

JONATHAN E. NUECHTERLEIN

Despite the centrality of the terminating access monopoly to modern communications policy, there is surprisingly little academic literature on that concept as it applies to current regulatory debates.⁵ This essay seeks to fill that gap by exploring the various settings in which the concept does, or does not, help explain market dynamics in the communications sector. We conclude that the terminating access monopoly phenomenon, strictly understood, does not itself generally threaten market failures except in very limited circumstances. As we explain, the phenomenon could threaten inefficient outcomes only where, because of the underlying market context, the interconnecting provider or its customer has a particularized need to reach the customer set of the terminating access provider, and even then, market forces might correct any problem without regulatory intervention.

This is a narrow thesis. Even though the terminating access monopoly may not itself give rise to widespread market failures, ordinary market-power dynamics may independently justify regulatory intervention. For example, to address monopsony concerns in the video programming marketplace, regulators have long sought to limit the aggregate share of eyeball customers nationwide that any given cable provider may serve.⁶ Just as important, policymakers may have valid reasons for intervening in interconnection arrangements wholly unrelated to market power, particularly if bargaining impasses would otherwise threaten the positive externalities associated with a ubiquitous communications platform, such as the Internet or the public telephone system. This essay is not concerned with those issues; it is concerned

Second, in the usual account, a terminating access monopoly is said to exist even if the consumer-facing provider faces substantial retail competition (i.e., competition for consumers) from rival providers.¹¹ For example, around the turn of the millennium, policymakers asserted that new entrants in local telephone markets—

2015]

T

company could recover its incremental costs and minimize transaction

its single-homed customers, one would expect to see many different examples of small competitive providers charging very high rates to the senders of that incoming traffic. Tellingly, that phenomenon rarely arises outside of the voice-interconnection context.

To take one example, consider the marketplace for programming sold to multichannel video programming distributors (“MVPDs”), such as conventional cable companies, fiber overbuilders (e.g., Verizon FiOS or RCN), and satellite television providers. An MVPD’s customers are typically single-homed: a single household within Cox Cable’s footprint generally does not subscribe to both Cox and some alternative MVPD such as DirecTV; it subscribes to one or the other. And like other MVPDs, Cox receives the programming bound for its subscribers from a variety of content sources (such as HBO and Discovery), typically via intermediate satellite or fiber-optic transmissions. If the terminating access monopoly threatened endemic market failures for any unregulated exchange of communications traffic bound for any given provider’s single-homed customers, one would expect each of those MVPDs to charge content providers inefficiently high rates for rights of “access” to the MVPD’s customers. In fact, the consideration often flows in the opposite direction, from MVPDs to interconnecting content providers²¹:

FIGURE 2

21. See, e.g., *Amendment of the Comm’n’s Rules Related to Retransmission Consent*, MB Dkt. No. 10-71, Report & Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd. 3351, para. 2 (2014) [hereinafter *2014 Retransmission Conse*].

material to its negotiations with other Internet-based networks, one would expect each of those ISPs to extract inefficiently high rates from the interconnecting backbone providers and content delivery networks that deliver incoming Internet traffic bound for the ISP’s customers. In fact, such ISPs typically charge little or nothing for such access to their customers. To the contrary, the money often flows in the opposite direction: any ISP that is not a Tier 1 network typically pays third-party networks for transit services, which include the service of terminating traffic to that ISP’s customers.²⁵

FIGURE 3

Of course, the more eyeballs a given ISP serves, the greater its size and scope is likely to be within the Internet peering marketplace, and the less likely it is to pay transit providers for access to any given Internet content. Indeed, the largest ISPs have succeeded in charging some

connection into the home, whether or not they may also have Internet connections via their mobile devices or office computers. This is because any problems associated with terminating access are minimized if retail customers maintain multiple fungible connections. LAFFONT & TIROLE, *supra* note 8, at 215.

25. See Peyman Faratin, David Clark et al., *The Growing Complexity of Internet Interconnection*, 72 COMM. & STRATEGIES 51, 63 (2008); see also Stanley M. Besen & Mark A. Israel, *The Evolution of Internet Interconnection from Hierarchy to “Mesh”*

interconnecting networks—such as Level 3 and Netflix’s proprietary content distribution network (“CDN”)—for sending large amounts of incoming streaming video traffic to the ISPs’ customer base.²⁶ But there is little evidence so far that these charges are inefficiently high, such that they could cause deadweight losses to the Internet ecosystem; only then could they suggest a monopoly problem.²⁷ More importantly, only the largest ISPs appear capable of charging interconnecting CDNs anything at all for access to their customer base. This fact reaffirms that any negotiating leverage such ISPs may have originates from their size—and thus from traditional sources of bargaining power—not from the size-agnostic phenomenon of the terminating access monopoly.

In sum, these examples underscore that the terminating access monopoly does not play a central role in all unregulated interconnection

competition.

Third, even if the consumer-facing network provider faces no competition and enjoys a complete retail monopoly within its footprint, it will enj

We repeat what we said at the outset: this is a narrow thesis. There may be a variety of sound analytical bases independent of any terminating access monopoly for regulatory oversight of relationships between consumer-facing network providers and interconnecting suppliers of voice, Internet content, and other communications traffic. First, conventional market power concerns might well justify caps on any given provider's market share. For example, policymakers may reasonably seek to maintain competitive equilibrium within the marketplace for Internet peering and transit, a key basis for the rejection of the WorldCom-Sprint merger in 2000.³¹ Or they may wish to address monopsony concerns in the sale of cable programming, the basis for regulatory limits on a given cable provider's share of subscribers nationwide.³² Again, however, these concerns have nothing to do with conventional notions of a terminating access monopoly, which are indifferent to a terminating provider's size.