

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

**In the Matter of**

**THE PROVISION OF  
TELECOMMUNICATIONS SERVICE VIA  
"CABLE INTERNET"**

**UNITED STATES INTERNET  
INDUSTRY ASSOCIATION ("USIIA"),  
Petitioner**

**PETITION FOR DECLARATORY RULING,  
AND INSTITUTION OF RULEMAKING  
WITH RESPECT TO TARIFFS FOR  
CABLE INTERNET INTERCONNECTIVITY**

**To the Commission:**

## **SUMMARY OF FILING**

The US Internet Industry Association ("USIIA"), a trade association of companies engaged in Internet commerce, content, and connectivity, submits this Petition for Declaratory Ruling and for Institution of Rulemaking Proceedings. This petition concerns a requirement for interconnectivity relating to telecommunications services operating over cable television infrastructure that enables the provision of broadband Internet services to residential and business customers.

USIIA submits that the providers of this service are telecommunications carriers and, as such, should be subject to immediate FCC regulation like all telecommunications carriers. USIIA also submits that the FCC has the authority to regulate such carriers. Finally, USIIA submits that a delay in the institution of interconnection tariffs will substantially harm the Internet industry through the limitation of competition.

USIIA submits that it is not in the public interest to permit cable Internet service to be closed to competition, nor is it in the public interest for these select telecommunications carriers to operate outside the regulatory requirements applicable to all other carriers.

USIIA asks the Commission to issue a declaratory ruling confirming its authority over interstate and international telecommunications carriers engaged in the provision of cable Internet.

USIIA asks the Commission to institute rulemaking to establish appropriate tariffs for the provision of competitive access to the cable Internet infrastructure of such telecommunications carriers.

## **PETITION FOR DECLARATORY RULING AND INSTITUTION OF RULEMAKING**

The US Internet Industry Association ("USIIA") submits this Petition for Declaratory Ruling, and for Institution of Rulemaking Proceedings. In support of this petition, the following is shown.

### **STANDING**

USIIA is a national trade association of competitive companies engaged in Internet commerce, content and connectivity. Its members constitute a cross-section of the Internet industry, providing consensus on policy issues that breach the competitive interests of any single member or segment of the industry.

Some of its members also act as underlying (or wholesale) carriers providing network facilities, equipment and services to other members, including enhanced service providers engaged in the provision of information and Internet services to the public.

USIIA members who provide network facilities, equipment and services to other members and non-members engaged in the provision of enhanced information services are required by legal and regulatory decree to provide tariffed, open access to their network facilities to all qualified competitors.

Entities, like those described hereinafter, that do not comply with or operate subject to the same statutory and regulatory requirements as USIIA's carrier members, distort the economic and public interest environment in which USIIA's carrier members and nonmembers must operate. Continuing to allow such entities to operate without

complying with or being subject to the same legal and regulatory requirements as other carriers threatens the continued viability of USIIA's members and their ability to serve the public and acquit their public interest obligations under federal and state laws.

As the appointed representative of its members charged with advancing their economic interests and assisting in achieving and maintaining their legal and competitive parity, USIIA has standing to file and prosecute these petitions.

## **STATEMENT OF FACTS AND BACKGROUND**

In the merger of AT&T with Telecommunications, Inc ("TCI"), AT&T acquired one of the nation's largest cable television operators. In addition to providing traditional cable television programming, TCI provided cable broadband Internet access to consumers in certain geographic areas. Since acquiring TCI, AT&T has continued to offer cable broadband access as part of its "@Home" service, which bundles its cable conduit with Excite, an Internet service provider ("ISP") under an exclusive contract.

To effect the merger, AT&T and TCI sought three types of regulatory approval. The Department of Justice approved the merger on antitrust grounds, subject to TCI's divestiture of its interest in Sprint PCS wireless services. The Federal Communications Commission ("FCC") approved the transfer of federal licenses from TCI to AT&T, after addressing public interest concerns in four service areas, including residential Internet access. The last regulatory hurdle that AT&T and TCI faced was the approval of local franchising authorities where required by local franchising agreements.<sup>1</sup>

TCI's franchises with Portland and Multnomah County (collectively, "Portland") permitted the city to "condition any Transfer upon such conditions, related to the

technical, legal, and financial qualifications of the prospective party to perform according to the terms of the Franchise, as it deems appropriate.<sup>2</sup> Portland referred the transfer application for recommendation by the Mount Hood Cable Regulatory Commission, an intergovernmental agency overseeing cable affairs in the Portland region. In response to Portland's preliminary questions, AT&T confirmed that TCI was in the process of upgrading its cable system to support @Home over cable broadband, and maintained that @Home was a proprietary product "not subject to common carrier obligations."

At public hearings, the incumbent local telephone exchange carrier US WEST and the Oregon Internet Service Providers Association called for open access to TCI's cable broadband network, citing—in addition to consumer welfare—the need for "a level playing field" with US WEST's common carrier obligations and a "very real potential that consumer [Internet ] access businesses could go out of business." The Mount Hood Commission recommended that the city and county approve the transfer of franchise control subject to an open access requirement. On December 17, 1998, Portland and Multnomah County voted to approve the transfer, subject to an open access condition.

AT&T refused the condition, which resulted in a denial of the request to transfer the franchises. AT&T then brought this action, seeking declarations that the open access condition violated the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. S 151, et seq. (collectively, the "Communications Act"), the franchise agreements, and the Constitution's Commerce Clause, Contract Clause, and First Amendment. The district court rejected all of AT&T's claims and granted summary judgment to Portland.<sup>3</sup>

On appeal, the United States Court of Appeals for the Ninth Circuit overturned the lower court decision.<sup>4</sup> In doing so, however, the court ruled that cable Internet services should, under the definitions and rules of the Federal Communications Commission, be classified as telecommunications services subject to the competitive access requirements of other common carriers.

On June 30, 2000, the Federal Communications Commission issued a news release announcing that it would establish a framework for addressing the issues of cable Internet access, but specified neither a date to convene such proceedings nor the form they would take. Further, the release challenged the notion that telecommunications carriers be treated equally by the FCC, and affirmed the belief of the FCC that it has a right to forbear on these issues.<sup>5</sup>

## **ASSERTION AND ENFORCEMENT OF JURISDICTION**

USIIA submits that it is incumbent upon the Commission to exercise jurisdiction over cable Internet networks. As a first step, USIIA submits that the Commission may deem it appropriate to issue a declaratory ruling officially establishing its interest in and authority over interstate and international telecommunications services using cable Internet, consistent with the rulings of the US 9<sup>th</sup> Circuit Court of Appeals.

Secondly, USIIA submits that it is incumbent upon the Commission to examine and adopt rules, policies and regulations governing the uses of cable Internet for the provisioning of telecommunications services. The use of cable Internet to provide telecommunications services has an impact on the traditional means, methods, systems, providers, and users of enhanced information services. The unfair competition created

by the current unregulated and untariffed bypass of the traditional means by which enhanced services are sold could, if left unchecked, eventually create serious economic hardship on all existing participants in the Internet marketplace and the public which is served by those participants. Ignored, such unregulated operations will rapidly grow and create a far more significant and difficult to control "private" operational enclave of cable Internet providers and users. Such development will clearly be detrimental to the health of the nation's Internet industry and the maintenance of the nation's telecommunications infrastructure.

## **ARGUMENTS**

The US Internet Industry Association believes that a coherent national policy must be created in order to deal as rapidly as possible with the competitive issues related to cable Internet services. Specifically, the Association submits that:

1. The Federal Communications Commission has the authority to regulate cable Internet as a telecommunications service distinct from other cable services;
2. As a telecommunications service, cable Internet falls within the requirements of 47 U.S.C. S 251(a)(1) for interconnectivity;
3. Telecommunications services must be treated equally under the law, regardless of the facilities used;
4. The Commission does not have the right to forbear on this issue;
5. Undue delays and other efforts to forbear and forestall action on these issues will result in substantially lessened competition in the market for residential broadband services.

Commission's Authority to Regulate Cable Internet Services, Distinct From Cable Services. USIIA submits that the Commission has the authority to regulate cable Internet separately from any regulatory regime assigned to other cable services under the provisions of 47 U.S.C. Section 552 (6), which defines a "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."

For the purposes of this definition, "video programming" means "programming provided by, or generally considered comparable to programming provided by, a television broadcast station, " 47 U.S.C. S 522(20), and "other programming service " means "information that a cable operator makes available to all subscribers generally." 47 U.S.C. S 522(14). The essence of cable service, therefore, is one-way transmission of programming to subscribers generally. This definition clearly does not fit the cable Internet services as provided by AT&T through @Home.

AT&T itself recognizes the validity of the distinction between the two services. Subject to limited exceptions, the Communications Act of 1996 provides that "a cable operator may not provide cable service without a franchise." Yet AT&T has begun the provisioning of cable Internet services in the Portland, OR metropolitan area in full knowledge that no franchise exists under which to provide such services.<sup>6</sup> This would seem to validate the belief by AT&T that their own service is a telecommunications service distinct from the cable services provided under franchise.

Additional case law relative to the distinction between cable services and cable Internet services may be found in the decision regarding the "video dialtone" common

carrier television technology, which supports the contention that regulating @Home as a cable service "simply makes no sense in any respect, and would be infeasible in many respects."<sup>7</sup>

Commission's Authority to Regulate Cable Internet Services as Interstate Telecommunications Carriers, Distinct From Information Services. USIIA submits that by both established precedents defining "common carriage" for purposes of regulatory jurisdiction, and by statutory enactment, cable Internet qualifies as an interstate telecommunications carrier, subject to federal regulation, separate and distinct from the information services that are not regulated as common carriers.

What is generally described as "Internet access" is actually two separate services: The first is a telephone service linking the user and the ISP, which is classic "telecommunications," defined by the Communications Act 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." 47 U.S.C. S 153(43). A provider of telecommunications services is a "telecommunications carrier," which the Act treats as a common carrier to the extent that it provides telecommunications to the public, "regardless of the facilities used." 47 U.S.C.S 153(44) & (46).

The second service is what the FCC considers the "traditional" ISP to be—a provider of "information services" under the Act, defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C.S 153(20) (1996). As the definition suggests, ISPs are users of telecommunications when they lease lines to

transport data on their own networks and beyond on the Internet backbone. However, in relation to their subscribers, who are the "public" in terms of the statutory definition of telecommunications service, they provide "information services," and therefore are not subject to regulation as telecommunications carriers.<sup>8</sup>

It is therefore appropriate to regulate cable Internet services as telecommunications services, and to treat them differently in a regulatory regime than ISP services would be treated under established Commission precedent and policy.

#### Commission's Authority to Require Competitive Access to Cable Internet Networks.

The Telecommunications Act of 1996 enacted a competitive principle embodied by the dual duties of nondiscrimination and interconnection.

47 U.S.C. S 251(a)(1) states that "Each telecommunications carrier has the duty . . . to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers". Termed "open access," this principle of telecommunications common carriage governs cable broadband as it does other means of Internet transmission such as telephone service and DSL, "regardless of the facilities used." 47 U.S.C. S 153(46).

Nor is the carrier permitted to select who will be allowed rights of interconnection. 47 U.S.C. S202(a) states that "it shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to

subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.”

It is the present policy of the Commission to discriminate in the application of 47 U.S.C. S 251(a)(1) by applying it to some telecommunications services while forbearing its application to others — specifically, cable Internet. This opens the Commission to the possibility that other services may sue for equal treatment under the law — unraveling the entire fabric of the 1996 Telecommunications Act and its mandate for competition.

Requirement for Cable Internet Providers To File Rates. 47 USC S 203(a) requires that common carriers “shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges.”

To date, no schedule for interconnection has been filed for cable Internet services, in spite of the fact that such services are being sold outside of the franchising venue for cable services. It is the responsibility of the Commission to require such filings within a reasonable time.

Commission does not have the right to forbear on this issue due to the competitive issues. 47 U.S.C. S 160 (a), states that “In making the determination under subsection (a)(3) of this section, the Commission shall consider whether forbearance from enforcing

the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.”

This statutory requirement does not permit the Commission to forbear in the hope that market forces might, at some future point, drive competition. Rather, it requires the Commission to demonstrate how the act of forbearance in and of itself will promote competition. The Commission has failed to qualify such determination and therefore is not permitted to forbear until such determination is demonstrated. In point of fact, this policy of forbearance has been challenged by the findings of the US Department of Justice in its review of the merger of AT&T with MediaOne. The Commission’s misuse of forbearance in this merger, with its related issues of cable Internet open access, made it necessary for the Department of Justice to act in order to preserve competition in the market for the aggregation, promotion and distribution of broadband content.<sup>9</sup>

Other Issues Necessitating the Commission's Regulation of Cable Internet. The Commission has a duty to oversee and effect the Telecommunications Act of 1996 as well as its long-standing duties under 47 U.S.C. Section 151. The Commission should take action in order to preserve fair competition and the health of the Internet industry. Absent a healthy industry, with competition spurring innovation and fair consumer pricing, the Commission's duty to effectively promote broadband deployment cannot be achieved.

## **CONCLUSION**

Permitting the advanced telecommunications service known as Cable Internet to exist in an environment free of obligations under the law creates a substantial marketing advantage that works to limit competition and place consumers at a disadvantage. Therefore, USIIA urges the Federal Communications Commission ("the Commission") to exercise its jurisdiction in this matter and: issue a declaratory ruling establishing its authority over interstate and international telecommunications services using cable Internet; and institute rulemaking proceedings defining permissible tariffs and procedures on a basis equivalent to other and competitive forms of broadband Internet.

Respectfully submitted,

US INTERNET INDUSTRY ASSOCIATION

David P. McClure

Executive Director

Dated: July 7, 2000

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Footnotes:

<sup>1</sup> 47 U.S.C.S 537 (permitting franchising authority approval of cable system sales when the franchise agreement so requires).

<sup>2</sup> This language parallels the text of 47 U.S.C. S 541(a)(4)(C), which describes the conditions a locality may impose on a franchise.

<sup>3</sup> AT&T Corp. v. City of Portland, 43 F. Supp.2d 1146 (D.Or. 1999).

<sup>4</sup> AT&T Corp. v. City of Portland, D.C. No. CV-99-00065-OMP.

<sup>5</sup> FCC CHAIRMAN TO LAUNCH PROCEEDING ON "CABLE ACCESS", FCC unofficial announcement as posted at [http://www.fcc.gov/Bureaus/Cable/News\\_Releases/2000/nrcb0017.html](http://www.fcc.gov/Bureaus/Cable/News_Releases/2000/nrcb0017.html)

<sup>6</sup> 47 U.S.C. S 541(b)(1).

<sup>7</sup> National Cable Television Assn. v. FCC, 33 F.3d 66, 75 (D.C. Cir. 1994).

<sup>8</sup> Federal-State Joint Board on Universal Service, 13 F.C.C.R. 11501, PP BM, CB (1998) (report to Congress); cf. Child Online Protection Act, Pub. L. No. 105-277, S 1403(e)(4), 112 Stat. 2681 (1998) (codified at 47 U.S.C. S 231(e)(4)) & Internet Tax Freedom Act, Pub. L. No. 105-277, S 1101(e), 112 Stat. 2681 (1998) (reproduced at note to 47 U.S.C. S 151(e) (1998)) (defining Internet access services as: "a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. Such term does not include telecommunications services."). Indeed, "information services"—the codified term for what the FCC first called "enhanced services"—have never been subject to regulation under the Communications Act. See *Howard v. America Online, Inc.*, 208 F.3d 741, 752-53 (9th Cir. 2000); see also 47 C.F.R. S 64.702(a); *California v. FCC*, 905 F.2d 1217, 1223-25 (9th Cir. 1990) (discussing history of "enhanced services" non-regulation).

<sup>9</sup> Competitive Impact Statement, US Department of Justice v. AT&T Corp. and MediaOne Group, Inc., as posted to <http://www.usdoj.gov/atr/cases/f4800/4842.htm>.