

ORIGINAL

EX PARTE OR LATE FILED

SHER & BLACKWELL
ATTORNEYS AT LAW

SUITE 900
1850 M STREET, N.W.
WASHINGTON, D.C. 20036

TELEPHONE (202) 463-2500
FACSIMILE (202) 463-4950/4840

WRITER'S DIRECT DIAL NO.

(202) 463-2510

SUITE 510
15 EXCHANGE PLACE
JERSEY CITY, NJ 07302
TELEPHONE (201) 915-0100
FACSIMILE (201) 915-0393

GOVERNMENT RELATIONS
JEFFREY R. PIKE
ANTILLA E. TROTTER III

MARK W. AIWOOD
ROBERT J. BLACKWELL
JOHN W. BUTLER
EARL W. COMSTOCK+
MARC J. FINK
JEFFREY F. LAWRENCE
ANNE E. MICKEY
JOSEPH T. NAH
KELLY A. O'CONNOR
WAYNE R. ROHDE
STANLEY O. SHER
DAVID F. SMITH
HEATHER M. SPRING
PAUL M. TSCHIRHART

+ ADMITTED IN AK ONLY

February 28, 2001

RECEIVED

FEB 28 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

By Hand

Honorable Magalie Roman Salas
Commission Secretary
Federal Communications Commission
Room TW-B204
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation Regarding the Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; GN Docket No. 00-185 /

Dear Ms. Salas:

On behalf of EarthLink, Inc. (EarthLink) we hereby submit an original and one copy of this notice regarding a permitted *ex parte* presentation in the above-referenced proceeding. On February 27, 2001, Dave Baker, EarthLink Vice President for Law and Public Policy, and Earl Comstock and John Butler of Sher & Blackwell met with Mr. Kyle Dixon, Legal Advisor to Chairman Powell, regarding the above-referenced docket.

Mr. Baker opened the meeting by describing EarthLink's experience in the Internet access market. EarthLink is the nation's second largest Internet service provider (ISP), with over 4.7 million customers, including 215,000 broadband subscribers, and is the only major ISP that is not affiliated with a cable company. Mr. Baker related that in the fourth quarter of 2000, EarthLink's dial-up access subscriber base remained flat, indicating that the dial-up market is a mature one, while the number of broadband subscribers increased by over 50 percent. Mr. Baker emphasized that the increasing consumer demand for broadband services makes prompt Commission action on the cable open access essential if consumers are to have meaningful choices of broadband Internet access providers. Mr. Baker stressed that the growth curve for the broadband Internet access market has now reached the point of

No. of Copies rec'd 0
List A B C D E

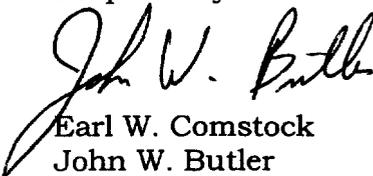
exponential growth that was experienced in the dial-up Internet access market approximately five years ago.

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. Dixon a copy of the *ex parte* notice that EarthLink filed on January 31, 2001.

EarthLink closed the meeting by emphasizing that the pending Supreme Court consideration in its review of *Gulf Power Co. v. F.C.C.*, 208 F.3d 1263 (2000), 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. In connection with that discussion, EarthLink is providing the enclosed excerpts from various Commission orders and briefs regarding the Commission's reluctance to date to address the proper legal classification of "cable modem services."

Respectfully submitted,



Earl W. Comstock
John W. Butler

Counsel for EarthLink, Inc.

cc: Mr. Kyle Dixon
Ms. Johanna Mikes, Common Carrier Bureau
Mr. Christopher Libertelli, Common Carrier Bureau
Mr. Carl Kandutsch, Cable Services Bureau
Mr. Douglas Sicker, Office of Engineering & Technology
Mr. Robert Cannon, Cable Services Bureau
International Transcription Service, Inc.

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND
THE UNITED STATES OF AMERICA, PETITIONERS

v.

GULF POWER COMPANY, ET AL.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER J. WRIGHT
General Counsel
JONATHAN E. NUECHTERLEIN
Deputy General Counsel
JOHN E. INGLE
*Deputy Associate General
Counsel*
GREGORY M. CHRISTOPHER
*Counsel
Federal Communications
Commission
Washington, D.C. 20554*

SETH P. WAXMAN
*Solicitor General
Counsel of Record*
A. DOUGLAS MELAMED
*Acting Assistant Attorney
General*
LAWRENCE G. WALLACE
Deputy Solicitor General
JAMES A. FELDMAN
*Assistant to the Solicitor
General*
ROBERT B. NICHOLSON
ROBERT J. WIGGERS
*Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217*

ected to what is commonly referenced in the telecommunications industry as 'plain old telephone service.'" *AT&T Corp. v. City of Portland*, 216 F.3d 871, 873-874 (9th Cir. 2000); see note 4, *infra*. The Commission based its conclusion that the Act governed attachments used simultaneously to provide cable television and Internet access on the ground that it "is still obligated under Section 224(b)(1) to ensure that the 'rates, terms and conditions [for pole attachments] are just and reasonable,' and, as Section 224(a)(4) states, a pole attachment includes 'any attachments by a cable television system.'" App. 90a. The Commission noted that that conclusion would remain valid regardless of whether a cable television system providing commingled Internet access is considered to be providing "cable service," "telecommunications service," or some other form of service. *Id.* at 89a-90a.² Finally, the Commission determined that the 1996 amendments extend the protections of Section 224 to wireless carriers no less than to other telecommunications carriers. *Id.* at 91a-96a.

4. A number of electric utility companies filed petitions for review of the FCC's order in the Third, Fourth, Sixth, Eighth, Eleventh, and D.C. Circuits. App. 14a-15a. Pursuant to the FCC's motion, the cases were consolidated in the Eleventh Circuit. *Id.* at 15a. In a ruling not at issue on this petition, a panel of the court of appeals unanimously held that challenges to various aspects of the FCC's orders under the Takings

² Indeed, because the classification of cable Internet access as "cable service," "telecommunications service," or some other form of service is the subject of ongoing proceedings before the Commission concerning issues outside the Pole Attachments Act, the Commission expressly stated that it "d[id] not intend * * * to foreclose any aspect of the Commission's ongoing examination of those issues." App. 89a; see note 4, *infra*.

tions 224(d) and 224(e), it falls entirely outside the scope of the Act's rate protections.⁴

That holding is incorrect. Even if (as the court of appeals believed) cable modem service should be characterized neither as a "cable service" nor as a

⁴ Because the court of appeals erroneously believed that a cable attachment receives statutory protection only if it is used to provide services falling within one of the two rate categories set forth in Section 224(d)(3) and Section 224(e)(1), it mistakenly felt compelled to address whether a cable company's provision of Internet access is properly characterized as a "cable service," a "telecommunications service," or an "information service." See App. 27a-29a. To date, the FCC has taken no position on that issue, which is central to a separate debate concerning whether a cable operator can be compelled to provide unaffiliated Internet service providers with "open access" to its cable facilities. See *id.* at 87a-89a; see also *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, FCC No. 00-355, ¶¶ 14-24 (Sept. 28, 2000) (*High-Speed Access Inquiry*) (seeking comment on proper statutory classification of high-speed Internet access using cable modem technology). Moreover, in its conclusion that Internet access provided through cable television wires "does not meet the definition of * * * a telecommunications service," App. 32a, the Eleventh Circuit's decision conflicts with a subsequent decision of the Ninth Circuit, which held that "to the extent that [a firm] provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act." *AT&T Corp. v. City of Portland*, 216 F.3d 871, 878 (2000); see also *ibid.* ("The Communications Act includes cable broadband transmission as one of the 'telecommunications services' a cable operator may provide over its cable system."); cf. *High-Speed Access Inquiry*, ¶¶ 13, 18-20 (seeking comment on whether it is appropriate to characterize cable modem service as "telecommunications service"). Ninth Circuit precedent therefore would compel a contrary result on the first question presented here, because, unlike the Eleventh Circuit, the Ninth Circuit would place cable Internet access within the scope of "telecommunications services" for purposes of Section 224.

No.

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND THE
UNITED STATES OF AMERICA, PETITIONERS

v.

GULF POWER COMPANY, ET AL.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO THE
PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER J. WRIGHT
General Counsel

JONATHAN E. NUECHTERLEIN
Deputy General Counsel

JOHN E. INGLE
*Deputy Associate General
Counsel*

GREGORY M. CHRISTOPHER
*Counsel
Federal Communications
Commission
Washington, D.C. 20554*

SETH P. WAXMAN
*Solicitor General
Counsel of Record*

A. DOUGLAS MELAMED
*Acting Assistant Attorney
General*

LAWRENCE G. WALLACE
Deputy Solicitor General

JAMES A. FELDMAN
*Assistant to the Solicitor
General*

ROBERT B. NICHOLSON
ROBERT J. WIGGERS
*Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217*

TABLE OF CONTENTS

	Page
Appendix A (opinion of the court of appeals. Nos. 98-6222 et al., Apr. 11, 2000)	1a
Appendix B (per curiam opinion of the court of appeals, Nos. 98-6222 et al., Sept. 12, 2000)	42a
Appendix C (order of the court of appeals (denial of rehearing) Nos. 98-6222 et al., Sept. 12, 2000)	55a
Appendix D (FCC report and order, CS Docket No. 97-151)	56a
Appendix E (statutory provision)	205a

APPENDIX D
BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

CS Docket No. 97-151

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

Adopted: February 6, 1998
Released: February 6, 1998

REPORT AND ORDER

By the Commission:

TABLE OF CONTENTS

	Paragraph No.
I. Introduction	1
II. Background	2
III. Preference for Negotiated Agreements and Complaint Resolution Procedures	10
IV. Charges for Attaching	22
A. Poles	22
1. Formula Presumptions	22
2. Restrictions on Services Provided over Pole Attachments	26

directed the Commission to undertake a review of the implementation of the provisions of the 1996 Act relating to universal service, and to submit a report to Congress no later than April 10, 1998.¹²⁸ That report is to provide a detailed description of, among other things, the extent that the Commission's definition of "telecommunications" and "telecommunications service," and its application of those definitions to mixed or hybrid services, are consistent with the language of the 1996 Act.¹²⁹ We do not intend, in this proceeding, to foreclose any aspect of the Commission's ongoing examination of those issues.

34. We need not decide at this time, however, the precise category into which Internet services fit. Such a decision is not necessary in order to determine the pole attachment rate applicable to cable television systems using pole attachments to provide traditional cable services and Internet services. Regardless of whether such commingled services constitute "solely cable services" under Section 224(d)(3), we believe that the subsection (d) rate should apply. If the provision of such services over a cable television system is a "cable service" under Section 224(d)(3), then the rate encompassed by that section would clearly apply.¹³⁰ Even if

¹²⁸ Pub. L. 105-119, 111 Stat. 2440 (1997), sec. 623.

¹²⁹ *Id.*

¹³⁰ The legislative history of the 1996 Act may be read to support such a conclusion. See Conf. Rpt. at 206 which indicates that, "to the extent that a company seeks pole attachment for a wire used solely to provide cable television services (as defined by Section 602(6) of the Communications Act), that cable company will continue to pay the rate authorized under current law (as set forth in subparagraph (d)(1) of the 1978 Act)." Further, the Conference Report states that "[t]he conferees intend the amendment to

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

In the Matter of
Applications for Consent to the
Transfer of Control of Licenses and
Section 214 Authorizations from
MediaOne Group, Inc.,
Transferor,
To
AT&T Corp.
Transferee
CS Docket No.99-251

MEMORANDUM OPINION AND ORDER

Adopted: June 5, 2000

Released: June 6, 2000

By the Commission: Chairman Kennard issuing a statement; Commissioner Furchtgott-Roth
concurring in part, dissenting in part and issuing a statement; Commissioner
Powell concurring and issuing a statement; and Commissioner Tristani
concurring and issuing a statement.

Table of Contents

I. INTRODUCTION 1
II. PUBLIC INTEREST FRAMEWORK 8
III. BACKGROUND 14
A. The Applicants 14
B. The Merger Transaction and the Application to Transfer Licenses 30
IV. ANALYSIS OF POTENTIAL PUBLIC INTEREST HARMS 35
A. Video Programming 36
1. Diversity and Competition in Video Program Purchasing 39
a. The Merged Firm's Cable Ownership Interests 41
b. The Merged Firm's Video Programming Purchasing Power 50
c. Potential Harm to Competition and Diversity

125. In our monitoring of broadband developments, we have seen no evidence of cable operators imposing proprietary protocols. According to the Applicants, “both AT&T and MediaOne have used open standards in their broadband systems.”³⁵⁷ The Applicants argue that, as “nascent” service providers in an Internet arena still dominated by established narrowband providers, they have “neither the incentive nor the ability to change course and impose proprietary standards in the future.”³⁵⁸ Commenters have provided no evidence to the contrary. Given the increasingly rapid deployment of alternative broadband technologies, we cannot conclude that the merged firm will have sufficient bargaining power in this emerging field to give it the incentive and the ability to establish proprietary interfaces for new broadband software applications. If the merged entity imposes proprietary protocols, providers of applications and content tailored to those protocols will be forced to forego alternative broadband outlets such as DSL. Were the merged firm to attempt such a strategy, it is more likely than not that software developers could find adequate outlets in alternative broadband providers to discipline the merged firm’s anti-competitive action.

126. We also decline to impose an “open/forced access” requirement on the merged firm’s cable systems as a condition of this merger based on arguments regarding alleged disparate regulatory treatment of cable operators and telephone companies offering broadband Internet access.³⁵⁹ As we noted in our *Amicus Brief* to the U.S. Court of Appeals for the Ninth Circuit, the Commission has not determined whether Internet access via cable system facilities should be classified as a “cable service” subject to Title VI of the Act, or as a “telecommunications” or “information service” subject to Title II.³⁶⁰ There may well come a time when it will be necessary and useful from a policy perspective for the Commission to make these legal determinations. However, those legal determinations would have industry-wide application, as well as legal and practical implications that extend far beyond the contours of this particular merger. Our review of this merger does not provide an appropriate forum for a determination of the legal status of cable broadband Internet access services.

127. We find insufficient evidence to support the imposition of an “open/forced access” requirement on the merged entity at this time, given the potential for competition from alternative broadband providers and the potential for unaffiliated ISPs to gain direct access to provide broadband

³⁵⁷ Applicants Sept. 17 Reply Comments at 86.

³⁵⁸ *Id.*

³⁵⁹ MCI WorldCom and MindSpring argue that the Commission, in the context of its merger review, should rule that AT&T and MediaOne, insofar as they provide Internet access over cable, should be classified as “common carriers” subject to the provisions of Title II of the Communications Act of 1934. *See* MindSpring Comments at 3, 7-16; MCI WorldCom Comments at 26-32. MindSpring further argues that the Administrative Procedure Act (5 U.S.C. §§ 551 *et. seq.*) requires the Commission to decide whether Title II applies to the Applicants because, given the Applicants’ prior arguments that an “open/forced access” requirement would prevent their investments to make system upgrades, such a requirement would cause the anticipated benefits of the merger to disappear. *See* MindSpring Comments at 19-21. We find this scenario unpersuasive, particularly because the Applicants continue to project extensive system upgrades and deployment of new services following the December 6, 1999 AT&T-MindSpring letter memorializing AT&T’s “open access” commitment, which is discussed above.

³⁶⁰ *Amicus Curiae* Brief of the FCC at 9-11, *AT&T Corp. v. City of Portland*, No. CV 99-65 PA (9th Cir. filed Aug. 16, 1999). The issue is pending in the forementioned litigation. In addition, the United States Court of Appeals for the Eleventh Circuit recently held that the Commission is not authorized under the 1996 Pole Attachment Act, 47 U.S.C. § 224, to regulate pole attachments for cable facilities used to provide “Internet service” because such service is neither a “cable service” nor a “telecommunications service.” *Gulf Power Company v. FCC*, No. 98-6222, slip. op. at 26-30 (11th Cir. Apr. 11, 2000).

No. 99-35609

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AT&T CORP., TELECOMMUNICATIONS, INC.,
TCI CABLEVISION OF OREGON, INC., and
TCI OF SOUTHERN WASHINGTON,
Appellants,

v.

CITY OF PORTLAND, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
Case No. CV 99-65 PA

BRIEF OF THE FEDERAL COMMUNICATIONS COMMISSION
AS AMICUS CURIAE

William B. Schultz
Acting Assistant Attorney General

Christopher J. Wright
General Counsel

Jacob M. Lewis
Mark Davies
Attorneys, Appellate Staff
Civil Division, Room 9134
Department of Justice
601 D Street, N.W.

Daniel M. Armstrong
Associate General Counsel

James M. Carr
Counsel

Federal Communications Commission
Washington, D.C. 20554
(202) 418-1762

ARGUMENT**I. THE FCC HAS NOT DETERMINED WHETHER BROADBAND ACCESS IS A CABLE SERVICE; THUS, THE PARTIES MAY HAVE PREMISED THEIR ARGUMENTS IN THIS CASE ON A FAULTY LEGAL ASSUMPTION.**

It is understandable why the district court in this case assumed that the provision of Internet access through a cable modem is a "cable service" subject to Title VI of the Communications Act. Both plaintiffs and defendants agreed on that premise, and no party to this case suggested that Internet access via cable could be anything but a cable service. In proceedings before the FCC, however, many parties have vigorously contested the notion that Internet access provided by a cable system is a cable service. See TCI Order ¶ 83. According to these parties, cable modem service is more properly categorized as a "telecommunications" or "information service."

To date, the Commission has not decided whether broadband capability offered over cable facilities is a "cable service" under the Communications Act, or instead should be classified as "telecommunications" or as an "information service." The answer to this question is far from clear. The statute itself does not provide a definitive answer. And even Portland and Multnomah County recognize that the legal status of Internet access is not free from doubt. Both of

services" might pose a significant risk of regulatory disparity with respect to all other broadband service providers. Any such disparity might undermine the objectives of section 706 by impeding the reasonable and timely deployment of advanced telecommunications capability to all Americans.

More generally, on a conceptual level, an argument can be made that Internet access is more appropriately characterized as an information or telecommunications service rather than a cable service. At the most basic level, there are two kinds of communications service networks: (1) broadcast (one-to-many) networks, in which the distributor chooses the content and sends it to all customers; and (2) switched (one-to-one) networks, in which the customer chooses the content and sends it to the person(s) of his or her choice. The first type of network best describes cable service; the second type of network most accurately depicts telecommunications and information services. Some have argued that Internet access more closely resembles the switched network. However, the Commission has not yet conclusively resolved the issue.