

BROADBAND REGULATORY AND LEGAL ISSUES

15th Annual Computer Law Institute
Atlanta, Georgia

September 21, 2000

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Friend, Hudak & Harris, LLP (the AFirm®) is a boutique law firm, concentrating its telecommunications practice in transactions, regulation and litigation. The Firm represents a wide variety of telecommunications clients on regulatory matters in a number of capacities - including state, regional and national representation.

The Firm's telecommunications regulatory practice includes client representation before the Federal Communications Commission (AFCC®) and state regulatory agencies for all aspects of regulatory advocacy and compliance. The Firm has secured entry certification and tariff approval for intrastate, local exchange, long distance or operator service providers before all fifty state regulatory commissions and - for interstate and international service - before the FCC.

The Firm's transactional experience includes the following: drafting and negotiating carrier interconnection, right-of-way and franchise agreements; drafting and negotiating Acontract tariff® agreements; securing state regulatory approvals and related opinion practice for mergers, acquisitions, and financing transactions involving regulated entities; and negotiating credit agreements and related loan documents for financing entrants in both wireless and wireline telecommunications markets.

Clients include, *inter alia*, corporate telecommunications users, wireless carriers (including cellular, paging, PCS, SMR and others), rural incumbent local exchange carriers, competitive local exchange carriers (including facilities-based carriers, resellers, prepaid providers and next generation carriers), interexchange carriers (including facilities-based carriers, switched resellers and switchless resellers), operator service providers, shared tenant service providers, and payphone operators.

BROADBAND REGULATORY AND LEGAL ISSUES

This outline briefly summarizes selective topics addressing domestic telecommunications regulation of broadband services and does not purport to be an exhaustive discussion. Nor is this summary to be construed as legal advice.

I. Definition of Broadband:

- A. The FCC has defined broadband as:

the capability of supporting, in both the provider-to-consumer (downstream) and the consumer-to-provider (upstream) directions, a speed (in technical terms, bandwidth) in excess of 200 kilobits per second (kbps) in the last mile.

- B. Broadband service does not include content, but consists only of making available a communications path on which content may be transmitted and received.

- C. Examples of broadband providers and transmission mediums:

Provider:

Telephone companies
Wireless companies

Cable companies

Electric utilities

Services:

xDSL, T-1, T-3, DS-1, DS-3, OC-n
fixed wireless (MMDS, LMDS) and
satellite (LEOs)

cable modem

utility fiber to the home

II. Introduction to the Broadband Telecommunications Regulatory Environment:

- A. Subject Matter of U.S. Telecommunications Regulation - The subject matter of U.S. telecommunications regulation currently includes the provision of traditional telecommunications services and information services, as well as equipment used by carriers and others in order to provide these services.

- B. Overview of U.S. Domestic Regulation - Generally, U.S. domestic telecommunications regulation is based in the Communications Act of 1934 (as amended by the Telecommunications Act of 1996); the rules, regulations and orders of the Federal Communications Commission (FCC); state regulatory laws administered by state public service or utility commissions (collectively, State PSCs); the rules, regulations and orders of the State PSCs; and ordinances of local governmental authorities.

1. FCC - regulates interstate and foreign commerce in communication by wire and radio so as to make available . . . a rapid, efficient, nationwide, and world-wide wire and radio communications services with adequate facilities at reasonable charges. . . . (47 U.S.C. ' 152(a)).
2. State PSCs - Congress, under the Communications Act, limited state telecommunications regulation to charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio. (47 U.S.C. ' 152(b)(1)).
3. Local governmental authorities - regulate use of public right-of-way by carriers in a respective city, county or municipality.

III. Overview of Existing Telecommunications Regulation of Voice and Data Services

A. Federal Regulation - The FCC and the Communications Act

The Communications Act of 1934, as amended, conferred upon the FCC extensive authority over all common carriers, which the Communications Act defined to include all persons engaged as a common carrier for hire, in interstate and foreign communication.

Title II of the Communications Act requires, *inter alia*, that common carriers provide service at just and reasonable prices, and subject to just and reasonable practices, classifications and regulations; that they make no unjust or unreasonable discrimination; that they file tariffs, subject to FCC scrutiny; and that they obtain FCC approval before acquiring or constructing new lines. (47 U.S.C. ' ' 201(b), 202(a), 203-205, 214).

1. Common vs. Private Carriage:

- a. Federal case law defines a common carrier as one who undertakes to carry for all people indifferently. (*Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630 (D.C.Cir. 1976) (citations omitted)). A common carrier holds itself out to the public for hire, or acts under a legal obligation to do so. Conversely, an entity will not be deemed a common carrier if it makes individualized decisions in particular circumstances regarding whether and on what terms to deal. This so-called holding out standard distinguishes common from private carriers.
- b. FCC regulation under Title II of the Communications Act attaches to common carriers, not private carriers.

- c. Federal and state laws differ with respect to common carrier determinations; state law often supports more expansive regulation than federal law.

B. State Regulation - State PSCs

State telecommunications regulation is vested in the State PSCs, which regulate ~~A~~telephone companies~~@~~, ~~A~~telecommunications companies~~@~~, ~~A~~utilities~~@~~, ~~A~~telephone utilities~~@~~, ~~A~~common carriers~~@~~ or ~~A~~carriers~~@~~, as defined under state law. State PSC regulation is limited to the provision by such entities of purely intrastate communications services. State PSC authority to regulate communications activities extending beyond traditional telecommunications or utility services may arise under broad grant of statutory authority by the state legislature. Typical State PSC regulations are as follows:

1. State PSCs typically have authority to regulate the entry and exit of a telecommunications carrier, usually through issuance of certificates of public convenience and necessity. Applications for carrier entry authority generally require the carrier to demonstrate: (i) technical qualifications; (ii) financial qualifications; (iii) management qualifications; and (iv) some states require a proposed tariff.
2. Most State PSCs regulate rates for intrastate services and require the filing of tariffs.
3. All State PSCs provide complaint procedures for consumers and carriers aggrieved by an intrastate carrier's misconduct; State PSCs have authority to initiate complaint actions against carriers on their own motion.
4. Some State PSCs regulate the issuance of stocks, bonds, notes or other evidences of indebtedness by regulated intrastate carriers.
5. State PSCs require regulated carriers to comply with data requests, and other discovery associated with certification or with intervenor status in regulatory proceedings, and regulatory fee requirements.

Note: State PSC regulation varies from state to state (50 states and the District of Columbia).

C. Local Government Regulation - Cities, Counties and Municipalities

Cities, counties and municipalities issue various permits and authorizations to carriers in order to construct, install or deploy telecommunications network facilities in or along public right-of-way; in return for carrier placement of such facilities, local governmental authorities collect franchise fees and other surcharges from carriers.

IV. Regulatory Classification Issues: Basic vs. Enhanced Services and Telecommunications Services vs. Information Services

Attempting to reconcile the convergence of communication and computer technologies, in 1966, the FCC initiated a series of proceedings - known as the Computer Trilogy - which addressed the regulatory treatment of computers that were involved in the provision of communication services from the treatment of computers which perform data processing and related services. The regulatory categories of Basic and Enhanced services emerged from these proceedings. In the Telecommunications Act of 1996, Congress added definitions of Telecommunications services and Information services, relevant to the classification and regulatory treatment of computer and Internet-based services. A brief summary of these categories follows.

A. Basic vs. Enhanced Services

1. Definitions:

Basic Services are defined as those involving a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information. Example: voice telephone call, dedicated transmission circuits, domestic frame relay.

Enhanced Services are defined as services which combine basic services with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the subscriber additional, different or restructured information, or involve subscriber interaction with stored information. (47 U.S.C. § 64.702(a)). Examples: voice mail, e-mail, Internet, data processing, credit card inquiries, point of sale devices, Lexis/Westlaw.

2. The FCC regulates providers of basic services under Title II of the Communications Act. Common carriers are required to provide basic services to subscribers on a nondiscriminatory basis. Enhanced services are not regulated, but are subject to FCC ancillary jurisdiction under Title I of the Communications Act. (47 U.S.C. § 151).

3. State PSCs may or may not recognize the Basic vs. Enhanced service

distinction. State law often supports more expansive regulation than federal law. Federal preemption of purely intrastate enhanced services is unsettled.

B. Telecommunications Services vs. Information Services

1. Definitions:

Telecommunications Service means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used. (47 U.S.C. § 153(46)).

Information Service means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any such capability for the management, control or operation of a telecommunications system or the management of a telecommunications service. (47 U.S.C. § 153(20)).

As used in both definitions, the term telecommunications means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as set and received. (47 U.S.C. § 153(43)).

2. All of the services that the FCC previously considered to be enhanced services are information services. However, the information services category includes services that are not classified as enhanced services. Under FCC precedent, enhanced services are limited to services offered over common carrier transmission facilities used in interstate communications. In contrast, information services may be provided more broadly - via telecommunications. For example, live operator telemessaging services that do not involve computer processing applications are information services, even though they do not fall within the definition of enhanced services.
3. The FCC regulates providers of telecommunications services under Title II of the Communications Act. Information services are not regulated, but are subject to FCC ancillary jurisdiction under Title I of the Communications Act.

V. Application of Broadband Regulatory Scheme to Technology Companies: Case Studies

A. Internet Telephony (IP Telephony):

1. Is IP Telephony a regulated or unregulated service?
 2. If IP Telephony is a regulated service, is an ISP over whose facilities the call is routed deemed to be providing a telecommunications service?
- B. Internet Service bundled with basic telecommunications service used for Internet access
1. Does an ISP offer a regulated telecommunications service when it provides a subscriber with a data transport services to access the ISP's services.
- C. Internet Service offered in conjunction with separate basic telecommunications services not used for Internet access (*e.g.*, sales of basic telecommunications services not related to Internet)
1. Does an ISP offer a regulated telecommunications service when it provides a subscriber with telecommunications services that are separate from the ISP's Internet access services (*e.g.*, long distance service, private line service)?
- D. E-commerce collocation ^Ahotels@- Inadvertent resale of basic telecommunications offered in conjunction with otherwise enhanced products (*e.g.*, private lines for remote monitoring)
1. Does an e-commerce company offer a regulated telecommunications service when it provides a customer with a dedicated private line to transmit data to equipment (*e.g.*, server) collocated at the e-commerce company's premises?
- E. E-commerce applications - Inadvertent resale of basic telecommunications offered in conjunction with otherwise enhanced products (*e.g.*, sale of long distance services in conjunction with voice mail and other enhanced products)
1. Does an e-commerce company offer a regulated telecommunications service when it offers telecommunications service in conjunction with a package of enhanced services?
- F. Dedicated transmission circuits used for LAN to LAN connectivity -- the ^Asystem integrator problem@
1. Does a systems integrator offer a regulated telecommunications service when it purchases for resale a circuit to interconnect two (2) or more corporate LANs?

VI. Consequences of Non-Compliance with FCC and State PSC Regulation

A. Federal Penalties

1. Common carriers are subject to private actions for damages (including attorneys' fees) for violations of the Communications Act. (47 U.S.C. ' 206).
2. Fines (up to \$10,000) or imprisonment up to one (1) year, or both. (47 U.S.C. ' 501).
3. Fines of up to \$500 per day a violation continues. (47 U.S.C. ' 502).
4. Forfeiture of up to three (3) times the amount of any rebate received; Forfeiture of up to \$25,000 for each day of a violation (not to exceed \$250,000) for broadcast station licensees, cable television operators or applicants for broadcast or cable authority; Forfeiture of up to \$100,000 for each day of a violation (not to exceed \$1,000,000) for common carriers or applicants for common carrier authority; Forfeiture of up to \$10,000 for each day of a violation (not to exceed \$75,000) for all others. (47 U.S.C. ' 503).

B. State Penalties

1. Cease and desist actions or so-called ARule Nisi@ proceedings.
2. Statutory penalties plus interest (*e.g.*, in Georgia, up to \$10,000 per violation plus \$10,000 per day a violation continues).
3. Disgorge revenues received from non-compliant activities.
4. Criminal misdemeanor.

C. Other Consequences

1. Noncompliance may result in contract breach (*e.g.*, loan documents).
2. Noncompliance may result in misrepresentation or omission in securities filings.