Consolidated Cases: 00-14763-I & 00-15068-D

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ALABAMA POWER COMPANY and GULF POWER COMPANY,	)	
Petitioners,	)	Consolidated Cases
v.	)	00-14763-I & 00-15068-D
FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES,	)	
Respondents.	)	

ON PETITION FOR REVIEW OF ORDERS
OF THE FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF OF ALABAMA POWER COMPANY AND GULF POWER COMPANY

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Dated: May 18, 2001

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COMMISSION and the	)	
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	)	
Respondents.	)	

CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE and Eleventh Circuit Rule 26.1-1, it is hereby certified that the following persons or governmental agencies have been associated with or have an interest in the outcome of this case:

Adelphia (party to Docket No. PA-00-003 before the Federal Communications Commission)

Alabama Cable Telecommunications Association (party to Docket No. PA-00-003 before the Federal Communications Commission)

AT&T Cable Services (party to Docket No. PA-00-003 before the Federal Communications Commission)

Balch & Bingham, LLP (counsel for Petitioners)

Richard Beelend, Representative for Northland Cable Properties (party to Docket No. PA-00-003 before the Federal Communications Commission)

Beggs & Lane LLP (counsel for Petitioners)

Jane Belford, Representative of Mediacom Southeast LLC (party to Docket No. PA-00-004 before the Federal Communications Commission)

Barry Breithaupt, Representative of Torrence Cablevision USA, Inc. (party to Docket No. PA-00-003 before the Federal Communications Commission)

Jennifer M. Buettner (counsel for Petitioners)

Ramona Byrd, Representative for CVI of Alabama, Inc., d/b/a Time Warner Cable (party to Docket No. PA-00-003 before the Federal Communications Commission)

Cable One (party to Docket No. PA-00-003 before the Federal Communications Commission)

Cable Star Inc. (party to Docket No. PA-00-003 before the Federal Communications Commission)

Cablevision Services (party to Docket No. PA-00-003 before the Federal Communications Commission)

Cindy Cade, Representative for Comcast Cable (party to Docket No. PA-00-003 before the Federal Communications Commission)

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Century Cullman Corporation (party to Docket No. PA-00-003 before the Federal Communications Commission)

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Coosa Cable Company (party to Docket No. PA-00-003 before the Federal Communications Commission)

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Cox Communications Gulf Coast, L.L.C. (party to Docket No. PA-00-

004 before the Federal Communications Commission)

CVI of Alabama, Inc., d/b/a Time Warner Cable (party to Docket No. PA-00-003 before the Federal Communications Commission)

Demopolis CATV Company (party to Docket No. PA-00-003 before the Federal Communications Commission)

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Florida Cable Telecommunications Association (party to Docket No. PA-00-004 before the Federal Communications Commission)

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James Oglethorpe, Representative for Graceba Total Communication (party to Docket No. PA-00-003 before the Federal Communications Commission)

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James Cable Partners, LP (party to Docket No. PA-00-003 before the Federal Communications Commission)

Ron Johnson, VP of Operations for Charter Communications, LLC (party to Docket No. PA-00-003 before the Federal Communications Commission)

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MediaCom Southeast LLC (party to Docket No. PA-00-004 before the Federal Communications Commission)

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Leonard J. Rozek, Representative for Comcast (party to Docket No. PA-00-003 before the Federal Communications Commission)

Daniel K. Shoemaker, President of DKS Holdings, Inc. (subsidiary to James Cable Partners, LP) (party to Docket No. PA-00-003 before the Federal Communications Commission)

Sky Cablevision, Ltd. (party to Docket No. PA-00-003 before the Federal Communications Commission)

Jeffrey Smith, Representative for Coosa Cable Company and Cablevision Services (party to Docket No. PA-00-003 before the Federal Communications Commission)

Jim Smith, Representative for Time Warner Cable (party to Docket No. PA-00-003 before the Federal Communications Commission)

JoAnn Stone, Representative for Adelphia (party to Docket No. PA-00-003 before the Federal Communications Commission)

Time Warner Cable (party to Docket No. PA-00-003 before the Federal Communications Commission)

Time Warner Entertainment Advance Newhouse (party to Docket No.PA-00-003 before the Federal Communications Commission)

Torrence Cablevision USA, Inc.

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Twin County Cable (party to Docket No. PA-00-003 before the Federal Communications Commission)

D. H. Ward, III, Representative for Sky Cablevision, Ltd. (party to Docket No. PA-00-003 before the Federal Communications Commission)

It also is certified that the following corporations have an interest in the outcome of this case:

Alabama Power Company (Petitioner)

Empresa Eléctrica del Norte Grande, S.A. (Edelnor) (affiliate of Petitioners)

Georgia Power Company (affiliate of Petitioners)

Gulf Power Company (Petitioner)

Hidroeléctrica Alicura, S.A. (affiliate of Petitioners)

Integrated Communication Systems, Inc. (affiliate of Petitioners)

Mississippi Power Company (affiliate of Petitioners)

Mobile Energy Services Company, L.L.C. (affiliate of Petitioners)

Savannah Electric and Power Company (affiliate of Petitioners)

Southern Company Capital Trust I (affiliate of Petitioners)

Southern Company Capital Trust II (affiliate of Petitioners)

Southern Electric Generating Company (affiliate of Petitioners)

Southern Electric International Trinidad, Inc. (affiliate of Petitioners)

Southern Investments UK P.L.C. (affiliate of Petitioners)

The Southern Company (parent of Petitioners)

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ARGUMENT

The briefs of the Respondents ("FCC") and Complainants/Intervenors ("Cable Companies") make one point painfully clear -- they are willing to take *extreme* positions in an attempt to preserve the subsidy that the cable television industry has long received from the customers of electric utilities like Alabama Power ("APCo") and Gulf Power.[1] The subsidy (a/k/a the "Cable Rate") is based upon decades-old Congressional intent to provide "favorable" rates to Cable Companies in order to advance the industry. Since the birth of the Cable Rate in 1978, circumstances have changed. First, Cable Companies have flourished. APCo's Response to Complaint at ¶ 27 (quoting cable industry statistics). What once were small local companies "have morphed into two way broadband behemoths . . . . with newfound size and scale." *Id.* at ¶ 27 (quoting cable industry analysts). Second, while the original Pole Attachment Act did not require utilities to provide access to their facilities, in 1996 Congress mandated that cable and telecommunications companies have access to utility poles, ducts, conduits, and rights-of-way. This transformed the focus on the Cable Rate from an inquiry based on policy and notions of rate regulation to an inquiry fixed on the provision of constitutionally adequate just compensation. The filings of

[1] Since APCo and Gulf Power are similarly situated for purposes of this proceeding, all references herein to APCo should also be construed to refer equally to Gulf Power unless otherwise noted.

the FCC and the Cable Companies ignore these transformations. Instead, they cobble together a series of flawed arguments and erroneous assertions in an effort to mask the constitutional infirmities that plague the continued application of the "favorable" and "beneficial" Cable Rate.[2]

I. THIS IS A TAKINGS CASE

Notwithstanding this Court's holding in *Gulf Power I*, the Cable Companies steadfastly argue that no taking has occurred. Cable Companies at 2 & 23-27.[3] They argue that their continued access to APCo's poles is through irrevocable "voluntary" pole attachment agreements. Given the express termination provisions in the agreements, this argument is a stand-alone oxymoron. "Irrevocable" and "voluntary/terminable" are incurably inconsistent. Regardless, the Cable Companies' forced occupation on APCo's poles after APCo exercised its express contractual right to terminate leaves no doubt that a taking has occurred.

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[2] H.R. Rep. No. 104-204, at 91-92, 1996 U.S.C.C.A.N., at 58; H.R. Con. Rep. No., 104-458, at 91-92, 1996 U.S.C.C.A.N., at 220 ("The formula, developed in 1978, gives cable companies a more *favorable rate* . . . . The *beneficial rate* to cable companies was established to spur the growth of the cable industry, which in 1978 was in its infancy.") (emphasis added); APCo's Answer to Petition for Temporary Stay, Ex. 4 (AT&T's 3/27/00 Form 10-K) (commenting on "The *favorable* pole attachment rates afforded cable operators under federal law . . . ") (emphasis added).

[3] The FCC does not question whether a taking has occurred. The FCC admits that attachments to APCo's poles have undergone a "transition from voluntary attachment to mandatory attachment." FCC at 26-27.

A. Forced Continued Access Constitutes A Taking.

The Cable Companies initially obtained access to APCo's poles through voluntary attachment agreements.[4] One of the terms negotiated as part of the old voluntary agreements was an express termination provision: "either party may terminate the Agreement by giving 90 days advance notice in writing of its intent to do so to the other party." APCo's Response to Complaint at ¶¶ 12 & 14-15. Following the 1996 Amendments to the Pole Attachment Act and this Court's decisions in *Gulf Power I* and *Gulf Power II*, APCo exercised its contractual rights to terminate all "voluntary" agreements. *Id.* at ¶¶ 12-14, 16, 18 & 20. The Cable Companies argued that APCo could not exercise this right. The FCC agreed. Order at ¶ 7. Of course, a "voluntary" contract that cannot be terminated is not voluntary at all. Thus, what previously had been voluntary attachments became mandatory attachments; a taking unquestionably occurred.

The Cable Companies cannot have it both ways. They cannot argue that the relationships are "voluntary" in order to avoid a takings analysis and at the same time excise the voluntarily negotiated termination provisions. This Court recognized that attachment agreements could be terminated in *Gulf Power II*: "[s]ince the 1978 Act did

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[4] As set forth below, the regulated rate was anything but voluntary. Additionally, as noted by Intervenors AEP, et al., even calling access "voluntary" is a stretch.

not give the cable television companies the right to attach, the utilities could have avoided the FCC's regulation of rent and conditions . . . . *by canceling the existing arrangements*, and having the attachments removed." *Gulf Power II*, 208 F.3d 1263, 1267 n.6 (11th Cir. 2000) (emphasis added). Here, APCo attempted to do just that. In response, the FCC stated: "[w]e do not believe that an attacher that is already attached to a utility's poles needs to file a complaint for access under the Commission's rules." Order at ¶ 7. Accordingly, Cable Companies may remain on APCo's poles, *only* through their mandatory right of access under the 1996 Act as enforced by the FCC's Order in this case. As this Court stated in *Gulf Power I*: "[T]he mandatory access provision effects a per se taking of property under the Fifth Amendment, which leads us to the issue of whether the Act provides . . . just compensation for the taking." *Gulf Power I*, 187 F.3d 1324, 1331 (11th Cir. 1999).

Just compensation is the issue presented in this appeal.

B. <u>An Express Right To Terminate Is The Antithesis Of An Irrevocable License.</u>

Cable Companies claim they have an irrevocable license to attach to APCo's poles because they allege to have made expenditures which "greatly benefit" APCo. Cable Companies at 5-6 & 24-26. This argument, which was not raised below, ignores basic contract law: "substantive rules governing licenses are the same as those

governing contracts." *David Lee Boykin Family Trust, Inc. v. Boykin*, 661 So. 2d 245, 251 (Ala. Civ. App. 1995). The agreements at issue here, regardless of how the Cable Companies now choose to re-name them, are express, written, and binding agreements. The terms and conditions (other than the regulated rate) were the product of negotiation. Those express written terms - and not some purported custom or "course of dealings" - control.[5] As the Alabama Supreme Court has held:

> With regard to the Licensees' irrevocable license argument, they *specifically agreed* [in a written document] that both parties would have the right to terminate the agreements upon 90 days' notice and that the licenses were for periods of 15 years, renewable at their option. The agreements were signed *before* improvements were made. *Thus, expressly limited, these licenses cannot now be termed "irrevocable."*

Lake Martin/Alabama Power Licensee Assoc., Inc. v. Alabama Power Company, 547 So. 2d 404, 409 (Ala. 1989) (emphasis added).[6]

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[5] If there is some type of "course of dealings," it has consistently been governed by the written contracts and has consistently included APCo's right to terminate. APCo's Answer to Petition for Temporary Stay, Ex. 1 at ¶¶ 3-4. Moreover, any "course of dealing" claim is a simple contract claim over which state courts, not the FCC, have jurisdiction. *See In the Matter of Marcus Cable Assoc., L.P. v. Texas Utilities Electric Co.*, 12 F.C.C.R. 10362, ¶ 10 (1997) (holding that the FCC's jurisdiction does not apply to breach of contract claims).

[6] The same rule applies under Florida law with respect to Gulf Power's terminated attachment agreements. *Jabour v. Toppino*, 293 So. 2d 123, 127-28 (Fla. Dist. Ct. 3d 1974) ("Where the parties have fully manifested an intention to limit the duration of [an easement], it is the duty of the courts to enforce that limitation and not to disregard it by giving a perpetual right where only a determinable one was

In reports to their shareholders, several of the Cable Companies in this case have previously characterized what they now call irrevocable licenses as "cancelable on short notice" and "cancelable after an initial period by either party upon notice." APCo's Answer to Petition for Temporary Stay, at 10. "[T]hese licenses cannot now be termed 'irrevocable.'" *Lake Martin*, 547 So.2d at 409; *see also Leverso v. SouthTrust Bank*, 18 F.3d 1527, 1534 (11th Cir. 1994) ("[U]nder universal contract principles judicial equitable notions cannot override unambiguous contractual rights.").

II. JUST COMPENSATION MYTHS DISPELLED

Unable to address the glaring deficiencies in the Cable Rate, the FCC and Cable Companies attempt to obfuscate the just compensation analysis by perpetuating a series of myths regarding the Cable Rate: (1) the Cable Rate reflects a "willing seller"/"willing buyer" market price; (2) the Cable Rate allows recovery of "fully allocated" costs; and (3) APCo deserves nothing for its so-called "surplus" property. The FCC and Cable Companies then inject two unfounded arguments concerning just compensation analysis: (1) public policy justifies a less than perfect price and (2) the nature of APCo's property as so-called "bottleneck facilities" has some bearing on the

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intended.").

just compensation price to which APCo is entitled. These myths do not withstand scrutiny.

A. Where There Is Compulsion, There Is No "Willing Seller"/"Willing Buyer" Market Rate.

The FCC's primary argument in support of the Cable Rate goes something like this: since utilities received a regulated rate before the taking, the regulated rate "is what a willing buyer would pay to a willing seller." FCC at 25-26. Consequently, the FCC argues that the "favorable" and "beneficial" regulated rate has bootstrapped itself into becoming a market rate. This argument, adopted and asserted by *Amicus* WorldCom, fails.[7]

The "willing buyer/willing seller" standard defines a market price as "the amount that in all probability would have been arrived at by *fair negotiations* between an owner willing to sell and a purchaser desiring to buy." *Olson v. United States*, 292 U.S. 246, 257 (1934) (emphasis added); *see also United States v. Miller*, 317 U.S. 276, 280 (1942) (requiring that the willing buyer and willing seller must be operating "under fair market conditions"); *Iriarte v. United States*, 157 F.2d 105, 110 (1st Cir. 1946) ("[T]he Fifth Amendment . . . requires the government to pay . . . 'fair market

[7] Even the Cable Companies recognize that twenty years of government regulation in their favor has stifled any analysis of a true market rate. Cable Companies at 32 ("The 'market value' approach to determining just compensation does not apply to utility pole attachments because there is no market for comparable property.").

value' at the time of the taking, the price in cash at which the property would at that time change hands in a transaction between a willing buyer and a willing seller, neither acting under a compulsion to buy or sell.") (citing *United States v. Miller*, 317 U.S. at 373). As such, the amount must be "the result of the *uncontrolled bargaining* of a vendor willing but not obliged to sell with a purchaser willing but not obliged to buy." 4 Julius L. Sackman, *Nichols on Eminent Domain*, § 12B.07[1] (3d ed. 1998) (emphasis added). The Cable Rate -- as a "take it or leave it" proposition -- cannot be construed as the product of "fair negotiations" or "uncontrolled bargaining." The Cable Rate places a cap on the amount a utility can receive, an element of compulsion that forecloses a willing seller/willing buyer analysis. *See* 47 U.S.C. § 224(d).[8]

Moreover, when carried to its logical conclusion, the FCC's argument is self-defeating. If it was ever a willing seller/willing buyer "market price," the Cable Rate has been rendered a vestige of the past with the enactment of the higher Telecom Rate.

[8] *Amicus* WorldCom states in its brief: "The pole owner would charge the same statutory maximum rate if it voluntarily leased capacity." WorldCom at 7. Not true. In fact, the dispute now before this Court demonstrates the absurdity of this statement. APCo's evidence below, including its transactions outside the context of regulated pole attachment rates, also dispels this counterintuitive assertion. For example, APCo's joint use agreements provide an attachment charge much higher than the regulatory rate, historically ranging from $25-$40 per pole. APCo's Response to Complaint, Ex. A at ¶ 14 (Second Aff. of R. E. Prater); *see also id.* Ex. A, Tab 8 (APCo Joint Use Rental Rates for 1998). Moreover, since 1996, other companies have demanded access to APCo's poles and have willingly paid the just compensation charge of $38.81. APCo's Answer to Petition for Stay Ex. 1, ¶¶ 6, 14.

In other words, the Telecom Rate provides evidence of a comparable sale available in this so-called "market." Under APCo's current cost data, the Telecom Rate is $20.41; the Cable Rate is $6.30 -- a disparity of over 300%. APCo's Response to Complaint, Ex. A (Second Aff. of Ed Prater) at ¶¶ 4-6; *id.*, Ex. A, Tab 3-4. When a cable company mandates access, at a bare minimum APCo has lost the right to lease that particular pole space to a telecommunications company at the much higher Telecom Rate. The FCC's own "market" argument demonstrates that APCo is entitled to at least $20.41.[9] In any event, the Cable Rate is inadequate; a higher price is warranted.

This conclusion is reinforced by the brief of *Amicus* WorldCom. Not once does WorldCom argue that the Telecom Rate it must pay (300% greater than the Cable Rate) is unfair, unjust or somehow a windfall to APCo. One must therefore conclude that WorldCom is perfectly "willing" to pay the fully phased-in Telecom Rate. As APCo demonstrated below, there is absolutely no basis to distinguish between cable attachments and telecommunications attachments. If the FCC wants to engage in this flawed analysis, it should not cherry-pick the forced rate it applies.

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[9] Although closer to the mark, the Telecom Rate is still inadequate because of its reliance on historical costs (instead of current costs) and the FCC's exclusion of certain appropriate cost accounts. As is apparent from its brief, WorldCom participates in this proceeding only to protect the subsidy it receives under the Act (albeit not as "favorable" and "beneficial" as the cable subsidy).

B. The Cable Rate Fails To Equitably Allocate The Costs Of Unusable Space.

One of the primary reasons the Cable Rate fails to provide just compensation is that it does not include an allocation for the unusable space supporting the elevated corridor even though unusable space "is of equal benefit to all entities attaching to the pole." H.R. Rep. No. 104-204, at 92, 1996 U.S.C.C.A.N., at 58-59; H.R. Con. Rep. No. 104-459, at 206, 1996 U.S.C.C.A.N., at 220. In reply, the FCC argues that APCo has "mischaracteriz[ed]" the formula because under the Cable Rate "cable operators in fact pay a share of the cost of the entire pole." FCC at 20.

APCo has not mischaracterized the formula. The Cable Rate does *not* contain an equal allocation for unusable space. Instead, the Cable Rate only allocates the cost of the entire pole based upon the amount of *usable* space occupied by the Cable Companies. 47 U.S.C. § 224(d). There is no direct allocation for an equal share of the unusable space.

This defect in the Cable Rate is best illustrated by comparison to the Telecom Rate. While the Cable Rate contains an allocation only for usable space, the Telecom Rate contains two separate allocations: one for usable space and another for unusable space. 47 U.S.C. § 224(d) & (e); 47 C.F.R. §§ 1.1409 & 1.1417. The net effect of the Cable Rate's limited allocation is that Cable Companies only pay for 7.41% of the

pole while telecommunications providers pay for approximately 24% of the pole. APCo's Response to Complaint, Ex. A at ¶¶ 4-5. Therefore, while Cable Companies do pay a share of the entire pole, it is neither a fair share nor a constitutionally adequate share. Specifically, they only pay for approximately 7.41% of total pole space when their equal share of both usable and unusable space is 27.08%. *See id.* at ¶ 8 (indicating that there are fewer than three entities with attachments on an average APCo pole). Examined closely, the phrase "fully allocated" - as used in the Cable Rate - is a misnomer.[10]

The FCC and the Cable Companies attempt to rationalize the discrepancies between the Cable Rate and the Telecom Rate by arguing that Congress must have expected that over time that the number of attachers would increase. FCC at 36; Cable Companies at 42-43. If this came to pass, they argue the resulting increase in the denominator of the Telecom Rate would cause the Telecom Rate to approach the Cable Rate and might someday cause the Telecom Rate to be lower than the Cable Rate. FCC at 36. Aside from being an irrelevant policy argument, this argument fails to consider that full compensation is determined at the time of the taking. *See Olson v. United States*, 292 U.S. 246, 255 (1934); *see also Iriarte v. United States*, 157 F.2d

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[10] WorldCom's brief appears to support APCo's assertions with respect to the fairness inherent in a full allocation for unusable space for all attachers. WorldCom at 2-4.

105, 110 (1st Cir. 1946) (discussing the need for "'fair market value' at the time of the taking" and "the price in cash at which the property would at that time change hands") (citing *United States v. Miller*, 317 U.S. at 369, 373 (1934)). Here, the taking occurred no later than September 11, 2000, when APCo exercised its right to terminate the voluntary attachment agreements. Just compensation must be determined as of that date and not upon speculative predictions concerning future market conditions. *See Olson*, 292 U.S. at 257 ("Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable should be excluded from consideration for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value -- a thing to be condemned in business transactions as well as in judicial ascertainment of truth.").[11]

C. What Respondents Call "Surplus" Property Is Actually A Valuable Communications Corridor.

The general rule for determining just compensation -- as the FCC and Cable Companies concede -- is to calculate the "owner's loss, not the taker's gain." Cable Companies at 27-28 (quoting *First English Evangelical Lutheran Church of Glendale*

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[11] Interestingly enough, this alleged legislative forecast does not appear anywhere in the legislative history of the 1996 amendments, only in the Cable Companies' mythology.

v. County of Los Angeles, 482 U.S. 304, 319 (1987)). They assert, however, that APCo suffers no loss because its pole space is "surplus" property and that the cable attachments do not "interfere with APCo's core business." FCC at 25; Cable Companies at 30. Under this theory, one would have to assume that anything APCo gets -- even 1¢ -- should suffice. Firmly grounded in principles of fairness, just compensation analysis does not tolerate such an absurd result. *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 631 (1961) ("The word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity'.") (quoting *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950)). The loss suffered by APCo is the inability to charge market rates for its valuable communications corridor. APCo's Notice of Filing of Supplemental Authority (Second Aff. of Henry J. Wise at 5) ("[W]hat was taken from the power company is its right to lease the required 'sliver' to the market of potential attachers who find that the corridor of power poles has, for them, functional utility.").

Next, the Cable Companies claim that APCo is somehow inconsistent in arguing that it has lost the right to lease its pole space at "market" rates, while recognizing that there is a very limited market. Cable Companies at 32. The effect of over twenty years of heavy-handed rate regulation is that an actual market for pole attachment corridor space has only begun to develop. However, when left unfettered by

government regulation, working private enterprise analogues for rental of pole space exist. APCo's Response to Complaint at ¶ 22. For example: (1) wireless transmission tower companies rent rights-of-way from state departments of transportation; (2) fiber optic companies execute similar rental contracts with state DOTs; (3) wireless communications tower companies contract with paging companies and other wireless users for tower space; and (4) fiber optic communications companies lease rights-of-way from municipalities. *Id.; see also id.*, Ex. B (Aff. of Henry J. Wise) at 8-17; *id.* Ex. C (Report By Reed Consulting Group, submitted to the FCC as part of Proposed Rulemaking, CS Docket 97-98) at 32-44.

In fact, one of the Cable Companies provides a strikingly apt market analogue. APCo submitted evidence below that Comcast owns cellular communications towers and typically charges market rates for wireless attachments that range from $18,000 - $21,600 annually. APCo's Response to Complaint, Ex. B at 11. It is inconsistent for Comcast to argue here that APCo's pole space is nothing more than "surplus," yet to hold its own "surplus" property out as having such high value.

APCo's just compensation price does not come close to Comcast's $18,000 - $21,600 annual rate. Nevertheless, the Cable Rate denies APCo the opportunity to charge rents for attachments in a manner more closely aligned with the value of the

linear communications corridor. APCo's pole space, like Comcast's tower space, is valuable. The "surplus" property argument is a smokescreen.

D. Policy Issues Are Irrelevant To The Determination Of Just Compensation.

The FCC and Cable Companies' briefs are replete with policy arguments for why the cable industry should continue to receive a subsidy from electric utilities and their customers. *See, e.g.,* Cable Companies at 7-8 (arguing that the subsidy is needed so that Cable Companies can out-compete their rivals and so that the Cable Companies can continue to expand their services). While these policy goals may be relevant under a regulatory analysis, or may affect a determination of whether there is a public purpose justifying the taking in the first place, they are wholly irrelevant in determining just compensation. *See Gulf Power I*, 187 F.3d at 1331 ("However laudatory its motive, Congress' power to regulate utilities does not extend to taking without just compensation the right of a utility to exclude unwanted occupiers of its property.").

No one disputes that the Cable Rate was created in 1978 to favor Cable Companies so they could expand the delivery of cable services through "beneficial" pole attachment rates. Mission accomplished. APCo's Response to Complaint at ¶ 27. In this case, this Court is addressing a takings situation. The focus must be on

just compensation - not policy. Whether good policy or bad, there is no room for "favoring" Cable Companies with "beneficial" rates. APCo is entitled to just compensation; the Cable Rate does not meet this standard.[12]

E. The "Bottleneck" Facilities Argument Made By Cable Companies Is Unfounded And Irrelevant.

The Cable Companies argue that they should continue to receive a subsidy because APCo's poles are "essential facilities." This policy argument is irrelevant once a taking occurs. APCo's property has been taken. The only issue remaining is the determination of just compensation. Nevertheless, because the Cable Companies continue to muddy the proceeding with concerns over "bottleneck" facilities, APCo must dispel this myth as well.

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[12] *Amicus* WorldCom spells out with clarity the subsidy the attaching entities seek to maintain: "the more attachers pay under federal (or state) law, the less electric consumers pay under state law." WorldCom at 14. Of course, the converse is also true - the less attaching entities pay, the more APCo's customers are forced to pay. Yet, WorldCom argues that APCo should care less whether cable and/or telecommunications companies pay 1¢ or $38.81. This argument misses the point. In fact, the argument is no more helpful than APCo arguing that the Cable Companies should not mind paying $200.00 per pole because they can pass the costs along to their customers through increased rates. Of course, that option is not attractive to them. Instead, the Cable Companies argue that the subsidy should continue so that they can out-compete their competitors and continue to expand their business. Cable Companies at 7-8. Just compensation, grounded in principles of fairness, cannot be twisted to countenance this result. Notwithstanding state rate regulation, APCo, like the Cable Companies, have competitive concerns creating an incentive to reduce costs and rates. *See, e.g.*, APCo's Response to Complaint, Ex. C (Reed Report) at 39-40.

APCo's poles are not essential facilities. Ironically, the reasoning presented by the cable industry in their briefs submitted to the Ninth Circuit in *AT&T Corp. v. City of Portland*, 216 F.3d 87 (9th Cir. 2000) - a case in which the cable industry's shoe was on the other foot - provides the appropriate rationale. In *City of Portland*, telecommunications companies argued that the cable industry should be subjected to "forced access" because its facilities were "essential facilities" for telecommunications providers. In response, AT&T and TCI, two of the complainants in the instant proceeding, argued:

> [W]hile the concept of 'essential facilities' has no legal relevance under Title VI of the Communications Act, the doctrine could not be invoked here even if it were pertinent. The concept of essential facilities is a basis for finding that a firm's past conduct violates the antitrust laws - - after a full adjudication in a court of law - - if a firm is found to have controlled an essential facility and unreasonably denied access to it to maintain a monopoly. As this Court has held, '[a] facility that is controlled by a single firm will be considered 'essential' only if control of the facility carries with it the power to eliminate competition in the downstream market.

Opening Brief of Appellants AT&T Corp., TCI, et al. 39-40[13] (Case No. CV 99-65 PA 9th Cir.) (quoting *Alaska Airline v. United Airlines*, 948 F.2d 536, 544 (9th Cir. 1991)). Applying that reasoning to APCo's facilities, there has been no "full adjudication in a court of law" finding that its "past conduct violates the antitrust laws."

Furthermore, Cable Companies do have alternatives -- some of which did not exist in 1978. *See* Brief of Intervenors AEP, et al.; *see also* APCo's Response to Complaint, Ex. C (Reed Report) at 36-37.

Cable Companies cannot support a bottleneck facilities argument. However, even if they could, Congress remedied their concerns with nondiscriminatory, mandatory access. Thus, any cries of potential use of "bottleneck" facilities or preferential treatment for utilities (or their subsidies) engaged in telecommunications are wolfcries of the highest order. Mandatory access creates a taking. A taking requires just compensation. Just compensation is the issue before this Court.

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[13] APCo respectfully requests that the Court take judicial notice of this publicly filed document. *Lyons v. Stovall*, 188 F.3d 327, 333 n.3 (6th Cir. 1999) ("[I]t is well-settled that '[f]ederal courts may take judicial notice of proceedings in other courts of record.'") (citations omittd)). For the Court's convenience, AT&T's Ninth Circuit brief is attached to this Reply as Ex. A.

III. APCO'S REPLACEMENT COST METHODOLOGY IS AN APPROPRIATE PROXY FOR MARKET VALUE.

As discussed above, the FCC's valuation argument assumes that the Cable Rate represents what a "willing seller" and "willing buyer" would agree upon in the exercise of free negotiation:

> We established in the preceding section that utilities are not constitutionally entitled to more than the regulated rate for voluntary attachments so they cannot be constitutionally entitled to cost factors and computations that would raise the regulated rate for mandatory attachments beyond that which is just and reasonable.

FCC at 30. Because this discredited argument is the foundation for the FCC's valuation arguments, all of its valuation arguments collapse as well. The FCC analyzes the issue as if it were merely whether the Cable Rate could survive scrutiny as a regulated rate. *See, e.g,* FCC at 31 (relying upon *Florida Power Corp.* - - a pure regulatory analysis case). The FCC's analysis misses the mark since the standard here is just compensation - not a reasonable rate.[14]

The Cable Companies' valuation arguments are similarly flawed. The principal support for their valuation argument is that the FCC has repeatedly approved the Cable Rate and has always rejected attempts by utilities to revise that rate to accurately

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[14] The FCC and Cable Companies continue to argue that rate regulation is no different than just compensation. If this is true, why do they continue to make strained arguments to avoid the right of access being deemed a taking?

capture pertinent costs. *See, e.g.,* Cable Companies at 44-47 (repeatedly relying upon FCC pronouncements). Those FCC pronouncements, however, were pre-mandatory access and have no applicability to a just compensation analysis.[15] Neither the Cable Rate nor the FCC's corresponding regulated pronouncements pass muster under just compensation.

A. <u>The Use Of Replacement Costs Is Appropriate.</u>

The Cable Companies make two primary arguments against replacement costs. First, they argue that "the replacement cost approach requires that the property interest being condemned be complete ownership" and that the Cable Companies "occupy only a fraction of APCo's poles pursuant to a 'license.'" Cable Companies at 38. This argument is unavailing for two reasons. First, Cable Companies have all the benefits of "complete ownership" for the portion of the pole they occupy and the unusable space which "is of equal benefit to all entities attaching to the pole." H.R. Con. Rep. No. 104-459, at 206, 1996 U.S.C.C.A.N., at 220; *see also United States v. Benning Housing Corp.*, 276 F.2d 248, 251 (5th Cir. 1960) (holding that an ownership interest

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[15] For this same reason, WorldCom's reference to the rates set by states which choose to regulate pole attachments is equally non-persuasive. First, those states have, for the most part, adopted the federal regulatory model. Applied in the context of a taking, that model is flawed - regardless of the regulating sovereign. If the state models were applied in a takings case, that particular state would be the defendant in a proceeding very similar to this case.

less than fee simple was "complete ownership" for takings purposes). Second, under APCo's just compensation charge, the Cable Companies are only charged for a "fraction" of the pole based on the amount of the pole they occupy and from which they benefit. *See generally* APCo's Response to Complaint, Ex. A (Second Aff. of Ed Prater); Ex. B (Henry J. Wise Aff.).

The Cable Companies' second argument against replacement cost valuation methodology is that "courts do not apply a . . . replacement cost approach to valuation if reproducing the property would not be reasonable." Cable Companies at 38. The Cable Companies argue that it would not be reasonable to replace utility poles because they "are an essential facility." Cable Companies at 38.[16] As discussed in part II.E. *supra*, this argument fails because APCo's poles are not essential facilities. Additionally, replacement *is* an issue for attaching entities and APCo. From the standpoint of the attaching entity, the existence of extensive underground burial and other alternative means of delivery evidence that companies that rely on cables and other similar installations are considering a "replacement" to poles. From the standpoint of utilities like APCo, replacement of the facilities is perpetual. Whether due to normal wear-and-tear, storm damage, or other events, APCo annually replaces

[16] The principal case relied on to for this proposition was referring to *obsolete* property, not "essential" property. *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 399-400 (1949)

significant aspects of its pole system. APCo's Response to Complaint, Ex. A, Tab 5 (APCo's 1999 New Pole Additions).

B. APCo Has Not Included An Enhancement Factor In Its Just Compensation Price.

The Cable Companies argue (1) that APCo's just compensation charge "seek[s] to arrogate . . . the value of the authorization granted [to the Cable Companies] by cities and other local franchising authorities" and (2) that entities besides APCo own some of the poles that are part of the network of elevated corridors. Cable Companies at 21-23. The Cable Companies make this argument in an apparent attempt to rebut the inclusion of an enhancement factor (for the value of the pole system as a whole) in APCo's just compensation price. However, APCo's just compensation price does *not* include such an enhancement factor. APCo's Response to Complaint, Ex. A at ¶ 12 (Second Aff. of R. E. Prater) ("[T]his replacement cost methodology *does not* include, for example, any enhancement value to recognize the linear corridor and access to APCo's customers.") (emphasis added). The only reason an enhancement factor is even mentioned by APCo's appraiser is to show the comparatively conservative nature of APCo's actual just compensation price methodology. *Id.* In fact, APCo's appraiser directly rebutted these same arguments in the FCC proceeding:

> Nothing in my first affidavit relates either to the payment of a franchise fee or to the cable company's use of the public right of way.
>
> * * *
>
> I concede that other companies, other than APCO, contribute to the network that the Cable Companies find beneficial. However our approach to estimating just and adequate compensation to the power company reflects only the share of the network owned by the power company.

APCo's Notice of Filing Supplemental Authority, Second Aff. of Henry J. Wise at 2 & 4. The enhancement factor is not an issue in this case.

C. <u>APCo Did Not Use Market Value Or The Income Approach In Determining Its Just Compensation Price.</u>

In the spirit of Don Quixote's fabled attack on the windmill, the Cable Companies take several shots at the market value and income approaches to valuation. Cable Companies at 32-37. As with the enhancement factor, APCo did not use either of these approaches in determining its just compensation charge. Instead, APCo employed a conservative cost-based approach substantially similar to the Telecom Rate. *See generally* APCo's Response to Complaint, Ex. A (Second Aff. of R. E. Prater) and Ex. B (Aff. of Henry J. Wise); APCo's Notice of Filing Supplemental Authority (Second Aff. of Henry J. Wise). Of course, market value would be an

appealing option but for the Pole Attachment Act's displacement of any such market with an artificially low regulatory rate.

III. PROCEDURAL ISSUES

A. This Court Has Jurisdiction.

The FCC and Cable Companies essentially restate and incorporate by reference their argument that this Court lacks jurisdiction over this matter. APCo, likewise, incorporates by reference its responsive arguments establishing that this Court may properly review this matter. Which argument prevails depends upon a critical inquiry this Court must make: would further agency proceedings be futile? Futility of further agency action trumps any of the procedural requirements relied upon by the FCC. APCo's Response to Motion to Dismiss at 11-19; Gulf Power's Response to Motion to Dismiss at 11-18.[17] Notwithstanding the FCC's strategy of asking this Court to defer the issues pending their "imminent" ruling on APCo's Petition for

[17] As for its additional arguments against Gulf Power's standing, the FCC overlooks the standard in the Hobbs Act that allows a "party aggrieved" by agency action to seek judicial review. 28 U.S.C. § 2344. To be a "party aggrieved" requires, "as a general matter[,] that petitioners be parties to any proceedings before the agency preliminary to its order." *Erie-Niagra Rail Steering Committee v. Surface Transp. Bd.*, 167 F.3d 111, 112 (2d Cir. 1999). Certainly, Gulf Power was, and still is, a party to a proceeding before the agency that is nearly identical to the case against APCo. Thus, Gulf Power is a "party aggrieved" within the meaning and intent of the Hobbs Act.

Reconsideration, a quick read of the FCC's brief makes clear the answer to this critical inquiry:

- Page 17: "[T]he statutory formula satisfies any constitutionally applicable standard."

- Page 19: APCo and Gulf Power "are not so entitled" to their just compensation charge.

- Page 19: "Because the regulated rate satisfies the constitutional standard for just compensation, the utilities are not constitutionally entitled to a modification of the formula that would result in a higher rent."

- Page 20: "The use of historical cost of the poles results in 'just and reasonable' compensation to the utilities."

- Page 21: "The complaint proceeding afforded the utilities the right to a hearing, but they failed to identify any substantial and material questions of fact that would warrant a hearing."

- Page 21: "The Bureau's focused analysis of the record and explanation of its decision was commensurate with the delegated responsibility to administer the Cable Formula. The Bureau was not required to use the complaint proceeding as an opportunity to reexamine settled Commission policy."

- Page 23: "The pole attachment fee allowed by the FCC in this case satisfies the constitutional requirements of just compensation and represents reasoned agency decision making."

- Page 23: "[The Court] should rule that an annual rate of $7.47, the maximum allowable by the order in this case, affords the utility all the compensation to which it is constitutionally entitled. As we explain below, the $7.47 rate provides just compensation under any accepted rational measure, and the decision to adhere to that measure represents reasoned agency decision making."

- Page 24: "A few observations are sufficient to demonstrate the emptiness of the utilities' theory" that they are entitled to a just compensation charge of $38.81.

- Page 34: "It is difficult to comprehend how a failure to compensate the utilities for the unused and unusable portion of their poles amounts to a loss of constitutional dimensions."

- Page 36: "Given, as explained above, that the Section 224(d) cable television rate provides constitutional just compensation, the FCC's decision to enforce that rate, which implements the statutory directive, was not arbitrary and capricious."

- Page 37: "The utilities have been making this argument for years in various contexts, and the Commission has consistently held that the proffered accounts do not contain any significant costs that should be allocated to the ownership or maintenance of the poles."

- Page 38: "Contrary to the utilities' assertions, the Cable Formula does incorporate all capital and operating expenses reasonably and readily attributable to pole plant."

These are not the statements of an objective undecided tribunal. If not before now, the FCC has made it abundantly clear in its brief to this Court that, in the FCC's view, APCo is not entitled to any pole attachment rate higher than the Cable Rate. Further administrative proceedings before the FCC would obviously be futile.

B. The FCC Is Not Entitled To Deference On Constitutional Issues.

This Court has determined that "the issue of whether the rate adopted by the FCC provides a utility just compensation for a taking effected by the Act is of course, a constitutional issue." *Gulf Power I*, 187 F.3d at 1333. The Court reviews constitutional challenges de novo. *Gulf Power II*, 208 F.3d at 1271; *Gulf Power I*, 187

F.3d at 1328; *Rodriguez v. United States*, 169 F.3d 1342, 1346 (11th Cir. 1999). This case asks the Court to determine the constitutionality of the 1996 Act and the Cable Rate as both were applied by the FCC in its Order setting APCo's pole attachment prices. Accordingly, the agency is not entitled to deference on any aspect of its Order. Likewise, as argued by the Intervenors AEP, et al., no deference is due to legislative judgment because "the question of [just] compensation is judicial" and this Court is "not bound to follow [legislative] standards in making judicial determinations" of just compensation. *Gulf Power I*, 187 F.3d at 1332 & 1333 (quoting *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893)).

C. The Tucker Act Argument By *Amicus* WorldCom Is Irrelevant.

Amicus WorldCom raises the issue of whether the Tucker Act provides a remedy to APCo. This issue has not been raised by any other party to this proceeding for good reason: it has no bearing on the outcome.[18] Furthermore, in *Gulf Power I*, this Court outlined the procedure it deemed appropriate in the event a utility was aggrieved by an FCC determination of just compensation: "A utility that believes the rate ordered by the FCC fails to provide just compensation for the taking of its property may appeal the FCC's rate order directly to a federal appeals court." *Gulf*

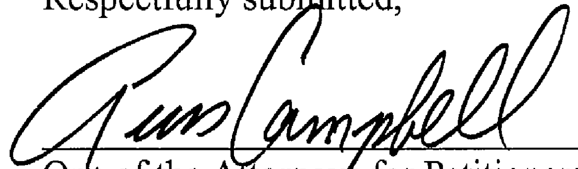
[18] In raising an extraneous issue, WorldCom has exceeded its role in this proceeding. *Amici* are not permitted to "create, extend, or enlarge the issues." *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991) (citing *Phoenix v. Phoenix Civic Auditorium & Convention Center Ass'n*, 408 P. 2d 818, 821 (1965)) (other citations omitted).

Power I, 187 F.3d at 1334. This Court then outlined "five means at its disposal to gather information needed to determine just compensation" should it need additional facts.[19] The Tucker Act was not among these specifically described means. For their part, the FCC and the United States flatly rejected the applicability of the Tucker Act to a determination of just compensation for pole attachments. *Gulf Power I* Brief of Appellees at 48 ("IV. RELIEF UNDER THE TUCKER ACT WOULD NOT BE AVAILABLE HERE,").

CONCLUSION

For any or all of the reasons presented in APCo's filings, the Court should strike down as unconstitutional application of the Cable Rate to APCo. This Court should further rule that APCo's replacement cost methodology is an acceptable proxy for fair market value in this takings case.

Respectfully submitted,



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[19] In the present case, there are sufficient facts of record to support APCo's just compensation charge.

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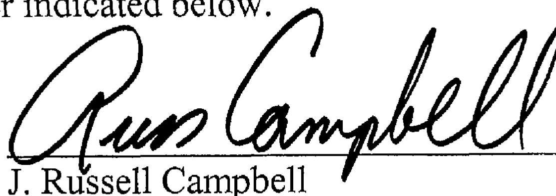
CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Brief was served this 18th day of May 2001, to the persons and in the manner indicated below.



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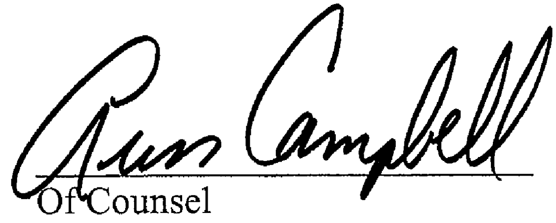

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CERTIFICATE OF COMPLIANCE

I, the undersigned, do hereby certify that this brief complies with the type-volume limitations set out in Rule 32 of the Federal Rules of Appellate Procedure. This brief uses a 14 point Times Roman font and contains 6,825 words (excluding items listed in Rule 32(a)(7)(B)(iii)) according to the word count function of the word processing system used.

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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**

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August 9, 1999

CORPORATE DISCLOSURE STATEMENT

AT&T Corp. has no parent corporation. AT&T is the parent corporation of Telecommunications, Inc. The parent corporation of TCI Cablevision of Oregon, Inc. is TCI West, Inc. TCI of Southern Washington is a partnership, 99% owned by TCI Washington Associates, LP. TCI West, Inc. and TCI Washington Associates, LP, are, indirectly, subsidiaries of Telecommunications Inc. and hence of AT&T.

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INTRODUCTION

This appeal presents the question whether the City of Portland and each of the nation's 30,000 other local cable television franchising authorities has jurisdiction to require cable systems to carry particular programming and to use particular transmission technologies. In particular, appellants challenge ordinances (the "Ordinances") adopted by Portland and Multnomah County, Oregon (collectively "Portland") that would force a Portland cable system to act like a telephone company and to provide transmission facilities that would allow any Internet service provider ("ISP") to use that cable system to provide its own services.

As explained below, Congress expressly prohibited municipalities from adopting such "forced access" measures. The Communications Act bars local authorities from ordering cable systems to provide transmission facilities to any third party, from prohibiting or restricting a cable system's use of any transmission technology, and from imposing any other requirements regarding the provision or content of any cable service. Congress determined that local regulation of such operational matters would needlessly burden cable operators and could subject them to conflicting requirements that balkanize the nation's cable systems. The Communications Act also expressly prohibits any regulator -- federal, state or local -- from subjecting cable systems to any of the "common carrier" regulations that apply to telephone companies.

But Portland adopted the Ordinances to regulate a new high-speed cable service that allows subscribers to interact with information provided by the cable system and also to access the public Internet. Because these cable services compete with the Internet access and other online services offered over local telephone lines, local telephone monopolists, America Online ("AOL"), and other online service providers had asked the Federal Communications Commission ("FCC") both to impose forced access requirements on all providers of these cable services and to condition approval of AT&T's then-proposed acquisition of TCI on that requirement.

The FCC refused to do so -- without even deciding whether a forced access requirement would violate the Communications Act or the First Amendment.[1] Based on an extensive record, the FCC determined that cable systems do not have monopoly power over Internet and online services and that numerous alternatives to cable systems exist for the transmission of such services. The FCC concluded that marketplace forces should ensure that customers have the ability to obtain high-speed access to multiple ISPs. It further found that forcing cable systems to provide access on regulatorily-

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[1] *Inquiry Concerning the Deployment of Advanced Telecommunications*, 14 FCC Rcd 2398, ¶¶ 45-6, 85-101(1999) ("*Advanced Services Order*"); *Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc. To AT&T Corp.*, 14 FCC Rcd 3160, ¶¶ 92-94 (1999) ("*FCC Approval Order*").

prescribed terms could impose unnecessary costs, limit customer choices, and reduce innovation.

Nevertheless, Portland imposed this same forced access requirement as a condition to its approval of AT&T's acquisition of control of TCI's Portland cable franchise. Portland made no determinations of need for this extraordinary measure or of its current feasibility. Instead, it relied on speculative claims that Oregon ISPs might provide fewer local jobs if forced access were not ordered. As explained below, even if Congress had not squarely prohibited this measure, the Ordinances would thus violate both the First Amendment and the Commerce Clause.

JURISDICTION

AT&T and TCI sought a declaratory judgment from the United States District Court for the District of Oregon that the Ordinances violated, *inter alia*, the Communications Act, 47 U.S.C. § 151 *et seq.*, and the First Amendment and Commerce Clause of the Constitution. The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1337, 1343, 2201 & 2202.

On June 7, 1999, the District Court entered a final judgment that granted the defendants' motions for summary judgment and dismissed the complaint with prejudice. AT&T and TCI filed timely notices of appeal on June 14 and June 18, 1999. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

Whether Portland's forced access requirement is preempted by the Communications Act, and, if not, whether it violates the First Amendment or the Commerce Clause?

STATEMENT OF THE CASE

AT&T and TCI filed this suit for declaratory relief on January 19, 1999. They alleged that the forced access requirement of the Ordinances violates, *inter alia,* 47 U.S.C. §§ 541(b)(3), 541(c), 544(e), & 544(f), and the Commerce Clause and First Amendment. Intervenors filed a motion to dismiss, which the court treated as a motion for summary judgment, and Portland moved for summary judgment. AT&T and TCI also filed a motion for summary judgment. On June 7, 1999, the District Court entered summary judgment dismissing the Complaint. E.R. 0210.[2]

STATEMENT OF FACTS

The issues on appeal are pure questions of law. But to place these issues in their proper regulatory and competitive context requires an explanation of: (1) cable service and its regulation, (2) local telephone service and its very different regulation, (3) the online services of AOL and others and the development of cable services that may

[2]The Excerpts of Record are cited as "E.R.__."

compete with them, (4) the FCC's rejection of a forced access requirement, and (5) the Portland proceedings.

1. Cable Service and its Regulation. Cable systems have been built and operated to meet the demands of consumers for video and other programming. Cable systems operate like electronic magazines. The operators select the programming they will offer, obtain rights to it, and then include it in the menu of what is available to subscribers. Whether the programming is CNN, HBO, or an interactive online cable service that includes Internet access, the cable operator purchases rights to the programming (or produces it itself) and then sells it as a cable service to its subscribers at prices determined by the cable operator.

Courts have long recognized that these exercises of editorial discretion concerning the content, information, programming, and services offered by cable operators are protected by the First Amendment. As such, courts have upheld requirements that cable operators carry particular programming only when both specifically mandated by the Communications Act and proven to be necessary to further some substantial national policy. *See Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622 (1994) ("*Turner I*"); *id.*, 520 U.S. 180 (1997) ("*Turner II*").

The transmission capacity of a cable system is limited and is effectively shared by all subscribers. A cable operator has only a certain amount of capacity available at

any one time, and it must exercise editorial discretion to allocate the limited system capacity among different types of programming. A requirement that a cable system carry additional programming can necessitate that the cable operator drop other programs or modify its network to add transmission capacity. In addition, because the transmission capacity of a cable system is shared among multiple uses, control and management by a single operator is essential to ensure that one use does not interfere with or degrade the quality of the cable system's offerings to its subscribers.

Although the Communications Act did not expressly refer to cable television until 1984, the FCC asserted jurisdiction over cable system operations decades ago. *See Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 701-702 (1984). In 1968, the Supreme Court affirmed the FCC's authority to prohibit cable systems from importing the programming of distant broadcast television stations on the ground that it was "reasonably ancillary to the effective performance of the [FCC's] various responsibilities for the regulation of television broadcasting." *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). However, because Congress had "firmly rejected" the argument that "broadcast facilities should be open on a nonselective basis to all persons wishing to talk" (*Columbia Broadcast Sys., Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 105 (1973)), the Court invalidated the FCC's later efforts to impose on cable systems forced access requirements unrelated to the

regulation of broadcast television. *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 708-709 (1979).

In the 1970s, the FCC began to free cable system operators from a patchwork of conflicting local regulations.[3] The FCC left it to local authorities to grant franchises to cable operators and to oversee "such local incidents of cable operations as delineating franchise areas, regulating the construction of cable facilities, and maintaining rights of way," but asserted "exclusive jurisdiction over all operational aspects of cable communication." *Capital Cities Cable*, 467 U.S. at 702. The FCC took this approach because "only federal pre-emption of state and local regulation can assure cable systems the breathing space necessary to expand vigorously and provide a diverse range of program offerings to potential cable subscribers in all parts of the country." *Id.* at 708.

In 1984, Congress enacted Title VI to the Communications Act "to establish a national policy concerning cable communications" and to "minimize unnecessary regulation that would impose an undue economic burden on cable systems." 47 U.S.C. §§ 521(1), (6). "Congress sanctioned in relevant respects the regulatory scheme that the [FCC] had been following since 1974." *City of New York* v. *FCC*, 486 U.S. 57, 66-

[3] *See generally Amendment of Part 76 of the Commission's Rules and Regulations Relative to an Inquiry on the Need for Additional Rules in the Area of Duplicative and Excessive Over-Regulation of Cable Television*, 54 FCC 2d 855 (1975).

67 (1988). Congress reaffirmed cable companies' exemption from "common carrier" regulations (47 U.S.C. § 541(c)), and specifically prohibited "requirements regarding the provision or content of cable services." *Id.* § 544(f)(1).

A 1996 amendment to Title VI bars local attempts to "prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology" (*id.* § 544(e)), or to impose any condition with the "purpose or effect" of requiring or restricting a cable system's provision of a telecommunications facility to third parties. *Id.* § 541(b)(3)(D). Congress also made explicit that "interactive" online services offered by cable systems are "cable services,"[4] and declared that "[i]t is the policy of the United States to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2).

Under Title VI, local franchising bodies retain authority only over uses of public rights-of-way and related aspects of cable service. Local authorities may, for example, establish "construction schedules and other construction-related requirements" (*id.*

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[4] *See* H.R. Rep. No. 104-458 at 169 (1996). The 1996 Act added the words "or use" to the definition of "cable service" so that it now includes "one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and *subscriber interaction*, if any, which is required for the selection *or use* of such . . . other programming service." 47 U.S.C. § 522(6) (emphasis added). "Other programming service" includes any "information" that a cable operator "makes available to all subscribers generally." *Id.* § 522(14).

§ 552(a)(2)), collect franchise fees for the cable system's use of public rights-of-way (*id.* § 542(a)), determine whether a new operator has the "financial, technical, or legal qualifications to provide cable service" (*id.* § 541(a)(4)(C)), and where otherwise "consistent" with the Act, "establish requirements for facilities and equipment," but not "for video programming or other information services." *Id.* §§ 544(a) & (b).

2. Local Telephone Service and its Regulation. An entirely different regulatory regime applies to telephone systems. They were established not to engage in speech, but to serve as conduits for the unedited speech of others and to provide basic point-to-point communications to any member of the public. Unlike the shared facilities of cable systems, telephone services are provided over networks in which transmission wires and facilities are dedicated to each individual telephone subscriber and are designed to provide service to any person or entity, including firms providing online services.

Local telephone companies are regulated under Title II of the Communications Act as "common carriers." Title II generally requires these firms to offer service under tariff to all who request it on rates, terms and conditions that are just, reasonable, and nondiscriminatory. 47 U.S.C. §§ 201-205.

3. Online Services and the Development of Cable Modem Services. Online services allow customers to obtain, and to interact with, proprietary information and

information available over the public Internet. The provision of online services has been dominated by AOL (which itself serves over half of all such customers), Microsoft, and other firms. Virtually all of these firm's nearly 35 million U.S. customers access these online services through "dial-up" modems attached to ordinary "narrowband" telephone lines.[5]

Telephone networks, satellite and wireless systems, and other media have the technical ability to offer "broadband" transmission capabilities that can deliver information at much higher speeds than do "narrowband" telephone lines. *See Advanced Services Order* ¶¶ 12, 41-42. For example, established "DSL" technology transforms individual telephone lines into broadband transmission facilities, allowing a subscriber to establish a high-speed connection with a particular online service provider and simultaneously to use that telephone line to make ordinary telephone calls. *Id.* ¶¶ 42, 58, 61 & Chart 2. To date, however, there has been limited demand for high-speed access, and AOL has stated that "narrowband" service is fully adequate for the overwhelming majority of users, and, indeed, will be their technology of choice for many years to come.[6]

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[5] *See* U.S. Department of Commerce, *The Emerging Digital Economy II* at 2 (June 1999) (citing <www.nua.ie/surveys>); Andrea Petersen, *Small Players Deluge Market With Free Disks*, Wall St. J., Aug. 3, 1999, at B1.

[6] *Power Lunch*, Television Interview with Steve Case (CNBC broadcast, Sept. 28, (continued...)

"Cable modem" services were developed after it became feasible to upgrade cable systems to provide two-way high-speed transmission in addition to traditional video programming. These upgrades required cable companies to deploy high-speed fiber optic transmission cables and other facilities needed to send and receive information to personal computers or terminals.[7] To provide cable modem services, a cable system must allocate them a portion of its limited transmission capacity.

Because of the multi-billion dollar costs associated with these upgrades,[8] and because AOL and other online service providers offer content that makes full use of the capabilities of narrowband transmission facilities, cable systems that wished to offer cable modem services entered into arrangements to obtain distinctive content that took advantage of the capabilities of broadband transmission. For example, TCI and others formed a company -- now named Excite@Home ("@Home") -- to develop this content and a network of computers and transmission facilities to deliver the content and Internet connectivity to cable systems.[9]

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[6](...continued)
1998); Transcript of Panel Discussion, *Cyberspace and the American Dream*, Aspen Summit (Aug. 25, 1998) (interview with George Vradenburg, AOL's Vice President for Law and Public Policy).

[7] *See* @Home 1998 10-K, at 9-11 (describing necessary technology and equipment).

[8] *See Advanced Services Order* ¶ 37.

[9] For example, @Home installs and maintains the "routers" and "servers" that connect,
(continued...)

Prior to its merger with AT&T, TCI had begun to upgrade its cable networks, purchase @Home's programming, and offer it to cable subscribers under the name TCI@Home.[10] A subscriber to TCI@Home accesses the service over a personal computer connected to the cable system. The TCI@Home service includes both content that TCI obtains from @Home and other content that TCI produces itself or obtains from other sources. This includes advertising, commentary, news, and matters of local interest.[11]

Through the public Internet connection, a TCI@Home customer has access to AOL or any other online service provider with "one click" of his computer mouse. Individual subscribers may even program their computers to bypass the TCI@Home "home page" and go directly to another online source. TCI sets the price for its

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[9](...continued)
transmit, and receive signals to and from the Internet. @Home 1998 10-K, at 9-10. @Home also assists with the installation and use of necessary hardware and software, designs and implements billing and technical support systems, and responds to customers' technical questions. *Id.* Other cable systems operators have entered into similar arrangements with @Home or one of its competitors to obtain programming for interactive online cable modem services.

[10] *See FCC Approval Order* ¶¶ 70-72; @Home 1998 10-K at 3. TCI entered into contracts with @Home that made @Home TCI's exclusive provider of this interactive programming for several years. *Id.*

[11] *See* @Home 1998 10-K at 3-4; http://www.tci.net/pages/about.html (describing TCI@Home and providing interactive "tour" of the service).

TCI@Home cable service and pays @Home for its content and services by sharing subscriber revenues.

Although TCI@Home nationally has fewer than 100,000 subscribers, the availability of that service has spurred incumbent local telephone monopolies to deploy DSL. *Advanced Services Order* ¶ 42 & n.84.[12] Cable modem service has also been cited as a key factor behind recent deals by AOL and others to provide high-speed access options over DSL or satellites.[13]

4. Proceedings Before the FCC and Department of Justice ("DOJ"). After TCI and others began offering cable modem services, local telephone monopolies, AOL

[12]As the Chairman of the FCC observed:

> Where cable modem service has been introduced, DSL has followed. For instance, in May 1997, @Home launched service in Phoenix; four months later U S West launched DSL there. That same month, @Home began offering service in San Diego; soon thereafter Pacific Bell began offering DSL. In June 1998, @Home entered Denver; that same month so did U S West. And just last week, Bell Atlantic – anticipating the roll-out of cable Internet access in New York City – announced that it will begin offering DSL service in the Big Apple.

"The Unregulation of the Internet: Laying a Competitive Course for the Future," Remarks by FCC Chairman William E. Kennard Before the Federal Communications Bar Association, Northern California Chapter, San Francisco, CA, at 4 (July 20, 1999) <http://www.fcc.gov/Speeches/Kennard/spwek924.html>.

[13] *See, e.g., America Online and SBC Communications to Offer High Speed Upgrade to AOL Members* <www-db.aol.com/corp/news/press/view?release=579>; *Hughes Invests $1.4B in Network* (March 17, 1999) <www.mercurycenter.com> (announcing $1.4 billion investment in a two-way satellite network that will soon provide high-speed services).

and other ISPs petitioned the FCC and DOJ to impose forced access requirements. These would have required cable operators that offer cable modem services to modify their systems and deploy technologies allowing any requesting ISP to connect to the cable system and have its own online services offered to cable subscribers. Portland participated in the FCC proceedings, advocated forced access, and urged "prompt[]" FCC action to provide "a nationwide resolution of these important national communications matters." E.R. 0139.

It was undisputed that TCI and other cable systems could not, without modification, support access to multiple interactive online services.[14] Proponents of forced access claimed that the technology could be developed[15] and should be required because cable systems control facilities that are "essential" to Internet access.[16] They further argued that "fairness" required that cable systems be subjected to the same common carrier requirements as local telephone monopolies.[17]

These claims were initially advanced in an industry-wide proceeding the FCC instituted to determine how best to promote widespread availability of broadband and

[14] *See FCC Approval Order* ¶¶ 87-88 (discussing extent and feasibility of necessary modifications).

[15] *Id.*

[16] *Id.* ¶ 75.

[17] *Id.*

other advanced communications services.[18] After AT&T announced its proposed acquisition of TCI, forced access proponents also urged the FCC and DOJ to condition their regulatory approvals on forced access.[19]

Without addressing whether a forced access requirement would be lawful, both the FCC and the DOJ rejected forced access as bad policy. The FCC determined that it would likely harm consumers, impede innovation, and be contrary to the public interest. As the FCC found, "there are a large number of firms providing Internet access services in nearly all geographic markets in the United States, and these markets are quite competitive today," and there is no prospect that cable systems will dominate, much less monopolize, online services. *FCC Approval Order* ¶ 93. Broadband deployment is in its "nascency," and "virtually all segments of the communications industry" -- including telephone companies, electric utilities, satellite systems, wireless and terrestrial radio systems, and cable systems -- are making enormous investments to develop competing consumer offerings. *Advanced Services Order*, ¶¶ 12, 34-44, 48, 54-61 & Chart 2, 87 & Chart 3. Each of the technologies that "different companies are using" has "advantages and disadvantages;" each will be priced accordingly, and consumers will benefit from these choices. *Id.* ¶ 48. Indeed, "it is very likely that the

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[18] *See Advanced Services Order* ¶ 100.

[19] *FCC Approval Order* ¶ 75.

imperfections in existing broadband technologies will lead to new technologies that will improve broadband" and still more competition. *Id.* ¶¶ 48-53. Accordingly, the FCC concluded that the "preconditions for monopoly" in high-speed online services and transport are "absent" (*id.* 48) and predicted "facilities-based competition in much of the United States, even in the short term." *Id.* ¶ 94.

With respect to AT&T's purchase of TCI, the FCC specifically concluded that the merger was "unlikely" to yield "anticompetitive effects," and instead "may yield public interest benefits to consumers in the form of a quicker roll-out of high speed Internet access services." *FCC Approval Order* ¶ 94. The FCC also recognized that forced access concerns are unaffected by the AT&T-TCI merger and "would remain equally meritorious (or non-meritorious) if the merger were not to occur."[20] Similarly, the DOJ allowed the merger to proceed, subject only to the unrelated condition that AT&T divest TCI's minority interest in wireless telephone provider Sprint PCS. *See United States v. AT&T Corp.*, Case No. 98-3179, Final Judgment (D.D.C. 1998).

Recently, FCC Chairman William Kennard and FCC Commissioner Michael Powell have passionately defended the FCC's policy of relying on market forces and negotiated arrangements to determine how consumers obtain online services over new broadband facilities. They emphasized that a forced access requirement not only would

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[20] *Id.* ¶ 96.

impose immense and unnecessary costs on cable systems,[21] but also would inhibit the competition from telephone companies and others that cable modem services have recently fostered.[22]

5. Portland Proceedings. In connection with its merger with TCI, AT&T filed an FCC Form 394 detailing its qualifications to provide cable service with hundreds of local franchising authorities nationwide. Among these was the Mount Hood Cable Regulatory Commission ("MHCRC"), to which Portland had delegated its authority under 47 U.S.C. § 541(a)(4)(C). That provision of the Act authorizes local franchising authorities to review the "financial, technical, or legal qualifications to provide cable service" of a company that seeks to acquire control of a cable system.

Citing "trade journal reports" that "TCI's upgrade and marketing plans include introduction of high speed Internet access through cable modems" (E.R. 0049), the MHCRC asked AT&T whether AT&T planned to open its cable networks to all other ISPs. AT&T objected that this information was irrelevant to its legal, financial, and technical qualifications. *Id.* AT&T nonetheless confirmed that it planned to deploy the

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[21] *See* Remarks by Commissioner Michael K. Powell, Before the Federal Communications Bar Association (June 15, 1995). <http://www.fcc.gov/Speeches/Powell/spmkp902.html>

[22] *See* Remarks of Chairman William E. Kennard, Before the National Cable Television Association, Chicago, Illinois, June 15, 1999, at 6. <http://www.fcc.gov/Speeches/Kennard/spwek921.html>

TCI@Home cable service in Portland after it upgraded TCI's cable facilities and that it had no plans to provide common-carrier type access to ISPs. *Id.*

The MHCRC held public meetings on October 19, November 16, and December 14, 1998.[23] U S WEST, the incumbent local telephone monopolist that carries virtually all ISP-bound traffic in the Portland area, advocated forced access. It argued that because "U S WEST is required to provide nondiscriminatory access" to its telephone network, AT&T "should be forced to do the same thing" with respect to TCI's cable network. E.R. 0101-02. The president of the Oregon State Internet Service Providers Association ("ORISPA") agreed. He also speculated that there was a "potential" that Oregon ISPs "could go out of business" if forced to compete with the new TCI@Home service, and urged the MHCRC to impose a forced access requirement to save "40 ISPs," "400 jobs" and the "$20 million contributed to our local economy" by local ISPs. E.R. 0106.[24]

Despite the fact that @Home service was already available in nearby Seattle and other communities, no proponent of forced access submitted any market data, empirical analyses, or expert testimony supporting the claim that forced access was needed to protect either Oregon consumers or Oregon ISPs. Nonetheless, at the November 16

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[23] *See* E.R. 0050-55, 61-62, 63-72, 89-94.

[24] The ORISPA representative admitted that AOL was anonymously "providing a lot of legal and financial support for [ORISPA's] effort." E.R. 0107.

meeting, the MHCRC passed a resolution recommending that approval of AT&T's application be conditioned on its "agreement" to provide access to all ISPs on "nondiscriminatory terms" (so long as TCI@Home was offered and continued to be statutorily defined as a cable service). E.R. 0070. The resolution offered no reasons for the condition and included no findings with respect to any competitive issues. E.R. 0078.

On December 17, 1998, the City and the County each held brief public meetings to consider the MHCRC resolution. U S WEST and ORISPA repeated their respective arguments -- again without substantiation -- that AT&T's cable network should be regulated like U S WEST's telephone network and that a forced access requirement is necessary to protect local ISPs.[25] Norman Thomas, Chairman of the MHCRC, stated that the MHCRC had "barely looked at" the forced access condition, but nevertheless urged its prompt adoption. E.R. 0119.

The City and the County each adopted ordinances that would require AT&T, upon offering the TCI@Home service, "to provide nondiscriminatory access to [its] cable modem platform for providers of Internet and on-line services." E.R. 0116 (Multnomah); E.R. 0097 (Portland). Neither ordinance provides any enforcement

[25] *See* E.R. 0106-07 (ORISPA), 0101-02 (U S West); E.R. 0128-29 (ORISPA), 0130 (U S WEST).

mechanism. Further, neither the City nor the County made any findings to support the Ordinances or attempted to explain how any ISP could replicate the terms and conditions of the relationship between @Home and TCI.[26]

AT&T and TCI declined to accept the condition on the ground that is unlawful. The City and the County then adopted ordinances denying approval of the proposed change in control. *See* E.R. 0135-36.

Since the issuance of the District Court's decision, U S WEST, GTE, AOL and others have launched a massive nationwide lobbying campaign in which they have urged Los Angeles, San Francisco, and many other local franchising authorities to impose forced access, either through general cable regulations or as conditions to transfer of control applications.[27] GTE has even announced that it will indemnify local franchising authorities that adopt such measures for the costs and fees they occur in subsequent litigation. To date, one additional local franchising authority (Broward

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[26] Just prior to the vote, one city councilmember stated: "I would expect that you would be paid fairly [but] what fairly would be, I don't know, but I don't expect that it would be a free donation from AT&T to whoever got that access." E.R. 0126.

[27] *See* Thomas E. Weber, *Lobbying Move in Cable Fight May Pay Off for AOL Coalition*, Wall St. J., July 15, 1999, at B6.

County, Florida) had adopted a forced access requirement, and dozens of others are considering such requirements.[28]

STATEMENT OF REVIEWABILITY AND STANDARD OF REVIEW

In this appeal, AT&T and TCI raise federal preemption, First Amendment, and Commerce Clause claims. All of these claims were pled in the Complaint (E.R. 0001) and raised in the parties' summary judgment papers. These issues, therefore, have been properly preserved for appeal.

This appeal arises from a grant of summary judgment, which is reviewed *de novo* under the same standard applied by the District Court. *See, e.g., Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). "Summary judgment should be granted where, viewing the evidence in the light most favorable to the non-moving party, there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law." *Atwood v. Newmont Gold Co.*, 45 F.3d 1317, 1323 (9th Cir. 1995).

This Court "review[s] questions of law *de novo*." *United States v. Beard*, 161 F.3d 1190, 1193 (9th Cir. 1998). This includes both questions of statutory construction, *United States v. Doe*, 136 F.3d 631, 634 (9th Cir. 1998), and

[28] *See* Ann Grimes and Khanh Tran, *San Francisco Transfers Cable System to AT&T: to Revisit Open-Access Issue*, Wall St. J., July 27, 1999, at A4.

"constitutional issues." *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1382 (9th Cir. 1998).

SUMMARY OF ARGUMENT

The District Court upheld the Ordinances on the ground that the Communications Act was intended to "interfere" only minimally with local regulations of cable service and that the Ordinances implicate no constitutionally protected interest. This is patently wrong. The Ordinances are preempted by four separate provisions of the Communications Act. Each unconditionally prohibits local franchising authorities from requiring cable systems to act like telephone companies and to carry third parties' services, and there is no exception to these prohibitions for transfer of control proceedings conducted under 47 U.S.C. § 533(d). The Ordinances also violate the First Amendment and Commerce Clause.

Foremost, the Ordinances violate two prohibitions of the Act that bar the nation's local franchising authorities from regulating specific operational aspects of cable systems. Congress enacted these prohibitions to prevent any of these 30,000 local bodies from burdening a cable system operator with requirements that could impair the uniform, national planning and operation of its cable systems.

Section 541(b)(3)(D) provides that "a franchising authority may not require a cable operator to provide any telecommunications . . . facilities" as a "condition" of the

grant, renewal, or transfer of a cable franchise. The Ordinances violate this express prohibition by requiring TCI to provide telecommunications transmission facilities to any requesting ISP as a condition of the transfer of control of the Portland franchise to AT&T.

Similarly, the Ordinances violate § 544(e), which provides that "[n]o state or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology." The Ordinances "prohibit" the use of current transmission technologies if TCI@Home is offered and "condition" and "restrict" these transmission technologies by allowing TCI to use them only if it does not offer a cable modem service.

In addition, the Ordinances violate two other prohibitions of the Communications Act that were enacted to protect the editorial discretion and First Amendment rights of cable system operators. 47 U.S.C. §§ 541(c) & 544(f). Section 541(c) prohibits any regulatory body -- local, state, or federal -- from imposing "common carrier" regulation on a cable system by reason of its provision of a cable service. Portland's forced access requirements epitomize these prohibited common carrier requirements.

Section 544(f) prohibits any federal, state, or local body from imposing "requirements regarding the provision or content of cable services, except as expressly provided in this title." The Ordinances violate this ban, for they impose requirements

that burden TCI with reconfiguring its system and carrying online cable services of third parties if TCI chooses to offer an online cable service and not just video programming.

The Ordinances also violate the Constitution. By forcing a cable system to carry particular services and adopting requirements that are not content neutral, the Ordinances interfere with TCI's First Amendment rights. Portland could not -- and has not even remotely -- made the strict showings required to justify this measure, and the District Court could not have upheld the Ordinances even if it had applied the proper legal standard. Further, because the Ordinances were adopted in order to protect Oregon ISPs and threaten to balkanize cable systems, they also violate the Commerce Clause. Accordingly, the decision below should be reversed.

ARGUMENT

I. THE FORCED ACCESS REQUIREMENT IS PREEMPTED BY THE COMMUNICATIONS ACT.

Whether a state or local law is preempted "at bottom, is [a question] of statutory intent." *Morales* v. *Trans World Airlines*, 504 U.S. 374, 383 (1992). Preemption analysis therefore "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *FMC Corp.* v. *Holliday*, 498 U.S. 52, 57 (1990). Here, the

Communications Act provides that "any provision of law of any . . . franchising authority . . . which is inconsistent with this chapter shall be deemed to be preempted and superseded." 47 U.S.C. § 556(c).

In this case, there are four separate provisions of the Act that expressly prohibit Portland's forced access requirements and establish, *a fortiori*, that the Ordinances are "inconsistent" with the provisions of the Act and thus "preempted." Each provision bans Portland's attempt to subject cable systems to the access and carriage requirements that apply to telephone networks. Each provision refutes the District Court's conclusion that Congress intended "little" interference with municipal regulation of cable systems.

Two of these prohibitions (47 U.S.C. §§ 541(b)(3) & 544(e)) apply only to state and local bodies. These were enacted to prevent local regulation of operational matters that could impair a cable operator's uniform national operation of its cable systems. *See* Part A, *infra*. The other two prohibitions (§§ 541(c) & 544(f)(1)) apply to federal as well as state and local regulations. They were enacted to protect the editorial discretion and First Amendment rights of cable operators by banning any access and carriage requirements beyond those specifically provided by Congress. *See* Part B, *infra*. Contrary to the District Court's conclusion, the Act does not create an exception

to these prohibitions for transfer proceedings conducted under 47 U.S.C. § 533(d). *See* Part C, *infra*.

A. The Ordinances Violate The Act's Specific Prohibitions On Local Regulation Of Cable System Facilities And Technologies.

The narrowest grounds of decision in this case are the two prohibitions that bar local franchising authorities from regulating operational aspects of cable systems and codify the historic limits on local franchising authorities. These provisions were enacted to ensure that none of these 30,000 bodies can adopt regulations that would burden cable operators, disrupt the centralized planning and operation of their systems, and produce, in the words of the FCC's Chairman, "chaos."[29]

47 U.S.C. § 541(b)(3). Section 541(b)(3)(D) expressly prohibits a franchising authority from "requir[ing] a cable operator to provide any telecommunications service or facilities" as a "condition" of a "grant," "renewal," or "transfer of a [cable] franchise." Congress enacted this prohibition in 1996 because "some local franchising authorities ha[d] attempted to expand their authority over the provision of cable service to include telecommunications service" and Congress wanted to preclude local franchising authorities from requiring cable systems to provide transmission facilities

[29] *See* Testimony of William E. Kennard, Chairman, Federal Communications Commission, Before the House Subcommittee on Telecommunications, Trade, and Consumer Protection, March 17, 1999. <http://www.fcc.gov/Speeches/Kennard/Statements/stwek914.html.>

for use by any third party.[30] As the FCC has explained, this provision bars local franchising bodies from "impos[ing] telecommunications-related requirements on cable operators" and makes it explicit that "[t]he scope of a local government's franchising authority under Title VI does not extend to communications services."[31]

The Ordinances violate § 541(b)(3)(D). Although forced access is triggered by the offering of the TCI@Home cable service and although the Ordinances would require reconfiguration of cable facilities, the offering that AT&T would be required to make to ISPs is a basic communications transmission facility. This facility would, as proponents of the Ordinances stated, be a broadband substitute for the narrowband local telephone facilities that carry most online services today and that U S WEST and other local telephone monopolies are required to provide to ISPs.

The Ordinances thus would require TCI to provide ISPs with "telecommunications facilities" in violation of § 541(b)(3)(D). The 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." *Id.* § 153(43). The Ordinances would require TCI to provide ISPs with facilities for the transmission of their online services to their

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[30] *See* House Rep. No. 104-204, p. 93 (1995).

[31] *See TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd. 21396, ¶¶ 6, 38, 62 (1997).

customers. The Ordinances would thus create a stand-alone right in ISPs to obtain telecommunications facilities from a cable system. Because this requirement has been imposed as a condition of the transfer of control of the cable franchises to AT&T and because the requirement would become a condition of the franchise itself, the Ordinances violate § 541(b)(3)(D).

Portland enacted the Ordinances, and the District Court appears to have upheld them, on the false premise that the transmission facility that TCI has been ordered to provide is a "cable service" within the meaning of the Act and that it thus has not been excluded from the local authorities' jurisdiction by § 541(b)(3)(D). There is no substance to this claim. The Act defines "cable service" as the transmission "to subscribers" of "(i) video programming, or (ii) other programming service" (as well as the "subscriber interaction" required to select or use the service). 47 U.S.C. § 522(6). The access TCI would be required to provide ISPs does not satisfy a single element of that definition. The ISPs are not TCI's subscribers; TCI would not be distributing anything "to" them, and the access TCI would be providing is obviously not "video programming." Nor is it an "other programming service," for that is defined by the Act as "information that a cable operator makes available to all subscribers generally." *Id.* § 522(14). In short, the Ordinances violate the ban of § 541(b)(3)(D).

47 U.S.C. § 544(e). Section § 544(e) provides that "[n]o State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology." This prohibition was added to § 544(e) in 1996. In the prior versions of § 544(e), Congress gave the FCC jurisdiction to adopt technical standards for the operation of cable systems and authorized the FCC to preempt state technical standards. Congress "intend[ed] . . . to avoid the effects of disjointed local regulation," and had "f[ound] that the patchwork of regulations that would result from a locality-by-locality approach is particularly inappropriate in today's intensely dynamic technological environment."[32] In 1996, Congress enacted the broad and categorical ban on local regulations that prohibit, condition, or restrict transmission technologies because it wanted to foreclose any local regulations in this area, irrespective of whether the FCC had expressly preempted them. The purpose of this provision "is to prohibit cable franchising authorities from regulating in the areas of technical standards, customer equipment, and "transmission technologies,"[33] and, as the FCC has held, § 544(e) expressly preempts any local regulations in this "area."[34]

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[32] *See* H.R. Rep No. 104-204 at 110 (1995).

[33] *See* Conference Report at 168.

[34] Prior to 1996, the Supreme Court held that FCC regulations adopted under § 544(e)
(continued...)

The violation of § 544(e) here is patent. The technologies used by TCI today indisputably cannot provide interconnection and access for multiple ISPs. Portland acknowledged that fact by relying on the affidavit by a network architect that intervenor GTE had submitted in the proceedings in which the FCC refused to impose forced access. This affidavit admitted that AT&T would have to "modify its cable network [if it were required] to allow open access by competing ISPs"[35] and stated that "broadband cable networks thus far have not been designed specifically to be used by multiple ISPs" and that "new . . . technical solutions" would be required to enable such use.[36] Indeed, when this issue was before the FCC, all proponents of forced access agreed that modifications to cable operators' existing technologies would be required;

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[34](...continued)
preempted any jurisdiction that local franchising authorities would have had to adopt different or additional technical requirement based on their authority under § 544(b) to establish "requirements for facilities and equipment." *City of New York v.* FCC, 486 U.S. 57, 61, 66-70 (1988). The Court relied on the ground that § 544(a) provides that local authorities may only regulate cable "services, facilities, and equipment" to the extent "consistent" with the other provisions of the Act. *Id.* Similarly, as the FCC has concluded, now that § 544(e) has been amended categorically to prohibit any local regulation "in the area" of "transmission technologies," local franchising authority over these matters is now expressly preempted by the Act itself, notwithstanding § 544(b). *Cable Act Reform Provisions of the Telecommunications Act of 1996*, CS Dkt. No. 96-85, ¶ 141 (March 29, 1999).

[35] *See* Declaration of Justin A. Aborn, at 7 (Exhibit 2 to Defendants' Reply Memorandum in Support of Motion for Summary Judgment (Apr. 16, 1999)).

[36] *See id.*, pp. 6, 13.

the only technical debate was over the practicability and feasibility of such modifications.[37]

However, the District Court held that § 544(e) is inapposite because the local authorities' action "does not tell TCI how to implement open access, nor does it require that TCI use any particular transmission technology." E.R. 0203-04. That is irrelevant. The Ordinances prohibit, condition, and restrict the existing technology that TCI uses today, that it plans to use in the future, and that does not support access to multiple parties. Thus, TCI would be "prohibited" by the Ordinances from using its chosen transmission technology if it offered cable modem service. Conversely, its cable systems would be allowed to use this technology only if it abided by the "conditions" or "restrictions" that barred the offering of any cable modem service over those systems. That violates the plain terms of § 544(e).

B. The Ordinances Violate The Prohibitions of §§ 541(c) and 544(f) That Protect Cable Systems Against Any Access And Carriage Requirements Beyond Those That Congress Has Itself Imposed.

In addition to banning local regulation of operational aspects of cable systems, Congress prohibited any regulations -- local, state, or FCC -- that would require cable systems to carry programming or other services of third parties. Congress understood that a cable operator engages in speech protected by the First Amendment when it

[37] *See Approval Order*, 14 FCC Rcd 3160, ¶¶ 87-88.

exercises "editorial discretion" over the programming it offers. The Act protects these First Amendment interests by prohibiting any access and carriage requirements that Congress has not itself imposed and by prohibiting the imposition of any regulatory requirements regarding the provision or content of cable services. The Ordinances violate these prohibitions as well.

47 U.S.C. § 541(c). In Title VI, Congress adopted specific, narrowly defined "must carry" and other specific access requirements that set aside particular numbers of cable system channels for particular kinds of programming. *See* 47 U.S.C. § 531 (public, educational, and government), § 532 (unaffiliated video programming); § 534 (local broadcast television stations); and § 535 (non-commercial educational television). Congress prohibited the adoption of carriage requirements for any additional types of video programming,[38] and Congress enacted the broad generic provision of § 541(c) to prevent the FCC, the states, or the local franchising authorities from imposing any other access, carriage, or related requirements.

Section 541(c) provides that a "cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service." 47 U.S.C. § 541(c). According to its legislative history, § 541(c) was enacted to prevent a cable

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[38] *See* 47 U.S.C. § 532(b)(2) ("Any Federal agency, State, or franchising authority may not require any cable system to designate channel capacity for commercial use by unaffiliated persons in excess of the capacity specified [herein]").

system from being subjected, *inter alia*, "to the traditional common carrier requirement of servicing all customers indifferently upon request." H.R. Rep. No. 98-934, at 60 (1984).

The Ordinances violate this prohibition. They subject TCI to a forced access requirement "by reason of" its provision of the TCI@Home cable service, and courts have uniformly held that a requirement that a cable system carry the programs or services of a specified category of users is a prohibited common carrier regulation.

Indeed, the stated purpose of the Ordinances was to subject TCI and AT&T to this common carrier regulation. The intervenors who urged forced access did so to impose regulations on AT&T that parallel the common carrier regulations that apply to U S WEST and other monopoly local telephone companies. ISP proponents of forced access stated that U S WEST was required to file a tariff allowing ISPs to use U S WEST's telephone transmission facilities to reach online service customers, and urged Portland to give ISPs the same rights to use TCI's cable systems.[39] Similarly, U S WEST openly argued for "regulatory parity" between AT&T and U S WEST.[40] U S WEST explained that "as a common carrier, we are required to . . . provide service to every customer within the area that we serve. We are not allowed to differentiate

[39] *See* E.R. 0054 (MHCRC Oct. 19, 1998 Transcript).

[40] *See* E.R. 0059 (U S WEST submission to MHCRC).

between customers."[41] It urged that because "U S WEST is required to provide nondiscriminatory access to a telephone network," AT&T's cable network "should be forced to do the same thing."[42] Portland also candidly acknowledged that the forced access condition was intended to make the TCI cable system "look more like the open-access telephone lines"[43] and that "those who provide access to the Internet should be treated as public utilities."[44]

The Ordinances constitute forbidden common carrier regulation under settled law. Indeed, in *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979), the Supreme Court invalidated FCC rules that required cable operators to set aside four channels for use by particular programmers. Although § 541(c) had not yet been enacted, the Court held that these access requirements "plainly impose[d] common-carrier obligations on cable operators" that violated an implicit statutory prohibition on imposing common

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[41] *See* E.R. 0094 (MHCRC Dec. 14, 1998 Transcript).

[42] *See* E.R. 0101-02 (MHCRC Dec. 17, 1998 Transcript); E.R. 0093-94.

[43] *See* Defendants' Memorandum in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction, p. 6 (Feb. 22, 1999).

[44] *See* Defendants' Memorandum in Support of Defendants' Cross Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, p. 16 (March 26, 1999); *see also, e.g.,* E.R. 0062 (MHCRC Nov. 16, 1998 Meeting Minutes) (statement by MHCRC member that because "ISPs have access to U S WEST's system . . . ISPs should have fair access to cable"); E.R. 0118 ((MHCRC Dec. 17, 1998 Meeting Transcript) (U S WEST was required to open its network and "that same public policy principle should apply here").

carrier duties on cable systems that are not ancillary to the FCC's regulation of broadcast television. *Id.* at 701-02 (citing § 3(h) of the Act, now codified as 47 U.S.C. § 153(10)).

The Supreme Court reasoned that these earlier forced access requirements were common carrier regulations because "cable systems are required to hold out dedicated channels on a first-come nondiscriminatory basis" to "categories of users" specified by the FCC and because "[o]perators are prohibited from determining or influencing the content of access programming." *Id.* at 699, 701-702. This forced access requirement, the Court held, is the essence of common carriage, for it deprives the firm of the right held by a private carrier to "make individualized decisions, in particular cases, whether and on what terms to deal." *Id.* at 701; *see also California* v. *FCC*, 905 F.2d 1217, 1240 n.32 (9th Cir. 1990). Numerous other courts,[45] as well as Congress[46] and the

[45] *See also, e.g., ValueVision Intl., Inc.* v. *FCC*, 149 F.3d 1204, 1206 (D.C. Cir. 1998) (leased access requirements place the cable operator "in the position of a common carrier"); *Alliance for Community Media* v. *FCC*, 56 F.3d 105, 123 (D.C. Cir. 1995) (*en banc*) (requirements for access by public, educational, local governmental, and nonaffiliated commercial users impose "common carrier obligations on cable operators"); *National Association of Regulatory Utility Comm'rs* v. *FCC*, 525 F.2d 630, 640-41 (D.C. Cir. 1976).

[46] *See, e.g., Columbia Broadcasting Sys.* v. *Democratic National Committee*, 412 U.S. 94, 105-110 (1973) (setting forth legislative history in which Congress recognized that requiring a broadcast station to provide nondiscriminatory access to its facilities by political candidates would render it a common carrier).

FCC,[47] have likewise held that requirements that cable systems provide access to third parties constitutes common carrier regulation.

That principle is dispositive here. By reason of its provision of TCI@Home, the Ordinances would require AT&T to provide nondiscriminatory access to its cable facilities indiscriminately to all ISPs. AT&T would have no ability to make individualized decisions of whether or on what terms it would share capacity with any ISP. AT&T would similarly have no control over the content that would be offered over its transmission facilities. Instead, it would be required to provide transmission facilities to any requesting ISP and to accede to any ISP's request for access. This is the very definition of common carrier regulation.

Ironically, the District Court relied on *Midwest Video* to conclude that Portland's forced access requirement is not common carrier regulation. E.R. 0203. It gave two reasons. First, the Ordinances do not require that access be given to "any member of the public" but only to a subset of the public ("only . . . competing ISPs"). Second, the

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[47] *See, e.g., FCC Approval Order* ¶ 29 ("Commenters advocating [access by multichannel video programming distributors to cable capacity] rely on the open access rules applicable to common carriers and seek to expand those requirements beyond traditional common carrier functions. We continue to recognize and adhere to the distinctions Congress drew between cable and common carrier regulation" and deny the request).

Ordinances order access to a purported "essential facility" which is "not the same as regulating that business as a common carrier." *Id.* Each conclusion is wrong.

Midwest Video itself refutes the District Court's conclusion that a common carrier regulation requires service to the entire public, not merely a subset of it. In *Midwest Video*, the Supreme Court invalidated three access requirements that were not open to the entire public, but that only applied (as the FCC's order explained) to "specified users"[48] -- *i.e.*, "educational and governmental bodies"[49] and the unaffiliated programmers that use leased access.[50]

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[48] *See Amendment of Part 76 of the Commission's Rules and Regulations Concerning the Cable Television Channel Capacity and Access Channel Requirements of Section 76.251*, 59 F.C.C.2d 294, 296 (1976).

[49] *See Midwest Video* v. *FCC*, 571 F.2d 1025, 1032 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979).

[50] The District Court cited a footnote from *Midwest Video* that distinguished the leased access requirements from regulations that required local cable systems to carry local broadcast television stations and that were not at issue in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), but that were discussed in it. The District Court apparently believed that the difference between these regulations and those invalidated in *Midwest Video* was that the latter required that access be granted to the entire public. *See* E.R. 0203 (citing *Midwest Video* at 706-707 n.16). As shown above, that is wrong. Further, *Southwestern Cable* did not discuss common carriage, but upheld the requirements that were at issue only because they were found to be "necessary to ensure the achievement of the Commission's statutory responsibilities" to protect the viability of its broadcasting licensees and were reasonably ancillary to the FCC's broadcast jurisdiction. *Midwest Video*, 440 U.S. at 706.

Indeed, it has been settled for nearly a century that a firm need not offer to serve the entire public to be a common carrier. In *Terminal Taxicab* v. *Kutz*, 241 U.S. 252 (1916) (Holmes, J.), the Supreme Court held that a taxicab operator was a common carrier even though it had held itself out indiscriminately to serve only the guests of a particular hotel. The Court reasoned that "[n]o carrier serves all the public," and it is sufficient that it is obligated to serve a subset of it. *Id.* at 255. As the D.C. Circuit stated sixty years later, *Terminal Taxi* and other "cases make clear . . . that common carriers need not serve the whole public." *National Association of Regulatory Utility Comm'rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976). "One may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population" (*id.* at 641), and a person "whose service is of possible use to only a fraction of the population" will be a "common carrier if he holds himself out to serve indifferently all potential users" and does not "make individualized decisions in particular cases whether and on what terms to serve." *National Association of Regulatory Utility Comm'rs* v. *FCC*, 533 F.2d 601, 608-609 (D.C. Cir. 1976).[51] Because the Ordinances require TCI indiscriminately to

[51] *See also Shell Offshore Services Co.*, 11 FCC Rcd 10119, ¶ 8 (1996) (finding common carriage even though the "proposed system will be a narrow one serving [only] a limited group of users").

provide transmission facilities to ISPs who are the potential users of the facilities, the Ordinances impose common carrier regulation.

There is also no basis for the District Court's conclusion that because Portland allegedly was regulating the TCI cable system as an "essential facility," the forced access requirements are not common carrier requirements. Section 541(b)'s ban on common carrier regulation is absolute and unconditional. It does not create an exception for cable systems that are deemed "essential," and nothing in *Midwest Video* supports such a notion. To the contrary, the beneficiaries of the forced access regulations at issue in *Midwest Video* had maintained that they had no other alternatives to cable systems to transmit their programming.

In addition, while the concept of "essential facilities" has no legal relevance under Title VI of the Communications Act, the doctrine could not be invoked here even if it were pertinent. The concept of essential facilities is a basis for finding that a firm's past conduct violates the antitrust laws -- after a full adjudication in a court of law -- if a firm is found to have controlled an essential facility and unreasonably denied access to it to maintain a monopoly. As this Court has held, "[a] facility that is controlled by

a single firm will be considered 'essential' only if control of the facility carries with it the power to eliminate competition in the downstream market."[52]

Here, contrary to the District Court's conclusion, the Portland tribunals did not conduct proceedings designed to determine whether cable systems were "essential" to online service providers, received no competent proof, and did not find that essential facilities were involved, much less that the TCI cable system had the power to eliminate competition in "downstream" online service markets. Nor was there any conceivable basis for a finding that TCI's Portland system (which does not yet offer TCI@Home) is an essential facility. Online services are dominated by the services that AOL, Microsoft, and others provide using the facilities of local telephone monopolists, not cable systems. As the FCC has also found, there are a large number of actual participants and potential entrants who are using multiple competing technologies and facilities to provide high-speed transmission for online services.[53]

Finally, the fact that the Ordinances are forbidden common carrier regulation is vividly illustrated by consideration of the common carrier regulations that apply to monopoly local telephone companies. Under the FCC's *Computer III* regulations, if a local telephone company provides an online service or some other "enhanced"

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[52] *See Alaska Airlines* v. *United Airlines*, 948 F.2d 536, 544 (9th Cir. 1991).

[53] *See Advanced Services Order* ¶¶ 4, 12.

service, it is required to allow other providers to connect with and use "the telephone company's transmission network on an 'unbundled' and 'equal access' basis." *See Computer III*, 104 FCC 2d 958, 1019 (1986). The implementation of these regulations has required the FCC to regulate the rates, terms, and conditions under which other online service providers can access telephone company transmission facilities.[54]

By decreeing that AT&T provide "nondiscriminatory access" to unaffiliated ISPs, Portland will likewise be required to engage in broad regulation of rates, terms, and conditions at which such access will be provided. As explained above, there is no "rate" which TCI currently "charges" @Home that could simply be applied to other ISPs. Rather, TCI purchases from @Home the right to distribute @Home's content and Internet capabilities (to which TCI adds its own content to establish the TCI@Home cable service), and TCI pays @Home with a share of the revenues that TCI collects from its subscribers. This arrangement is a reflection of what each party brings to the table -- @Home, for instance, provides content, Internet connectivity, and service support for TCI -- and of the minority equity stake that TCI holds in @Home.

This complex arrangement cannot be transferred to a forced relationship with one or more ISPs, and the Ordinances' requirement of "nondiscriminatory access" would

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[54] *See Third Computer Inquiry*, 104 F.C.C.2d 958 (1986); *see also California* v. *FCC*, 39 F.3d 919 (9th Cir. 1994); *California* v. *FCC*, 4 F.3d 1505 (9th Cir. 1993); *California* v. *FCC*, 905 F.2d 1217 (9th Cir. 1990).

be meaningless unless and until Portland authorities were to engage in proceedings that determine a nondiscriminatory and "fair price" for the transmission facilities that TCI would provide the ISPs and prescribe other terms of the relationship that would somehow be deemed equivalent to @Home's. Indeed, Portland acknowledged below that it would need to "commence a formal quasi-adjudicatory, hearing" to address rate issues as well as other technical details of forced access.[55] As FCC Commissioner Michael Powell has stated, any forced access requirement would quickly "mire" regulators in proceedings to "resolve disputes over price" and myriad other aspects of the provisioning of broadband facilities, and would require "a never-ending regulatory exercise to catch up with change."[56] This epitomizes the common carrier regulation that Congress enacted § 541(c) to prevent.

47 U.S.C. § 544(f)(1). Section 544(f)(1) provides that "[a]ny Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in [Title VI]." Section 544(f)(1) was passed because Congress recognized that overregulation of the cable industry during the 1960s and 1970s had "unfairly inhibited the growth and

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[55]E.R. 0192.

[56] Remarks by Michael E. Powell, Commissioner, Before the Federal Communications Bar Assoc. (June 15, 1999).

development of cable."[57] To ensure that history did not repeat itself, Congress precluded any regulation of the provision or content of cable services unless it was specifically authorized by other provisions of the Act.[58] "Congress thought a cable company's owners, not government officials, should decide what sorts of programming the company would provide." *United Video, Inc. v. FCC*, 890 F.2d 1173, 1189 (D.C. Cir. 1989).[59]

The Ordinances expressly condition TCI's provision of the TCI@Home cable service to its Portland-area customers on TCI's "agreement" to supply unaffiliated ISPs with a direct connection to the cable system on nondiscriminatory terms. In other words, TCI's "provision" of the TCI@Home cable service and any other interactive online cable services triggers the Ordinances' forced access requirements. That violates the plain terms of § 544(f)(1).

The District Court ruled that the Ordinances do not violate § 544(f)(1) because they are "content-neutral." E.R. 0204. Even if it were true, that finding would be

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[57] H.R. Rep. No. 98-934 at 22 (1984).

[58] *Id.* at 70; *Cable Television Ass'n* v. *Finneran*, 954 F.2d 91, 97-98 (2d Cir. 1992) (holding that 47 U.S.C. § 544(f)(1) has divested "both the states and the FCC of regulatory authority").

[59] *See also Time Warner Cable v. City of New York*, 943 F. Supp. 1357, 1367, 1399 (S.D.N.Y. 1996) (47 U.S.C. § 544(f)(1) protects the programming decisions of the cable operator), *aff'd sub nom. Time Warner Cable v. Bloomberg L.P.*, 118 F.3d 917 (2d Cir. 1997).

irrelevant. Franchising authorities "may not impose requirements regarding *the provision or* content of cable services, except as expressly provided in this subchapter." 47 U.S.C. § 544(f)(1) (emphasis added). The Ordinances would require the reconfiguration of TCI's cable systems due to its "provision" of a particular cable service.

Moreover, the statute bars *any* requirements relating to the content of cable services -- whether or not they are deemed "content neutral" -- except where expressly authorized by Title VI. The statute's broad and unconditional prohibition assures that there is no interference with Congress's goal of preserving cable operators' control over the programming and services they provide.

In all events, the District Court was wrong as a matter of law in concluding that the Ordinances are "content neutral." The District Court's conclusion rested on its statement that TCI/AT&T had "already agreed to give @Home subscribers access to unaffiliated ISPs." The District Court relied on the facts that the TCI@Home subscribers could use its Internet access features to connect to the websites of AOL or any other online service provider and that TCI@Home subscribers are further able to program their computers effectively to bypass the "home page" of TCI@Home and go directly to a specified online service provider. In the District Court's view, it followed

that, "as applied" the Ordinances "affect[ed] only economic arrangements" and did not impose requirements relating to "content" of cable services. E.R. 0204.

But this purported "indirect" and "voluntary access" merely represented the use of the connections to the Internet and other capabilities that TCI has chosen to offer in its TCI@Home cable service. By contrast, the Portland "forced access" requirement imposes radically different and burdensome new requirements on TCI by reason of its provision of a cable service that has a particular kind of content. Specifically, by virtue of TCI's provision of an online cable service, the Ordinances would require TCI to reconfigure its cable systems so that customers can directly subscribe to AOL and other competing online services over TCI's cable systems. That is the imposition of burdens and other requirements on TCI solely because of the content of the cable services it has chosen to offer, and the Ordinances directly interfere with TCI's editorial discretion to determine the repertoire of cable services that comprise its offering to its subscribers.

Accordingly, it is irrelevant that TCI@Home service allows subscribers to obtain the content of AOL and other online services, and the District Court erroneously concluded that the Ordinances "as applied" are thus "content neutral." This is akin to a holding that the Los Angeles Times can be required to put a letter to the editor on the front page of the newspaper merely because it was willing to print it in its letters to the

editor column -- or that the Times can be required to print and distribute a third party's newspaper merely because the Times would have included the third party's advertising supplement in the Sunday paper.

Contrary to the District Court's statement, the decisions in *United Video*, and *Storer Cable Communications v. City of Montgomery Alabama*, 806 F. Supp. 1518 (M.D. Ala. 1992), provide no support for the Ordinances. Both decisions make clear that local governmental regulations that force cable operators to provide particular programming are prohibited by § 544(f). Thus, in *United Video* the court of appeals upheld the FCC's Syndex Rule[60] because "it d[id] not require carriage of any particular program or *type of program*." 890 F.2d 1189 (emphasis added). Similarly, *Storer* upheld a municipal ordinance because it "would not . . . interfere with the editorial decisions of the plaintiffs by telling them what programming they can or cannot provide to the public."[61] Because that is what the Ordinances do, *Storer* and *United Video* confirm that they violate § 544(f).

[60] The FCC's Syndex Rule provided that a broadcast station with exclusive rights to a syndicated program could forbid a cable company from importing the program into its local broadcasting area from a distant station.

[61] The ordinance in question would have required cable operators to "license programming" in certain situations. *Storer*, 806 F. Supp. at 1546.

C. 47 U.S.C. § 533(d)(2) Does Not Save The Forced Access Requirements From Preemption.

In rejecting the preemption claims, the District Court concluded that Portland had acted to maintain competition in cable services and that 47 U.S.C. § 533(d)(2) confirms "the power of local franchising authorities to preserve competition for cable services." E.R. 0201. Quite apart from the fact that Portland did not and could not make findings that forced access requirements promote competition, the court's reliance on § 533(d) is mistaken, for at least three reasons.

First, § 533(d)(2) provides no roving mandate to impose any restrictions a local franchising authority deems necessary to promote competition. Instead, as a reading of the entire subsection makes clear, Congress only exempted certain competition-preserving measures from § 533's general ban on state or local prohibitions on "ownership or control" of cable systems:

> Any State or franchising authority may not prohibit the ownership or control of a cable system by any person because of such person's ownership or control of any other media of mass communications or other media interests. *Nothing in this section* [§ 533] shall be construed to prevent any State or franchising authority from prohibiting the ownership or control of a cable system in a jurisdiction by any person (1) because of such person's ownership or control of any other cable system in such jurisdiction; or (2) in circumstances in which the State or franchising authority determines that the acquisition of such a cable system may eliminate or reduce competition in the delivery of cable service in such jurisdiction.

47 U.S.C. § 533(d) (emphasis added). As a matter of plain meaning, § 533(d) does not exempt competition-preserving measures from the preemptive reach of other provisions of the Communications Act -- such as the four provisions that expressly preempt the forced access requirement here. Rather, the exemption applies only to "this section" and its ban on local prohibitions on "ownership and control" of a cable system, not to the other prohibitions of the Act that bar forced access requirements.

Second, even if the "preserving competition" phrase could somehow be extended to other provisions of the Act, it would still be inapposite here. The phrase applies only where a transfer of "ownership or control" would "eliminate or reduce competition in the delivery of cable service in [a given] jurisdiction." 47 U.S.C. § 533(d)(2). Here, it is both undisputed and beyond dispute that competition in the delivery of cable service in Portland will be unaffected by AT&T's acquisition of TCI.

Presently, TCI is the only cable operator delivering cable service in the TCI franchise areas in Portland. After AT&T acquires TCI's cable system in Portland, TCI (albeit with a new owner), will be the only cable system delivering cable service in Portland. The change in TCI's ownership has no effect on competition.

In addition, it is undisputed that TCI planned to roll out TCI@Home on its own before AT&T and TCI agreed to merge. There is therefore no causal link between

AT&T's acquisition of TCI and the competitive harm posited in Portland, a fact likewise fatal to reliance on § 533(d).[62]

Third, the "competition" Portland claims to be preserving is not within the ambit of § 533(d). The subsection does not apply to any and all competitive concerns; instead, it applies only to "competition *in the delivery of cable service*." 47 U.S.C. § 533(d) (emphasis added); *see generally* H.R. Rep. No. 102-628, at 91 (1992). Cable service is provided by cable system operators.[63] But, as noted above, the municipalities and proponents of the forced access requirement made plain that their aim was not to preserve competition between cable system operators, but rather to promote "competition" between a single cable system operator (TCI) and entities which provide online services over telephone lines and therefore do not "deliver" cable service at all.

[62] Indeed, the FCC cited TCI's prior intentions in approving AT&T's acquisition of TCI without any mandatory access requirements. *See FCC Approval Order* ¶ 94.

[63] *See id.* § 522(5) (defining "the term 'cable operator'" in terms of "any person or group of persons who provides cable service over a cable system").

II. THE ORDINANCES VIOLATE THE FIRST AMENDMENT.

The Ordinances also violate the First Amendment. The District Court was wrong in concluding that forced access requirements are "economic regulations" that are to be adjudged under a minimal rationality test. E.R. 0205. Indeed, although the Ordinances are content-based requirements subject to strict scrutiny, they also patently fail to satisfy the heightened standards applicable to requirements that are content neutral.

A. The District Court's Holding That The Ordinances Are Mere "Economic Regulations" Ignores Their Impact On Protected Speech.

It is axiomatic that cable operators enjoy First Amendment rights. "Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment." *Turner I*, 512 U.S. 622, 636 (1994); *accord Preferred Communications, Inc.* v. *City of Los Angeles*, 13 F.3d 1327, 1330 (9th Cir. 1994). Here, however, the District Court held that Portland's forced access requirement is only "economic regulation" that infringes no interests protected by the First Amendment. It reasoned that forced access does not discriminate in favor of any "particular message" and that there was no evidence that "cable subscribers" would "associate AT&T with the speech of unaffiliated ISPs," and it analogized the Ordinances to a requirement that shopping centers allow persons

lawfully on the premises to protest. E.R. 0205 (*citing PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 87 (1980)).

This holding violates settled law. Cable television is a medium through which cable operators select and then transmit news, analysis, entertainment, and other protected speech. Like newspaper publishers and other media, a cable operator exercises "editorial discretion over which stations and programs to include in its repertoire." *Los Angeles* v. *Preferred Communications Inc.*, 476 U.S. 488, 494 (1986). The Supreme Court has thus held that statutes or other "compulsory access" laws that require a newspaper or a cable operator to carry any particular programs, services, articles, or any other content infringes their First Amendment rights to decide whether or how to include particular content in their respective media, regardless of any other considerations.

In *Miami Herald Publ. Co.* v. *Tornillo*, 418 U.S. 241, 254-55 (1974), the Supreme Court invalidated a state statute that gave political candidates a right of equal access to the pages of a newspaper in order to publish a reply to newspaper articles. The Court held that this "government coercion" would interfere with the newspaper publisher's First Amendment rights:

> Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, *the Florida statute fails to clear the barriers*

> *of the First Amendment because of its intrusion into the function of editors.* A newspaper is more than a passive receptacle or conduit for news, comment, and advertising.

Id. at 258 (emphasis added).

In *Turner I*, the Supreme Court applied these same principles to cable systems and rejected the claim that they should be afforded the lesser First Amendment protection given to broadcast television. 512 U.S. at 637. It held that the "must carry" provisions of the Cable Act could not be upheld as mere "economic regulation," for laws that require cable operators to carry particular programming interfere with their editorial function, "'pose a particular danger of abuse by the State' and so are *always* subject to at least some degree of heightened First Amendment scrutiny." *Id.* at 640-41 (emphasis added) (citation omitted). *Turner I* thus conclusively establishes that the District Court was required to apply heightened First Amendment scrutiny in deciding the constitutionality of the Ordinances, and that it was error to apply a minimum rationality standard.

In this regard, as explained in Part I.B, it is irrelevant that the TCI@Home service allows cable subscribers to use the Internet access features to access AOL or any other online service. The Ordinances plainly interfere with TCI's control over what TCI includes in its "repertoire." That is particularly so because the Ordinances

impose burdens on TCI because it has elected to offer cable services that have a particular kind of programming.

The District Court thus should have decided whether it would evaluate the Ordinances under the "intermediate" scrutiny that applies to "content neutral" carriage requirements (*Turner I*, 512 U.S. at 640-41, 662) or the "strict" scrutiny that applies to forced access requirements that are not content neutral. *Id.* at 657-61. As explained in Part II.C, the Ordinances are not content neutral, and should have been evaluated under "strict scrutiny" and upheld only if found to be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 231 (1987). However, that question need not be reached, for the Ordinances do not satisfy the "intermediate" standard.

B. Even If Strict Scrutiny Does Not Apply, The Ordinances Are Invalid.

Under "intermediate" scrutiny, a forced access requirement is invalid unless "it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner II*, 520 U.S. at 189. Under this standard, proponents of forced access must demonstrate that the restriction is in fact "designed to address a real harm" and to "alleviate [the harm] in a material way." *Id.* at 195. "When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do

more than simply posit the existence of the disease sought to be cured." *Turner I*, 512 U.S. at 664.

Portland has not met, and could not meet, this burden. Portland authorities had no competent evidence before them when they adopted the Ordinances; they made no findings, and the Chairman of the MHCRC stated that they had "barely looked at" the forced access issue "as a Commission." E.R. 0119. Nonetheless, Portland argued in the District Court that forced access was required to protect "competition" for "Internet services." E.R. 0150-51, 0163. The District Court accepted these claims not because they were supported, but because the court concluded that "[i]t is not [its] role to second-guess the findings supporting the decision to impose open access." E.R. 0202. However, it is well settled that courts have an "obligation to exercise independent judgment when First Amendment rights are implicated." *Turner I*, 512 U.S. at 666; *accord Sable Communications of Calif., Inc. v. FCC*, 492 U.S. 115, 129 (1989).

If the District Court had exercised independent judgment, it would have recognized that Portland's claims of future harm to competition are unsupported, speculative, and contrary to the FCC's well-supported conclusions. Although TCI@Home is currently provided in other parts of the country, there is no evidence that it has had any substantial adverse effects on competitors, much less on *competition*. Indeed, all Portland could rely upon were unsupported and speculative statements by

rivals of AT&T and TCI that TCI's cable system will be an "essential facility" when it hereafter offers TCI@Home in Portland and that other ISPs will then be driven from the market if there is no forced access requirement. E.R. 0142-43, 0150-51. Indeed, while Portland relied on "testimony" by the President of Oregon association of ISPs, he admitted under questioning that he did not "necessarily know if we [rival ISPs] are afraid of being squeezed out of the marketplace." E.R. 0053-54. In all events, none of this "testimony" by interested parties is sufficient to support the ordinance, for it is not "supported by verifiable information and citation to independent sources." *Turner II*, 520 U.S. at 199.

By contrast, there is a readily available source of reliable data that is based on verifiable information and citation to independent sources. The FCC's findings and the comprehensive record on which they were based establish that cable modem services do not pose a threat to competition in the provision of online and Internet access services and that the Ordinances are not "designed to address a real harm."

While that itself establishes the First Amendment violation, Portland and the District Court also failed to make "any findings concerning the actual effects of [the challenged regulation] on the speech of cable operators and cable programmers," which is "critical" to determining whether the ordinance is narrowly tailored. *Turner I*, 512 U.S. at 667-68 (plurality section). In particular, no determination was made of the "the

extent to which cable operators will, in fact, be forced to make changes in their current or anticipated programming selections" as a result of the Ordinances. *Id.* That is an additional reason to invalidate the Ordinances in view of the questions whether and when cable systems could technically provide "nondiscriminatory access" to other ISPs, whether the effect of the ordinance would be to delay or prevent the offering of cable modem services, or whether providing access to multiple ISPs (if and when feasible) could degrade TCI's cable service and even force it to drop existing video programming due to resulting bandwidth management or related problems.

C. In Any Event, The Ordinances Are Content-Based Intrusions On AT&T's Editorial Control That Cannot Survive Strict Scrutiny.

Finally, the Ordinances are content-based requirements that cannot survive strict scrutiny. In particular, as explained above, the Ordinances impose costly and burdensome requirements that are triggered entirely by the content of TCI's speech: its decision to offer the TCI@Home interactive online cable services that provide access to the Internet. Correlatively, the Ordinances provide benefits only to particular speakers -- AOL and other providers of Internet and online services. The Ordinances favor providers of this programming over all forms of programming that TCI may choose to provide, and punish TCI specifically for providing online services that offer access to the Internet.

Portland's Ordinances are thus fundamentally different from the must-carry rules that the Supreme Court held to be "content-neutral" in *Turner I.* As the Supreme Court emphasized, the must-carry "rules impose obligations upon all operators . . . regardless of the programs or stations they now offer or have offered in the past." 512 U.S. at 644. Similarly, the Supreme Court emphasized that these must carry obligations did not "impose[] a restriction, penalty, or burden by reason of the views, programs, or stations the cable operator has selected or will select," and thus "an operator cannot avoid or mitigate its obligations under the Act by altering the programming it offers to subscribers." *Id.* By contrast, under the Ordinances, TCI can avoid its obligations only by foregoing the speech that the Portland has disfavored due to its alleged potential effect on Oregon's ISPs -- *i.e.*, the offering of TCI @Home to its customers. Moreover, the speech that Portland has disfavored is of the utmost public importance. As the Supreme Court has stated, "from the publishers' point of view," online services content "constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers." *Reno* v. *ACLU*, 521 U.S. 844, 853 (1997).

Thus, the Ordinances are subject to strict scrutiny. *See Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241 (1974). This conclusively establishes that the Ordinances violate the First Amendment Even if Portland's justifications were

somehow sufficient to satisfy intermediate scrutiny, they cannot --- for the reasons stated above -- satisfy the much more stringent standards of strict scrutiny.

III. THE ORDINANCES VIOLATE THE COMMERCE CLAUSE.

Finally, the Portland ordinances violate the "negative" or "dormant" aspect of the Commerce Clause. It "prohibit[s] state or municipal laws whose object is local economic protectionism." *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994). It further invalidates local laws whose negative effects on interstate commerce are disproportionate to any possible local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The Ordinances violate both principles.

First, the Ordinances were enacted for the stated purpose of protecting local ISPs and their employees from losses. *See, e.g.*, E.R. 0106 (citing the "very real potential that consumer [Internet] access business could go out of business" if forced to compete with @Home); E.R. 0111 (County Commissioner stating that he hopes "AT&T listens to these *local* policy makers who say 'We care about *our* industry, and this is the right way to go'") (emphasis added); E.R. 0128 (claiming that "over 427 jobs of your top 25 Internet providers will be saved by this"); E.R. 0131 (City Commissioner arguing that without forced access "some harm could come to other Portland companies"). Indeed, in the District Court, Portland affirmatively defended the Ordinances by relying on this protectionist purpose. E.R. 0201. This is the classic form of "economic

protectionism" that the Supreme Court has "routinely struck down." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988).

In addition, the Ordinances also violate the Commerce Clause under *Pike*. Portland cites the "local benefit" of preventing the "monopolization" of Internet services, but, as demonstrated above, these purported "benefits" are nonexistent. By contrast, the Ordinances' burdens on interstate commerce are substantial, particular given the Congressional determination that "[i]t is the policy of the United States to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2).

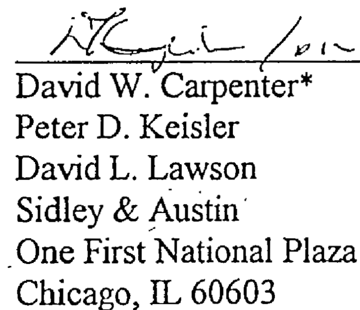
In addition, the burden on interstate commerce is established by consideration of the way in which "the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would rise if not one, but many or every, [jurisdiction] adopted similar legislation." *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989). In the words of FCC Chairman William E. Kennard: "There are 30,000 local franchising authorities in the United States. If each and every one of them decided on

their own standards for [Internet] communications on the cable infrastructure, there would be chaos.'"[64]

CONCLUSION

Accordingly, the District Court's judgment should be reversed, and it should be directed to enter a judgment declaring the Ordinances invalid.

Respectfully submitted,



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August 9, 1999

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[64] *See supra* n.28.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of August, 1999, I caused two copies of the foregoing Opening Brief of Appellants to be served via overnight mail upon the following:

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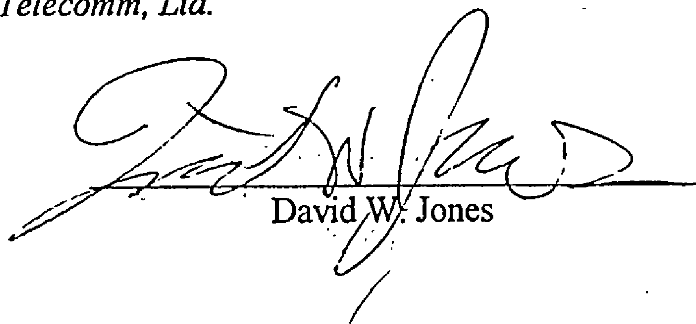

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STATUTORY ADDENDUM

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