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Re: FCC Docket 01-338

Chairman Powell and Commissioners,

I am amazed at the ILECs and High Tech Broadband Coalitions proposition that DSL is a secondary after thought to the Telecommunications Act of 1996. Not only has past Supreme Court rulings supported DSL, but also a CLEC's right to offer just DSL via UNE. Let's try and get a glimmer of insight from the TERLIC case that the Supreme Court has already ruled upon. I think the ILEC's and the High Tech Broadband Coalition have selectively ignored at least portions of the TERLIC case that the Supreme Court decided. The TERLIC case in fact does support DSL entirely under the Telecommunications Act of 1996. Not only does it support DSL as a telecommunications, but also it put it on equal to local voice telecommunications. First we must remember that the Supreme Court Justices are hypersensitive to the words they use. The words they choose are not ramblings; each word is selected carefully and judiciously.

The following is from the opening paragraphs from Supreme Court Justice Breyers opinion in the TERLIC Supreme Court Case. (Page 3 of the Opinions)

*“An example will help explain the system as I understand it. Imagine an incumbent local telephone company's major switching center, say, in downtown Chicago, from which cables and wires run through conduits or along poles to subsidiary switching equipment, other electronic equipment, and eventually to end-user equipment, such as telephone handsets, computer modems, or fax machines located in office buildings or private residences. A new competitor, whom the law entitles to use an element of the incumbent firm's system, asks for use of such an element, say, a single five-block portion of this system, thereby obtaining access to 20 downtown office buildings.”*

I have a couple of points of mention from this passage.

First, nowhere in his opinion did Justice Breyer say telecommunications would travel through a “Legacy System”, around the “next generations” facilities, or capped at FCC determined speed limits. These are made-up terms from ILEC lawyers and FCC Commissioners. These terms will never stand up to judicial review! Justice Breyer

specifically says in his concurring opinion that “an incumbent local telephone company’s major switching center... from which cables and wires run through conduits or along poles to subsidiary switching equipment, or other electronic equipment, and eventually to end-user equipment, such as telephone handset, computer modems, or fax machines.” This is pretty straightforward. Justice Breyer is listing some of the elements that are to be covered as elements of a UNE. He is not limiting the equipment based on the time that they were put into use; nor if they contain Fiber. From TERC we know the Commission cannot look at or base pricing on the Rate of Return. But it seems your basing the whole assumptions on your so-called “Next Generation” facilities whether the ILEC’s can get a fair rate of Return on Return on their investment.

Secondly, “subsidiary switching equipment” specifically sounds like a Remote Terminals, fiber based or not. The Court didn’t say “Secondary”, or the “central office” or any other term. They specifically used “subsidiary” which means to the lay person meaning “any” equipment from the “Major switching center” to the end-user. The Supreme Court did not care what’s in between. UNE pricing jurisdiction should care, but not whether it’s a UNE or not a UNE. The fact is it is an element of the system. The FCC or State PUC should only be looking at whether it is duplicatable or not.

Lastly, when Justice Breyer says in the opinion that the Telecommunications will go “eventually to end-user equipment”, they mean exactly that. If the Supreme Court meant just voice going to their equipment, they would have said “Voice”. But Justice Breyer chose more than just that. He chose to include everything going to equipment “such as telephone handsets, *computer modems*, or fax machines.” I assume Justice Breyer choose “such as” meaning that there is more than just this. Remember, these words are not just ramblings. They have been judicially chosen. As an example let me state the following example...

If I want to go into the Fax Machines business and offer residential telecommunications fax service via the Bell network elements I am covered as a CLEC under the Telecommunications Act of 1996. In today’s society is it a good business model, “NO”. Is it covered under the Telecommunications Act of 1996? 100% absolutely “YES”.

Neither the FCC nor the Telecommunications Act of 1996 is here to decide what is a good business model. That is not your role. The market will decide that. Your role is to strictly interpret where it falls under the Telecommunications Act of 1996.

But “computer modems” is exactly what we are talking about when we say DSL. The facilities part is a Telecommunications service and therefore covered under all Title II restrictions. For that matter, I find hard to believe that a finding by the commission that ILEC DSL equipment would be outside Title II would stand up in Judicial review. The ISP portion might, but certainly Justice Breyers feels otherwise to the equipment portion.

So what must be decided? First, DSL facilities are specifically covered as a Telecommunications Service and given *equal ground* with Voice. Secondly, open the

ILEC facilities once and for all and include all the non-duplicatable equipment including Remote Terminals. Thirdly, all parts of the ILEC facility from the Major Switching area to the End-User fall under a specific UNE element to the Common Carriers whether they want to provide Voice, DSL, Fax or any other telecommunication service. Let the states decide whether the element is needed or not. Finally, do not repeat the fallacies of the DC Circuit Court and base your premises on the 1 dissenting opinion. Instead embrace the opinions of majority. **For the majority opinion of the Supreme Court should stand up to any judicial review!**

Sincerely,

Jeffrey Bower