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‘Competing’ approaches to broadband law

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Since the groundbreaking Telecommunications Act of 1996 became the law only six years ago, it is now generally accepted that broadband will play a critical role in the growth of the global economy. However, while penetration statistics reflect impressive growth in the broadband access market, most consumers continue to connect to the Internet via low bandwidth local dial-up services. There is general agreement that growth of broadband has been disappointing.

This consensus has led to significant activity and debate in legislative and regulatory arenas over the adoption of a policy that would promote expanded investment in broadband infrastructure and wider penetration of broadband access services.

Congress and the Federal Communications Commission are both considering, among other things, whether to change the 1996 act’s unbundling and interconnection requirements as they apply to incumbent local exchange carriers (ILECs). Should certain of the proposals be adopted, the dissimilar regulatory schemes now applicable to ILEC-delivered broadband, on the one hand, and cable-delivered broadband (i.e., cable modem), on the other, may be more coordinated.

The House has already passed the Internet Freedom and Broadband Deployment Act, commonly known as Tauzin-Dingell after its co-authors, Congressmen Billy Tauzin (R. La.) and John Dingell (D. Mich.). The bill would eliminate regulatory barriers that, in the ILECs’ view, discourage them from investing in their broadband infrastructure. Specifically, the bill would limit third-party (read competitive) access to their digital subscriber line (DSL) circuits, allow their entry into the long distance data services market before there is local competition and prohibit the FCC and state commissions from regulating high-speed access. Competitive local exchange carriers (CLECs) and Internet service providers (ISPs), among others, are staunchly opposed to Tauzin-Dingell, asserting that elimination of the requirement that ILECs open their networks will result not in greater deployment of broadband, but rather in less competition, greater consolidation in the industry, higher prices and a decline in innovation.

On a related tack, there has been a push to accelerate the rollout of broadband by ensuring regulatory parity among the competing broadband delivery technologies of cable modem, DSL, fixed wireless and satellite. That is precisely the focus of legislation recently introduced by Sen. John Breaux (D. La.) and Sen. Don Nickles (R. Okla.) in the form of the Broadband Regulatory Parity Act of 2002.

Finally, Senate Commerce Committee Chairman Ernest “Fritz” Hollings (D. S.C.) recently introduced the Broadband Telecommunications Act of 2002 as an alternative to Tauzin-Dingell and the Breaux-Nickles legislation. The Hollings bill proposes, among other things, the use of telephone excise tax revenues to provide \$2 billion in low interest loans and grants to support the buildout of broadband infrastructure in rural areas and underserved communities.

In the regulatory arena, the FCC currently has no fewer than four ongoing proceedings that consider the regulatory treatment of broadband and which have the potential to dramatically affect the competitive and regulatory landscape.

The FCC has enunciated three overarching principles that guide its analysis of the issues and that clearly reflect its perspective on the debate:

First, consistent with statutory mandates, the FCC's primary policy goal is to "encourage the ubiquitous availability of broadband to all Americans."

Second, the FCC believes that "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market."

Third, the FCC seeks to create a rational framework for the regulation of competing services that are provided via different technologies and network architectures.

Since many of these legislative and regulatory efforts are oriented toward a relaxation of existing statutory requirements imposed on ILECs, they raise fundamental questions about whether this type of deregulation will truly promote deployment of broadband or merely undermine the growth of competition. A parity-based regulatory scheme such as that currently proposed by the FCC (and echoed in Tauzin-Dingell and the Breaux-Nickels bill) would likely foster "intermodal competition" while significantly limiting the opportunities for CLECs and ISPs to provide competition through access to existing networks.

One threshold concern is whether this regulatory approach is consistent with the pro-competitive intent of the 1996 act. CLECs and ISPs assert that a uniform regulatory framework will not bring greater competition to the broadband industry, but rather will crush it completely. Another issue is whether the FCC has the power to limit the scope of requirements currently applicable to the ILEC industry absent authorizing legislation.

More to the point, however, is whether it will truly be beneficial for the industry to impose parity in the regulatory framework governing broadband such that cable, telephone and wireless providers are subject to the same regulatory requirements.

If there really is a "problem" in the development of broadband, is it one of supply or one of demand? Is current policy-making about broadband regulation premature? Some believe broadband needs time to naturally mature into a mass market, thereby permitting a more educated assessment of consumer demand and willingness to pay for such services. Many believe that further assessment of these critically important issues is required before material changes in the regulatory scheme work are implemented.

Key among all these concerns is the honest and realistic assessment of how much of an impact changes in the rules will likely have on broadband deployment. Is it valid to assume that the elimination of all regulations requiring ILECs to permit CLECs to use their networks will catapult ILECs into making the required investments and developing the necessary infrastructure required in a uniform manner throughout all geographic regions? It is undeniable that service

providers need a stable regulatory environment so that they can make business decisions and know how they will be affected in the long term. However, legislative and regulatory changes intended to foster broadband usage, deployment and competition should be implemented in a manner that does not result in any adverse impact on the pro-competitive provisions of the 1996 act.

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