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Thomas Jones

March 9, 2001

EX PARTE

Magalie Roman Salas
Secretary
Federal Communications Commission
Room TW-A325
445 Twelfth Street, S.W.
Washington, D.C. 20554

EX PARTE OR LATE FILED

Re: CC Docket No. 96-98

Dear Ms. Salas:

On March 8, 2001, Kevin Joseph of Allegiance Telecom and I, on behalf of Allegiance Telecom, discussed the terms and conditions under which unbundled local switching should be available with Dorothy Attwood, Glenn Reynolds, Michelle Carey and Jonathan Reel of the Common Carrier Bureau. During the meeting, we discussed the standard for the unbundled local switching carve-out set forth in the ex parte letter Allegiance filed in this proceeding on January 30, 2001. We left behind a copy of an article from the March 5, 2001 Legal Times, a copy of which is attached hereto. During the meeting, the staff asked for a list of the 28 markets in which Allegiance has entered. Those markets are as follows: Atlanta, Baltimore, Boston, Chicago, Cleveland, Dallas, Denver, Detroit, Fort Worth, Houston, Long Island, Los Angeles, Miami, Minneapolis/St. Paul, New York, Northern New Jersey, Oakland, Orange County, Philadelphia, Phoenix, St. Louis, San Antonio, San Diego, San Francisco, San Jose, Seattle, Tampa, and Washington, D.C.

In addition, there are two issues raised in the ex parte letter filed in this proceeding on March 2, 2001 by WorldCom that should be clarified for the record.[1] First, WorldCom asserts that Allegiance requires that its customers meet minimum revenue commitments. See WorldCom Letter at 4, 5, 6. This is simply not so. Allegiance does not require that its customers meet minimum revenue commitments. Second, WorldCom alleges that Allegiance's network footprint is extremely limited in the geographic areas it has entered, and it implies that Allegiance will not expand the scope of that

[1] See Letter from Chuck Goldfarb, Director, Law and Public Policy, WorldCom, Inc. to Ms. Magalie Roman Salas (March 2, 2001) ("WorldCom Letter").

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footprint by adding more collocations in existing markets. See id. 6-7. This is also not true. In addition to adding new geographic markets to its network, Allegiance has continued to aggressively add new collocations within existing markets. For example, Allegiance added 84 new collocations in the fourth quarter of 2000, most of which were added to existing markets. By the end of 2000, Allegiance had a total of 636 collocations.

Pursuant to Section 1.1206(b)(1) of the Commission's rules, 47 C.F.R. § 1.1206(b)(1), an original and one copy of this letter are being provided for inclusion in the public record of the above-referenced proceedings.

Sincerely,

Thomas Jones

cc: Dorothy Attwood
Glenn Reynolds
Michelle Carey
Jonathan Reel

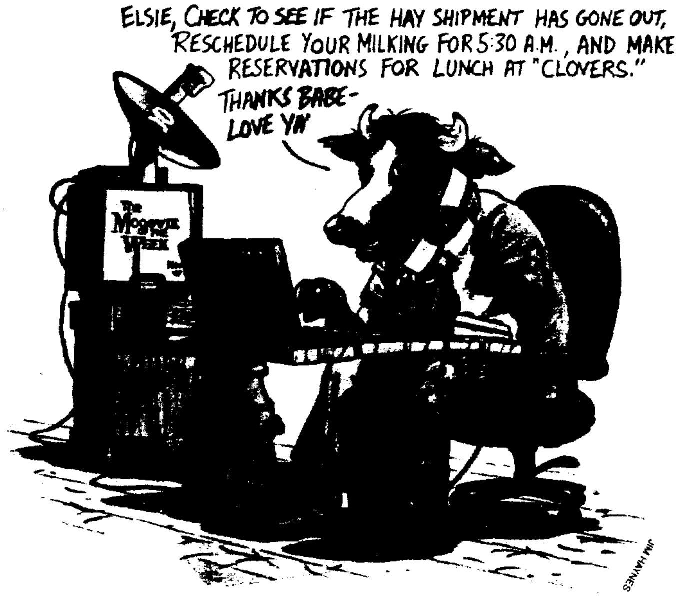
Attachment

Points of View

Animal Advice

The new FCC chair is correctly telling the communications industry that success requires cows and capitalism.

By Randolph J. May



The new chairman of the Federal Communications Commission, Michael Powell, has good advice to the industry he helps to regulate. In a speech in 1999, he proclaimed that "a fundamental premise of competition and markets is that the general rule is that you are supposed to 'Get your own cow.' " The advice is not only sage, but is biblical, based as it is on the Tenth Commandment's injunction against coveting thy neighbor's ox.

Fourth Branch

As I mentioned in my last column, Powell also warned in a recent speech that the agency's "bureaucratic process is too slow to respond to the challenges of Internet time." His two statements are not unrelated. In Internet time it's been eons since the passage of the Telecommunications Act of 1996, signed into law five years ago last month. With a new chairman at the helm of the agency responsible for the act's implementation, the agency needs to reorient its policies in a way that will encourage new market entrants to get their own cows. Let me explain.

The 1996 legislation was spurred by the increase in competition that had been taking root for a decade or so in various telecommunications markets and by the budding convergence of the markets themselves. This new competition and convergence were attributable to many factors, but especially to rapid technological advancements, the positive effects of the 1984 break-up of the old Bell system, and some key pre-1996 FCC decisions that wisely had begun to relax regulatory requirements on new entrants and incumbents alike.

So in 1996, Congress faced an environment radically different than the monopoly environment that prevailed when the original Communications Act of 1934 was passed. Congress's vision for the new statute was made clear in the very first paragraph of the Conference Committee report accompanying the statute. The report declared that the act was intended "to provide a pro-competitive, deregulatory national policy framework."

Amid the celebratory hoopla surrounding passage of the statute, there was much anticipation that the old regulatory paradigm—one in which the FCC closely controlled entry and service provider rates—was dead. Indeed, some observers were fond of saying that the old model was as "as dead as Elvis."

HARD TO KILL

Well, not quite. Like Elvis, the old public utility regulatory paradigm has proved rather hard to bury. And because the old model has resisted burial, the full promise of the 1996 act has yet to be realized. Although there have been gains, progress in one of the most important markets has been disappointing.

One of the primary goals of the 1996 Act was to bring competition to the local telephone marketplace. As of the end of last year, about 7 percent of the local lines nationwide were served by the new competitive local exchange carriers (which I'll call the "new carriers," for short). While this is evidence of progress, Congress must have hoped that there would be more competition in the local marketplace five years after the act's passage.

What went wrong is subject to much debate. In my opinion, both Congress and the FCC share the blame. First, the statutory provisions relating to local telephone competition are sufficiently ambiguous that the FCC's attempts to implement them have led to protracted litigation that continues to this day. The continuing uncertainty regarding the rules of the road for local competition has been a disincentive for investment in new facilities by local service participants, both new carriers and incumbent local exchange carriers ("incumbent carriers," for short) alike.

Second, left with so much discretion to fill in the blanks, the FCC has exhibited an irrational exuberance for retaining excessive regulatory control over the process of transitioning to a competitive environment. This penchant for holding tight the regulatory reins was evident in the commission's August 1996 order establishing regulations to implement the act's local competition provisions. While Congress envisioned that the new carriers would build out their own network infrastructures, it also provided a means to give the new carriers a jump-start by requiring the incumbents to unbundle and lease piece parts of their networks to the new carriers. But the statute mandates such unbundling only if access to network elements is "necessary" and the failure to provide access would "impair" the ability of the new carriers to provide service.

The agency's local competition rules implementing the statute finally were reviewed by the Supreme Court in *AT&T v. Iowa Utilities Board* in January 1999. Even given the statute's ambiguity, and the normal deference afforded an agency's construction of ambiguous statutory provisions, the Court invalidated the network unbundling rules. It determined that the commission had interpreted the "necessary and impair" statutory standard so loosely that, in effect, the new carriers had available "blanket access" to the incumbent carriers' networks. Therefore, it remanded so the agency could adopt some meaningful limitation on the unbundling obligation in light of the "necessary and impair" prerequisite, one that takes into account the availability to new carriers of facilities outside the incumbent carriers' networks.

Justice Breyer in a separate opinion emphasized the ultimate harm to competition caused by the FCC's tilt toward excessive unbundling. He wrote:

> Increased sharing by itself does not automatically mean increased competition. It is in the unshared, not the shared, portions of the enterprise that meaningful competition would likely emerge. Rules that force firms to share every resource or element of a business would create not competition, but pervasive regulation, for the regulators, not the marketplace, would set the relevant terms.

WRESTLING WITH REGULATIONS

So here we are in early 2001, and the commission is still wrestling with the unbundling rules in its remand proceeding. Under the new chairman's leadership, the commission should seize the opportunity presented by the remand to articulate an interpretation of the "necessary and impair" standard that is much less titled toward unrestricted access by the new carriers to the incumbent carriers' networks.

The commission is scheduled shortly to reconsider the unbundling requirement for one of the network piece parts, local switching equipment. Significantly, a few of the more far-sighted new carriers who have begun to invest in their own facilities have joined with some of the incumbent carriers to urge that, in light of the ability of the new carriers to self-provision switches, the FCC should relax the incumbents' obligation to make available switches.

The commission often has paid lip service in recent years to the view that new entrants need to own their own facilities if they are to have an incentive to offer innovative technologies and services, particularly new high-speed broadband services, and if competition is to be sustainable. But in formulating its local competition policies, the agency's policies thus far have not matched its rhetoric.

But maybe this will now change, especially with the emergence of some future-oriented new carriers willing to support moving away from regulations that mandate unrestricted access to all incumbent carriers' facilities. In speaking to one of the new carriers' trade associations in December 1998, then-commissioner Powell said, "There is no upside, in the long run, being dependent on your primary competitor for your key assets, or in relying on the Government to protect or subsidize your service." It was in this vein that Powell urged the new carriers to get their own cows.

It's time for the agency to embrace Justice Breyer's insight that meaningful competition is likely to emerge in the unshared, not the shared, portions of the enterprise. We almost certainly would be further down the road to a competitive local marketplace if Congress had given the commission more specific deregulatory direction in 1996. Nevertheless, the FCC now has the opportunity to employ the same discretion that it so far has employed to over-regulate the transition to local competition to give the marketplace some real breathing room.

Randolph J. May is a senior fellow and director of communications policy studies at the Progress & Freedom Foundation in Washington, D.C. The views expressed are his own and do not necessarily reflect the views of the foundation. He may be reached at rmay@pff.org. His column, "Fourth Branch," appears monthly in Legal Times.

■ Justice Antonin Scalia's recent criticism of two cases from the 1920s raises questions regarding the legacy of precedent. **Page 58** ■ Abandoning the SAT in college admissions is just a backdoor route to affirmative action. **Page 59** ■ A chalkboard in Charlottesville would stand as a monument to our heritage of free speech. **Page 60**