

Before the  
*Federal Communications Commission*  
Washington, D.C. 20554

RECEIVED

MAY 12 1998

In the Matter of: )  
 )  
Implementation of Section 703(e) )  
of the Telecommunications Act of 1996 )  
 )  
Amendment of the Commission's Rules )  
and Policies Governing Pole Attachments )

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

CS Docket No. 97-151

**JOINT OPPOSITION  
TO THE PETITIONS FOR RECONSIDERATION**

**ADELPHIA COMMUNICATIONS CORPORATION  
LENFEST COMMUNICATIONS, INC.**

FLEISCHMAN AND WALSH, L.L.P.  
1400 Sixteenth Street, N.W.  
Washington, D.C. 20036  
202/939-7900

Its Attorneys

May 12, 1998

File of Copy the rec'd  
MADE                      *OHY*

## **TABLE OF CONTENTS**

- i. SUMMARY**
  
- I. INTRODUCTION**
  
- II. INTERNET ACCESS OFFERED BY CABLE SYSTEMS IS NOT A “TELECOMMUNICATIONS” SERVICE UNDER THE 1996 ACT**
  
- III. BECAUSE INTERNET IS NOT “TELECOMMUNICATIONS” AND AN UNREGULATED RATE PRESENTS UNTENABLE IMPLICATIONS, CABLE SYSTEMS PROVIDING INTERNET ACCESS SERVICE ARE ENTITLED TO THE EXISTING POLE ATTACHMENT RATE**
  
- IV. THE COMMISSION’S DECISION TO APPLY THE LOWER RATE TO INTERNET SERVICE PROVIDED BY CABLE SYSTEMS IS SUPPORTED BY FUNDAMENTAL POLICIES OF THE 1996 ACT**
  
- V. THE COMMISSION SHOULD REJECT THE CERTIFICATION PROPOSAL AS BURDENSOME AND DUPLICATIVE**
  
- VI. CONCLUSION**

## SUMMARY

Adelphia and Lenfest oppose the petitions requesting the Commission to reconsider its decision in the Pole Attachment Order to apply the Section 224(d) pole attachment rate to cable systems providing commingled Internet and traditional cable television service. The Commission's conclusion is overwhelmingly supported by statutory text, its own precedent, and fundamental policy considerations of the 1996 Act.

Internet access service provided by cable operators can not be interpreted as a "telecommunications" service according to the plain meaning of the 1996 Act; Commission treatment of the regulatory classification of Internet service confirms this result. Therefore, the Section 224(e) rate specified in the statute for providers of "telecommunications" cannot apply to cable systems providing Internet access service. An unregulated rate would similarly contradict the statutory directive to the Commission to regulate rates for all pole attachments as well as Congress' entire rationale since 1978 to counter pole owners' anticompetitive incentives. Therefore, the only logical rate for cable systems offering Internet services is the already compensatory Section 224(d) rate. This conclusion is consistent with the historically broad application of the rate to cable-provided services beyond merely traditional cable television service. In addition, the core principles of competition and expanded access to communications services on which the 1996 Act was founded affirm the Commission's conclusion in the Pole Attachment Order.

Finally, Adelphia and Lenfest also oppose the proposal by one petitioner that cable systems certify that they are not offering telecommunications. Petitioner's proposal is unnecessary given the existing notification requirements and would be unduly burdensome.

## I. INTRODUCTION

Adelphia Communications Corporation (“Adelphia”) and Lenfest Communications, Inc. (“Lenfest”), by their attorneys, and pursuant to Section 1.106(g) of the Commission’s rules, hereby submit this Opposition to the Petitions for Reconsideration of the Pole Attachment Order<sup>1</sup> filed by various Petitioners.<sup>2</sup> Adelphia and Lenfest are owners and operators of cable systems across the country. In the Pole Attachment Order, the Commission adopted rules implementing Section 703 of the Telecommunications Act of 1996,<sup>3</sup> which amended Section 224 of the Communications Act of 1934. Section 224 directs the Commission to prescribe regulations ensuring that “rates, terms and conditions” for pole attachments are “just” and “reasonable.”<sup>4</sup>

Congress first enacted the pole attachment provisions in 1978 to prevent owners of utility poles from using their bottleneck control to stifle the development of the cable television industry.<sup>5</sup> As part of the 1996 Act, Congress gave cable systems and telecommunications carriers

---

<sup>1</sup>In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission’s Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, Report and Order, FCC 98-20 (released Feb. 6, 1998) (“Pole Attachment Order”).

<sup>2</sup>See Petitions for Clarification and Reconsideration of Bell Atlantic Telephone Company (“Bell Atlantic”), United States Telephone Association (“USTA”), Edison Electric Institute and UTC, the Telecommunications Association (“Edison/UTC”), SBC Communications Inc. (“SBC”), MCI Telecommunications Corporation (“MCI”) (collectively “Petitioners”).

<sup>3</sup>Pub. L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. § 224 (“1996 Act”).

<sup>4</sup>Id. § 224(b)(1).

<sup>5</sup>S. Rep. 580. 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 19, 20 (1977) (“1977 Senate Report”), reprinted in 1978 U.S.C.C.A.N. 109, 121.

mandatory rights of access to utility poles<sup>6</sup> while imposing a higher rate for attachments used to provide telecommunications.<sup>7</sup> At the same time, the 1996 amendments limited the existing rate, outlined in Section 224(d)(1)<sup>8</sup>, to attachments used “solely to provide cable service.”<sup>9</sup>

In the Pole Attachment Order, the Commission made a number of findings pursuant to its statutory directive to ensure “just and reasonable” pole attachment rates. Among these decisions was the conclusion that the maximum rate utilities can charge cable operators providing commingled traditional cable and Internet services is the 224(d)(1) rate.<sup>10</sup> Petitioners urge reconsideration of this finding in addition to matters not addressed herein. Respondents oppose these petitions for reconsideration on the grounds that the statute, legislative history, Commission precedent and policy goals of the 1996 Act inescapably lead to the conclusion that cable systems providing Internet services are entitled to the 224(d)(1) rate.

## **II. INTERNET ACCESS OFFERED BY CABLE SYSTEMS IS NOT A “TELECOMMUNICATIONS” SERVICE UNDER THE 1996 ACT**

The text of the statute clearly demonstrates that Internet service is not a “telecommunications” service. Under the 1996 Act’s definition, a “telecommunications” service

---

<sup>6</sup>47 U.S.C. § 224(f).

<sup>7</sup>*Id.* § 224(e)(2-3).

<sup>8</sup>*Id.* § 224(d)(1).

<sup>9</sup>*Id.* § 224(d)(3).

<sup>10</sup>Pole Attachment Order at paras. 30-35.

transmits information without altering its content.<sup>11</sup> By contrast, Internet access of the type provided by cable operators does not just involve mere transmission of information without change in its form or content but enables subscribers to interact with stored information and to access information provided by others. Contrary to Petitioners' assertions,<sup>12</sup> cable systems providing Internet service are functionally equivalent to Internet Service Providers (ISPs). For example, Tele-Communications Inc.'s @Home Network includes caching servers and managed multimedia content arranged for consumers.<sup>13</sup> Petitioners repeatedly cite Section 224(d)(3)'s limitation of the Section 224(d)(1) rate to attachments used "solely for cable service" and the absence of any similar limit on the telecommunications rate in Section 224(e) as evidence that Internet service fits within the supposedly expansive "telecommunications" definition.<sup>14</sup> Petitioners' citations to the text and legislative history of the 1996 Act do nothing beyond showing that Congress intended different rates for pole attachments carrying "telecommunications" and "cable" services. Certainly, there is nothing to support an interpretation that Internet access offered over cable systems is within the definition of "telecommunications." For example, MCI argues that the Conference report to the 1996 Act "makes clear" that Congress rejected the idea of allowing cable operators providing anything

---

<sup>11</sup>"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 sent and received." 47 U.S.C. § 153(43).

<sup>12</sup>Petitioners argue that the functions of cable operators' Internet services are so similar to telecommunications that they ought to be regulated under the higher Section 224(e) rate. SBC at 5-7, USTA at 4-6.

<sup>13</sup>For a brief description of the @Home Network, see [www.home.net/corp/network](http://www.home.net/corp/network).

<sup>14</sup>Bell Atlantic at 2-4, SBC at 3, MCI at 5-6.

other than traditional cable video services to receive the 224(d)(1) rate when it added subsection (e)(1).<sup>15</sup> However, in spite of Petitioners' efforts to demonstrate that some revelation is contained within them, the cited passages only reveal an intent to differentiate the treatment of attachments used to carry "cable" and "telecommunications" services -- the same distinction as in the text.

Commission precedent strongly supports the notion that the definition of "telecommunications" does not include Internet service. For example, in the 1997 Universal Service Order,<sup>16</sup> the Commission did not require ISPs to contribute to the Universal Service Fund, as required of all telecommunication carriers. Similarly, in the 1998 Universal Service Report, the Commission declined to designate a regulatory classification for Internet access provided via cable systems, noting only the Commission's conclusion in the instant proceeding that the 224(d) rate applied.<sup>17</sup> Even Internet Protocol (IP) telephony did not earn a designation as a "telecommunications" service in the 1998 Universal Service Report.<sup>18</sup> The Commission has similarly refused to impose access charges on Internet services provided by cable systems, which

---

<sup>15</sup>MCI at 5-6.

<sup>16</sup>Federal State Joint Board on Universal Service, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8776, paras. 787-790 (1997) ("1997 Universal Service Order"). The Commission's Order flatly contradicts one petitioner's contention that the 1997 Universal Service Order was not dispositive as to whether Internet service could be classified as a telecommunications service. See Bell Atlantic at 2-4.

<sup>17</sup>Federal-State Joint Board on Universal Service, Report to Congress, CC Docket No. 96-45, FCC 98-67 (rel. April 10, 1998) ("1998 Universal Service Report") at n.154.

<sup>18</sup>Id. at paras. 83-90.

would have been required had such services been classified as telecommunications.<sup>19</sup> Therefore, while the precise regulatory classification of Internet service offered over cable remains unclear, the Commission has left little doubt that it is outside the boundaries of “telecommunications.”

To counter the weight of precedent against it, one petitioner resorts to a strained analogy to the Commission’s treatment of Internet services provided by Bell Operating Companies (BOCs) in the Non-Accounting Safeguards Order to support its theory that Internet service provided by cable operators is “telecommunications.”<sup>20</sup> In that order, the Commission held that, for purposes of Section 272 of the 1996 Act, “an InterLATA information service” incorporates an InterLATA telecommunications transmission component.<sup>21</sup> While vague, petitioner appears to be arguing that because the cable operator similarly is offering a bundled transmission component, the Commission should treat attachments used to provide Internet service via cable as an “information” service,<sup>22</sup> and thus, presumably not entitled to the Section 224(d) rate.<sup>23</sup>

---

<sup>19</sup>In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure, First Report and Order, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, FCC 97-158 (rel. May 16, 1997), at para. 345.

<sup>20</sup>Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, 11 FCC Rcd 21905 (rel. Dec. 24, 1996), paras. 115-127. These sections govern the conditions under which a BOC that is an LEC must provide services through a separate affiliate under Section 272.

<sup>21</sup>Id. at para. 115.

<sup>22</sup>“Information service” means “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and [such term] includes electronic publishing, but does not include any use of 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).

<sup>23</sup>SBC at 5.

Petitioner's analogy actually weakens its argument insofar as it shows Internet access to be a service other than a "telecommunications" service, and thus certainly outside the parameters of Section 224(e). In addition, petitioner's analogy is based on the flawed premise that the Section 224(d) rate only applies to cable systems offering traditional cable television service. As aptly demonstrated by the Heritage decision, the Commission has never confined the Section 224(d) rate to such an interpretation.<sup>24</sup>

**III. BECAUSE INTERNET IS NOT "TELECOMMUNICATIONS" AND AN UNREGULATED RATE PRESENTS UNTENABLE IMPLICATIONS, CABLE SYSTEMS PROVIDING INTERNET ACCESS SERVICE ARE ENTITLED TO THE EXISTING POLE ATTACHMENT RATE**

Internet services offered over cable systems definitively are not "telecommunications" and thus can not be subject to the Section 224(e) rate. The Commission is left either with the Section 224(d) rate or, as proposed by one petitioner, an unregulated rate. But given that allowing pole owners to charge cable systems providing Internet access an unregulated rate would contravene the very essence of the pole attachment provisions and the basic principles of the 1996 Act, the Section 224(d) rate represents the only logical rate for attachments used by cable systems to offer Internet service.

According to one petitioner, the Commission is without authority to regulate the pole attachment rates for cable systems offering Internet service because such service is neither "telecommunications" nor a "cable service" as defined by the 1996 Act.<sup>25</sup> This argument is

---

<sup>24</sup>See III infra.

<sup>25</sup>SBC at 4-5.

clearly wrong. The statute directs the Commission to regulate the “rates terms and conditions for pole attachments,”<sup>26</sup> which are defined as “*any* attachment[s] by a cable television system to a pole ... owned or controlled by a utility.”<sup>27</sup> Moreover, allowing an unregulated rate for attachments used for Internet service provided by cable systems would contravene the entire rationale behind the pole attachment provisions. If petitioner’s suggestion is correct, Congress’ amendments to Section 224 in 1996 were intended to protect providers of traditional cable television services and telecommunications from pole owners’ anticompetitive incentives but left providers of other communications services at the mercy of the pole owners. Even absent the clear statutory directive to the Commission to regulate all pole attachment rates, the illogical ramifications of petitioner’s suggestion make it easy for the Commission to dismiss an unregulated rate as a possible outcome.

The Section 224(d) rate is the only sound result for attachments used by cable systems to provide Internet services. In order to reach this result, it is unnecessary to decide whether Internet service offered over cable systems meets the statutory definition of a “cable service.”<sup>28</sup> By applying the Section 224(d) rate, the Commission adheres to the historical application of the Section 224(d) rate to other services besides traditional cable television services. In Heritage, the Commission held that cable operators providing nonvideo broadband communications services

---

<sup>26</sup>47 U.S.C. §224(b)(1).

<sup>27</sup>Id § 224(a)(4) (emphasis added).

<sup>28</sup>Pole Attachment Order at para. 34. The 1996 Act defines “cable service” as “(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.” 47 U.S.C. § 522(6)(B).

as well as traditional cable television service were entitled to the Section 224(d) pole attachment rate.<sup>29</sup> Therefore, nothing in the 1996 Act should prevent a cable system adding Internet to its traditional television service from continuing to receive the rate outlined for cable services under Section 224(d). If anything, contrary to one petitioner's claim,<sup>30</sup> in the wake of new competition and overlapping technologies, the holding in Heritage is more pertinent to today's regulatory and technological landscape than to the environment before the 1996 Act. Today, pole owners face even greater threats of competition than before the 1996 Act, making their anticompetitive incentives to extract monopoly rents from would-be competitors even more dangerous to consumers.

#### **IV. THE COMMISSION'S DECISION TO APPLY THE LOWER RATE TO INTERNET SERVICE PROVIDED BY CABLE SYSTEMS IS SUPPORTED BY FUNDAMENTAL POLICIES OF THE COMMUNICATIONS ACT**

Increased competition among providers of Internet services and expanded access to the Internet represent two more foundations for the Commission's decision to apply the Section 224(d) rate to cable systems offering Internet access. The 1996 Act was premised on the idea that competition among providers of communications services would bring benefits to consumers.<sup>31</sup> In the new market for Internet access, cable operators could help fulfill the Act's

---

<sup>29</sup>Heritage Cablevision Associates of Dallas v. Texas Utilities Electric Co., 6 FCC Rcd 7099 (1991), aff'd Texas Utilities Electric Co. v. FCC, 977 F.2d 925 (D.C. Cir. 1993). See Pole Attachment Order at paras. 26-28.

<sup>30</sup>One petitioner maintains that because the decision predates the 1996 amendments, Heritage has little or no precedential value. SBC at n.12.

<sup>31</sup>Preamble to the 1996 Act.

competition goal by offering high quality Internet service to consumers, unless they are deterred by a doubling or tripling of pole attachment rates. One petitioner argues that under either rate, the cable industry will enter the Internet services market,<sup>32</sup> but that assertion underestimates the deterrent effect of high pole attachment rates. Launching Internet service requires a significant financial commitment by cable systems. The significantly higher pole attachment rate for telecommunications would represent a substantial disincentive to cable operators interested in providing additional services beyond traditional cable television to consumers. As the Commission pointed out, the punitive effect of the higher rate would indeed contradict the Congress' desire to give competitors incentives to enter the market.<sup>33</sup>

One petitioner actually tries to portray the Commission's decision in the Pole Attachment Order as anticompetitive on the theory that the lower rate forces incumbent local exchange carriers ("ILECs"), who, under the 1996 Act, must allow competitors on their own poles but do not have mandatory access rights to other utility poles,<sup>34</sup> to "subsidize" cable operators in the market for Internet access.<sup>35</sup> Petitioner's invocation of the argument that "cut rate" pole attachment rates force utility ratepayers to subsidize cable operators' attachments is a familiar one, but no more compelling in this proceeding than in its previous incarnations. Even under the Section 224(d) rate, pole attachment fees are a boon to utilities; indeed, if any subsidy exists, it flows from the cable customers to utility ratepayers and not vice versa, as petitioner suggests. If

---

<sup>32</sup>SBC at 4.

<sup>33</sup>Pole Attachment Order at para. 32.

<sup>34</sup>See *id.* at para. 5, *citing* 47 U.S.C. § 224(a)(5).

<sup>35</sup>Bell Atlantic at 6.

a utility must erect a pole in order to construct its plant, and no other entity attaches to the pole, its ratepayers will pay the entire cost of installing and maintaining that pole in place. Under Section 224(d), if a cable system desires to place an attachment on this pole, all make-ready costs must be paid by the cable operator. If a taller or stronger pole is needed, the cable operator will pay for the new pole. If additional guying and anchoring is needed because of the presence of the cable system's attachment, the cable operator will pay those costs. Thus, the only additional continuing costs to the utility and its ratepayers are the minimal incremental costs, such as maintenance and administration, of having the cable operator on the pole. However, under Section 224(d)'s existing rate formula, cable operators pay far more than this incremental cost. They pay a percentage of the total costs of the installation and maintenance of the pole along with the incremental costs of their presence on the pole.<sup>36</sup> Thus, even under the Section 224(d) rate, the utility's ratepayers are enjoying a contribution from the cable operator to the cost of the pole, a contribution which they would not receive without the cable operator's attachments. This is a net plus for the utility's ratepayers. The new formula in Section 224(e) for telecommunications carriers will increase this contribution. No concept could be simpler, yet utilities, including some of the Petitioners,<sup>37</sup> persist in arguing that third party attachments to their poles somehow burden their ratepayers.

Inextricably linked to the 1996 Act's competition goal is the expansion of access to high quality communications services.<sup>38</sup> In the Internet services market, this objective finds special

---

<sup>36</sup>47 U.S.C. § 224(d)(1).

<sup>37</sup>See Bell Atlantic at 6.

<sup>38</sup>Preamble to the 1996 Act.

relevance. While the number of Americans subscribing to the Internet has grown rapidly in recent years, the Internet still serves a fraction of potential users and is plagued by usage and technological demands limiting its performance.<sup>39</sup> Cable's technology and market position could help address those problems. Cable currently passes over ninety-six percent of American homes,<sup>40</sup> and its higher bandwidth offers consumers faster service than Internet service provided by other carriers.<sup>41</sup> By applying the Section 224(d) rate to cable systems offering Internet service, the Commission helps further Congress' goal of increased, higher quality access to the Internet.

**V. THE COMMISSION SHOULD REJECT THE CERTIFICATION PROPOSAL AS BURDENSOME AND DUPLICATIVE**

One petitioner's proposal that cable operators certify that they are not providing a telecommunications service<sup>42</sup> runs counter to the statutory scheme and would be unduly burdensome and duplicative. By proposing that cable operators certify that their services are something other than telecommunications, petitioner implies that most services fall into this category, and thus should be charged the higher pole attachment rate. However, as described, "telecommunications" is a statutorily defined term that excludes Internet services. Further, the

---

<sup>39</sup>In the Matter of the Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fourth Annual Report, CS Docket No. 97-141 (rel. January 13, 1998) para. 98 ("1997 Competition Report").

<sup>40</sup>Id. at para. 14.

<sup>41</sup>Adelphia's Power Link service offers Internet service up to 50 times faster than consumers can get by adding a second phone modem. For a brief description of Adelphia's service, see Adelphia's Web site at [powerlink.adelphia.net](http://powerlink.adelphia.net).

<sup>42</sup>Edison/UTC at 11-12.

certification proposal contradicts the 1996 Act's goals of reducing administrative burdens and fostering competition. As the Commission noted, the proposal would be duplicative since cable systems are already under a duty to provide notice to pole owners when they provide such telecommunications service.<sup>43</sup>

## **VI. CONCLUSION**

Petitioners' arguments that attachments used to provide Internet service via cable should be regulated under the Section 224(e) rate for telecommunications are contradicted by the statute's text, Commission precedent and fundamental goals of the 1996 Act. Specifically, options for setting pole attachment rates for cable systems offering Internet service leave only one clear choice. Internet services are not "telecommunications", eliminating the Section 224(e) rate as an option. The implications of an unregulated rate are so contrary to the statute and the rationale for limits on pole attachment rates as to not merit serious consideration. Therefore, the application of the Section 224(d) rate is the only possibility for cable systems offering Internet access. In addition to being supported by policy considerations, this conclusion is consistent with historical treatment of such services.

---

<sup>43</sup>Pole Attachment Order at para. 35.

Adelphia and Lenfest therefore respectfully urge the Commission to reaffirm its finding in the Pole Attachment Order that the maximum rate for pole attachments by cable systems offering Internet service is the Section 224(d) rate.

**ADELPHIA COMMUNICATIONS CORPORATION  
LENFEST COMMUNICATIONS, INC.**

By:   
Charles S. Walsh

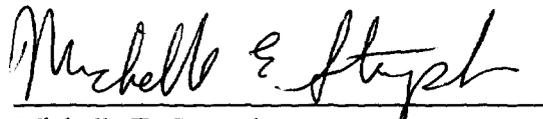
**FLEISCHMAN AND WALSH, L.L.P.**  
1400 Sixteenth Street, N.W.  
Washington, D.C. 20036  
202/939-7900  
Its Attorneys

Date: May 12, 1998

78909

**CERTIFICATE OF SERVICE**

I, Michelle E. Stumph, hereby certify that the foregoing Joint Opposition to the Petitions for Reconsideration in CS Docket No. 97-151 has been filed this 12<sup>th</sup> day of May, 1998 to the attached matrix.

  
Michelle E. Stumph

May 12, 1998

Lawrence Fenster  
1801 Pennsylvania Avenue, NW  
Washington, DC 20006  
Counsel for MCI Telecommunications

Joseph DiBella  
1320 North Court House Road  
Eighth Floor  
Arlington, VA 22201  
Counsel for Bell Atlantic

David L. Swanson  
Edison Electric Institute  
701 Pennsylvania Avenue  
Washington, DC 20004

Jeffrey L. Sheldon  
Sean A. Stokes  
UTC  
1140 Connecticut Avenue  
Suite 1140  
Washington, DC 20036

Mary McDermott  
Linda Kent  
Keith Townsend  
Lawrence E. Sarjeant  
1401 H Street, N.W., Suite 600  
Washington, DC 20005-22164  
Counsel for the United States  
Telephone Association

Robert M. Lynch  
Durward D. Dupre  
Jonathan W. Royston  
One Bell Plaza, Room 3022  
Dallas, TX 75202  
Counsel for SBC Communications, Inc.