

TELECOM CONSUMER ISSUES -- RECENT DEVELOPMENTS

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Universal service to all without discrimination is a longstanding expectation of entities providing utility services, which are allowed to exploit public resources, such as the streets and airwaves, and publicly conferred powers of eminent domain, in order to carry on their businesses.² Universal telephone service is a stated goal in the federal Communications Act³, and is embodied in New York common law, and in the Public Service Law.⁴

In 2006, the last time the New York Public Service Commission (PSC or Commission) assessed its style of telecom regulation, the Commission relied on hoped-for “intermodal” competition among providers using three technology platforms — wireline, wireless and cable

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² Judge Cardozo said the duty to serve the public "goes hand in hand with the privilege of exercising a special franchise." *Cayuga Power Corp. v. Public Serv. Comm'n*, 226 N.Y. 527, 532 (1919). He declared that "the duty to serve would exist without the statute, for it results from the acceptance of the franchise of a public service corporation." *Tismer v. New York Edison Co.*, 228 N.Y. 156, 161 (1920). In *Penn. Gas Co. v. Public Serv. Comm'n*, 225 N.Y. 397, 402 (1919), *aff'd*, 252 U.S. 23 (1920), Cardozo stated that: "a gas company occupies the streets . . . with its mains. Even without any statute, it would be under a duty to furnish gas to the public at fair and reasonable rates. The statute might be repealed, and still the courts would have the power, if exorbitant charges were made to give relief to the consumer." *Id.* at 40 (emphasis added).

³ Universal service is a mandate of the 1934 Telecommunications Act as amended by the Telecommunications Act of 1996. A central purpose of the law is "to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges...." 47 U.S. Code § 151.

⁴ "Every telegraph corporation and every telephone corporation shall furnish and provide with respect to its business such instrumentalities and facilities as shall be adequate and in all respects just and reasonable. All charges made or demanded by any telegraph corporation or telephone corporation for any service rendered or to be rendered in connection therewith shall be just and reasonable and not more than allowed by law or by order of the commission. Every unjust or unreasonable charge made or demanded for any such service or in connection therewith or in excess of that allowed by law or by order of the commission is prohibited and declared to be unlawful." PSL 91.1.

— to substitute for regulatory measures.⁵ There have been no rate cases or other generic proceedings since then to test reasonability of prices, terms and conditions of service or to measure progress toward universal service goals. Legislation has reduced regulation further, with the detariffing of “non-basic” service in 2013.⁶ An effort to deregulate even basic service in the last session in the Governor’s budget bill did not succeed.

Are New York consumers receiving adequate telecommunications services at reasonable prices with reasonable terms and conditions of service? Are universal service and service quality goals for telephone and broadband service being set and progress toward them measured?

Telephone Service Subscribership

Phone service is essential for efficient communication with friends and family, schools and workplaces, government services, medical services, emergency services, and other utility services, to name a few. For example, Niagara Mohawk has no walk in customer service offices and nearly all contact with residential customers is routed through telephone call centers or internet communications, apparently based on the assumption that everyone has ready access to phone or internet service. Because of network externalities, the value of communications networks to all is enhanced as more people are connected, and is diminished to the extent

⁵ CASE 05-C-0616 – Proceeding on Motion of the Commission to Examine Issues Related to the Transition to Intermodal Competition in the Provision of Telecommunications Services, STATEMENT OF POLICY ON FURTHER STEPS TOWARD COMPETITION IN THE INTERMODAL TELECOMMUNICATIONS MARKET AND ORDER ALLOWING RATE FILINGS (Issued and Effective April 11, 2006), p. 76 – 79.

⁶ Non-basic telephone services are now detariffed by operation of PSL § 92-g, which took effect in January 19, 2014.

connection is not universal. Accordingly, an important metric for universal service is the household telephone subscribership or “penetration” rate.

Eight years ago, New York’s Utility Project called to the PSC’s attention that low-income Lifeline rate enrollment was inadequate and declining, even as prices were rising, and that telephone subscribership in the state was slipping. The Commission summarized our points as follows:

“[New York's Utility Project notes] the reduction in the telephone penetration rate which has occurred over the last five years, noting that “the decline in telephone service penetration rates in New York between 2000 and 2005 represented an estimated 300,000 households which lacked basic telephone service but who would have had such service if penetration rates had not declined. [The Utility Project] goes on further to state that “there are at least 250,000 households in New York today that are eligible for the Lifeline assistance, but do not receive it.” The parties strongly argue that this trend should be reversed. *[The Utility Project] expresses concern that its initial comments regarding the significant decline in telephone service penetration rates and Lifeline subscription rates were largely ignored. Overall policies can only be adopted, according to [the Utility Project], when meaningful strategies are developed to address the decline in telephone subscribership and the level of participation in the Lifeline program.*”

At that time, the Commission dismissed the evidence of slippage in the universal service objective and the impact of rate increases and deregulating non basic charges, stating:

While we would certainly share [the utility Project's] concern if the magnitude of such a decline could be confirmed and its cause identified, *we question whether the decline cited actually reflects a change in New Yorkers’ access to telephone services, a change in the method by which the data were collected, or some other data anomaly.** * * * We anticipate that the rate increases that might result from the pricing flexibility we authorize here will not undermine universal service. The rate increases to message rate service has been limited and should not undermine universal service.⁷

Since that decision in 2006, prices for telephone service continued to rise faster than inflation while the incomes of many New Yorkers did not, and much of the telecom “competition”, such

⁷ CASE 05-C-0616 – Proceeding on Motion of the Commission to Examine Issues Related to the Transition to Intermodal Competition in the Provision of Telecommunications Services. STATEMENT OF POLICY ON FURTHER STEPS TOWARD COMPETITION IN THE INTERMODAL TELECOMMUNICATIONS MARKET AND ORDER ALLOWING RATE FILINGS (Issued and Effective April 11, 2006), p. 76 – 79.

as MCI, disappeared or was merged. Meanwhile, New York State's performance regarding telephone service penetration continued to decline.⁸ New York's national ranking in telephone subscribership shows that the existing level of competition and regulation has not enabled the state to perform well on this rudimentary measure of universal service. The FCC's 2013 Universal Service Monitoring Report⁹ with data through October 2013, the latest available, shows New York again slipped in comparison with other states with respect to the percentage of households with telephone service. The National average household telephone penetration is 96%, but in New York State only 94.1% of households have phones.

It could be worse: New York State, ninth from the bottom in 2006, is now 47th in the nation on this basic measure of universal service, still ranking ahead of two states, Indiana and West Virginia.¹⁰

New York has 7,230,896 total households, so if 5.9% lack phone service this means 426,622 households do not have phone service. With an average of 2.6 persons per household, that means approximately 1,109,219 New Yorkers do not have a phone in their household. This decline in telephone service penetration parallels the PSC's continued reliance on "price cap" and "performance regulation" regime. Under this regime, service quality

⁸ See [NEW YORK'S HOUSEHOLD TELEPHONE PENETRATION AND LIFELINE ENROLLMENT FALLING, NYUP](#) | August 29, 2008; [NEW YORK'S HOUSEHOLD TELEPHONE PENETRATION HOLDS STEADY, REMAINS LOW, NYUP](#) | June 5, 2009; [NEW FCC TELEPHONE PENETRATION STATISTICS REVEAL PROBLEMS IN NEW YORK, NYUP](#) | August 14, 2009; [NEW FCC TELEPHONE SUBSCRIBERSHIP STATISTICS REVEAL SHORTCOMINGS IN NEW YORK, NYUP](#) | December 17, 2009; [LATEST FCC STATISTICS REVEAL SHRINKING TELEPHONE SUBSCRIBERSHIP IN NEW YORK, NYUP](#) | February 4, 2010; [FCC: LOW INCOME NEW YORKERS STILL STRUGGLING TO AFFORD PHONE SERVICE, NYUP](#) | May 14, 2010; [ASLEEP AT THE SWITCHBOARD: NEW YORK TELEPHONE SUBSCRIBERSHIP SAGS, NOW NINTH FROM THE BOTTOM, NYUP](#) | March 7, 2013.

⁹ <http://bit.ly/1suSXAh>. See Table 3.8 of the report. The survey includes wireless phones.

¹⁰ <http://bit.ly/1nMIEkP>

standards are often breached with minimal penalties,¹¹ suggesting economic breach, and measurement standards were lowered so as to count only service to “core” customers believed to lack competitive alternatives. The price cap regime gives maximum latitude to companies to cut costs and allocate resources with little or no public scrutiny. There appears to be faith-in-competition belief, belied by the evidence, that companies are in actual competition for all customers and will strive to win and keep them. It is possible that with few providers an equilibrium is reached where they do not vigorously compete to serve persons with payment problems or those requiring more customer service.¹² The Commission allows companies to share data regarding customers in arrears to discourage a perceived moral hazard of “carrier hopping.” In more competitive industries there is competition even for customers who are in debt to others.

There are no PSC performance metrics or financial consequences regarding critical matters that affect the availability or cessation of service, such as denials of applications for phone service, terminations of service, reasonability of payment plans, compliance with the Telephone Fair Practices regulations, or enrollment of all eligible low-income customers in the Lifeline and LinkUp assistance programs for low-income customers. The current regulatory paradigm places little or no explicit value on reaching universal service goals.

¹¹ See Case 10-C-0202, Verizon Service Quality Plan, *Order to Show Cause why Penalty Action Should Not be Commenced for Violation of Service Quality Standards*, (Issued Nov 28, 2012).

¹² . See Eduardo Porter, [Concentrated Markets Take Big Toll on Economy](#), The New York Times, May 27, 2014.

Availability of Lifeline Assistance to VOIP providers and Applicability of NY PSC TFPA and Billing and Collection Rules to VOIP Phone Service

The regulation of cable-based platforms for Voice Over internet Protocol (VOIP) service has been controversial. The FCC has not explicitly held that cable VOIP phone service is a “telecommunications service” that would bring it under Title II of the Telecommunications Act, subjecting providers to statutory and regulatory common carrier requirements. Instead, VOIP has been called an “information service” under Title I of the Act. However, the FCC selectively has imposed some telecom service-like requirements upon it, such as 911, and has made Lifeline assistance available, which allows VOIP providers to reduce rates for low income customers and receive corresponding assistance from the Universal Service Administrative Corporation, which is funded by universal service surcharges for various purposes, including low income Lifeline and Linkup assistance. There is a persuasive argument that since by statute only “eligible telecommunications carriers” can get the lifeline subsidies, the FCC impliedly held that VOIP is a telecommunications service under Title II when it made them eligible for the program.

The New York Commission generally follows its 2006 deregulation approach with VOIP phone service providers, allowing them to operate without direct regulation or periodic review of prices, terms and conditions of service, and without the consumer protections of the Telephone Fair Practices Rules. This changed in 2012, when Time Warner, seeking to obtain reimbursement for low income Lifeline assistance, asked the PSC to recognize its home phone

service subsidiary as a fully regulated telephone company, in order to gain recognition of as an “Eligible Telecommunications Carrier” (ETC), which was granted.¹³

This change in status meant that Time Warner’s service to its 1.2 million home telephone customers became fully subject to New York state regulation, including the Telephone Fair Practices Act (TFPA), and Time Warner’s low income customers became eligible for Lifeline rate assistance. After gaining recognition as the state’s second largest phone company, Time Warner sought waiver by the PSC of various requirements, including service quality reporting (on the ground it is a competitive option to companies under service quality regulation), and for waiver of limitations on the times when service may be suspended as a bill collection measure, asserting that shutting service off later at night, (until 9:30), and on Friday afternoons and evenings and Saturdays would be for the convenience of its customers

Discovery in Case 13-C–0193 revealed that service to large numbers of customers had been shut off as a collection measure when combined bills for phone, TV, or internet service were unpaid, without offering the opportunity to save phone service through an allocated partial payment. The Commission denied some of the waiver requests, and required service quality reporting. The Commission declined to require the inclusion of payment allocation options on the bills to customers in arrears threatened with shutoff.¹⁴

¹³ “TWCIS(NY)’s petition represents the first request to the Commission for ETC designation from an entity providing service using fixed Voice over Internet Protocol (VoIP) technology.” Case 12-C-0510, Petition of Time Warner Cable Information Services (New York) LLC, for Modification of its Existing Eligible Communications Carrier Designation, Order issued March 18, 2013, at p. 10, available at <http://bit.ly/15rXCet>.

¹⁴ CASE 13-C–0193 - Petition of Time Warner Cable Information Services (New York), LLC for Waivers of Certain Commission Regulations Pertaining to Partial Payments, Directory Distribution, Timing for Suspension or Termination of Service, and a Partial Waiver of Service Quality Reporting Requirements. Order Granting In Part And Denying In Part Requests For Waivers Of Rules, (Issued October 21, 2013).

In contrast to Time Warner, Comcast and Cablevision and other cable VOIP phone service providers have not requested a determination by the Commission that they are providing telephone service to their New York customers. As a consequence, their customers are not eligible for Lifeline assistance, their customers' service may be shut off for nonpayment of TV bills, they may not be able to enter into deferred payment plans to avoid termination when they fall behind, shutoffs may occur on weekends or at night, and they do not have recourse to the Commission's Hotline and complaint remedies under the Telephone Fair Practices Rules.

Abandonment of Copper Lines and Replacement with Inferior Wireless Service

Verizon appears to have adopted policies favoring harvesting revenue from copper wireline customers and abandoning their maintenance, with replacement by inferior wireless service. In 2012, Verizon announced plans to "kill the copper," referring to the wireline service received by most of its New York telephone customers.¹⁵ Wireline customers in upgraded areas would be migrated to FiOS; customers outside those areas would be relegated to wireless services, starting with areas where the company has decided it does not want to upgrade to FiOS and does not want to maintain copper line service. Reflecting an apparent market division with cable providers of TV and broadband, Verizon also halted deployment of FiOS in new areas.¹⁶ The issue surfaced when the company decided to abandon copper wireline service on Fire Island and substitute a fixed wireless service (which does not accommodate DSL or fax and other features of copper wire service). It filed a tariff to allow copper abandonment and

¹⁵ http://www.media-alliance.org/downloads/Verizon_Kill_Copper.pdf.

¹⁶ *Verizon to End Rollout of FiOS, Wall Street Journal*, March 30, 2010.

wireless substitution elsewhere when maintenance was deemed inefficient.¹⁷ Following a major outpouring of opposition Verizon withdrew the tariff and is installing fiber optic lines on Fire Island.

Information regarding Verizon's costs of maintaining copper lines and other data filed with the PSC was requested under FOIL. Litigation is underway to determine whether it is a legitimate trade secret, disclosure of which would compromise a competitive advantage, or confidential commercial information, release of which would cause a competitive disadvantage.¹⁸

Broadband

By and large, regulators have allowed communications companies to decide where and when they will deploy broadband service and what they will charge for it. The lack of accurate information regarding geographic deployment of broadband infrastructure and subscribership within local communities frustrates efforts to assess whether sufficient progress is being made toward achieving affordable, universal broadband access for all. The FCC found in its Eighth annual report on broadband deployment that it is not being deployed in a timely manner.¹⁹ The

¹⁷ See Case 13-C-0197, *Tariff Filing By Verizon New York Inc. To Introduce use of Wireless Technology as an Alternative to Repair of Damaged Facilities*, Order (Issued October 24, 2013).

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Verizon New York Inc. v. New York State Public Service Commission (Albany County Supreme Court, Index No.6735-13) . On July 31, 2014, the court directed a remand to the Commission to clarify its decision that the information could be made public under a different standard articulated by the court.

¹⁹ "The Report finds that approximately 19 million Americans—6 percent of the population—still lack access to fixed broadband service at threshold speeds. In rural areas, nearly one-fourth of the population —14.5 million people—lack access to this service. In tribal areas, nearly one-third of the population lacks access. Even in areas where broadband is available, approximately 100 million Americans still do not subscribe." FCC, Eighth Broadband Progress Report, summary at <http://www.fcc.gov/reports/eighth-broadband-progress-report>.

methods for counting broadband access are controversial.²⁰ Many areas of the state lack any high speed broadband service, and many more have service available only from one provider, typically a cable company.

It is difficult to obtain detailed information regarding broadband infrastructure deployment and subscribership data in areas where broadband service is available. Typically, providers of broadband service have been secretive about where they have built their systems, where they are deploying services, and how many persons in any particular area are actually buying broadband service when it is available. Questions have been raised about “redlining” in broadband deployment which results in lower income areas lacking access to high speed internet service, placing them at a further economic, educational, and informational disadvantage.²¹ An initial FOIL determination requires Time Warner to provide its broadband deployment plan provided to PSC staff in connection with its review of the purchase of Time Warner Cable by Comcast. That ruling is on appeal.

The FCC has avoided classifying broadband as a “telecommunications service” and thus subject to common carrier obligations under Title II of the federal Telecommunications Act. Efforts to address regulation of broadband under cable regulation and ancillary regulation powers have foundered. New York has not addressed the issue directly in statute or regulation .While there is no state statutory regulation of broadband service it could be seen as an

²⁰ “The data gathering methodology of the federal broadband mapping program includes data collection from providers at the census block level. Under the federal guidelines, one household served in a census block deems the entire block as being served. In many parts of NYS (particularly rural areas), availability is vastly overstated.” Comments of New York State Broadband Program Office in Case 14-M-0183, Joint Petition of Time Warner Cable Inc. and Comcast Corporation for Approval of a Holding Company Level Transfer of Control, at <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=14-m-0183#>

²¹ See Broadband ‘Redlining’ Issue Raised In Fiber Deployment, <http://www.techweb.com/wire/networking/60400165>.

additional service riding on telephone lines installed using utility powers and thus subject to the state common law duty to serve.

An analogous situation once existed, when Edison, then a lighting company under the statutes, began to use its wires to provide power for refrigeration and motors. In response to a denial of power to an applicant, the court found that there is a duty to serve without discrimination, even in the absence of statutory duties:

the company's duty to furnish service does not rest upon the statute alone, but upon the common-law obligation as a public service corporation which requires it to serve impartially every member of the community. It may be that if it did not undertake to furnish electricity for power purposes to anyone it could not be coerced to do so. Upon that question we express no opinion. It does, however, profess and undertake to furnish electric current for power purposes, and this it does by virtue of its franchise as a public service company. So professing and undertaking, it cannot arbitrarily pick and choose whom it will serve and whom it will not.²²

DPS Staff Review Underway

Apparently, when the legislature did not enact requested deregulation and regulatory forbearance provisions in the state budget process, the PSC pledged to undertake a comprehensive review of the telecom situation. A report issued by the Utility Project calls for a new review of the PSC's telephone deregulation policies and their impact on vulnerable consumers.²³ Also, a petition was filed seeking a review of the Commission's telecommunications policies, joined in by numerous parties. A proceeding has been

²² *New York ex rel. C. Perceval, v. Public Serv. Comm'n*, 163 A.D. 705, 708; 148 N.Y.S. 583; 1914 N.Y. App. Div. LEXIS 6955 (Supreme Court of New York, Appellate Division, First Department, 1914).

²³ See *It's All Interconnected*, available at <http://bit.ly/1qG7Vws>.

commenced regarding a new DPS staff review, with no indication yet of any process for public participation.²⁴

²⁴ Case 14-C-0370, *In the Matter of a Study on the State of Telecommunications in New York State*.