

Telecommunications Law: Open Access to Cable Broadband Transmission

AT&T Corp. v. City of Portland,
216 F.3d 871 (9th Cir. 2000)

by
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In *AT&T Corp. v. City of Portland*,¹ the Ninth Circuit considered whether a local cable franchising authority could condition the transfer of a cable franchise upon the cable operator's grant of unrestricted access to its cable broadband transmission facilities.²

In 1998, AT&T — the nation's largest long-distance telephone provider — proposed a merger with Telecommunications, Inc. ("TCI"), which was among the nation's largest cable-television operators.³ In the merger, AT&T received access to TCI's cable broadband transmission system as a conduit for AT&T's "@Home" Internet service. A cable broadband system provides Internet access at much faster speeds than through typical modem connections.⁴ Even though AT&T's @Home service ultimately failed financially, the case raises difficult legal and policy issues that will continue to spark debate.

AT&T and TCI received the requisite approval for this franchise transfer from the Department of Justice, which considers antitrust issues,⁵ and from the Federal Communications Commission ("FCC"), which considers the transfer of federal licenses.⁶ The merger, however, also required approval from the City of Portland and Multnomah County — two local franchising authorities.⁷

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1. *AT&T Corp. v. City of Portland*, 216 F.3d 871, 873-74 (9th Cir. 2000).

2. *Id.* at 873.

3. *Id.* at 874.

4. *Id.* at 873-74.

5. *Id.* (citing *U.S. v. AT&T Corp. and Tele-Communications Inc.*, No. CIV. 98 CV03170, 1999 WL 1211462 (D.D.C. Aug. 23, 1999)).

6. *Id.* (citing *Application for Consent to the Transfer of Licenses and Section 214 Authorizations from TCI to AT&T*, 14 FCC Rcd 3160 (1999)).

7. *Id.* at 875.

Portland referred its inquiry into the proposed merger to the Mount Hood Cable Regulatory Commission, "an intergovernmental agency overseeing cable affairs in the Portland area."⁸ While recommending approval of the merger, the Commission conditioned the transfer of cable operations from TCI to AT&T upon an open-access Internet requirement.⁹ Under this condition, Internet service providers ("ISPs") would have received access to AT&T's broadband cable line — whether or not they were affiliated with AT&T.¹⁰ When AT&T refused to comply, Portland denied the transfer of the cable franchise.

AT&T and TCI then sought declaratory relief in federal district court in Oregon.¹¹ AT&T claimed that the open-access requirement:

- (1) violated the Communications Act of 1934 (as amended by the Telecommunications Act of 1996) regulating cable television;
- (2) violated the First Amendment, Commerce Clause, and Contract Clause of the United States Constitution;
- (3) violated the contract clause of the Oregon Constitution; and
- (4) breached the parties' franchise agreements.¹²

Section 541(c) of the Communications Act prohibits the regulation of a cable system as a common carrier.¹³ Under this provision, AT&T and TCI argued that Portland's open-access requirement was a form of common-carrier regulation.¹⁴

Both sides filed summary-judgment motions, and the district court granted Portland's motion. The court rejected AT&T's claim that the Communications Act preempts the open-access requirement, holding that local authorities have the power to "promote competition in the local economy" unless the plain

8. *Id.*

9. *Id.*; see Christopher E. Duffy, Note, *The Statutory Classification of Cable-Delivered Internet Service*, 100 COLUM. L. REV. 1251, 1257 (2000).

10. *AT&T Corp.*, 216 F.3d at 875.

11. *AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146 (D. Or. 1999), *rev'd*, 216 F.3d 871 (9th Cir. 2000).

12. *Id.* at 1149; see also *AT&T Corp.*, 216 F.3d at 875.

13. 47 U.S.C. § 541(c).

14. *AT&T Corp.*, 43 F. Supp. 2d at 1152.

language of the statute expressly prohibits such regulation.¹⁵ The court also rejected AT&T's other claims, concluding that the open-access condition was not unconstitutional and did not impair the franchise agreements between AT&T and TCI.¹⁶

On appeal, the Ninth Circuit began by noting that since the facts were undisputed, the proper standard of review was *de novo*. Thus, the court considered only the statutory interpretation of the Communications Act.¹⁷ Under the Ninth Circuit's interpretation, a franchising authority is prohibited from conditioning transfer of a cable franchise upon providing other ISPs with open access.¹⁸ The court concluded that:

- (1) cable broadband Internet service is telecommunications — not a “cable service,” as defined by the Communications Act;¹⁹
- (2) the Act, as amended by the Telecommunications Act of 1996, prevents a local franchising authority from regulating a telecommunications service;²⁰ and
- (3) federal law prohibits a local franchising authority from conditioning a franchise transfer on providing unaffiliated ISPs with open access to unrestricted access to the recipient's cable broadband transmission facilities.²¹

In reaching its first conclusion, the Ninth Circuit relied on the plain language of the statute. As the court observed, the Communications Act defines “cable service” as a “one-way transmission of programming to subscribers.”²² But AT&T's @Home Internet service is a two-way communication involving exchanges of information through email, chat rooms, and web pages.²³ Further,

15. *Id.*

16. *Id.* at 1154-55.

17. *AT&T Corp.*, 216 F.3d at 876.

18. *Id.* at 873.

19. *Id.* at 877.

20. *Id.* at 879.

21. *Id.*

22. *Id.* at 876; see also 47 U.S.C. § 522(6) (including “video programming” or “other programming service”).

23. *AT&T Corp.*, 216 F.3d at 876-77.

the court reasoned that while cable-franchising authorities can require cable operators to use certain channels for public or educational programming, the "interactive" nature of the Internet made it unreasonable to require Internet providers to carry public programming channels. Thus, the court concluded that the cable system regulations did not apply to Internet services and that AT&T's cable broadband Internet service was not a "cable service" under the Act.²⁴

The Ninth Circuit also concluded that AT&T's @Home service provided a telecommunications service, which, under section 541(b)(3)(A), a cable franchising authority cannot regulate.²⁵ As the court explained, while ISPs themselves are not classified as telecommunications services, they are "information services" that use telecommunications services (telephone lines).²⁶

AT&T's @Home service consists of both Internet service and the cable broadband service (AT&T's own conduit for the Internet service). Under the Communications Act, "advanced telecommunications" is defined as "high-speed, switched, broadband telecommunications capability," without specifying the medium or technology to be used. According to the court, this includes AT&T's cable broadband system.²⁷

In summary, the Ninth Circuit concluded that Portland may not impose an open-access requirement on the transfer of the franchise from TCI to AT&T because AT&T's cable broadband Internet service is a telecommunications service, and the Communications Act bars a cable franchising authority from regulating telecommunications.²⁸

AT&T's @Home Internet service is difficult to classify because of its dual nature as an ISP and a transmission "pipeline" using fiber-optic cable for high-speed transmission. The Ninth Circuit correctly held that cable broadband Internet service is not "cable service," which is defined under the Communications Act as "the one-way transmission to subscribers of video programming."²⁹ Although cable broadband Internet service may have the ability to carry the "one-way transmission" of a video, the primary purpose of the Internet is for an exchange of information in a two-way transmission.

Legislative history reveals that Congress rejected the inclusion of cable broadband Internet service as "cable service." The House report on the Cable

24. *Id.* at 877.

25. *Id.* at 879; *see also* 47 U.S.C. § 541(b)(3)(A).

26. *AT&T Corp.*, 216 F.3d at 877.

27. *Id.* at 879.

28. *Id.* at 880.

29. 47 U.S.C. § 522(6).

Communications Policy Act of 1984 ("Cable Act")³⁰ suggests that the definition of "cable service" includes limited "retrieval of information."³¹ But Internet activities such as downloading from the World Wide Web and communicating through email exceed the bounds of "cable service." The Cable Act did not anticipate the interaction that is possible through the Internet and never intended to cover transmission other than traditional one-way cable service.³²

The Ninth Circuit also characterized cable broadband service as a telecommunications service under the Communications Act. Based on this characterization, the court prohibited Portland from regulating access to cable broadband Internet service. The court's classification of cable broadband as a telecommunications service, however, may be incorrect. Under the Act, "any service that changes the form or content of information" is beyond the scope of a telecommunications service.³³ Because Internet transmissions frequently alter the information being sent, Internet services may be outside the scope of telecommunications.

Furthermore, the FCC's 1998 Universal Service Report suggests that Internet access services should be classified as "information services" rather than telecommunications services.³⁴ The report defines "information services" as the "capability for generating, acquiring, storing, transforming, processing, retrieving or making available information via telecommunications" but not the actual operation of telecommunications services.³⁵ The FCC has also concluded that Internet services are not telecommunications services because Internet services allow the storage, retrieval, and transformation of information.³⁶ Yet the Ninth Circuit identified cable broadband services as telecommunications services without addressing the information-services argument.

30. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended in scattered sections of 47 U.S.C.).

31. H.R. REP NO. 98-934 at 43 (1984) (discussing the scope of information retrieval), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4680; *see also* Duffy, *supra* note 9, at 1271.

32. Jason Whiteley, Note & Comment, *AT&T Corp. v. City of Portland: Classifying "Internet Over Cable,"* 2000 BYU L. REV. 451, 464 (2000).

33. Duffy, *supra* note 9, at 1272.

34. *Id.* at 1273.

35. James B. Speta, *Handicapping the Race for the Last Mile?: A Critique of Open Access Rules for Broadband Platforms*, 17 YALE J. ON REG. 39, 67 (2000).

36. *Id.* (citing the 1996 amendment to the Communications Act of 1934).

Finally, the Ninth Circuit did not rule on whether cable broadband Internet service operates as a common carrier. Instead, it held that this service is considered "advanced telecommunications." Under the Telecommunications Act of 1996, common carriers have a duty to provide access to other providers. And Portland argued that the common-carrier duty applies to cable broadband Internet services.³⁷ The FCC has not explicitly subjected broadband Internet services to the common-carrier duty, even though it has done so with digital subscriber line ("DSL") service — another advanced telecommunications service.³⁸ The court refrained from imposing the common-carrier duty on cable broadband providers. But if this duty had been imposed, Portland's open-access condition probably would have been upheld.

Although the Ninth Circuit based its decision on the plain language of the Communications Act and its amendment, public-policy concerns may prompt the FCC to subject cable broadband to open-access requirements. But in the Ninth Circuit's view, the higher-speed Internet access provided by AT&T @Home's cable broadband system balanced the lack of consumer choice in obtaining this service.³⁹

Admittedly, the lack of competition from other ISPs disadvantages consumers, who must pay higher costs for cable broadband access. But insisting on open access in the early stages of cable broadband Internet usage may stifle further development in this field, ultimately harming consumers.⁴⁰ Providing a monopoly by disallowing open access may actually enhance the service because the service provider has a financial incentive to make improvements as its customer base grows.⁴¹ And even if a monopoly is created, it will most likely be short-lived, giving way to new and improved alternative technologies.

In November 2001, bankruptcy forced the shutdown of the AT&T's @Home service to hundreds of thousands of customers.⁴² But most observers attribute @Home's financial failure to "questionable management decisions, high expenses and the drastic downturn in the online advertising market, even as its cable access business grew well."⁴³ Still, consumer advocates suggest that if cable Internet service had been defined and regulated by the FCC, the

37. *AT&T Corp.*, 216 F.3d at 879.

38. *Id.*

39. *Id.* at 875.

40. Speta, *supra* note 35, at 87.

41. *Id.* at 87-88.

42. *Id.* (noting that 850,000 customers lost Internet cable service after the bankruptcy proceedings of AT&T @Home).

43. Keith Benman, *AT&T Internet Patrons in South Bend, Ind., Area Don't Have Service Yet*, S. BEND TRIB., Dec. 6, 2001.

shutdown of service to customers of AT&T @Home might have been prevented.⁴⁴

Following the Ninth Circuit's lead, courts will likely continue to classify ISPs as information services that use telecommunications services.⁴⁵ It is also likely that cable broadband Internet services will continue to be classified as "advanced telecommunications," which are not subject to local regulation. Thus, the law governing cable broadband Internet transmission will likely be a national one — molded by the policies and priorities of federal lawmakers and federal agencies. For now, it remains unclear how, in this evolving field, the law should balance the often-conflicting interests of consumers, business, and technology.

44. *Lack of Regulation Bemoaned*, TELEVISION DIG., Dec. 10, 2001, available at 2001 WL 7882641.

45. *AT&T Corp.*, 216 F.3d at 877; see Duffy, *supra* note 9, at 1280.