



"telecommunications carriers." Section 254(d) requires all such carriers that provide interstate telecommunications services to contribute to universal service.<sup>3</sup>

As the principal trade association of the local exchange carrier ("LEC") industry, USTA is interested in this matter because many of its members are carriers that provide interstate telecommunications service and thus contribute to universal service as required by section 254(d).

The Act requires interstate telecommunications carriers to contribute to universal service with only the narrowest of exceptions. This obligation must be shared among all such carriers and their customers, regardless of the technology that such carriers use to provide telecommunications service. For example, wireless commercial mobile radio service ("CMRS") providers, like wireline carriers, must contribute to universal service. If some carriers do not contribute, the obligation becomes greater for those that do. This would be contrary to the purpose of section 254 while disadvantaging the contributing carriers and their customers. This would violate the nondiscrimination requirements of section 254 and the Commission's basic principle of competitive neutrality in administering universal service.

When granted, the requested ruling will demonstrate the Commission's commitment to regulatory parity as convergence continues for different technologies and service offerings in the communications industry.

---

<sup>3</sup> Even if the Commission were to find that some cable operators that provide cable broadband transmission are not interstate telecommunications carriers, the Commission should require them to contribute to universal service as providers of interstate telecommunications, as section 254(d) authorizes.

## II. THE COMMISSION SHOULD CLARIFY THE UNIVERSAL SERVICE CONTRIBUTION OBLIGATIONS OF CABLE OPERATORS

### A. All Telecommunications Carriers That Provide Interstate Telecommunications Service Must Contribute To Universal Service

Universal service has been one of the principal goals of U.S. telecommunications policy for decades. The addition of section 254 to the Act in 1996 demonstrates congressional recognition of the importance of universal service to all Americans.

Section 254(d) establishes the obligation to contribute to universal service:

Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanism established by the Commission to preserve and advance universal service. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be *de minimis*. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.<sup>4</sup>

The Commission has applied section 254(d) broadly in order to ensure that telecommunications carriers contribute to universal service "on an equitable and nondiscriminatory basis."<sup>5</sup> In doing so, the Commission has provided detailed regulations to implement section 254(d).<sup>6</sup> It has pursued enforcement actions against

---

<sup>4</sup> 47 U.S.C. § 254(d).

<sup>5</sup> The Commission's only exemption from the contribution requirement for interstate telecommunications carriers is if a carrier contributes *de minimis* amounts, which it applies to carriers whose interstate end-user telecommunications revenues in a given year are less than \$10,000. *See* 47 C.F.R. § 54.705.

*See, e.g.*, 47 C.F.R. §§ 54.706-54.717.

carriers that fail to make their universal service contributions. The Commission has denied requests by small carriers for waiver of or forbearance from its contribution rules.<sup>8</sup>

B. Cable Operators That Provide Telecommunications Services Are Telecommunications Carriers

As the Court of Appeals found in *City of Portland*, cable broadband transmission service is an example of a telecommunications service offered by cable operators:

The Communications Act includes cable broadband transmission as one of the “telecommunications services” a cable operator may provide over its cable systems.<sup>9</sup>

This holding is central to the Ninth Circuit’s decision in *City of Portland*, which held that the Act prohibits a cable franchising authority (in this case, for Portland, Oregon) from imposing regulations on a cable operator’s broadband Internet access service. In so holding, the Court of Appeals applied section 621(b)(3) of the Act, codified at 47 U.S.C. §541(b)(3) (“section 541(b)(3)”), as well as the Act’s definition of “telecommunications service”:

We hold that subsection 541(b)(3) prohibits a franchising authority from regulating cable broadband Internet access, because the transmission of Internet

---

<sup>7</sup> See *North American Telephone Network, LLC*, File No. EB-00-IH-0054, NAL/Acct. No. x32080026; Notice of Apparent Liability for Forfeiture, DA 00-1746 (rel. Aug. 4, 2000); *Matrix Telecom, Inc.*, File No. EB-00-IH-0057, NAL/Acct. No. x32080022, Notice of Apparent Liability, for Forfeiture, FCC 00-262 (rel. Jul. 27, 2000); *ConQuest Operator Services Corp.*, 14 FCC Rcd 12518 (1999).

<sup>8</sup> See *Federal-State Joint Board on Universal Service; Startec Global Communications Corporation Request for Forbearance or Exemption from the Universal Service Contribution Requirement*, 14 FCC Rcd 8030 (1999).

<sup>9</sup> See *City of Portland*, 231 F.3d at 878.

service to subscribers over cable broadband facilities is a telecommunications service under the Communications Act.<sup>10</sup>

As the Ninth Circuit found, section 541(b)(3) specifically limits the power of cable franchising authorities to regulate cable operators' provision of telecommunications services. Indeed, because AT&T's @Home broadband service is a telecommunications service, the Ninth Circuit stated:

Thus, AT&T need not obtain a franchise to offer cable broadband, see 47 U.S.C. § 541(b)(3)(A); Portland may not impose any requirement that has "the purpose or effect of prohibiting, limiting, restricting or conditioning" AT&T's provision of cable broadband, see 47 U.S.C. § 541(b)(3)(B); Portland may not order AT&T to discontinue cable broadband, see 47 U.S.C. § 541(b)(3)(C); and Portland may not require AT&T to provide cable broadband as a condition of [a] franchise transfer, see 47 U.S.C. § 541(b)(3)(D).<sup>11</sup>

Because the limitations on franchise authorities of section 541(b)(3) only apply when a cable operator offers a telecommunications service, the Court of Appeals carefully analyzed the legal status of AT&T's cable broadband offering.<sup>12</sup> The Ninth Circuit found that the offering is a telecommunications service, which the Act defines to mean:

---

<sup>10</sup> See *id.* at 879.

<sup>11</sup> *Id.*, citing section 541(b)(3). See also *City of Portland*, 216 F.3d at 878, citing 47 U.S.C. § 253(a). The Court of Appeals noted that the Act elsewhere contemplates the provision of telecommunications services by cable operators over cable systems. See *id.*, citing 47 U.S.C. § 224(d)(3).

<sup>12</sup> The Ninth Circuit's detailed consideration of AT&T's broadband transmission service contrasts with the conclusory dicta in *MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712 (E.D. Va. 2000) ("*County of Henrico*"), *appeal pending* (4<sup>th</sup> Cir. 2000). There, in a case decided prior to *City of Portland*, the District Court stated that MediaOne's "Road Runner" Internet service was "cable service" as defined in the Act, 97 F. Supp. 2d at 716, a finding that the Commission has never made. Similarly, *City of Portland* addresses a different issue from that considered in *Gulf Power Company v. FCC*, 208 F.3d 1263 (11<sup>th</sup> Cir. 2000), which found that Internet service – as opposed to broadband transmission service – is not telecommunications service under the Act.

[T]he offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.<sup>13</sup>

The Court of Appeals explained that:

Like other ISPs [information service providers], @Home consists of two elements: a “pipeline” (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs, @Home controls all of the transmission facilities between its subscribers and the Internet. To the extent @Home is a conventional ISP, its activities are one of an information service. However, to the extent that @Home provides its subscribers Internet transmission over its cable broadband facility, *it is providing a telecommunications service as defined in the Communications Act.*<sup>14</sup>

In light of this holding, USTA requests the Commission to declare that cable operators that provide telecommunications services such as broadband transmission service are telecommunications carriers.

With limited exceptions not applicable to cable operators, providers of telecommunications services are telecommunications carriers by definition. The Act defines the term “telecommunications carrier” to mean:

*[A]ny provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.*<sup>15</sup>

---

<sup>13</sup> 47 U.S.C. § 153(46). The Act defines the term “telecommunications” to mean:

[T]he 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 transmission of information over cable operators’ broadband offerings satisfies this definition.

<sup>14</sup> See *City of Portland*, 216 F.3d at 878 (emphasis added).

<sup>15</sup> See 47 U.S.C. § 153(44).

To the extent that cable operators offer telecommunications services, they satisfy this definition. The Act's "telecommunications carrier" definition is consistent with the long-standing principle that an entity can be a telecommunications carrier for some purposes but not others,<sup>16</sup> which applies directly to cable operators that offer transmission services.

### III. CABLE OPERATORS MUST CONTRIBUTE TO UNIVERSAL SERVICE TO THE EXTENT THAT THEY ARE TELECOMMUNICATIONS CARRIERS PROVIDING INTERSTATE TELECOMMUNICATIONS SERVICES

The Commission should declare that cable operators are subject to the universal service contribution requirements of section 254(d). When cable operators provide telecommunications services, they, like any other entity, are telecommunications carriers. The Commission should rule that section 254 applies to cable operators that are telecommunications carriers, and that such carriers should contribute to universal service like other carriers.<sup>17</sup>

---

<sup>16</sup> See *Nat'l Assoc. of Reg. Util. Comm'rs. v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976).

<sup>17</sup> Even if cable operators were not telecommunications carriers, the Commission has ample "permissive" authority under section 254(d) to require them, as providers of interstate telecommunications, to contribute to universal service to the extent that they provide cable broadband transmission.

For the public interest reasons discussed in the text, the Commission should require universal service contributions from those cable operators, if any, that provide interstate telecommunications but are not telecommunications carriers. See 47 U.S.C. §§ 254(d), 153(43); see also *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9182-9186 (1997), *aff'd in part, rev'd in part sub nom. Texas Off. Of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5<sup>th</sup> Cir. 1999), *cert. granted sub nom. GTE Service Corp. v. FCC*, 120 S.Ct. 2214 (2000). We note that in 1998, the Commission expressed no view on this topic as applied to cable operators that provide Internet access service. See

Of course, according to section 254(d), telecommunications carriers that provide *interstate* telecommunications services must make universal service contributions. The broadband transmission services offered by cable operators for use with the Internet are such interstate services. As AT&T recently explained to the Commission in discussing the jurisdictional nature of traffic to ISPs:

No one disputes that, when evaluated under the courts' and the Commission's traditional end-to-end test, ISP-bound traffic terminates predominantly at distant, out-of-state websites. Therefore, ISP-bound traffic falls squarely within the Commission's longstanding jurisdiction over interstate communications.<sup>18</sup>

This is as true for ISP-bound traffic using the telecommunications services of cable operators as it is for ISP-bound traffic using the telecommunications services of LECs.<sup>19</sup>

The Commission has acted wisely in strictly enforcing the Act's universal service contribution requirement for all telecommunications carriers that provide interstate telecommunications service. This competitively neutral and even-handed policy serves the public interest and should be exercised with respect to cable operators that offer telecommunications service. The requested declaratory ruling will ensure that universal

---

*Federal-State Joint Board on Universal Service*, Report To Congress, 13 FCC Rcd 11501, 11535 n. 140 (1998).

<sup>18</sup> Reply Comments of AT&T Corp., CC Docket Nos. 96-98, 99-68 (filed Aug. 4, 2000) at 1-2. *See also* Comments of USTA, CC Docket Nos. 96-98, 99-68 (filed Jul. 21, 2000).

<sup>19</sup> Other carriers have announced plans to offer bundled packages of cable, telephone service, and Internet access. *See* Bergquist, Lee, *Another player enters arena of high-speed Internet access*, Milwaukee Journal Sentinel (Jun. 21, 2000), available at <http://www.jsonline.com/bvm/news/jun00/cable22062100a.asp> (reporting on plans of Digital Access Inc. ("Digital Access") in the Milwaukee, Wisconsin area); *Comm. Daily Notebook*, Communications Daily (Aug. 9, 2000) at 3 (reporting that Digital Access has obtained its first cable franchise and CLEC status in Wisconsin).



service obligations will be shared, "on an equitable and nondiscriminatory basis," among all such carriers and their customers.

If some carriers do not contribute, the obligation would become greater for those, such as USTA's member LECs, that do contribute. This result would be contrary to the purposes of section 254 and the Commission's principle of competitive neutrality, which guides its universal service support mechanisms and rules.<sup>20</sup> Such disparate treatment would be patently unfair to the contributing carriers and their customers.

The ruling requested in this petition will advance the Commission's application of the principle of regulatory parity to communications industries and service offerings that are converging. In considering AT&T's recent merger activities, the Commission stated:

We review this merger in the context of an unprecedented convergence of communications services, including a trend toward consolidation in communications industries generally and the cable industry in particular. Cable companies are upgrading their systems to provide a full range of video, data, and voice services.<sup>21</sup>

As the cable companies' offerings continue to converge with those of traditional telecommunications carriers,<sup>22</sup> the Commission's regulation of these industries must reflect such convergence in an equitable and efficient way. Enforcement of cable operators' duty to contribute to universal service when they offer telecommunications

---

<sup>20</sup> See *Federal-State Joint Board on Universal Service, supra*, 12 FCC Rcd at 8790, 8801.

<sup>21</sup> See *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, 15 FCC Rcd 9816, 9818 (2000).

<sup>22</sup> See, e.g., *AT&T To Offer Free Local Service Over Cable For Several Months*, *Communications Daily* (Aug. 31, 2000) (stating that in 10 of its markets, AT&T will offer free local phone service over its cable lines until January 31, and that some plans will include free long distance).

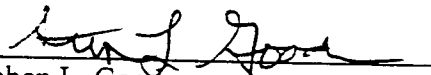
services acknowledges convergence by treating telecommunications service providers and their customers equally. By so promoting universal service, the Commission will directly benefit the American public.

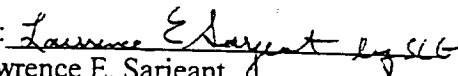
#### IV. CONCLUSION

Section 254(d), the Commission's rules, and the public interest require cable operators that offer telecommunications services to contribute to universal service. The Commission should move expeditiously to grant this petition for declaratory ruling for the reasons stated herein.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

By:   
Stephen L. Goodman  
William F. Maher, Jr.  
Halprin, Temple, Goodman & Maher  
555 12<sup>th</sup> Street, N.W.  
Suite 950 North  
Washington, DC 20004  
(202) 371-9100  
*Counsel for USTA*

By:   
Lawrence E. Sarjeant  
Linda Kent  
Keith Townsend  
John W. Hunter  
Julie Rones  
1401 H Street, N.W.  
Suite 600  
Washington, DC 20005  
(202) 326-7375  
*Its Counsel*

September 26, 2000