

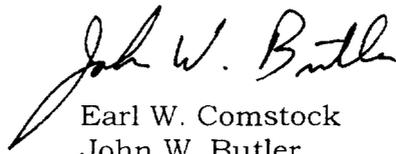
exponential growth that was experienced in the dial-up Internet access market approximately five years ago.

EarthLink representatives summarized the points made in EarthLink's comments and reply comments filed in Docket 00-185. Specifically, EarthLink reiterated that the Communications Act and long-standing Commission precedents make clear that Internet access is an information service that is provided to the public via a telecommunications service, and that facilities-based providers of information services (such as cable operators) are required as telecommunications carriers under title II of the Communications Act and the Commission's *Computer Inquiry* and *Frame Relay* proceedings to make available to competing information service providers (such as ISPs) on nondiscriminatory terms the underlying transmission services that the facilities-based information service providers use to offer their services to the public.

In response to cable industry arguments that cable companies are not offering Internet access and the associated telecommunications services over which Internet access rides to the public, EarthLink provided to Mr. Goodfriend a copy of the *ex parte* notice that EarthLink filed on January 31, 2001, and a copy of EarthLink's reply comments, both of which are part of the existing record. Finally, EarthLink provided an excerpt from the brief filed by the National Cable Television Association in support of its petition for certiorari seeking U.S. Supreme Court review of the Eleventh Circuit Court of Appeals' decision in *Gulf Power Co. v. F.C.C.*, 208 F.3d 1263 (2000). A copy of that excerpt, which states in several places that cable companies are providing Internet access directly to their subscribers over the cable companies' own facilities, is attached to this filing.

EarthLink closed the meeting by emphasizing that the pending Supreme Court consideration in *Gulf Power* of the central issue in the Commission's Notice of Inquiry, as well as other on-going litigation, presents a substantial risk that the Commission will forfeit its opportunity to decide the proper regulatory classification of "cable modem service" if the Commission does not act promptly.

Respectfully submitted,



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IN THE
Supreme Court of the United States

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioner,

v.

GULF POWER COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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A. The Cable Television Industry.

Cable television began more than 50 years ago as a means to provide antenna service to households in mountainous or geographically remote areas where reception of over-the-air television signals was poor. J. Goodale, *All About Cable* § 1.02, at 1-6 (2000) (“Goodale, *Cable*”). Since its inception, the cable industry has grown dramatically in its importance to the national economy. In 1950, a total of 70 cable systems transmitted local broadcast signals to just 14,000 subscribers nationwide. By the mid 1980s, nearly 53 million households subscribed to cable services, and today about 7 of 10 television households (more than 65 million) subscribe to a cable television service.

Just as the size of the cable industry has grown, so too has the scope of the services that cable operators provide to their subscribers. In addition to serving as a community “antenna” in areas where reception is otherwise poor, cable operators have expanded their services to include cable programming networks that provide video entertainment and information to the industry’s subscribers. Similarly, by the late 1980s, the cable industry began providing its subscribers “nonvideo communications services, such as data transmission.” *Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925, 927 (D.C. Cir. 1993). Recent technological advances have allowed cable operators, who have invested billions of dollars in the effort, to upgrade further their existing coaxial cables and other equipment so that they can simultaneously carry both traditional video programming services and high-speed or “broadband” Internet access at data transmission speeds hundreds of times faster than the “narrowband” services available through traditional telephone lines. The cable industry thus actively competes against numerous segments of the communications industry to provide high-speed Internet services to consumers nationwide. See Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to*

Accelerate Such Deployment Pursuant to Section 706 of the Telecomms. Act of 1996, 14 FCC Rcd 2398, 2404 (¶ 12) (1999) (“*Section 706 Report*”).

As the FCC has noted, “[w]idespread access” to high-speed or broadband Internet services “can increase our nation’s productivity and create jobs” as well as “meaningfully improve our educational, social, and health care services.” *Section 706 Report*, 14 FCC Rcd at 2400 (¶ 2). Indeed, the FCC has concluded that development of such services is important because it will provide consumers with “the ability to download feature-length movies in a matter of minutes,” “change web pages as fast as changing the channel on a television” and create “new possibilities . . . for electronic commerce.” *Id.* at 2401 (¶ 3).

As to this important developing high-speed service, the cable industry has been instrumental. See *id.* at 2415-16 (¶ 37) (describing multi-billion dollar investments by cable operators to develop this service). For example, in August 2000, the Commission reported that 1.4 million of the 1.8 million high-speed lines to residential homes and small businesses were provided by cable technology. Second Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, at 33 (¶ 71 & Fig. 5) (FCC Aug. 21, 2000) (“*Second Section 706 Report*”). More recently, the Commission reported that there were 4.3 million broadband lines connecting homes and small businesses to the Internet and that the cable industry provided about 2.2 million such lines. FCC, *Federal Communications Commission Releases Data on High-Speed Services for Internet Access*, at 1 (Oct. 31, 2000) (“*FCC, Data on High-Speed Services for Internet Access*”). The development of these services by the cable industry is likewise spurring development and deployment of competing high-speed

services (known as “DSL”) by telephone companies. See *Section 706 Report*, 14 FCC Rcd at 2419 (¶ 42).

Although the cable industry has undergone a remarkable transformation over the past 50 years, it remains equally true today that “to deliver television signals to their subscribers,” cable operators “must have a physical carrier for the cable.” *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987). As this Court has explained, “virtually the only practical physical medium for installation of television cables” has been poles, ducts, and rights-of-way owned or controlled by local utilities. *Id.* Accordingly, a cable system’s “right to secure the use of those facilities on reasonable terms may be crucial to its very existence.” Goodale, *Cable* § 6.01, at 6-3. Because high-speed Internet services offered by cable operators are “commingled” with traditional cable services “on one transmission facility,” Pet. App. 63a (¶ 30), cable operators that provide high-speed Internet services and traditional cable services must rely on utilities for reasonable and affordable access to “poles, ducts, conduits, or rights-of-way” that are necessary to deliver these commingled services to their subscribers. Moreover, the incentive that these utilities have to deny such access on just and reasonable terms has increased because the 1996 Act lifts restrictions that previously prohibited them from diversifying into telecommunications and other services where they can compete against cable entities and others. See Pub. L. No. 104-104, 110 Stat. 56, 81-86, § 103 (1996) (codified at 15 U.S.C. § 79z-5c).

This case presents the issue whether cable operators forfeit regulatory protections that ensure that they will have access to these bottleneck facilities on just and reasonable terms if they choose to provide Internet services as well as their traditional video programming.

B. Statutory And Regulatory Background.

A review of the development of the statutory and regulatory structure governing access by cable operators to bottleneck
