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TechNet Seeks Lofty Goals For Broadband Deployment

High-tech companies are sharpening their focus on telecom policy, calling on the Bush administration and policy-makers to make broadband deployment a "national priority" and to set lofty goals to reach by 2010. The U.S. and Italy are the only "G-7" countries that haven't adopted a national broadband policy, the companies said, and Italy has signaled its intention to do so.

During a Jan. 15 conference call, TechNet, a group consisting of more 200 chief executive officers and senior executives of technology companies, outlined a slate of policy principles designed to reach that goal.

"Originally we thought broadband was just an issue for the networking companies," said John Chambers, CEO of Cisco Systems, Inc., and a cofounder of TechNet. "Now you can see it is a top priority for all of the high-tech industry." TechNet officials said they hoped the president would mention the need for expanded broadband deployment in his upcoming State of the Union address.

Rick White, TechNet's president and CEO, said the group's primary principle was the creation of a "free-market approach to lead to the sort of competition, innovation, and investment that's necessary." TechNet is recommending a goal of delivering 100 megabits per second in capacity to 100 million homes by 2010. That level of capacity will be necessary to deliver music, high-definition video, and movies.

TechNet also proposed an interim goal of making broadband service at speeds of 6 Mbps from two or more providers to at least 50% of U.S. households and small businesses by 2004. Mr.

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White said the 6 Mbps threshold was chosen because it is "about as much as you can coax out of existing technology."

The 100 Mbps goal will require a "leap" to fiber to the home or other technologies, he said. "We have the technology to get there if we make it a national priority," said John Doerr, partner with Kleiner Perkins Caufield & Byers. "This country is wealthy enough to do this."

TechNet offered several overall principles. It recommended "regulatory restraint" with respect to broadband applications and services and the removal of "regulatory uncertainty and disincentives."

Specifically, TechNet said the FCC should "exercise extreme caution" in regulating advanced services such as voice over Internet protocol.

TechNet also said it supported the FCC's decision not to require cable TV companies to open their cable modem platforms to competing Internet service providers. The Commission should "carefully consider whether the application of unbundling requirements to new last-mile investment" by incumbent local exchange carriers would discourage such investment, the group said.

It also said the technology and consumer electronics industries "have a responsibility to develop the tools—including security standards, encryption, and other content protection technologies—that will encourage the availability of online content."

TechNet said it was "strongly opposed to government mandates that would impose specific copyright protection technologies or time frames for resolving these issues."

TechNet said states and localities should promote streamlined laws and regulations to encourage broadband investment and to eliminate "excessive regulation and exorbitant fees" that hinder such investment.

The group is planning to develop a "Broadband Index" to assess and rank state policies to encourage broadband deployment. The index will "highlight the successes or failures of states to encourage broadband de-

ployment" and, in so doing, will "put constructive pressure" on the states to ensure that their policies promote such deployment, TechNet said.

TechNet recommended market-based approaches to spectrum policy in an effort to reduce the "artificial scarcity of spectrum" for broadband applications. TechNet backed investment incentives, "potentially including targeted tax incentives," to encourage deployment to underserved communities and businesses.

Mr. White said TechNet wasn't backing specific legislation, such as HR1542, the Internet Freedom and Broadband Deployment Act pushed by Reps. W. J. (Billy) Tauzin (R., La.) and John Dingell (D., Mich.). "We've tried really hard not to take positions on some of the low-level issues" that have been hotly debated in the telecom industry, he said.

TechNet's principles received widespread support, providing something for all of the warring telecom interests to like. AT&T Corp. said it shared TechNet's "vision for a national broadband program that goes beyond the narrow, self-serving interests of the Bell monopolies in favor of a positive agenda that promotes robust competition among multiple providers."

The Association for Local Telecommunications Services and the Competitive Telecommunications Association each applauded TechNet's support of competition as a key element in promoting broadband deployment, as well as its neutral stance on the Tauzin-Dingell bill.



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LMTR Interviews

Powell Sees ‘Harmonization,’ Not Parity, for Broadband

FCC Chairman Michael K. Powell has set an ambitious agenda for the Commission in 2002, particularly in the areas of broadband and competition policies. The agency has a slate of competition policy proceedings under way and is readying another on how to handle telephone companies’ broadband service offerings.

In his first interview of the new year, Chairman Powell sat down with LMTR Jan. 3 to discuss those proceedings and whether the oft-discussed idea of “regulatory parity” is the goal of his broadband regulatory efforts. Mr. Powell also addresses his policy on merger reviews, suggesting that case-specific reviews may be preferable to reviewing compliance with “prophylactic” regulations.

LMTR: I know you’ve said recently that broadband and competition issues top your agenda for the year. Could you talk a bit about your goals for the recent competition policy proceedings and give us more specifics about the broadband proceeding that’s coming up soon?

Powell: We bit off a lot. We’ve tried to put together a comprehensive program. Two critical dimensions are broadband and competition policy, but there’s a lot of interaction between the two. It’s an effort, on one hand, to continue to create the right regulatory incentives for investment and development of new architecture and infrastructure and, at the same time, to continue to foster a competitive environment in which that all takes place.

There are different degrees of clarity about what the regulatory environment is with respect to those different tasks. In many ways, the [1996 Telecommunications Act] spoke largely to competition policies, although the Commission has an extraordinary breadth of implementation responsibility. Much of that

has had to be done in a relatively theoretical context because we used to have regulated monopoly, not competition, and we learn each year things that work and don’t work, and we have a whole lot of things that are going to get wrapped up into that context.

We have the “dominant/nondominant” proceeding, which has two dimensions. What we’re trying to do there is to explore whether it’s possible to employ that regulatory tool [of distinguishing between dominant and nondominant carriers or services] to create greater granularity and regulatory treatments. For example, a company might be dominant in a particular market. It might be dominant on a particular kind of service. It might be particularly dominant in a particular region. But that same company may not be dominant somewhere else.

So what we’re looking at is whether there is some way in which we can tailor regulatory treatment, depending on the answer to that question. Right now, one of the things I think we struggle with is that there’s a one-size-fits-all tension here, particularly with the introduction of new services. Just because a company is big doesn’t necessarily mean it’s dominant in some markets. Just because a company’s small doesn’t mean it’s necessarily a new entrant in some markets. . . .

The triennial review of our [network-element] unbundling rules is the continued implementation work of the competition and interconnection provisions of the statute. And there’s a national performance standard proceeding, which is very important to us. That will give us greater clarity and simplicity in terms of some of the interconnection obligations, so that entrants have a fair set of rights that can be more effectively enforced and incumbents have a clearer picture of what they’re really required to do.

All of them have a tendency to get lost in the morass of complexity. Bell companies can hide in the ambiguity about what they’re really supposed to do. [New market] entrants have a hell of a time enforcing their rights be-



Michael K. Powell

cause they can get buried in the ambiguity and complexities, and they don't have the resources and the time to get through these cases. So we're trying to make some dent there.

Finally, there's the broadband proceeding. Broadband conceptually continues to be a challenge because it's unclear what it is. It bleeds over lots of things. It's an infrastructure at some fundamental level. It's also a new service at some level, but it has components of old services. It's content as well, so you start getting into cable and broadband. And it's very platform-agnostic, so this thing is not easily put in the traditional buckets and labeled.

We're going to come out with a broadband proceeding, which will have pieces particularly focused on a host of Title II [of the Communications Act of 1934] common carrier kinds of challenges and questions . . . [dealing with an issue that] communication policy has always been back and forth on.

Ever since the [FCC's first, second, and third Computer Inquiry proceedings], government has embarked on this morass of definitional challenge: . . . We're starting to have regulatory consequences just because of what label we stuck on someone. And it's getting really hard to have a coherent reason why you got that label and not the other one. . . .

Of course, we have the questions about cable modem "open access" and the proper definition [of cable modem service]. We've taken way too long in answering for the courts and the markets what the service is. Two years ago, I listened to people debate whether it's an information service, cable service, or telephone service. [Different] courts have said it's each [of those things], and the truth is that we need to provide the answer to that question. And that's something that I hope we'll do in the early part of the year.

Then there'll be questions about that service, too. Once you decide what it is, there are still subsidiary questions, like whether there should be some kind of right to access and interconnection.

So that's a whole lot [to deal with]. We're going to have the cable open-access and definition proceeding that's already in place. We'll have a telephone counterpart. And then you'll

have the explorations of aspects of those [issues] in the trilogy of proceedings on competition. That's an enormous set of issues, and that's only in those two areas.

And then on top of that is the extracurricular activity we can't control. I can't tell you when and if a merger [proposal] will just show up. That happens. Then suddenly a huge part of our year will be taken up with something that you can't really plan for. . . .

And the economy is critical to what we're doing in some ways because if there's a rebound, the telecom sector recovers, and competitive entry [inches] up a little bit, . . . it can change the dynamics. If it sinks further, that can change the dynamics a little bit. . . .

LMTR: Following up on the broadband and cable modem proceedings, the argument that's always brought up is this idea that there should be regulatory parity between DSL [digital subscriber service] and cable-modem services, for example. Is regulatory parity one of your goals or a factor that you consider? Or is it not really part of the equation when you're trying to figure out how to proceed?

Powell: It's part of the equation, but . . . it doesn't mean that anything that's not identical is not parity. What you're looking for is not [to have] unreasonable or unjustifiable distinctions. It's kind of like the equal protection clause [of the U.S. Constitution]. You don't want similarly situated things to have different legal treatment. But that doesn't mean in every respect all of them are similarly situated. The notion that nothing's fair unless they have absolutely identical treatment, I find to be just a little bit too fanciful.

Take telephone companies, for example. The statute itself makes incredibly granular distinctions among who they are. If you're a telecom carrier, you have these duties. But if you're a local exchange carrier, you have these [other] duties. But if you're an incumbent local exchange carrier, you have these duties. And if you happen to be one of the historical regional Bell operating companies, there are other [regulatory obligations] that only you have.

But fundamentally it's right to think that from the consumer vantage point, you want

the race between cable modem service and DSL to be based on their competitive advantages and disadvantages as a result of their technologies, their business plans, and the content and quality they offer, and not as a consequence of regulatory distinctions.

Now, it's already a little bit of a red herring [for a service provider] to say, "We have these costs and [those other providers] don't." Well, yes, but they also have other [costs] that you don't, and you have benefits that they don't. Ask a cable [TV] company about franchise authorities in local jurisdictions and some of the [commitments] that get extracted in that context.

Yeah, I think it's a goal. I like to say harmonization is a goal, but I don't intend to get into this mind-set of [providers' saying], "We have this rule [to comply with] and they don't." It's a little too simple.

LMTR: How do you measure the success of policies in these areas? Are you looking for deployment, for investment, for competition? What kind of metrics do you use when you're trying to evaluate whether something's working?

Powell: I've given this a lot of thought because it's not that clear, and I think it de-

pends on who you are and what your responsibilities are. What we should be looking at is availability [of services], . . . meaning, Do you have an addressable market? Is the technology in your neighborhood so you could subscribe if you wanted?

For one thing, I think that's what we do best, and it's probably the [area] most squarely within our jurisdictional authority. That's also the approach that's most respectful of innovation.

What I mean is that whenever you have the burgeoning of a new service, . . . there's a dialogue that must occur between consumers and producers about what they're willing to pay for, how much they're willing to pay for it, how highly it's valued, what the killer apps are.

I don't know exactly what a telecom regulatory agency does about the fact that services are available but nobody's taking them. That may be a very important cue. It may be a very important cue to the AT&T Broadbands of the world or AOL Time Warner [Inc.]. They might have to ask themselves, "Maybe we need to change our approach. Maybe the service needs to evolve. Maybe we need to be cheaper and we need to find a way to lower cost, maybe we've got the wrong demographic."

All of that is part of what market freedom allows the producer and the consumer to

HIGH COURT DENIES REVIEW IN 'RECIP COMP,' ROW CASES

The U.S. Supreme Court has declined to review a reciprocal compensation case involving Global NAPs, Inc. The company had challenged an FCC order rejecting its tariff for terminating Internet service provider (ISP)-bound traffic. The FCC had found that the tariff was unjust, unreasonable, and in violation of section 201(b) of the Communications Act of 1934. The Commission was acting on a complaint filed by Bell Atlantic Network Services, Inc. (now part of Verizon Communications, Inc.).

In *GNAPs, Inc., v. FCC* (case 00-1136), the U.S. Court of Appeals in Washington had upheld the FCC's decision. By declining to hear the case, the Supreme Court let stand the appeals court decision.

The high court also declined to review a decision by the U.S. Court of Appeals for the Ninth Circuit (San Francisco) that preempted cities from imposing certain franchise requirements unrelated to the management of public rights-of-way (ROW) on telecom carriers. The denial leaves in place the April 2001 appellate decision in *City of Auburn et al. v. U S West Communications, Inc.* (case 99-13173).

In that case the Ninth Circuit ruled in favor of U S WEST (now Qwest Corp.) regarding the "onerous" franchise requirements but rejected an argument that the carrier's tariff required cities to reimburse it for the costs of relocating facilities as a result of ROW improvements.

wrestle with. That is something I think regulators are pretty bad at and is not really any of our direct business. We're supposed to make things potentially possible; we don't make the horse drink.

For now, in the period of innovation and experimentation and deployment that we're in, there's an enormous amount of risk already. What we're trying to do is create the proper incentives for investment deployment and availability.

Right now, if 100% of Americans have the service available to them, I think as the FCC we'd be pretty happy. I think we'd say we've succeeded. If you told me only 15% of the country was buying it, that might be a problem, but is that a government problem? It may be that we tend to start with this assumption that it's the Holy Grail, and I never fall for that really. Technologies can often do amazing things and, ironically sometimes, consumers don't embrace them. You have to let that play out.

LMTR: Let's turn to merger reviews. How do you go about evaluating something like the proposed AT&T [Broadband]-Comcast [Corp.] merger with your cable TV ownership rules in limbo?

Powell: The same way the [Justice Department's] Antitrust Division does. I'm glad you asked this because this is the biggest red herring that I read out there—that because we don't have a rule, we're helpless.

Well, we don't have any rules for a lot of public-interest [license] transfers we review around here every single day. There are a handful of areas in the communications base that have prophylactic ownership rules, and most of them [involve the] media. When we reviewed the SBC-Ameritech [Corp.] merger, there was no prophylactic rule about how many lines a telephone company could own, but we did it.

I don't think it's always clear, but the interesting thing is that there's an honest debate about two different kinds of approaches to transactions. You can do them prophylactically by rule or you can do them in a case-specific, merger-specific way.

I'm an antitrust lawyer. All of antitrust is the latter [approach. Antitrust lawyers] don't

get lost because they don't have a prophylactic rule about how many cars Ford Motor Co. is allowed to own when it buys Jaguar. But it doesn't mean [the antitrust authority] doesn't know what to do.

If you look at all of the mergers we've reviewed, the rules were there, but we had to do an analysis of the transaction that included tried-and-true competitive principles about concentration and market power, so there's a competitive policy part of it. Then there's the question of whether the merger complies with rules that do exist. The fact that there isn't an absolute bar [limiting the size of a cable TV company] doesn't mean we don't still assess whether the levels of concentration would cause us concern.

Indeed, I'm actually a bit of a fan of case-specific analysis because I've trained on it in the antitrust context. Rules can be useful, but they're clubbing instruments because there are always some transactions above the line that you might think are good, and some below the line that get by that shouldn't.

The minute you draw a line and say, "This is it. You can't be over this," the court wants to know where you got that number. I think you get more leeway in the courts on a merger-specific review in which you have the facts of that transaction . . . to make the case why you're not going to let it proceed. But when you set a limit in a rule, you're doing it in a theoretical way.

Cable's a relatively local business. I don't know about you, but my local town has a monopoly cable provider. The fact that it might own one in California, too, doesn't have anything to do with me in northern Virginia. But when we [have prophylactic ownership limits], I have to convince a court why in every corner of this country, every cable company, regardless of its assets, regardless of its ownership, should never be allowed to rise above these ownership limits. I think the courts are going to, as they should, be much more vigorous in scrutinizing where we get these numbers if we're going to adopt prophylactic limits. . . .

We get criticized a lot as being on a deregulatory tear, [as] taking away all the rules. I bristle [over such criticisms].

ITAA URGES BUSH FOR AGENDA TO BOOST BROADBAND DEMAND

The Information Technology Association of America has sent a letter to President Bush calling for an “action-oriented, positive, competitive agenda” to stimulate demand for broadband services among residential consumers and small businesses.

In a Jan. 14 letter to President Bush, ITAA said government and industry must work together to “improve the broadband value equation” for consumers and business and to help fill the perceived gap between the cost and benefit of broadband connections.

“Too often in this debate over broadband, the interests of consumers have taken a back seat, and the policy focus has centered on the contentious issues of ‘deployment regulation,’” said ITAA President Harris Miller.

“Imagine a society where 70% of households have access to indoor plumbing, electricity, or telephone service, but only 10% take advantage of these services,” Mr. Miller said. “And then imagine policy-makers deciding that the way to fix this perplexing situation is by worrying only about installing more pipes and stringing more wire, not how to attract more new customers to the existing infrastructure,” he said. “That is the current broadband situation.”

One effort that may help address ITAA’s concerns is an upcoming U.S. Department of Commerce conference. Bruce P. Mehlman, assistant secretary-technology policy at the U.S. Department of Commerce, told *LMTR* that his agency was targeting mid-February for a conference designed to demonstrate the benefits of broadband technologies and stimulate demand among small businesses.

When the wireless spectrum cap is eliminated, it will be replaced with case-specific analysis. I’m not sure the wireless industry will love that when it’s all said and done. I happen to believe it’s the better way to do it, but it doesn’t mean we’ve thrown in the towel or that we don’t care anymore. It just means we think that this approach is more tailored and more effective. So I don’t have any doubt whatsoever that I know how to review [a proposed merger of] Comcast and AT&T [Broadband].

TIA: White House Vision Key to Broadband Rollout

Broadband telecom service deployment is critical to the future of the U.S. economy, according to Matthew Flanigan, president of the Telecommunications Industry Association. In an interview with LMTR, Mr. Flanigan said vision from the White House, along with appropriate financial incentives, are the keys to achieving ubiquitous deployment of broadband services to every American. An edited transcript of the interview follows.

LMTR: What are the main factors you see influencing the telecom industry?

Flanigan: There are a lot of things going on right now, but the main influence is probably regulation and the hopes of getting some [economic] stimulus package through [Congress] to increase investments in telecom.

The telecom industry, as you know, has been hurt this past year, not just since [the terrorist attacks on] 9/11—that sure didn’t help—but even prior to that. We’re hearing now that the telecom industry has lost over 400,000 jobs. We’ve been working very hard with people here in Washington to try to get into the stimulus package some incentives [to invest in the sector], such as the Rockefeller tax credit bill as well as other things—just something to get the economy going in telecom.

LMTR: Broadband service deployment is obviously a major policy issue right now, and an argument is made by some that regulatory policy is the main roadblock. What do you see as the key issues that need to be addressed?

Flanigan: I think the issues are twofold. I think one of them is regulatory and the other is financial. The industry has really been crushed [financially] over this past year. The Rockefeller broadband tax act really [would] help that situation considerably. It [would] pump about \$2 billion into the infrastructure. We believe that's the kind of growth [the industry] needs in order to get things going.

LMTR: Are there any issues important to the telecom industry that you think aren't receiving the kind of attention they deserve?

Flanigan: I think the biggest area is broadband deployment. Everybody's talking about deregulation . . . but the deployment of broadband is the area that is not getting the attention it needs. We have sent a very strong letter to the president saying that we think [broadband deployment] needs a national vision from the White House. Just as it took the president to say back in the '60s that we were going to go to the moon.

We think the ubiquitous deployment of broadband in America is critical to the future

economy of this country. Right now, only about 10% of the population is enjoying broadband, whereas the applications and the business that will follow [broader deployment] are enormous financial incentives for this country.

It's not just for the telecommunications sector; it's everything that's going to follow. Broadband deployment will create additional jobs for next-generation computers, the interfaces, and the applications. It will be the next wave.

If you look at [commercialization of] the Internet as the first wave, followed by the Telecommunications Act of 1996, almost half a million jobs were created in this segment. We're saying the same thing will happen again if you get broadband deployed, but it needs incentives and a very presidential vision in order for it to happen right now.

[Broadband deployment] has been a top issue for the TIA board of directors, at our board meeting in August [2001] and at our board meeting in November. I guarantee it's going to flow right into [2002].

Focus on Washington

Daschle: Broadband Credits Key To Spurring Economy

"High-speed, broadband Internet access has become an indispensable tool for businesses, schools, libraries, and hospitals," said Senate Majority Leader Tom Daschle (D., S.D.) in a Jan. 4 speech promoting his economic stimulus plan. "We should create tax credits, grants, and loans to make broadband service as universal tomorrow as telephone access is today," he added.

He suggested several steps Congress could take in crafting an economic stimulus plan, including a job-creation tax credit, a depreciation bonus for investment in new equipment, and a permanent extension of the research and development tax credit.

"The first step is to get our economy back on track by passing a real economic stimulus plan," he said. "To spur business investment and job creation, we proposed allowing businesses to write off a larger share of their investments immediately."

"Access to this service [broadband] is fast becoming the line between the haves and have-nots in the information age," he continued. "We can restore fiscal integrity, keep America on the cutting edge of technology, and help Americans seize the extraordinary opportunities this new global, information economy affords."

Mr. Daschle's plan would consist entirely of one-year measures to promote economic activity now, and it "should include nothing that will run up long-term deficits or drive up long-term interest rates," he said.

“I’m also proposing that we allow 40% bonus depreciation [on new equipment purchases] for the first six months and 20% for the next six months,” said Mr. Daschle.

He said it would spur new equipment and technology purchases. “A depreciation bonus on new equipment purchases would give companies an incentive to make investments now,” he said.

He also proposes to make the research and development tax credit permanent. “The R&D tax credit is one of the most effective mechanisms to encourage innovation, increase business investment, and keep the economy growing.”

His plan includes doubling government funding of nonmilitary R&D efforts, including the National Science Foundation and the National Telecommunications and Information Administration’s Advanced Technology Program.

Finally, Mr. Daschle called for more investment in education, training, and technology to promote job creation and economic growth. In the last couple of years, the technology sector has gone through a shakeout, he recalled.

“Now, it’s poised to grow again,” he said. “It’s essential that the federal government continue to be a good partner, so that American tech companies can continue to lead the world,” he said.

Clash over TELRIC Rekindled at NTIA

If most of the recommendations to the Commerce Department’s National Telecommunications and Information Administration on its inquiry on the deployment of broadband networks and advanced services sounded familiar, it’s because they were.

Several of the parties had filed similar comments, and in some cases the exact same report, with the FCC in its recent notice of inquiry on advanced-service deployment in Common Carrier docket 98-146. And in lieu of presenting NTIA with lengthy regulatory filings, a handful of telecom trade groups opted to reproduce recent surveys of their member companies’ broadband deployment figures.

NTIA had asked for comments on a wide swath of issues pertaining to broadband service deployment, including supply and demand for high-speed Internet access, and any pricing, technical, economic, or regulatory barriers that may be hindering its deployment.

In what has become the norm at the FCC and in Congress in recent years, incumbent local exchange carrier (ILEC) interests made a pitch for easing the regulation of current unbundling and resale rules for their advanced services, while competitive local exchange carriers (CLECs) and interexchange carriers

COMMERCE EYES CONFERENCE TO TOUT BROADBAND’S BENEFITS

The U.S. Department of Commerce may hold a conference soon to help small businesses understand the benefits of broadband services, according to Bruce Mehlman, assistant secretary-technology policy. Speaking before the Federal Communications Bar Association’s Online Communications Committee, Mr. Mehlman noted a recent National Federation of Independent Business study saying many small-business customers don’t see the need for such services.

Mr. Mehlman said he hoped to hold a conference soon to demonstrate “productivity-enhancing applications” that would show end users “what [broadband services] can do for them.” That’s one of the “demand-side” issues Mr. Mehlman said he was examining as possible barriers to widespread use of broadband services.

Another such issue is digital rights management, he said. The desire to download video and music and participate in online gaming could be a “killer app” to help drive demand for broadband services, but disputes about digital rights issues are slowing the availability of such content, he said.

(IXCs) stumped for preserving existing rules and stepping up enforcement of them.

The two sides also brought to NTIA their long-running dispute over the FCC's use of TELRIC (total-element long-run incremental cost) pricing rules for setting rates for interconnection and unbundled network elements (UNEs). The Supreme Court recently heard a challenge of the FCC's use of TELRIC for setting UNE and interconnection rates.

"There is no need for the NTIA to reopen consideration of TELRIC," declared AT&T Corp. "Any action on the part of the administration to enter the debate currently before the justices will only create further disarray and uncertainty in a telecommunications industry that is already reeling, discourage investment, and make overall economic recovery and growth that much more difficult."

Instead, AT&T said, NTIA "should demonstrate its support for the existing interconnection, unbundling, and resale requirements" for ILECs.

SBC Communications, Inc., however, said the FCC's TELRIC methodology was depressing investment by both incumbents and new entrants and wasn't "appropriate" for the broadband market. "From an ILEC's perspective, TELRIC creates a massive risk that capital investment will not be recovered because technological developments and industry-wide cost trends will reduce the value of such investment," SBC said.

"While TELRIC allows CLECs without their own facilities to enter the market quickly, its effect is anti-competitive. CLECs that would consider deploying their own facilities will be deterred from doing so because the competitive arena is crowded with other CLECs that have not deployed facilities of their own," SBC said.

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CLECs Complain Decision Tightens Rules for EELs

The FCC has found that a bankrupt competitive local exchange carrier (CLEC) failed to demonstrate that Verizon Communications, Inc., violated its rules regarding requests to convert special-access circuits to "enhanced extended links" (EELs), facilities consisting of combined unbundled loops and transport. The ruling has prompted complaints from CLEC representatives who said the decision amounted to a "rulemaking by enforcement with sweeping implications."

CLECs and incumbent local exchange carriers (ILECs) have been haggling over the details of EEL provisioning since the FCC made them available to requesting carriers in 1999.

The EEL provisions were adopted as part of the "UNE remand" order (Common Carrier docket 96-98), in which it set new unbundled network element rules in response to a U.S. Supreme Court remand of its earlier rules.

Fearing that interexchange carriers would convert special-access circuits to EELs simply to avoid paying special-access fees, the FCC limited the circumstances under which a carrier can make such conversions. Requesting carriers need to show that they are providing a "significant amount" of local service on the circuits in order for them to qualify for conversion.

But many questions have been raised surrounding the implementation of those rules, some of which were brought to the agency in a complaint by Net2000, a CLEC that has since filed for bankruptcy protection.

After repeated requests for Verizon to convert special-access facilities to EELs were denied, Net2000 filed its complaint (file no. EB-00-018) with the FCC. It charged that Verizon had (1) violated section 201(b) of the Communications Act of 1934 with its "unjust and unreasonable" failure to comply with the conversion requests, (2) violated the FCC's rules by conducting a "preconversion audit" of Net2000's conversion requests and failing to agree with the CLECs' "self-certification" that it met the guidelines for conversion, and (3) violated provisions of its own tariff.

In its Jan. 9 order, the FCC found that Verizon didn't violate its rules by refusing to convert the circuits to EELs in response to Net2000's self-certification. "Net2000 contends that once it had certified to Verizon that the requested circuits carried a 'significant amount of local exchange service traffic,' Verizon was obligated to convert those circuits to EELs," the FCC recalled.

"We disagree with Net2000's characterization of Verizon's actions," it said. "Although an ILEC may not question, prior to conversion, the requesting carrier's self-certification of the substantial use of the circuits for local exchange service, ILECs are not required to convert circuits when the requested circuits do not on their face meet the other requirements specified for conversion."

Verizon also had refused to convert the circuits to EELs because it said (1) the circuits did not terminate in a collocation space, (2) all the DS1s multiplexed onto the DS3s did not satisfy the EEL eligibility criteria, and (3) a loop/transport combination cannot be combined with an access service.

The FCC disagreed on the first point. "We did not state or imply that only collocated carriers had a right to use unbundled network elements or convert special-access circuits to EELs," it said.

On the second point, however, the FCC said Net2000 was incorrect. The FCC's rules "clearly and specifically require that when a loop-transport combination includes multiplexing (e.g., DS1 multiplexed to DS3 level), each of the individual DS1 circuits must meet the substantial local exchange service use criteria," it said. "Although Net2000 argues that it would be better if CLECs were permitted to convert only the parts of their DS3s that are used to provide local exchange service and to continue to obtain the remaining parts of the DS3s by tariff, this clearly is not permitted under our rules," the Commission said.

The FCC also agreed with Verizon that Net2000 couldn't connect EELs to the ILECs' tariffed services. "This restriction prevents Net2000, for example, from converting a DS1 special-access circuit from its customers' premises and terminating at a local Verizon switching center and a Net2000 operating office," it said.

"In that case, Net2000 must continue to obtain the DS3 circuit under tariff because the DS3 circuit contains exchange access, interstate, or other traffic that does not qualify as 'significant local exchange service' use under the prescribed criteria," it said.

The FCC added that Verizon had agreed to "reprice" circuits that should have been eligible for conversion to EELs, but only after Net2000 notified it to proceed and executed an amendment to its interconnection agreement regarding the EEL issues.

"Verizon has reasonably sought Net2000 confirmation before it proceeds with the conversions," the FCC said. "Net2000 has not yet, as far as we are aware, confirmed its conversion request."

The Association for Local Telecommunications Services said it was "disappointed" by the ruling. "It appears that the [FCC's] Enforcement Bureau has once again, in the context of a restricted enforcement proceeding without industrywide participation, engaged in rulemaking by enforcement with sweeping implications beyond the interests of the named parties," said ALTS General Counsel Jonathan Askin.

"Even assuming we had known the Enforcement Bureau was drafting such a terrible order, given the nature of restricted proceedings, we had no opportunity to lobby the issue, nor, for that matter, did the named plaintiff Net2000, which was dissolved months ago," Mr. Askin said. "The only party unaffected by the order is Net2000, which declared bankruptcy quite likely in part due to Verizon's discriminatory provisioning practices."

CLEC COVERAGE

Merrill Lynch & Co. analyst Kenneth Hoexter will no longer cover the competitive local exchange carrier (CLEC) industry. His new coverage area will be the air freight sector. Merrill Lynch is consolidating its emerging broadband/CLEC coverage under the telecom services umbrella.

Broadband Deployment

AOL Time Warner, AT&T May Speed ISP Choice

As AOL Time Warner, Inc., tries to get other cable TV operators to open their cable modem systems to America Online, the company is hoping its experience will convince other operators of the benefits of allowing subscribers to choose an Internet service provider (ISP).

AOL Time Warner's "multiple ISP" offering has not caused cannibalization of Time Warner Cable's in-house ISP, Road Runner, executives said during a recent conference call with analysts. The multiple-ISP program seems to attract new subscribers who wouldn't have signed up for cable modem service otherwise, said Robert W. Pittman, AOL Time Warner's co-chief operating officer.

"These are almost all incremental subscribers" who provide revenue that AOL Time Warner wouldn't have otherwise, he said. Time Warner Cable has more experience than other cable TV operators in offering multiple ISPs because it agreed to do so in order to gain federal regulatory approval for its merger with AOL. It now offers multiple ISPs in 20 markets and intends to deploy the service in all of its markets by year-end.

Having become the guinea pig for multiple ISP deployment, AOL Time Warner now has a vested interest in seeing that other cable TV operators launch similar programs. The company is in talks to sell its AOL online content and Internet access over the systems of other cable TV operators, Mr. Pittman said.

"We have pretty much proven that it is in their economic interest" for other operators to open their cable modem networks, he said. "They, like us, have been concerned about cannibalization, and now our experience puts that concern to rest."

AOL Time Warner may want to seek carriage with AT&T Broadband. AT&T says it is ramping up efforts to allow multiple ISPs to offer service over its cable modem platforms,

particularly in the wake of its shift away from relying on former partner At Home Corp.

AT&T's sudden switchover last month from At Home's cable modem service to its own in-house service will reduce the company's earnings by \$60 million to \$65 million in the fourth quarter of 2001, AT&T executives say.

But the switchover means AT&T will earn more future profit from each cable modem subscriber, and the new in-house network will enable additional new services, said William T. Schleyer, president and chief executive officer of AT&T Broadband.

Speaking Jan. 9 at a Salomon Smith Barney investors' conference in Scottsdale, Ariz., Mr. Schleyer said the new network would enable AT&T to let unaffiliated Internet service providers (ISPs) offer service over the AT&T system. Gaining access to cable modem platforms has long been a goal of the ISP community, but several of the big cable TV providers had exclusive contracts with At Home.

With its new cable modem network, AT&T will pursue a "wholesale strategy," providing access to an array of ISPs and other online service providers to generate traffic on its network, Mr. Schleyer said. "We think that's a very, very good thing for our industry and our company in particular," he said.

AT&T patched together its new network on the fly last month after it balked at paying higher rates to At Home. Thousands of AT&T cable modem customers were without service for a few days during the switchover.

Customer credits, slowed sales, and increased customer-care efforts will reduce AT&T Broadband's EBITDA (earnings before interest, taxes, depreciation, and amortization) by as much as \$65 million in the fourth quarter, Mr. Schleyer said. AT&T Broadband also had to spend \$30 million for new equipment, he added. But AT&T will save \$2 per subscriber per month because it won't have to share revenue anymore with At Home, he said.

He suggested that AT&T Broadband was poised to show better financial performance as its new cable modem and cable telephony networks begin to generate revenue. Until recently, AT&T has had to spend heavily to build the networks, but “the fixed costs of the business are largely behind us,” he said.

While cable modem service has increasingly become a cash cow at other cable TV operators, most of them have been reluctant to dive into the cable telephony market, Mr. Schleyer noted. But he said he thought cable telephony would prove to be a better business than cable modem service. “The economics of telephony are better than data, and data’s a great business,” he said.

Holiday Brings Boost To BellSouth’s DSL Sales

Many U.S. consumers must have had high-speed Internet access on their holiday wish lists, according to BellSouth Corp., because its sales of DSL (digital subscriber line) connections climbed steeply in the fourth quarter of 2001.

“The holiday season brought additional DSL subscribers,” Ralph de la Vega, BellSouth president-broadband and Internet services, told reporters and analysts during a Jan. 3 conference call.

“I think we’ll see the same pattern” of increased interest in broadband connections in future fourth quarters, he added. New promotions, such as free modems, also helped boost BellSouth’s fourth quarter installation totals, Mr. de la Vega said.

BellSouth now has 620,500 DSL customers, 405,000 of whom began receiving ser-

vice in 2001, the company said. About 70% of the customers in BellSouth’s local territory have access to DSL service. The company hopes to have 1.1 million subscribers and to have service available to 76% of its customers by year-end.

Mr. de la Vega said BellSouth probably got a “minimal lift” in subscribers as customers of bankrupt cable modem service provider At Home Corp. looked for alternative broadband service suppliers. It is too soon, however, to know precisely how much of an effect At Home’s demise had, he said.

Meanwhile, according to BellSouth’s opponents in the policy arena, BellSouth’s DSL tallies show that it doesn’t need the regulatory relief it and other incumbent local exchange carriers (ILECs) are seeking in Congress in the form of HR 1542, the Internet Freedom and Broadband Deployment Act.

“This represents a howling repudiation of virtually everything that BellSouth and three other local phone giants have told Congress for years,” said Steve Ricchetti, cochairman of the Voices for Choices coalition, which includes the Association for Telecommunications Services, the Competitive Telecommunications Association, AT&T Corp., WorldCom, Inc., and Sprint Corp.

“Their entire lobbying campaign to pass [HR 1542] and roll back a key consumer protection in federal telecom law was predicated on one idea: that current telecom law does not allow them to adequately deploy their high-speed Internet service,” he said. “Yet now—by its own admission—BellSouth admits that it is not only deploying high-speed services aggressively but is winning customers faster than any [other] high-speed provider of any kind in the country.”

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Financial News

McLeodUSA Misses Bond Interest Payments

McLeodUSA, Inc., says it has missed recent interest payments on about \$1.1 billion of outstanding junk bonds, triggering 30-day grace periods after which bondholders will have greater leeway to force the competitive local exchange carrier to reorganize its finances in bankruptcy court.

In early December 2001, the CLEC unveiled a recapitalization plan under which Forstmann Little & Co. would purchase the company's directory-publishing business for \$535 million and put \$100 million of new equity into the company.

McLeodUSA would then use those funds to retire \$2.9 billion worth of its junk bonds. Forstmann would end up owning a 45% stake in the recapitalized company, and existing shareholders would hold a 30% equity position.

McLeodUSA said it hoped to complete the restructuring outside bankruptcy proceedings but would seek court protection if need be. Since initiating talks with bondholders on terms of the proposal, the company has taken several steps to prepare for a bankruptcy scenario. It has

arranged debtor-in-possession funding commitments and solicited bondholder consents to implement a reorganization plan in bankruptcy court.

Failure to pay interest on its debt may speed the way toward a bankruptcy proceeding. The company's decision not to pay interest due Jan. 1 on \$750 million of bonds and interest due Jan. 15 on an additional \$375 million of bonds enables bondholders to declare McLeodUSA in default on the debt and to file involuntary bankruptcy proceedings against the company.

McLeodUSA has maintained that it would offer bond and stock holders the same terms whether it filed for bankruptcy or not. But the company's ability to control terms of a plan would be diminished by the nature of the bankruptcy process, which can open the way for competing bids and which tends to favor the interests of debt holders over stock holders.

In a statement, McLeodUSA would say only that it was continuing talks with bondholders on the terms of a recapitalization plan. Company officials did not respond to requests for comment. Bond market sources said McLeodUSA's bonds were quoted last week

ALLEGIANCE BUYS FORMER INTERMEDIA ASSETS

Allegiance Telecom, Inc., has paid an undisclosed amount for assets of Intermedia Communications, Inc., a competitive local exchange carrier that was acquired last year by WorldCom, Inc. The Department of Justice approved the WorldCom-Intermedia merger on the condition that WorldCom sell some of Intermedia's assets. WorldCom bought the CLEC to gain ownership of its Web-hosting subsidiary, Digex, Inc.

The companies withheld details of the transaction and said it was not a "financially material event for either company." Wall Street sources estimated that Allegiance paid about \$12 million for the Intermedia Business Internet assets, which included an Internet backbone, Internet peering arrangements with WorldCom's UUNet and other major Internet service providers, and several dozen points of presence.

"The true value of this acquisition [for Allegiance] is a combination of the private peering agreements and its ability to reduce its long-haul transport costs," said Kenneth Hoexter of Merrill Lynch & Co.

at about 23 cents on the dollar but warned that the market price of the bonds would fall by “a few points” on news of the missed interest payments.

Lenders Give Network Plus Breathing Room on Loans

Network Plus Corp., a Randolph, Mass.-based competitive local exchange carrier, has received a short-term waiver of loan covenants from lenders under its senior credit facility. The company is in talks to restructure the loans.

In addition, Network Plus disclosed the hiring of UBS Warburg LLC to examine financial and restructuring alternatives. Network Plus said it still needed an additional \$50 million to fund its present business plan and might radically scale back operations or default on the credit facility if it is unable to reach an agreement with current lenders or find new funding.

The latest credit facility waivers run through Jan. 31, through which Network Plus can draw down only \$3 million of funding under the \$225 million line of credit. Its lend-

ers include Goldman Sachs Credit Partners, DLJ Bridge Finance, and Fleet National Bank. As of Nov. 1, 2001, the company had borrowed \$160 million under the facility.

Network Plus twice amended the credit facility last year to avoid covenant violations. The negotiations under way involve the maturity date of the loan facility, which now expires in June, and the size of any additional borrowings, the company said.

When Network Plus negotiated previous covenant waivers, it gave lenders warrants to purchase 3.8 million shares of common stock in return. The warrants allow the lenders to buy Network Plus shares for as little as \$2.80 per share, but they’re currently worthless because the stock is trading for less than \$1 per share.

Despite achieving modest revenue growth in recent quarters, Network Plus is still having a hard time improving its bottom line. The company reported third quarter revenues of \$76.2 million, up from \$62.1 million in the comparable quarter last year. Operating losses for the most recent quarter, however, totaled \$20.0 million versus \$21.5 million in the year-ago quarter.

At Our Deadline. . .

High Court Backs FCC In Pole Attachment Fight

The U.S. Supreme Court has found that the FCC has the authority to limit rates that cable TV companies can be charged for attaching to utility poles to offer high-speed Internet services, but the court chose not to address the controversial issue of the appropriate regulatory classification of such services.

In *National Cable & Telecommunications Association et al. v. Gulf Power Co.* (00-832), the high court voted 6–2 to overturn a ruling by the U.S. Court of Appeals for the 11th Circuit (Atlanta). Justice Anthony Kennedy wrote the majority decision. Justices David Souter

and Clarence Thomas concurred in part and dissented in part. Justice Sandra Day O’Connor didn’t participate in the case.

The case presented to the court two questions: (1) whether section 224 of the Communications Act of 1934, as amended in 1996, gives the FCC jurisdiction to regulate pole attachments that are used to provide high-speed Internet access and cable TV programming simultaneously and (2) whether section 224 gives the FCC jurisdiction to regulate attachments of wireless telecommunications equipment.

The utilities had convinced the 11th Circuit that the statute authorized the FCC to regulate the placement on poles of equipment used for the delivery of “cable” or “telecom” services, but not services like high-speed Internet

services that haven't been placed in either category. The Supreme Court disagreed.

Section 224 requires the FCC to "regulate the rates, terms, and conditions for pole attachments," which it defines as "any attachment by a cable television system," the court recalled in its opinion. "No one disputes that a cable attached by a cable television company, which provides only cable television service, is an attachment 'by a cable television system,'" the court said. "If one day, its cable provides high-speed Internet access, in addition to cable television service, the cable does not cease, at that instant, to be an attachment 'by a cable television system.'"

The addition of a service "does not change the character of the attaching entity—the entity the attachment is 'by,'" the court said. "And this is what matters under the statute." The court said it found the statute "unambiguous." But even if it were ambiguous, the FCC's reading would be reasonable, it said.

On the question of whether and to what extent the equipment of wireless telecom providers is subject to section 224, the court said the dispute is a "narrow one." "Are some attachments by wireless telecommunications providers—those presumably which are composed of distinctively wireless equipment—excluded from coverage of the Act?"

Section 224 gave the FCC the authority to regulate rates, terms, and conditions for pole attachments, including those attached by a "provider of telecommunications service," the court recalled. "A provider of wireless telecommunications service is a 'provider of telecommunications service,' so its attachment is a 'pole attachment,'" the court said.

In a separate opinion, Justice Thomas, joined by Justice Souter, concurred with the majority on the wireless question. And the court "may be correct as well" in finding that the FCC had authority to regulate rates for attachments used to provide commingled cable TV and high-speed Internet access, he said.

"Nevertheless, because the FCC failed to engage in reasoned decision making before asserting jurisdiction over attachments transmitting these commingled services, I cannot

agree with the court that the judgment below should be reversed and the FCC's decision on the point allowed to stand," Justice Thomas wrote.

Justice Thomas said he would remand the case to the FCC with instructions to "clearly explain the specific statutory basis on which it is regulating rates for attachments that provide commingled cable television service and high-speed Internet access.

Such a determination would require the Commission to decide at long last whether high-speed Internet access provided through cable wires constitutes cable service or telecommunications service or falls into neither category."

In a statement, FCC Chairman Michael K. Powell said he was "pleased by the Supreme Court's decision upholding the FCC's authority to set rates for attachments to telephone and electric poles.

It is important that the Court rejected an interpretation of the Communications Act that could have raised the rates that consumers pay for high-speed Internet access services and derailed the broadband revolution."

NCTA Senior Vice President-law and regulatory policy Daniel Brenner said the decision was "good news for consumers" because it prevents utilities from charging "arbitrarily higher prices for cable attachments to utility poles simply because cable operators provide their customers with high-speed Internet as well as video services."

Walter B. McCormick Jr., president and chief executive officer of the U.S. Telecom Association, said the court didn't address the "most critical question: What is the regulatory status of the advanced services carried by cable systems, our principal competitors in the broadband world?" □

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