to provide its DSL service to voice customers of a CLEC (DeltaCom) providing service on the UNE platform.

Separately, the Georgia Public Service Commission ruled that BellSouth must continue to allow other providers of DSL services access to BellSouth's local service customers provided that BellSouth continues to offer long distance services. That order stands in contrast to the FCC's mandate in its August 2003 Triennial Review Order on UNE policy, on appeal in federal appeals court, to phase out line sharing over three years.

BellSouth has filed a petition with the FCC asking it to preempt state regulation of broadband Internet access services.

4. APPEALS COURT DIRECTS FCC TO DEFINE "SAME LOCATION" FOR WIRELINE PORTING

What is the "same location" in the context of wireline-to-wireline porting requirements where the numbers to be ported pertain to modem pools used for dialing in to Internet service providers (ISPs)? Declining to answer, the U.S. Court of Appeals for the Seventh Circuit in Chicago directed the FCC to define "same location" as used in Section 153(30) of the Telecommunications Act of 1996, which defines minimum portability requirements as "the ability of users of telecommunications service to retain, at the same location, existing telecommunications numbers."

The issue arose when StarNet, a modem pool owner selling services to ISPs seeking local access numbers for their customers, went bankrupt. During its bankruptcy, StarNet cancelled its contracts with Global NAPs—the CLEC with which it collocated its modems and purchased local service—and sought to have Global port its modem numbers to other CLECs. A bankruptcy judge ordered Global NAPs to port the numbers, finding the relevant location to be StarNet's headquarters, which did not change.

A federal district court declined to lift the order. Indicating that location could conceivably relate to "the customer's physical location, the end of the wire's physical location, or the rate center's physical location," the appeals court nevertheless concluded that the bankruptcy judge was probably incorrect to find StarNet's corporate address, in this case, to be the relevant location. Citing recent FCC activity on number porting, the court reasoned that the FCC probably considers the rate center location relevant. Desiring a concrete answer, it ordered the FCC to precisely define "how the 'same location' restriction applies to a local exchange carrier that hands off traffic to a modem pool at a collocation facility, when the customer wants to change local exchange carriers and move the modems."

5. IN THE STATES AND IN BRIEF

FCC Chairman Powell Appoints Lisa Zaina CEO of USAC. Lisa Zaina will leave her post as Senior Legal Advisor to FCC Commissioner Jonathan Adelstein to become, effective March 1, the Chief Executive Officer of the Universal Service Administrative Company (USAC). Ms. Zaina also has served as General Counsel for Shenandoah Telecommunications Company, General Counsel for OPASTCO, and Assistant General Counsel for NARUC.

TIA: Telecom Industry Spending to Rise. In an annual study, the Telecommunications Industry Association (TIA) reported that total spending in the U.S. telecommunications industry rose 4.7 percent in 2003 to an estimated \$720.5 billion. TIA forecast that the industry would grow at a projected 9.2 percent compound annual rate between 2004 and 2007, reaching \$1 trillion. (<http://www.tiaonline.org/>)

People Hate Cell Phones. An annual survey by the Massachusetts Institute of Technology revealed that the cell phone is the invention people hate the most but can't live without. Number 2? The alarm clock.

Intel Touts WiMAX. The *New York Times* reported that at a recent wireless conference, an Intel representative indicated that the next ten years "will be defined by wireless broadband." Intel is betting on a new technology, WiMAX, which provides faster throughput than WiFi and a reported range of up to 30 miles. Equipment using the technology is expected to be readily commercially available in 2005.

U.S. Supreme Court Hears One Argument, Declines to Hear Another. The Supreme Court heard oral argument on whether or not states may prevent municipalities from creating entities to provide telecommunications services. The FCC has declined to preempt state determinations to bar localities from providing service. Decisions of the D.C. (allowing states to bar localities) and Eighth (preventing states from barring localities) circuit courts of appeal are in direct conflict. A ruling is expected this spring. In addition, the Court declined to hear an appeal of a Seventh Circuit decision that disallowed a Wisconsin PSC-ordered Bell tariff on certain UNEs as inconsistent with the 1996 Act.

USF Seminar Transcript Available. The Progress & Freedom Foundation released a transcript of its September 26 Congressional seminar, "Universal Service: Who Gives, Who Gets and For How Long?," featuring Matt Brill of the FCC; Kathryn Brown, Verizon; John Rose, OPASTCO; John Stanton, Western Wireless; and the Hon. Nanette Thompson, state chair of the Federal-State Board on Universal Service.
<http://www.pff.org/publications/communications/pop11.1universalservice.pdf>

Computer OS allows VoIP Calls. The new version of the "Lindows" computer operating system, a version of Linux using "windows" navigation ships with session initiation protocol (SIP) capabilities built into it, allowing users to easily make use of Voice over Internet Protocol (VoIP) services. Newer versions of the Microsoft "Windows" operating system provide the same functionality. (www.lindows.com)

UPCOMING RICA EVENTS 📞 MARK YOUR CALENDARS!

- **Annual Conference 2004**, featuring half-day seminar (May 26) dedicated to Voice over IP challenges and opportunities. May 26-28, Luxor Hotel Las Vegas, Nev.
- **Fall Conference 2004** to be held November 1-3, Westin Riverwalk Hotel, San Antonio, Tex.
- Details/registration forthcoming: <http://ricalliance.org/events/index.php>