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August 15, 2001

RECEIVED
AUG 15 2001
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Re: GN Docket No. 00-185 – Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities

Dear Ms. Salas:

I am writing to inform you that on Wednesday, August 15, 2001, Alexander V. Netchvolodoff, Alexandra M. Wilson, David E. Mills, and the undersigned, on behalf of Cox Communications, Inc., sent the attached letter to W. Kenneth Ferree, Marjorie Greene, Sarah Whitesell, John Norton, and Royce Dickens of the Cable Services Bureau.

Pursuant to Section 1.1206(b) of the Commission's rules, an original and one copy of this letter are being submitted to the Secretary's office for the above-captioned docket by the close of business on the day following the submission of that written ex parte presentation and copies of this letter are being provided to the recipients of the presentation. Should there be any questions regarding this filing, please contact the undersigned.

Respectfully submitted,

To-Quyen Truong
Counsel for Cox Communications, Inc.

Attachment

cc: W. Kenneth Ferree, Esq.
Marjorie Greene, Esq.
Sarah Whitesell, Esq.
John Norton, Esq.
Royce Sherlock, Esq.

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Alexandra M. Wilson
Chief Policy Counsel

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August 15, 2001

VIA HAND DELIVERY

W. Kenneth Ferree, Esq.
Chief, Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: GN Docket No. 00-185 – Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities

Dear Mr. Ferree:

Cox Communications, Inc. ("Cox") respectfully submits this letter to address several issues you raised during our recent meeting to discuss Cox's comments in the above-referenced proceeding concerning the regulatory classification and treatment of cable modem and other broadband services. As discussed below, the regulatory classification of these services does not depend on the facilities used by the provider, but on the nature of the service offered to the public. While "telecommunications service," "information service" and "cable service" all may utilize "telecommunications," for a service to qualify as a "telecommunications service," the telecommunications must be not merely an input for the service, but the very service that is offered "for a fee directly to the public."[1] Cable modem service providers are not offering a pure transmission path for a fee directly to the public. Rather, cable modem service integrates high-speed Internet access, content, information and services, qualifying it as an "information service." Moreover, because cable modem service provides "programming" (i.e., "information that a cable operator makes available to all subscribers generally") and "subscriber interaction . . . for the selection or use of such" programming, the service also fits the definition of a "cable service."[2] Accordingly, under the Communications Act's definitions, cable modem service is not a telecommunications service, but an information service and a cable service.

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[1] 47 U.S.C. § 153(46).

[2] 47 U.S.C. § 522(6), (14).

A. Cable Modem Service Is Not a Telecommunications Service Because It Is Not an Offering of Pure Data Transmission for a Fee Directly to the Public.

The Communications Act regulates providers by reference to the nature of the services they offer, not the facilities they use. Because regulatory obligations do not attach to "telecommunications facilities" but to "telecommunications services," the Commission need not even concern itself with whether a cable network may be a "telecommunications facility" under certain circumstances. Such a reference is relevant only to the enforcement of Section 541(b)(3)(D), which provides that "a franchising authority may not require a cable operator to provide any telecommunications service or facilities . . . as a condition of . . . a transfer of a franchise."[3] In applying Section 541(b)(3)(D) to an "open access" local ordinance, a court need not decide whether the cable modem service offered by the cable operator to the public constitutes a "telecommunications service." Rather, the local ordinance is invalid if the court finds that the requirement for the cable operator to provide its cable system to multiple Internet service providers ("ISPs") – thereby limiting the operator's role solely to providing a facility for the transmission of information of the ISPs' choosing – constitutes a requirement that the cable operator provide "telecommunications facilities."

This was precisely the narrow ruling of the Fourth Circuit Court of Appeals in *MediaOne Group, Inc. v. County of Henrico*.[4] The Court in that case explained that, "[b]ecause the open access condition violates § 541(b)(3)(D) of the Communications Act, our analysis of federal law may stop at that [rather than] go[ing] further [to] determine the specific regulatory classification of" the cable modem service.[5] The Court expressly intended that its "telecommunications facilities" holding would leave entirely open the regulatory classification of the operator's cable modem service. This determination reflects a recognition that, as the Commission explained in its amicus brief to the Court, "not every use of telecommunications facilities necessarily involves the provision of a 'telecommunications service' under the Act's specialized definition of that term."[6]

Section 153(43) of the Communications Act defines "telecommunications" as "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."[7] The use of "telecommunications" is necessary to all services that require the transport of information electronically from Point A to Point B.[8] Consequently, a finding that the cable operator uses

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[3] 47 U.S.C. § 541(b)(3)(D) (emphasis added).

[4] 21 U.S. App. Lexis 15540, No. 00-1680 (4th Cir. July 11, 2001) ("*MediaOne*").

[5] *Id.*, slip op. at 15.

[6] FCC Amicus Brief in *MediaOne*, at 21.

[7] 47 U.S.C. § 153(43).

[8] One could argue that even traditional video and radio programming offered by cable operators, satellites, television and radio broadcasters utilize telecommunications, because

"telecommunications" or even "telecommunications facilities" to provide cable modem service would not and does not determine whether the service is classified as a telecommunications service subject to Title II regulation, an information service under Title I, or a cable service under Title VI.[9]

Section 153(46) of the Communications Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such class of users as to be effectively available directly to the public, regardless of the facilities used."[10] Thus, the Act defines "telecommunications service" by reference to the availability of the transmission path as a separate, commercial offering to the public from the service provider.[11] As the Commission explained in the Stevens Report to Congress:

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they involve the transmission of information between or among points specified by the service provider as the user of the transmission capability.

[9] Although Congress did not define the term "telecommunications facility" in the Act, it has used the phrase in provisions other than Section 541(b)(3)(D) to refer to the physical plant and equipment used to transmit services that are not common carrier in nature. For example, Section 397(13), which relates to the public broadcasting service, defines "public telecommunications facilities" as "apparatus necessary for production, interconnection, captioning, broadcast, or other distribution of programming, including but not limited to studio equipment, cameras, microphones, [etc.] . . . ." 47 U.S.C. § 397(13). Yet, broadcast services, like cable services, are defined by statute not to be common carrier services. *See* 47 U.S.C. § 153(10) ("a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier"); 47 U.S.C. § 541(c) ("Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service."). Clearly, therefore, the use of "telecommunications facilities" does not render the service provider a common carrier under the Communications Act.

Likewise, the possible use of the cable platform as a "telecommunications facility" would not take it outside of the definition of a "cable system." Section 522(7) defines a "cable system" as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community." 47 U.S.C. § 522(7) (emphasis added). Congress thus defines a "cable system" by reference to the inclusion of video programming service, not by reference to the exclusion of other uses of the system such as its possible use as a "telecommunications facility." Indeed, only the facilities of common carriers – i.e., carriers offering telecommunications services, not simply using telecommunications – are expressly exempted from the cable system definition (except to the extent they are used for the transmission of video programming directly to subscribers). *Id.*

[10] 47 U.S.C. § 153(46) (emphasis added).

[11] *See, e.g., Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, Order on Remand, CC Docket No. 96-149, FCC

> This functional approach is consistent with Congress' direction that the classification of a provider should not depend on the type of facilities used. . . . Its classification depends rather on the nature of the service being offered to customers. Stated another way, if the user can receive nothing more than pure transmission, the service is a telecommunications service. If the user can receive enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service.[12]

The Commission also recently reiterated in the Non-Accounting Safeguards Order that "simply using telecommunications as a means of providing an information service to end users" "does not have the effect of imposing common carrier obligations on information service providers."[13]

Application of this standard to cable modem service makes clear that the service is not a telecommunications service. Focusing on Cox's cable modem service as an example,[14] Cox does not offer pure data transmission for a fee directly to the public. Rather, while Cox may use telecommunications as an input, it offers a cable modem service to the public that integrates high-speed Internet access, content, information and services.[15] Like other ISPs such as

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01-140, at ¶ 18 (rel. Apr. 27, 2001) ("Non-Accounting Safeguards Order") ("Unlike the terms 'telecommunications service' and 'information service,' both of which are defined by reference to the act of 'offering,' the Act defines the term 'interLATA service' more broadly, without reference to its availability as a separate offering.").

12 *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, 13 F.C.C.R. 11501, at ¶ 59 (1998) ("Stevens Report to Congress") (footnote omitted); *see also id.* ¶ 39 (Only "an entity offering a simple, transparent transmission path, without the capability of providing enhanced functionality, offers 'telecommunications.'").

13 Non-Accounting Safeguards Order ¶¶ 32-41. In contrast, a provider who does offer a telecommunications service as a separate offering (e.g., voice-grade telephone service or frame relay service) does not cease to be a telecommunications service provider when it bundles that service with an information service in a second offering (e.g., offering bundled voice-grade telephone service and Internet service for a single price). *See In the Matter of Federal-State Joint Board on Universal Service,* Fourth Order on Reconsideration, 13 F.C.C.R. 2372, 13 F.C.C.R. 5318, at ¶ 282 n. 827 (1997); *Independent Data Communications Manufacturers Association, Inc. and AT&T Petition for Declaratory Ruling That All IXCs be Subject to the Commission's Decisions on the IDCMA Petition*, 10 F.C.C.R. 13717, at ¶¶ 19, 40, 46 (1995).

14 These services are offered primarily by Cox's subsidiary CoxCom, Inc. We refer to the service here as a "Cox" service solely for ease of reference.

15 In order to enable the subscriber to connect to the Internet and interact with World Wide Web content and other users, Cox must perform enhanced functions, including protocol conversion and protocol processing, assigning the user's cable modem and computer their IP addresses, making the user's computer visible to the Internet, providing domain name

Earthlink, Cox's cable modem service provides subscribers with a variety of enhanced functions including subscriber browsing and retrieval of files from the World Wide Web, access to other Internet service providers through the Web, use of electronic mail, and access to and interaction with online newsgroups. In addition, like AOL or Yahoo, the Cox cable modem service provides the subscriber with content such as news, weather reports, advertising and games on its welcome page. Cox also provides the subscriber with the ability to customize his or her welcome page by selecting from an array of content provided by Cox's service and the ability to create "homepages" using the web hosting facilities of the service's computer servers. In short, the subscriber receives from Cox all of the enhanced functionality offered by other ISPs, already determined by the Commission to be "information services,"[16] plus additional services and content. Because the subscriber gets far more than a pure transmission path, cable modem service is not a telecommunications service, but an information service and a cable service.

B. A Cable Operator's Use of Its Own Facilities to Provide Cable Modem Service Does Not Convert This Information Service Into a Telecommunications Service.

Section 153(20) defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . ."[17] The Commission has recognized that this statutory definition embodies Congress's intent not to tease out the telecommunications component of the service for regulation as a "telecommunications service." As the Commission stated in the Stevens Report to Congress, "[b]ecause information services are offered 'via telecommunications,' they necessarily require a transmission component in order for users to access information."[18] The Commission further explained that:

> The provision of Internet access service involves data transport elements: an Internet access provider must enable the movement of information between customers' own computers and the distant computers with which those customers seek to interact. But the provision of Internet access service crucially involves information-processing elements as well; it offers end users information-service capabilities inextricably intertwined with data transport. As such, we conclude that it is appropriately classed as an "information service."[19]

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resolution, and providing authentication, security and encryption of information to protect individual users' privacy on the shared cable network.

[16] Stevens Report to Congress ¶¶ 73-82.

[17] 47 U.S.C. § 153(20) (emphasis added).

[18] Stevens Report to Congress ¶ 57.

[19] *Id.* ¶ 80 (footnotes omitted); *see also id.* ¶ 81 (Internet access services "conjoin the data transport with data processing, information provision, and other computer-mediated offerings, thereby creating an information service.").

Accordingly, the cable modem service's data transport component cannot be separated from its information-processing components and treated as a "telecommunications service" as though the cable operator were offering it separately to the public for a fee.

The cable operator's use of its own facilities to provide the service does not change this conclusion. As the Commission reasoned in the Stevens Report to Congress:

> When the information service provider owns the underlying facilities, it appears that it should itself be treated as providing the underlying telecommunications. That conclusion, however, speaks to the relationship between the facilities owner and the information service provider (in some cases, the same entity); it does not affect the relationship between the information service provider and its subscribers.[20]

The Commission thus implicitly recognized that a service provider's "furnishing of raw transmission capacity to itself"[21] as an integral element of its Internet services sold to the public cannot be equated with the offering of telecommunications "for a fee directly to the public." Such a facilities-based service provider is a user of telecommunications rather than a provider of telecommunications service to the public. In short, the cable operator's self-provisioning of the telecommunications input within its integrated offering of Internet services and content to consumers cannot be equated with the offering of telecommunications "for a fee directly to the public."

C. Cable Modem Service Also Is a "Cable Service," Because It Offers Programming and Subscriber Interaction for the Selection and Use of Such Programming.

Section 522(6) of the Communications 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."[22] Section 522(14) further defines "other programming service" as "information that a cable operator makes available to all subscribers generally."[23] As the drafters of the Cable Act of 1984 explained, the definition of "other programming services" includes online computer services that provide information that is accessible by all subscribers generally.[24] They further emphasized that the definition of cable services did not "restrict the manner in which cable operators may obtain the information

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[20] *Id.* ¶ 69 n. 138 (emphasis added).

[21] *Id.* ¶ 55.

[22] 47 U.S.C. § 522(6).

[23] 47 U.S.C. § 522(14).

[24] H.R. Rep. 98-934, at 41-42 (1984) ("1984 Conference Report").

provided as a cable service."[25] The information cable operators make available to all subscribers of the cable modem service generally includes information provided through the service's welcome page and subsequent screens, its connections with other Internet websites and portals, and its "cache" computer servers. This information constitutes "other programming service" under the "cable service" definition.

The legislative history accompanying the amendment of the "cable service" definition in the 1996 Act explains that the addition of the term "or use" to the existing description of the subscriber interaction required for the selection of programming, is "intend[ed] . . . to reflect the evolution of cable to include interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services."[26] The inclusion of the element of subscriber "use of" programming – in addition to "one-way transmission to subscribers" of programming and subscriber "selection of" programming – reflects Congress's recognition that "cable services" would include upstream transmissions from subscribers and subscriber manipulation of data and related programming offerings. The cable modem service's provision of "programming" and a capability for subscribers to select and to manipulate this data and related programming offerings qualifies the service as a "cable service" under the Communications Act.

D. Classification of Cable Modem Service as an Information Service and/or Cable Service Best Satisfies the Commission's Policy Objectives.

Besides being dictated by the relevant statutory language and Commission pronouncements, recognition of the dual classification of cable modem service as an information service and a cable service accomplishes the Commission's three primary objectives in this proceeding. First, dual classification enables the Commission to refrain from regulating cable operator's Internet services under current competitive market conditions, in which there is no evidence of market failure. Indeed, as the Commission just reported, competition for broadband services continues to grow at an impressive rate.[27] Second, dual classification permits the

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[25] *Id.* at 41.

[26] H.R. Conf. Rep. No. 104-458, at 169 (1996) (emphasis added), reprinted in 1996 U.S.C.C.A.N. 124, 182 ("1996 Conference Report"). Accordingly, while "the categories of 'telecommunications service' and 'information service' in the 1996 Act are mutually exclusive," (Stevens Report to Congress ¶ 39), the categories of "information service" and "cable service" are not. This conclusion is reflected not only in the 1996 Conference Report, but also in the definition of information services, which broadly encompasses all forms of stored or generated content.

[27] The Commission's summary statistics of its latest data on the deployment of high-speed services in the United States, released on August 9, 2001, reveals that the rate of growth for telephone companies' residential and small business high-speed asymmetric DSL lines was over three times the rate of growth for cable modem service for the year 2000. *High-Speed Services for Internet Access: Subscribership as of December 31, 2000*, FCC Common Carrier Bureau, Table 3 (rel. Aug. 9, 2001)(The rate of growth for residential and small

Commission to develop a coherent national policy with respect to the development and deployment of broadband services in general, and cable modem services in particular. Rather than permitting broadband policy to be made in a piecemeal fashion by local governments, state legislatures and the courts, classification by the Commission sets the ground rules for all such services on a nationwide, uniform basis. And, third, dual classification for cable modem services preserves the Commission's jurisdiction and authority over broadband services. Should the market fail in some fundamental respect, the Commission would retain authority under Title VI and /or Title I to take corrective actions permitted by the Act.[28]

In short, both the statutory language and policy considerations dictate the classification of cable modem service as an information service and a cable service, rather than a telecommunications service. While cable operators may use telecommunications as an input for the cable modem service sold to the public, cable operators do not offer telecommunications as a separate service to the public for a fee. What cable operators offer for a fee directly to the public is a cable modem service that integrates high-speed Internet access, content, information and services. Even if cable modem service were found by the Commission or the courts not to be a cable service, it most certainly fits the definition of an information service and not a telecommunications service.

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business high-speed asymmetric DSL lines in service for the year 2000 was 447%, while the rate of growth for high-speed Internet connections over coaxial cable systems was 134%.).

[28] The policy and technical reasons for not imposing common carrier regulations on cable and other broadband service providers are discussed in detail in Cox's comments in this proceeding. *See* Comments of Cox Communications, Inc. (filed December 1, 2000).

We hope that the foregoing discussion will facilitate the Commission's analysis. Please do not hesitate to contact us if we can provide you with additional information.

Respectfully submitted,

Sandy Wilson

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