

In the
**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Brand X Internet Services, et al.,)	
)	Nos. 02-70518
Petitioners,)	02-70684
v.)	02-70685
)	02-70686
Federal Communications Commission)	02-70879
and the United States of America,)	02-71425
)	02-72251
Respondents.)	

OPPOSITION TO MOTIONS FOR STAY OF MANDATE

Consumer Federation of America, Consumers Union and the Center for Digital Democracy (“Public Interest Petitioners”) concur in the arguments of Petitioners Earthlink and Brand X in opposition to the pending motions for stay of mandate. To avoid needless replication, Public Interest Petitioners’ response is limited to calling attention to two significant points.

First, as Public Interest Petitioners explained at pages 9-10 of their January 6, 2004 *Response* opposing the FCC’s rehearing petition, the FCC not only has “forbearance” authority, *see* 47 U.S.C. §160(a), but it has a two-year old proposal it could implement immediately. *Order*, 17 FCC Rcd 4898, 4847 (R.E. 159)(2002). This would accomplish the same policy result the FCC has sought by attempting to label cable modem service as an “information service.” Moreover, on March 10, 2004, the FBI, DEA and Department of Justice filed a *Joint Petition for Expedited Rulemaking* which calls upon the Commission to address many of the policy issues raised in this case, as well as in other, related services. Two days later, the Commission set the matter for expedited consideration; comments on the petition are due on April 12, 2004, and reply comments are due on April 27, 2004. *FCC Public Notice*, DA No. 04-700 (March 12, 2004).

Whatever the reason for the Commission's failure to employ its forbearance powers, the fact is that the Congress has provided a direct means of avoiding the regulatory scheme which the FCC has unlawfully sought to ignore. The FCC's analysis is thus legally deficient and overstates the harm it claims would transpire absent a stay. If the harm were so great, the FCC is free to attempt to use its forbearance powers. If it is unable to use those powers, Congress must not have shared the Commission's views as to the burdens of employing a policy of non-discrimination

The fact that the law enforcement arm of the United States has pressed the FCC to conduct a rulemaking on these issues casts further doubt on the alleged burdens the FCC faces in the absence of a stay of mandate. In fact, the FCC is going to do much, or all, of the work it claims to wish to avoid, and is doing so on a much faster schedule than the Commission suggests would be possible.

Second, Public Interest Petitioners respectfully ask the Court to examine the stay petitions of the two government respondents for what they do *not* say as well as for what they do say. In particular, neither the FCC nor the United States specifically state that the FCC and/or the United States will in fact file a petition for *certiorari*.

In light of the fact that a motion for stay of mandate "will not be routinely granted..." *Circuit Advisory Committee Note to Rule 41-1*, the possibility that *certiorari* will not be requested should, at the least, cast doubt on the merits of the government's position and the degree of actual harm that would accompany issuance of the stay.

Here, too, what is not said is of import. As Public Interest Petitioners showed in their January 6, 2004 *Response*, at pp. 7-8, it is a matter of record that the United States did not petition for rehearing in this matter, and that several components of the Department of Justice have expressed opposition to the FCC's classification of cable modem and other broadband services as "information

services.” Indeed, the *New York Times* has reported that

the Justice Department tried to block the FCC from appealing a decision by a three-judge panel of the United States Court of Appeals for the Ninth Circuit, sitting in Seattle, because of the problems it could pose for law enforcement....

It also reported that

officials from the Justice Department, the F.B.I. and the drug agency warned officials of the FCC that the commission’s regulatory rulings on high-speed Internet access through cable systems “suffers from statutory interpretation problems” and “directly threatens” the ability to apply the law permitting them to monitor suspects...

“Easing of Internet Regulations Challenges Surveillance Efforts,” *New York Times*, January 22, 2004, page A1 [also accessible at 2004 WL 59680958].

Also hidden in the carefully couched language of the government stay motions is the fact that the Department of Justice has historically taken the position that the FCC lacks independent litigating authority in the Supreme Court, *see* 28 U.S.C. §516, and that it may file a petition for *certiorari* only with the consent of the Solicitor General. See Devins, “Unitariness and Independence: Solicitor General Control Over Independent Agency Litigation,” 82 Cal L. Rev. 255, 293-295 (1994). In light of the Department of Justice’s publically expressed discomfort with the FCC’s decision below, it is quite uncertain that a *certiorari* petition will be filed at all, or that an FCC petition, if permitted, will be supported by the United States.

CONCLUSION

There are too many uncertainties for this Court to conclude that the motions meet the high standard required to justify a stay of mandate. They should be denied.

Respectfully Submitted,

Andrew Jay Schwartzman
Cheryl A. Leanza
MEDIA ACCESS PROJECT
1625 K Street, NW
Suite 1000
Washington, DC 20006
(202) 454-5683
Counsel for Public Interest Petitioners

April 8, 2004

CERTIFICATE OF SERVICE

I certify that on this 8th day of April 2004, I caused copies of the foregoing *Opposition to Motions for Stay of Mandate* to be served upon the parties listed below:

Donna N. Lampert
Mark J. O'Connor
Lampert & O'Connor
1750 K Street, NW
Suite 600
Washington, DC 20006

Steven N. Teplitz
Vice President, Telecommunications Policy
AOL Time Warner
1101 Connecticut Avenue, NW
Suite 400
Washington, DC 20036

Charles C. Hunter
Hunter Communications Law Group, PC
1424 16th Street, NW
Suite 105
Washington, DC 20036

David W. Carpenter
David L. Lawson
Peter D. Keisler
Sidley Austin Brown & Wood, LLP
1501 K Street, NW
Washington, DC 20005

Mark C. Rosenblum
Stephen C. Garavito
Douglas Garrett
AT&T Corp.
295 N. Maple Avenue
Basking Ridge, NJ 07920

Paul Glist
John D. Seiver
Geoffrey C. Cook
Brian M. Josef
Cole, Raywid & Braverman, LLP
1919 Pennsylvania Avenue, NW
Suite 200
Washington, D C20006

James G. Harralson
William J. Ellenberg
BellSouth Corporation
1155 Peachtree Street, NE
Atlanta, GA 30309
Howard J. Symons
Tara M. Corvo
Mintz Levin Cohn Ferris Glovsky & Popeo, PC
701 Pennsylvania Avenue, NW
Suite 900
Washington, DC 2000

Michael H. Hammer
Francis M. Buono
Jonathan A. Friedman
Willkie & Farr
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036-3384

Michael K. Kellogg
Sean A. Lev
Colin S. Stretch
Kellogg, Huber, Hansen, Todd & Evans
Sumner Square
1615 M Street, NW, Suite 400
Washington, DC 20036

Harvey L. Reiter
Morrison & Hecker, LLP
1150 18th Street, NW
Suite 800
Washington, DC 20036

Jennifer S. Granick
Elizabeth H. Rader
Center for Internet & Society
Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94305-8610

Dennis J. Herrera, City Attorney
Julia M.C. Friedlander, Senior Counsel for
Technology and Government
William K. Sanders, Deputy City Attorney
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4682

Robert J. Aamoth
Todd D. Daubert
Kelley Drye & Warren, LLP
1200 19th Street, NW
Suite 500
Washington, DC 20036

Carol Ann Bischoff,
Executive Vice President
and General Counsel
Jonathan D. Lee
Vice President, Regulatory Affairs
Competitive Telecommunications Association
1900 M Street, NW, Suite 800
Washington, DC 20036

David E. Mills
To Quyen T. Truong
Todd B. Klessman
1200 New Hampshire Avenue, NW
Suite 800
Washington, DC 20036-6802

Richard R. Patch
Susan K. Jamison
Coblentz, Patch, Duffy & Bass, LLP
222 Kearny Street, 7th Floor
San Francisco, CA 94108-4510
Earl W. Comstock
John W. Butler
Sher & Blackwell
1850 M Street, NW
Suite 900
Washington, DC 20036

John A. Rogovin, General Counsel
Federal Communications Commission
Office of General Counsel
445 12th Street, NW

8 C723
Washington, DC 20554
Daniel M. Armstrong, Associate General Counsel
James M. Carr, Counsel
Federal Communications Commission
Office of General Counsel
445 12th Street, NW
8 B724
Washington, DC 20554

Jonathan Jacob Nadler
Angela Simpson
Squire, Sanders & Dempsey
1201 Pennsylvania Avenue, NW
Washington, DC 20044-0407

Tillman L. Lay
Miller, Canfield, Paddock & Stone
1900 K Street
Suite 880
Washington, DC 20006

John L. Kennedy
Metro Government of Nashville and
Davidson County Department of Law
222 Third Avenue North
Suite 501
Nashville, TN 37201

Assistant Attorney General R. Hewitt Pate
John J. Powers, III
Robert Wiggers
U.S. Department of Justice
Washington, DC 20530

Howard J. Symons
Tara M. Corvo
Mintz Levin Cohn Ferris Glovsky
& Popeco, PC
701 Pennsylvania Avenue, NW
Suite 900
Washington, DC 20004

Daniel L. Brenner
Neal M. Goldberg
Michael S. Schooler
National Cable & Telecommunications Association

1724 Massachusetts Avenue, NW
Washington, DC 20036
Frederick A. Polner
Rothman Gordon, PC
Grant Building, Third Floor
310 Grant Street
Pittsburgh, PA 15219

Gary L. Phillips
SBC Communications (Legal Dept.)
1401 I Street, NW
4th Floor
Washington, DC 20005

James D. Ellis
Paul K. Mancini
175 East Houston Street
#100
San Antonio, TX 78205

Gary M. Cohen
Lionel B. Wilson
Ellen S. Levine
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

William D. Aaron, Jr.
Goins Aaron
1010 Common Street, Suite 2600
New Orleans, LA 70112

Frank J. Uddo
Mark C. Carver
Uddo, Milazzo & Beatmann
3850 N. Causeway Boulevard
Suite 1510 - Lakeway Two
Metairie, LA 70002

William P. Barr
Verizon Telephone Companies, Verizon Internet
Services d/b/a Verizon.net
1515 Courthouse Road
Suite 500
Arlington, VA 22201-2902

Andrew G. McBride
Eve J. Klindera
Wiley Rein & Fielding
1776 K Street, NW
Washington, DC 20006

Dixie Henry
David B. Borsykowsky
Peter M. Bluhm
State of Vermont
Department of Public Service
112 State Street
Drawer 20
Montpelier, VT 05620

Mark D. Schneider
Kali N. Bracey
Jenner & Block
691 13th Street, NW
Washington, DC 20005

William Single, IV
WorldCom, Inc
1133 19th Street, NW
Washington, DC 20036

By: _____
Andrew Jay Schwartzman