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EarthLink, Time Warner challenge Net access ruling
Wireline providers too powerful, suit says

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Philadelphia — EarthLink Inc., Time Warner Telecom Inc. and a host of small Internet service providers went to court Friday to challenge regulatory action that they say puts wireline phone companies in control of high-speed broadband access to the Web.

In arguments before a federal appeals court, Atlanta-based EarthLink, Time Warner and other Internet service providers challenged a Federal Communications Commission decision to lift regulations that required companies that run wireline phone networks to sell access to competing sellers of broadband service.

"It's going to create havoc," Time Warner attorney David P. Murray said of the FCC's decision, which took effect recently. It allows AT&T, Qwest Communications and Verizon Communications to refuse to sell access to wireline phone networks to companies selling high-speed Internet services that rival the phone companies' DSL products.

The U.S. 3rd Circuit Court of Appeals took the case under advisement and will issue a written decision, one that Murray said could jeopardize the future of independent Internet services.

"Ultimately, competitive Internet access services are going to fall by the wayside," the lawyers said.

Until the FCC changed the rules, phone companies had to sell network access on a wholesale basis to competing ISP providers, at prices considered reasonable. Now it's an open market, which the phone companies say will promote competition and new technology.

Michael K. Kellogg, attorney for the phone companies, says the end of the "regulatory straitjacket" will push the development of satellite, power line and other forms of transmission to carry high-speed signals.

The FCC order "has been in place for some time, and the sky has not fallen," Kellogg said.

The phone companies have "every incentive" to keep selling access on the wireline system to wholesale customers like EarthLink and AOL, he said.

"We are signing wholesale contracts," Kellogg told a three-judge panel that must decide whether to leave the FCC rule change in place or tell the agency to take a second look.

A lawyer for EarthLink, however, said AT&T refused to offer a term sheet for a wholesale deal during months when the rule change was being hammered out at the FCC. As a result, EarthLink and its customers can be held hostage by the operating telephone companies, EarthLink attorney Donna Lampert said.

"Anti-competitive conduct is not only possible, it's likely," Lampert said.

The FCC said new technologies mean there's no longer a need to require the wireline companies to open their networks to ISPs.

"There are plenty of people who are looking at alternative ways," said James M. Carr, the lawyer representing the FCC.

Carr said the agency did a "market analysis" before shaking up the regulatory scheme, although not an analysis that relied on "static data."

"It's a joke," said Time Warner attorney Murray, referring to the FCC's claim that it conducted an adequate market analysis.

For many areas of the country and much of the business world, it's the phone lines or nothing when it comes to high-speed data transmission, lawyers said.

Time Warner attorney Murray said the wireline phone companies effectively have monopoly control of the "pipes" that carry signals to medium and large businesses.

While some high-end business services were carved out of the rule change, the lawyer said, that means only that the next generation of such technology will be developed so it falls outside the regulatory scheme, to become an exclusive phone company offering.

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