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Open Access, Private Interests, and the Emerging Broadband Market

by William E. Lee

Executive Summary

The debate over open access to new cable broadband networks marks the first significant entry of Internet service providers (ISPs) into the great game of using the regulatory process to escape market realities. Quite simply, a legal requirement opening local cable networks to ISPs allows ISPs to avoid investing in alternative networks. It is tempting for businesses in this position to take a regulatory shortcut, asking lawmakers to force existing networks to let them piggyback on others' investments.

It remains to be seen how proprietary networks that bundle content and delivery will compete with voluntary open-access business models. Networks built on either model are extremely risky, and the consequences of regulatory interference with market incentives here could be devastating.

In addition, mandatory access regulation raises troubling First Amendment issues. The Internet is rapidly emerging as an important member of the press. The decision of the city of Portland, Oregon, to force an open-access model on @Home's cable broadband network was initially approved by a judge who did not take @Home's First Amendment arguments seriously. The Ninth Circuit Court of Appeals did not reach First Amendment questions in ruling that open access to cable systems was a matter for the Federal Communications Commission, not local governments. In either forum, allowing government to determine what speech the networks must carry is a dangerous precedent. This analysis shows future policymakers the conflict between the First Amendment and mandatory open access.

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Introduction

It was a surreal scene. In 1998 America Online initiated an expensive campaign to convince lawmakers that the cable industry was about to monopolize high-speed connections to the Internet.[1] Many other Internet service providers (ISPs) joined in through the openNET Coalition. They claimed that all ISPs should be legally entitled to use cable systems on the same terms as ISPs affiliated with cable companies, a policy AOL and its allies labeled "open access."[2] But on January 10, 2000, AOL announced that it was becoming part of the cable industry by merging with Time Warner, the nation's second-largest cable operator.[3] AOL's Steve Case and Time Warner's Gerald Levin described the proposed merger. Levin stated, "We are going to take the open-access issue out of Washington, out of City Hall and put it in the marketplace."[4] Case then seconded Levin's aversion to government-mandated open access, adding, "We need to take it off the table."[5] But the issue that AOL introduced to the debate will not be so easily dismissed. The interests of an array of communications companies are affected by cable-Internet service and those companies vow to continue fighting for open-access laws.[6]

Simply stated, a cable modem is a device that enables users to gain high-speed access to the Internet. Deployment of cable modem service, however, has triggered an intense policy debate. Should cable companies offering high-speed Internet access be required to open their networks to unaffiliated ISPs? Should the government enact anticipatory regulations for emerging communications markets? What role should antitrust law play as the Internet becomes increasingly commercialized? And what level of First Amendment protection should exist for nascent communications services?

This policy debate was triggered by AT&T's June 1998 announcement of its acquisition of TCI, one of the nation's largest cable companies.[7] AT&T's acquisition of TCI was designed to facilitate AT&T's entry into local telephone service. AT&T offers or will offer consumers, either à la carte or bundled, services such as local and long-distance telephony, high-speed Internet access, and cable television programming. Initially, high-speed Internet access is offered exclusively through @Home, a company in which AT&T inherited a large stake when it acquired TCI; AT&T also inherited TCI's contract-making @Home, its exclusive ISP through June 2002.[8] Unlike the cable industry, whose initial forays into local telephone and Internet access markets have been sporadic and not very successful,[9] AT&T announced that it will spend billions of dollars to rapidly upgrade TCI's cable systems to accommodate those new services.

To many makers of communications policy in Washington, AT&T's strategy was the first significant step toward competition in the local telephone market, a central goal of the Telecommunications Act of 1996.[10] And AT&T's strategy also promises to intensify competition in the Internet-service market; the prospect of AT&T's offering high-speed cable modem service has increased the efforts of local telephone companies to deploy their own high-speed means of Internet access.[11] But AT&T's May 1999 announcement that it would also acquire MediaOne's cable systems,[12] giving AT&T an ownership interest in cable systems serving 51 percent of cable subscribers, intensified AOL's efforts on behalf of open access. Despite AOL's current dominance of the Internet access market, the company feared that it would be confined to slow narrowband forms of access while AT&T and other cable companies controlled the high-speed broadband market, and smaller ISPs' weaker positions augmented similar concerns on their part. Those concerns were heightened by the facts that most cable systems do not face head-to-head competition from other cable systems and that the largest cable companies have exclusive contracts with ISPs such as @Home or Road Runner.

This analysis outlines the current state of the broadband market, explores policy deci-

sions made by the Federal Communications Commission and local franchising authorities, and examines the claim that cable modem service is an essential facility. Finally, I show that, even when subjected to content-neutral scrutiny, open access violates the First Amendment rights of cable operators.

The Market for Internet Access Services

In 1998 approximately 30 million American households accessed the Internet through narrowband connections.[13] Those "dial-up" connections, provided by ISPs, offer access through traditional telephone lines at speeds of between 28 and 56 kilobits per second (Kbps). Consumers use modems attached to twisted-pair copper telephone lines to connect their computers to the ISP's server, which then connects to the Internet. That service typically costs $20 a month for relatively unlimited usage,[14] although several companies have started offering free service supported by advertising revenue.[15] Some ISPs, such as AOL and Prodigy, package content along with Internet access and are also known as online service providers. Other ISPs, of which there are literally thousands, offer primarily access to the Internet and services such as e-mail.[16] Ninety percent of Americans have access to several ISPs via a local phone call.[17] The narrowband market has experienced explosive growth in recent years: 10.2 million households signed up for Internet service for the first time in 1998, and AOL alone signed up more than 5 million new subscribers from July 1998 to June 1999.[18]

The broadband market offers connections at 200 Kbps or higher through a variety of transmission media. The residential broadband market began in late 1996,[19] and currently the most popular service is via a cable modem offered by cable companies. A cable modem connects a subscriber's computer to the cable network, which in turn is connected to the cable modem service provider, such as @Home or Road Runner. For a monthly fee of between $40 and $60, subscribers gain high-speed access to the Internet and the proprietary content of the cable modem service provider.[20] Typically, cable systems contract with only one cable modem service provider, and the current leading service is @Home, which recently merged with Excite, one of the leading Internet portal sites. An aspect of cable modem service that has created controversy is the start page, or first screen, that users encounter. For example, early @Home users saw a start page containing local and regional information provided by the cable operator and national information provided by @Home.[21] A broadband version of Excite was launched in March 2000 as the start page for @Home users unless they configure their computers to go to a different Web portal.[22]

Cable modem service allows users to download information at much faster speeds than are available with narrowband service; the service is always on—eliminating the process of dialing in—and it doesn't tie up the household's telephone line.[23] However, because of cable system architecture, cable modem users share the local network, and the transmission speed varies depending on the number of simultaneous users.[24] In 1998, 19.5 million homes were "passed by" (i.e., the cable ran past the residences) by cable systems upgraded to offer cable modem service.[25] The largest cable operators, AT&T, Time Warner, Cablevision, Cox, and Comcast, are now aggressively upgrading systems and by the end of 2000 plan to make cable modem service available to 61 million households.[26] Although the number of households now choosing to subscribe to cable modem service is small compared to the number of users of narrowband connections, both @Home and Road Runner have recently reported rapid growth. For example, in January 1999 the FCC estimated that 350,000 households used cable modems; at the end of 1999 @Home had surpassed the one million subscriber mark and Road Runner had 551,000 subscribers.[27]

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Another technology for broadband service is digital subscriber line (DSL), offered by local exchange telephone companies (ILECs) or by ISPs using the local telephone network.[28] There are several varieties of DSL technology that differ by transmission speed and type of modem used; retail costs vary depending on the technology and service package. For example, US West charges $37.90 a month for 256 Kbps service and GTE charges $49.95 a month for 768 Kbps.[29] Like the cable modem, DSL does not require "dialing in." Unlike the cable modem service, DSL services use a dedicated line for each customer; thus, the problem of congestion in the "last mile" of the network is not present with DSL. Its high speed is constant.[30] Although fewer households currently subscribe to DSL service than to cable modem service, in 1999 DSL grew at a faster pace.[31] By November 1999 there were approximately 600,000 residential DSL subscribers.[32]

The Bell Operating Companies (BOCs) and GTE are investing billions of dollars in broadband technologies and have aggressive timetables for those projects. For example, SBC Communications recently announced a $6 billion project to bring DSL to 77 million households by the end of 2002.[33] And the viability of DSL offerings by competitive local exchange carriers (CLECs) was increased by a recent FCC ruling on line sharing, which eliminates the need for consumers to buy a second telephone line to use the CLEC's DSL service.[34] Finally, AOL has agreements with three BOCs, Bell Atlantic, SBC Communications, and Ameritech, to offer AOL Plus, a new version of AOL configured for broadband users, at about $40 a month.[35]

AOL also recently invested $1.5 billion in Hughes Electronics to accelerate the growth of DirecPC, a satellite-based means of Internet access.[36] DirecPC users download information via satellite at speeds of up to 400 Kbps. The upstream connection from the home, however, is provided via standard telephone line at speeds of between 28 and 56 Kbps. Consumers pay about $50 a month for 100 hours of service.[37] Several other satellite companies, such as Loral and Lockheed Martin, have plans to deploy early in the next decade services that will transmit information both upstream and downstream via satellite.[38]

Open Access

Until the June 1998 announcement of the AT&T-TCI merger, little attention had been devoted to the policy questions raised by cable modem services.[39] In the 1996 Telecommunications Act, Congress proclaimed in broad terms that the policy of the United States is "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 . . . ."[40] AOL, MindSpring Enterprises, GTE, US West, and many smaller ISPs, however, quickly perceived that the merger threatened their positions in the marketplace. They urged that local governments and the FCC adopt open access as a means of protecting competition. The first jurisdiction to enact an open-access requirement was Portland, Oregon.

The Portland Ordinance

Despite the fact that the @Home cable modem service was not available in Portland, the prospect of AT&T's acquiring TCI and offering @Home galvanized AOL and the established Oregon narrowband ISPs. Although AT&T intended to allow @Home customers to connect with any Web site through @Home's facilities, AOL feared that few customers would want to pay for its service after paying $40 a month for @Home. The local ISPs feared that, without access to AT&T's high-speed facilities, they would be unable to offer broadband services. AOL hired a lobbyist to assist the local ISPs and helped shape the argument that the cable modem platform should be open to all ISPs. This coalition found a sympathetic audience in David Olson, director of the Portland area cable commission, who equated AT&T's cable system with the incumbent local telephone company, US West. Olson stated,

when US West and AT&T "are going to dominate the two wires that go into everybody's home, from pauper to king, they need to have that wire be available to serve other interests but their own. . . . That's been the core of telecommunications policy for years."[41] Olson's view, while illuminating, is erroneous, because the core of telecommunications policy is that cable services are regulated differently than telephone services.[42]

In a series of letters, AT&T told Olson that @Home is a cable service and, thus, the company was not required to open its network in the same manner as local telephone companies. Moreover, AT&T claimed that the city lacked the authority to impose the open-access requirements.[43] The coalition of local ISPs cast AT&T as a behemoth that would crush local businesses and severely affect "consumer choice, price of service, and technology innovation."[44] The plea to protect small local businesses was especially appealing to the Portland area cable regulatory commission, which recommended to city and county elected officials that AT&T's cable modem service be treated as an essential facility. As one cable commissioner stated, "It's like if I owned all the airports in the world and I owned an airline and said only my airline could land there."[45]

On December 17, 1998, the Portland city and Multnomah County commissioners adopted the following requirement:

> Transferee [i.e., AT&T] shall provide, and cause Franchisees to provide, nondiscriminatory access to Franchisees' cable modem platform for providers of internet and on-line services, whether or not such providers are affiliated with Transferee or Franchisees, unless otherwise required by applicable law.[46]

The ordinance also required that revenue from cable modem services be included in the franchisees' gross revenue, which is used to calculate franchise fee payments to local governments.[47]

The ordinance is intriguing because it assumes that AT&T's cable network has the capacity to handle an unlimited number of ISPs; the ordinance does not specify what would occur should demand for access to the cable modem platform exceed capacity, or what should transpire if traffic from a large number of ISPs were to degrade the performance of the network. And the ordinance assumes that the cable commission has the competence to monitor AT&T's relations with ISPs to detect instances of discrimination. Despite the requirement of nondiscrimination, the ordinance does not actually promote competition on equal terms because @Home will have significant advantages over other ISPs. As one antitrust scholar wrote about nondiscriminatory access rules for essential facilities:

> The other firms will pay the price charged by the facility; while the controller will "charge" itself the same price, the controller actually incurs only the resource cost of generating access for itself. The cost to the facility may thus be an amount far lower than the "nondiscriminatory" price that others are paying, leaving the facility with a substantial advantage in the downstream market.[48]

To regulate "nondiscriminatory access," the cable commission will have to develop elaborate rules governing pricing arrangements similar to the FCC's rules concerning relations between ILECs and CLECs, a task far beyond the local agency's resources and expertise.[49]

Most important, the open-access requirement is contingent on AT&T's establishing cable modem service. AT&T is not required to establish a cable modem platform; only if it does so must it make the platform available to unaffiliated ISPs. In response to the Portland requirement, AT&T refused to roll out @Home in Portland.[50] Michael Armstrong, CEO of AT&T, stated: "We believe our cable customers should be able to access any portals and content they want to

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reach. . . . But it should be done on the basis of a sound commercial relationship, not through regulation . . . . Cable carriage that does not deal with these realities will simply chill broadband investment and kill a competitive alternative to the local Bell companies."[51]

AT&T rejected the open-access requirement, and in early January 1999 Portland and Multnomah County denied the transfer of TCI's franchises. AT&T then initiated a lawsuit challenging the local governments' actions.

The FCC's Broadband Report

Following the decision by Portland, a fierce lobbying campaign broke out at the FCC as the agency considered the AT&T-TCI merger and a report on the deployment of broadband facilities.[52] As part of the Telecommunications Act of 1996, Congress requires that the FCC regularly study the broadband market and, if necessary, "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."[53] To AT&T and its allies, policies like Portland's discourage investment; to openNET and its allies, AT&T's control of cable modem service harms competition. Both sides viewed the FCC, which has the authority to preempt local regulation, as a critical forum in which to shape policy for the emerging broadband market.

In its Broadband Report, adopted January 28, 1999, the FCC found that "substantial investment in broadband technologies is taking place across virtually all segments of the communications industry"[54] and that deployment is occurring on a major scale.[55] In terms of the "last mile" to the residential consumer, the commission stated:

> We believe it is premature to conclude that there will not be competition in the consumer market for broadband. The preconditions for monopoly appear absent. Today no competitor has a large embedded base of paying residential customers. The record does not indicate that the consumer market is inherently a natural monopoly. Although the consumer market is in the early stages of development, we see the potential for this market to accommodate different technologies such as DSL, cable modems, utility fiber to the home, satellite and terrestrial radio. The fact that different companies are using different technologies to bring broadband to residential customers and that each existing broadband technology has advantages and disadvantages as a means of delivery to millions of customers opens the possibility of intermodal competition, like that between trucks, trains, and planes in transportation.[56]

Given that view of the broadband market, it was no surprise that the FCC rejected the suggestion that ISPs should have a right of access to cable modem services. First, the agency stated that its duty to encourage broadband deployment required that it "look broadly at all methods of providing additional bandwidth to customers, not just those methods provided by cable companies . . . ."[57] Second, the record indicated that multiple methods of accessing broadband are or soon will be available to consumers. Thus, the FCC saw no reason to enact open access to cable modem platforms at that time.[58] It did note, however, that it would monitor broadband deployment closely.

Throughout the report, the FCC acknowledged that the market was changing rapidly and that the report represented a snapshot taken at an early stage.[59] And, although it did not refer specifically to Portland, the commission's view of the market fundamentally disagrees with the view that cable modem service is an essential facility.

The AT&T-TCI Merger

On February 16, 1999, the FCC approved the AT&T-TCI merger without imposing any condition that AT&T open its cable modem platform to unaffiliated ISPs.[60] One of the

most significant issues raised during the inquiry was the status of cable-Internet services. To AT&T-TCI, @Home was a "cable service" as defined by the Communications Act; consequently, the FCC was prohibited from imposing any obligations beyond those provided by Congress in Title VI of that act.[61] AT&T's reading of the Communications Act meant that cable companies offering cable services were not subject to interconnection requirements, such as those imposed on ILECs under Title II of that act. Other parties argued that @Home was a "telecommunications service" under Title II of the Communications Act and AT&T's cable modem platform should be open to ISPs, just as the local telephone network is open to ISPs.[62] The commission, however, did not determine the status of cable modem services. That would later become a significant part of the *Portland* litigation; in June 2000 the Ninth Circuit found that @Home was a telecommunications and information service and was not subject to local regulation.[63]

Another issue unresolved by the FCC was the definition of the market for Internet access services. AT&T-TCI argued that broadband and narrowband services are in the same market.[64] AOL and other ISPs argued that narrowband services are not reasonable substitutes for broadband services and thus the two are in distinct markets.[65] The definition of the market did not affect the outcome of the FCC's analysis. If defined to include both broadband and narrowband services, the market for Internet access is "quite competitive," and the merger would not have adverse effects.[66] Even when confined to only broadband services, the market was still competitive. The agency stated:

> Although AT&T-TCI together might be able more quickly to deploy high-speed Internet access services and win a significant number of residential Internet access customers, it appears that quite a few other firms are beginning to deploy or are working to deploy high-speed Internet access services using a range of other distribution technologies.[67]

The merger would not eliminate any scarce assets or capabilities and would yield public-interest benefits in the form of a quicker rollout of broadband services.[68]

Especially important to the FCC was AT&T's commitment to allow cable modem customers access to any Internet content. The company wrote:

> Even if an online service provider cannot or does not want to enter into [an agreement providing TCI customers with unimpeded access to that provider], customers of TCI@Home, TCI's cable Internet service, can still access that provider through their TCI/IP connections using a "bring-your-own-access-plan" like that actively marketed by AOL. TCI customers subscribing to AOL under the BYOA plan today can connect directly to AOL by "double clicking" on the AOL icon on their computer desktop. They do not have to "go through" @Home or view any @Home-provided content or screens. In fact, if they so desire, customers will be able to remove the @Home icon from their desktop completely. This will continue to be the case after the merger.[69]

This passage needs to be explained carefully because at first glance it is somewhat misleading.

AOL has multiple price plans. Those consumers who use AOL as their ISP gain unlimited access to the Internet and AOL's proprietary content and features for $21.95 a month. Those consumers "go through" AOL's sign-on screen, advertising screen, and home page before going to another Web site. Consumers who use an ISP other than AOL may gain unlimited access to AOL's proprietary content and features for $9.95 a month.[70] AOL does not, however, sell Internet access without AOL's content.[71] In contrast, @Home has only one pricing plan, $39.95 to $44.95 a month for unlimited

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access to the Internet.[72] Access to sites that charge for content, such as AOL, would cost an additional amount, payable to the content provider. Thus, an @Home subscriber who was also an AOL subscriber would pay $39.95 to $44.95 a month to @Home and $9.95 a month to AOL. While those subscribers could configure their computers to connect with AOL without "going through" any @Home content, they would still be using @Home's servers, routers, and other Internet access support facilities.

With its recent merger with Excite, @Home has great incentives to steer its customers to Excite as the first screen they see. Since cable operators keep 65 percent of the monthly fee charged for @Home, @Home's profit has to come from the sale of advertising.[73] As T. J. Jermoluk, Excite@Home's CEO stated, "We don't want to be a dumb pipe for others to take advantage of."[74] AOL, which will be fully accessible to @Home's subscribers, however, has built its business on controlling that prime piece of electronic real estate—the first screen—and by offering a package of services such as easy access to the Internet, e-mail, and chat rooms, as well as customer service and one-stop billing. Although AOL's advertising revenue is increasing,[75] AOL's president Bob Pittman admits the company would lose money without the $21.95 monthly fee that most of its 23 million users pay for Internet access.[76] AOL's need for the revenue stream from customers who purchase its bundle of content and Internet access service explains why the firm vehemently fought against being confined to "BYOA" customers. Excite's need to be a start page for broadband Internet users explains @Home's opposition to becoming a "dumb pipe." As one writer noted, "This struggle isn't about where you can go, but about where masses of consumers are going to be herded." [77]

AT&T Corp. v. City of Portland

After the FCC approved the AT&T-TCI merger and issued its Broadband Report, legislative proposals concerning broadband access were introduced in Congress,[78] but they were not expected to be enacted because Congress is reluctant to meddle with the Internet except when sex is involved.[79] And a small ISP known as Internet Ventures asked the FCC to rule that ISPs are entitled to access to cable systems under the leased-access provisions of the Communications Act. Given the FCC's aversion to regulating the cable broadband market, it was not surprising that the FCC denied that petition.[80] Consequently, AOL and its allies began intensely lobbying the remaining local governments considering transfer of TCI's franchises to AT&T.[81] The importance of local governments as a forum for this dispute markedly increased after a federal judge ruled that Portland's open-access policy was not preempted by federal law.

In a June 3, 1999, opinion that can be described as cursory at best, Judge Owen Panner ruled that the Portland–Multnomah County open-access policy was not preempted by federal statutes concerning cable services.[82] A critical aspect of Judge Panner's decision is the *assumption* that Internet access over cable is a cable service (both parties had agreed that Internet access via cable was a cable service). The court of appeals ultimately reversed Judge Panner's ruling because the court did not view @Home as a "cable service," and the basis for municipal jurisdiction vanished. Judge Panner read the relevant statutes as reflecting congressional intent "to interfere as little as possible with existing local government authority to regulate cable franchises"[83] and permitting local governments to determine whether a change in ownership will reduce competition.[84] Having concluded that the open-access policy was within the scope of local government authority, Judge Panner devoted little attention to AT&T's substantive constitutional claims.

The tenor of Judge Panner's opinion is captured by his highly deferential approach to the local governments' conclusion that the cable modem service was an essential facility. AT&T questioned the record before the local governments and the competence of municipal officials to determine highly technical antitrust issues.[85] Judge Panner, however, stated: "It is

not my role to second-guess the findings supporting the decision to impose open access. So long as the City and County act within their jurisdiction, their findings are entitled to deference."[86] As support for this posture, he cited two equal protection cases in which local authorities received highly deferential review. Glaringly absent from this opinion is any reference to *Turner Broadcasting System, Inc. v. FCC*,[87] in which the Supreme Court held that courts faced with First Amendment challenges to content-neutral regulations targeting cable systems must examine the legislative record to determine if the legislative body has "drawn reasonable inferences based on substantial evidence."[88] As will be discussed later in this paper, the open-access regulation should have been subjected to a much more rigorous standard of judicial review than that used by Judge Panner.

Shortly after Panner's decision in *AT&T Corp. v. City of Portland*, FCC chairman William Kennard spoke at the annual convention of the National Cable Television Association and invited the industry to petition the FCC for preemption of local open-access regulations.[89] Kennard described his vision of a broadband market consisting of "multiple pipes" such as DSL, cable modem, terrestrial wireless, and satellite. He stated: "Sometimes people talk about broadband as though it is a mature industry. But the fact is that we don't have a duopoly in broadband. We don't even have a monopoly in broadband. We have a NO-opoly. Because, the fact is, most Americans don't even have broadband."[90] Noting the rapid emergence of new services, Kennard claimed that the FCC's nonregulation of the Internet is "born of humility. Humility that we can't predict where this market is going."[91] According to Kennard, a patchwork of local regulations would create chaos and deter investment in broadband facilities.[92]

AT&T chose not to petition the FCC and instead filed an appeal with the Court of Appeals for the Ninth Circuit.[93] The FCC then faced difficult questions about what role, if any, it should play in the appeal. In August 1999 the agency filed an amicus brief that outlined its long history of nonregulation of the Internet, its view of the broadband market as highly competitive, and the fact that the legal status of cable Internet access has not yet been resolved.

This last point was particularly important because the FCC cautioned the appellate court that, even in the absence of express statutory preemption, the FCC could preempt local regulations that conflict with federal policy.[94] One method of preemption, the agency hinted, would be for it to classify cable-Internet services as "advanced telecommunications capability," which would be beyond the scope of local governments. That would enable the agency to develop a coherent policy for the broadband market that would not differentiate among technologies. The agency stated:

> The FCC is the only agency with jurisdiction over all of the current providers of broadband technology—cable operators, wireline telephone companies, providers of wireless telecommunications service, and satellite communications firms. Local franchising authorities, in contrast, are in no position to implement technologically-neutral policies with respect to these competitors. These considerations support a narrow judicial resolution of the dispute before this Court.[95]

The FCC's decision to intervene in the appeal was influenced by the July 13, 1999, decision of Broward County, Florida, to require cable franchisees in unincorporated parts of the county to provide unaffiliated ISPs "such access on rates, terms, and conditions at least as favorable" as those provided to their affiliated ISPs.[96] Despite the claims of proponents of open access that many other cities would enact similar provisions,[97] and very intense lobbying campaigns in major markets such as San Francisco,[98] only a very small number of local governments

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have imposed open-access requirements on AT&T.[99] More than 1,500 local governments approved the transfer of TCI and MediaOne franchises to AT&T without an open-access condition.[100] Open-access requirements, however, have been imposed on other cable operators, such as Cox, Comcast, Charter, and Adelphia,[101] and were under consideration in a variety of communities until the Ninth Circuit said the debate was a matter for the FCC.[102]

The AT&T-MindSpring Agreement

In August 1999, the FCC declined to open a formal proceeding on cable modem service out of fear that such a proceeding would chill investment in this service.[103] Chairman Kennard, however, urged AT&T to negotiate an agreement to open its cable systems to unaffiliated ISPs. AT&T's CEO announced to Wall Street analysts that the company intended to pursue relationships with multiple vendors once its exclusive contract with Excite@Home expired in 2002, and it was widely reported that AT&T was negotiating with firms such as AOL, Yahoo, Microsoft, and MindSpring.[104] It was not surprising, then, that on December 6, 1999, AT&T, MindSpring, and the head of the FCC's local and state government advisory committee announced a set of principles to be used in contract negotiations between AT&T and unaffiliated ISPs.

According to the letter sent to Chairman Kennard, AT&T promised to work toward providing consumers with

- a choice of ISPs;
- the ability to exercise their choice of ISPs without having to subscribe to any other ISP;
- a choice of Internet connections at different speeds at prices reasonable and appropriate for those speeds;
- direct access to all content available on the World Wide Web without any AT&T-imposed charge to the consumer for such content;
- the continued ability to change or customize their "start page" and other aspects of their Internet experience;
- the functionality of their ISP comparable to that which such ISP has on competing high-speed systems, subject to any technical constraints particular to, or imposed on, all ISPs using AT&T's cable system to deliver high-speed Internet access.[105]

AT&T was prepared to negotiate agreements with multiple ISPs that would take effect at the expiration of its exclusive contract with Excite@Home in 2002. Those agreements would provide the ISP with Internet transport services at "prices reasonably comparable to those offered by AT&T to any other ISP for similar services," the opportunity to market high-speed Internet access to AT&T's cable customers, the opportunity to bill cable subscribers directly, and the opportunity to maintain brand recognition.[106] In a separate statement, AT&T noted that access for multiple ISPs would occur only after "technical issues are addressed,"[107] a process that Excite@Home's chief technology officer claimed would be difficult because the "technology to do what we're talking about in that letter doesn't exist today."[108]

AT&T's plan drew a mixed reaction from ISPs and other proponents of open access who claimed that it was a step in the right direction but did not go far enough.[109] Noticeably absent as a party to the letter was Internet giant AOL, which, unbeknownst to the rest of the world, was negotiating its merger with Time Warner. AOL's George Vradenburg, senior vice president for global and strategic policy, commenting on the AT&T-MindSpring agreement, stated that "the rubber's going to hit the road and really test this in reality when we try to enter into enforceable agreements."[110]

The AOL–Time Warner Merger

Time Warner has an exclusive contract with Road Runner to provide high-speed Internet services over Time Warner's cable

systems until the end of 2001. One of the intriguing consequences of AOL's merger with Time Warner is that AOL, the principal advocate of open access, will inherit this exclusive arrangement. And since Time Warner and MediaOne are the dominant shareholders in Road Runner, two archrivals, AOL and AT&T, would have been partners in Road Runner until the Department of Justice intervened. On the basis of antitrust concerns raised by the AT&T-MediaOne merger, the Department of Justice required AT&T to divest its interest in Road Runner.[111] Nonetheless, a deal between AOL and AT&T seems almost inevitable: AOL wants access to AT&T's cable systems and AT&T wants to provide local telephone service over the AOL–Time Warner cable systems.

At the time of the merger announcement, the position of AOL–Time Warner on open access was ambiguous. In a press release, the companies stated that they would be "committed to ensuring consumer choice of ISPs and content and that they hope this merger will persuade all companies operating broadband platforms to provide consumers with real choice."[112] But "real choice" seems sufficiently loose to cover a variety of positions that fall short of mandated access for all ISPs. As *Communications Today* reported:

> Steve Case, asked directly if AOL would remain an open-access partisan, mumbled several sentences about how it remains committed to multiple choices for consumers. "We are committed to the concept," Case said. What he did not say was "AOL was open access, so now Time Warner is too." There's a fair amount of distance between the two statements.[113]

Shortly after the merger announcement, AOL instructed its lobbyists to stop advocating open-access legislation.[114] Steve Case adopted Gerald Levin's view that private negotiations, rather than government regulations, should define the terms under which unaffiliated ISPs use cable systems for high-speed Internet access. AOL was now in a position to understand the business and regulatory realities that make mandatory open access a questionable idea. Voluntary open-access plans allow companies the flexibility to control the risk involved in the experimental venture of constructing broadband networks; they, not regulators, set the timetable and technical parameters, and allow for experimental rollouts.

On February 29, 2000, AOL and Time Warner unveiled a framework for ISP use of Time Warner's broadband cable facilities. The memorandum of understanding (MoU) establishes the following:

- Consumers will have choice among ISPs and will not be required to purchase service from an ISP affiliated with AOL–Time Warner;
- AOL–Time Warner will negotiate arm's-length commercial agreements with both affiliated (such as AOL) and unaffiliated ISPs and these agreements will not discriminate on the basis of whether or not the ISP is affiliated with AOL–Time Warner;
- AOL–Time Warner will allow video streaming; and
- ISPs will be able to have a direct relationship with the customer.[115]

The companies did not place a limit on the number of ISPs with which they would deal but added that the number of ISPs that could be accommodated was contingent on the "technological limitations" of broadband cable.[116] Furthermore, Time Warner stated that it would try to work with Road Runner so that other ISPs could use Time Warner cable systems before 2002.[117]

Like the AT&T-MindSpring letter, the AOL–Time Warner MoU received a mixed reaction. Appearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, Case and Levin resisted efforts to enact the principles of the MoU as

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law. For example, Levin told senators that "there's something even higher than the MoU and that's a sense of values."[118]

> Over snickering among spectators, Levin explained that beyond honest corporate culture of TW and AOL, senators could count on competition in market from DSL, DBS and fixed wireless to ensure cable operators will want to maximize revenue by accommodating ISPs at fair rates.[119]

Case and Levin urged other cable companies to adopt the principles of the MoU, which is not surprising because that would enable AOL to increase its broadband reach. Other major cable players, such as Cox and Comcast, recently announced that they will consider opening their systems after June 2002, but so-called consumer advocates continue to call for government-mandated open access.[120] As Kennard warned the cable industry in December 1999, "Don't underestimate the power of this issue to capture the attention, and the ire, of American consumers."[121]

The AT&T-MediaOne Merger

On June 5, 2000, the FCC conditionally approved the AT&T-MediaOne merger, provided that AT&T complied with rules limiting cable system ownership by May 2001.[122] The agency again refused to require that AT&T open its cable systems to unaffiliated ISPs, believing that consumers would not be harmed as long as alternative means of broadband Internet access continued to develop or unaffiliated ISPs were permitted access to AT&T's facilities.

The FCC's description of the emerging broadband market again undercuts claims that cable modem service has the characteristics of an essential facility. The commission stated:

> [T]here is evidence that ILECs, CLECs, and other competitive providers are aggressively rolling out alternative broadband technologies, notwithstanding cable's early lead in the nascent broadband area. ISPs lacking direct access to provide broadband services over cable systems are entering into alliances with alternative broadband providers, thereby accelerating the deployment of these technologies. Currently, those alternative technologies are attracting new subscribers at an exponential rate and prices for these new services appear to be falling. In fact, DSL sales are currently growing at a more rapid rate than cable modem sales.[123]

Moreover, ATT agreed to extend the commitments made in its December 6, 1999, agreement with MindSpring to MediaOne properties.[124] The FCC was hopeful that private negotiations would resolve the technical and business issues associated with unaffiliated ISP access to cable infrastructure "without the imposition of a government-mandated model."[125]

Several parties, such as MCI and MindSpring, argued that the FCC should classify cable systems offering Internet service as common carriers, subject to Title II of the Communications Act. The commission declined, stating that there may come a time when it will address the disparate treatment of cable and telephone broadband services, but these issues have industry-wide application and the merger review was not the appropriate forum.[126] The appropriate forum would arise in response the Ninth Circuit's decision in the *Portland* case.

The Ninth Circuit's Treatment of Cable-Internet Service

The ability of local governments in the western United States to mandate open access completely evaporated on June 22, 2000, when the Court of Appeals for the Ninth Circuit ruled that @Home was not a cable service.[127] The Ninth Circuit divided @Home into two elements. "To the extent @Home is a conventional ISP, its activities are one [*sic*] 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."[128] Congress prohibited local governments from "limiting, restricting, or conditioning" the provision of a telecommunications service by cable operators; thus, Portland could not tie the franchise transfer to AT&T's compliance with the open-access requirement.[129]

The Ninth Circuit believed that it could not rationally apply the scheme of cable regulation to "a non-broadcast interactive medium such as the Internet."[130] In contrast, treatment of cable broadband as a telecommunications service "coheres with the overall structure" of the Communications Act.[131] While noting that the FCC subjects ILEC DSL platforms to common carrier regulation, the Ninth Circuit was careful to note that the Communications Act also allowed the FCC to forbear from imposing similar obligations on cable broadband services.[132] Stated differently, the FCC may choose to regulate cable modem platforms like DSL platforms, but the classification of a portion of cable modem service as "telecommunications" does not automatically trigger common carrier regulation.

FCC chairman Kennard responded to the Ninth Circuit's opinion by announcing that the FCC would open a proceeding to define the appropriate regulation for cable broadband services. He cautioned, however, that he had not changed his preference for market forces' defining the terms under which unaffiliated ISPs gain access to cable systems. He stated, "Calling this a telecom service doesn't mean it invokes all the traditional telephone regulations."[133] Meanwhile, AT&T began signing up Portland area residents for @Home.[134]

The Essential Facilities Doctrine

The case for open-access regulation rests heavily on the claim that the cable modem is an essential facility.[135] Proponents of open access use "essential facility" loosely, in effect as an epithet reflecting the fact that a cable company has something that unaffiliated ISPs want.[136] But in law, "essential facility" is an antitrust term, used only after a detailed inquiry into the economic or practical infeasibility of duplicating the facility and other factors.[137] Consequently, it is extraordinary to regard a service that has not yet been deployed as an essential facility and to impose on it prophylactic regulations. Even if a facility is "essential," denial of access is not per se a violation of the antitrust laws; a monopolist with legitimate business reasons may refuse to deal with competitors.[138]

If an ISP such as MindSpring were to sue AT&T for refusing to open its cable modem service in a particular market, MindSpring would face an insurmountable burden in proving a Sherman Act violation; that explains why lobbying has been the preferred tactic of advocates of open access.[139] The difficulty of proving an essential facilities case is aptly illustrated by *Apartment Source v. Philadelphia Newspapers, Inc.*,[140] a recent case in which the defendants' refusal to publish the plaintiffs' advertising was claimed to violate the Sherman Act.

Apartment Source v. Philadelphia Newspapers

Apartment Source is an apartment locator service that links prospective tenants with apartment owners. One of its competitors is Apartment Solutions, which is owned by Philadelphia Newspapers Inc., the publisher of the city's largest daily newspapers, the *Philadelphia Inquirer* and the *Philadelphia Daily News*. Those newspapers refused to accept Apartment Source's advertisements because of a long-standing policy of denying access to competitors. In contrast, Apartment Solutions advertises extensively in the *Inquirer* and the *Daily News* at a fraction of the going advertising rates. Apartment Source challenged the newspapers' policy as an antitrust violation, claiming that access to those newspapers was essential to its ability to compete. Apartment Source asked the court to "level the playing field by requiring PNI to accept a modest amount of

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Apartment Source advertising."[141] After a four-day nonjury trial, Judge John Padova of the U.S. District Court for the Eastern District of Pennsylvania ruled that the plaintiffs failed to prove that PNI violated the Sherman Act.

The parties agreed that the relevant geographic market was the Philadelphia region but disagreed about the relevant product market. The plaintiffs claimed that apartment-locator services formed a product market or, alternatively, formed a submarket of the market for apartment rentals. Antitrust plaintiffs bear the burden of defining the relevant product market, and in this case Apartment Source failed to demonstrate the existence of an apartment-locator services market. Judge Padova found:

> There is evidence in the trial record that the consumer at issue here, apartment communities with 100 or more units, treat [*sic*] apartment guide books, classified advertising in newspapers, and other advertising vehicles as substitutes to listing with an ALS. In other words, there are a wide variety of advertising vehicles that are reasonably interchangeable by apartment communities for the same purpose: securing renters to fill vacant apartments.[142]

This definition of the product market was fatal to the plaintiffs' claim that PNI was a monopolist in control of an essential facility. The newspapers' share of the apartment rental advertising market was only 25 percent, a figure insufficient to establish monopoly power.[143]

The test for determining if a facility is essential is whether or not denial of access imposes a severe handicap on competitors. Judge Padova found that the newspapers' own apartment-listing service, Apartment Solutions, was "bleeding red ink" despite its extensive advertising in the newspapers at highly subsidized rates.[144] Thus, it was erroneous for the plaintiffs to believe that they could turn their venture into a profitable one if allowed to advertise in PNI's newspapers. Also, if equivalent facilities exist or if the benefits to be derived from access to the alleged essential facility can be obtained from other sources, the claim will fail. There were many feasible alternatives to PNI's newspapers, including "the suburban daily newspapers, the weekly newspapers, the Internet, the Yellow Pages, and direct mail. Suppliers in the apartment advertising market can, and do, advertise in the 75% of the market not controlled by PNI."[145] And Judge Padova found that the newspapers' refusal to deal with their competitor was based on a valid business reason—eliminating lost revenue.[146]

In his decision, Judge Padova made the following comment particularly applicable to the open-access issue:

> [T]he Court is not without sympathy for the difficulties faced by Plaintiffs in their new business venture. After all, PNI controls Philadelphia's largest daily newspapers, aggressively promotes Apartment Solutions in its newspapers, and flatly denies Apartment Source any access to this advertising vehicle. . . . [In the plaintiffs' eyes,] PNI's actions are unfair; while PNI props up its subsidiary with one hand, PNI pushes Apartment Source down with the other. . . .
>
> . . . But the antitrust laws are not designed to redress the alleged harm suffered by the Plaintiffs. *The general rule is that a company is free to do business with and to refuse to do business with anyone it pleases; a company is not obligated to give its competitors a helping hand. . . . A refusal to deal violates the antitrust laws in only very limited circumstances.*[147]

Stated differently, the antitrust laws do not pursue elusive goals such as a "level playing field" by eliminating all forms of competitive advantage. Behavior that may be harmful to a particular competitor, but does not harm the

market, is legal. As the Supreme Court stated, the purpose of antitrust policy is "the protection of competition, not competitors."[148]

Cable Modem Service and the Essential Facilities Doctrine

Because of the tie between the newspapers and Apartment Solutions, the *PNI* case provides a useful perspective for evaluating the antitrust implications of @Home's exclusive contracts with its cable parents such as AT&T or Comcast. Judge Padova's essential facility analysis is applicable to industries other than newspaper publishing. For example, in *Cyber Promotions v. America Online, Inc.*,[149] the same type of analysis was employed in a case brought by an e-mail advertising firm that sought to use AOL's system. In *Cyber Promotions,* AOL was found not to control an essential facility because there were numerous other ways for advertisers to reach AOL subscribers and AOL had legitimate business reasons for blocking Cyber's e-mail.

If AT&T or Comcast were sued under the essential facilities doctrine, the plaintiff would have to establish both the relevant geographic and product markets. Defining the geographic market is relatively easy; defining the product market is more difficult, especially given the nascent nature of residential broadband services. A plaintiff would seek the narrowest product market definition, arguing, as AOL did during the FCC's consideration of the AT&T-TCI merger, that broadband services constitute a market distinct from narrowband services.

The argument for defining the market narrowly focuses on the higher speed of broadband services. According to this view, narrowband services are not adequate substitutes for broadband services. Conversely, the argument for defining the market to include both narrowband and broadband services views the higher price of broadband as a disadvantage that explains why consumers thus far prefer lower-cost narrowband services.[150] Even if defined as including only broadband services, a particular geographic market may be quite competitive. For example, the Los Angeles Information Technology Agency recently defined the product market to include only broadband services. The ITA examined competition to cable modem service, such as DSL, satellite, and MMDS services, and agreed with the FCC that there was no evidence to indicate that cable modem service would emerge as a monopoly.[151]

The point of defining a relevant product market is to measure market power, but even a high market share, say, 80 percent or higher, may not necessarily indicate monopoly power. Given the fledgling status of the broadband market, a cable modem service provider's large market share in a particular geographic area may be only temporary and may "quickly dissipate as competitors catch up."[152] And a cable modem service provider's large market share in a particular geographic area does not necessarily mean that the provider controls an essential facility. As shown in the *PNI* case, the test for determining whether a facility is essential or not turns on whether denial of access imposes a severe handicap on competitors; if equivalent facilities exist, or the benefits to be derived from access to the alleged essential facility can be obtained from other sources, the facility is not essential. Thus, the presence of alternative ways for an ISP to reach broadband consumers, such as through DSL or wireless techniques, sharply undercuts the claim that a cable modem platform is an essential facility. The fact that alternatives may be more expensive or less convenient does not necessarily mean that the cable modem is an essential facility.

Closely related to the question of essentiality is the competitor's inability practically or reasonably to duplicate the alleged essential facility. Again, this is a very market-specific inquiry. In markets where DSL or other broadband technologies are available on economically feasible terms, a cable operator's refusal to deal with unaffiliated ISPs does not pose a severe handicap. In markets where feasible alternatives do not exist, the huge capital costs of building an alternative cable

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Even if the expense of duplicating a cable network makes it "infeasible" for the present, forced open access may not be the best approach for future competition.

network would indicate the infeasibility of duplicating the incumbent's network.[153] However, given the planned capital expenditures to deploy noncable broadband facilities, it is likely that in a few years cable will be the sole broadband provider only in unusual market situations. Of course, even in markets served by both DSL and cable broadband services, there may be neighborhoods where, because of technical considerations, DSL and cable modem services do not compete head-to-head.[154] But the fact that those pockets could probably also be served by terrestrial wireless and satellite services undercuts the essential facility status of cable.

Even if the expense of duplicating a cable network makes it "infeasible" for the present, forced open access may not be the best approach for future competition. Letting everyone onto the cable network will decrease incentives to innovate to find low-cost ways of duplicating the network.

Technical Issues

Assuming that the cable modem platform is considered an essential facility, the question of whether or not sharing the facility is practical remains. The "antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately."[155] One of the most contested issues in the open-access debate concerns the technical aspects of opening the cable network to unaffiliated ISPs. During the FCC's consideration of the AT&T-TCI merger, one of the leading ISPs, GTE, acknowledged that "the architecture and technology of the network planned by AT&T-TCI is not capable of supporting open and nondiscriminatory access without technical modification but suggests that the necessary modifications are feasible."[156] GTE bolstered its claim in June 1999 with the announcement of the results of a demonstration project using its cable system in Clearwater, Florida. GTE's test involved AOL, CompuServe Classic, and its own ISP, GTE.net, and used a router with special software to manage the traffic of those multiple ISPs instead of a router dedicated to the affiliated ISP. The technological changes to give 80,000 customers a choice of ISPs involved a one-time investment of $60,000.[157]

@Home instantly responded that the GTE test was of limited value because of the small number of customers and ISPs involved. The demonstration did not address issues such as capacity planning, customer interference, and network management. For example, @Home stated:

> Even if traffic can be directed to the proper ISP, the cable infrastructure is a shared network. How are one ISP's customers prevented from impacting and degrading the performance of another ISP's customers, and how can the cable operator know when to add additional capacity to the cable plant in order to keep up with growth? Because of the nature of the shared network, allocation of capacity is problematic.
>
> . . . As a shared facility, the network requires management of the cable modems, the plant, the head ends, and the routers. With no one operator to monitor and implement the services and fix problems, fingerpointing and poor service is the result for the consumer. When a customer has a problem that could be in the cable network or in the ISP's system, what database interfaces and software systems exist for these ISPs to troubleshoot the problem effectively?[158]

The FCC's chief technologist, Stagg Newman, agreed with @Home's technical analysis, stating, "Cable modem access is a very complicated technology."[159]

Although the FCC recently concluded that it is technically feasible for ILECs to share the telephone line providing residential voice service with competitors seeking to provide DSL service,[160] the commission's conclusion does not support open-access proposals.

The local telephone network, with a dedicated line for each residence, employs a different architecture than does the shared network design of cable systems. Moreover, although the FCC found that the technology exists to support more than two service providers on a single telephone line, "the complexities involved with implementing line sharing dramatically increase where more than two service providers share a single loop."[161] Consequently, the FCC rules require that an ILEC share a line with a only single CLEC, and the CLEC must use a form of DSL technology that does not degrade voice service.[162]

AT&T's agreement with MindSpring foresees AT&T's cable systems being reconfigured to accommodate some level of consumer choice among ISPs. And the AOL–Time Warner MoU acknowledges that there are limits on the number of ISPs that can use a cable system. It may well be that the technical problems of opening cable systems to multiple ISPs are not insurmountable, but neither are they simple.[163] Consequently, the accommodations necessary to facilitate open access are completely different from, for example, the scheduling necessary so that two professional football teams may share the only stadium in a metropolitan area. Unless an antitrust plaintiff can prove that sharing the facility is technically and economically practical,[164] access will not be mandated. Of course, if a cable company proves that shared access degrades its own use of its facilities, the company has a legitimate business reason for refusing access.

The First Amendment

The press is subject to generally applicable laws affecting business relationships, and courts reviewing so-called economic regulations apply the lowest form of judicial scrutiny. These types of laws do not present the danger of distorting the marketplace of ideas. Laws that target particular ideas or speakers, however, raise this danger and are subject to heightened forms of judicial review. Even though the Portland open-access law is not aimed at particular messages, it targets a specific speaker, AT&T. The Supreme Court requires that a content-neutral law that discriminates among speakers be subject to the highest form of judicial review unless it is justified by peculiar characteristics.[165] A content-neutral speaker-based law that is justified by peculiar characteristics of the speaker is subject to intermediate scrutiny. Thus, courts reviewing speaker-based laws should closely examine the characteristics of the medium or speaker to determine if the law is properly justified. Judge Panner's opinion in *AT&T Corp. v. City of Portland,* however, contains no analysis of the peculiar characteristics of AT&T's cable modem service. The opinion is an extraordinarily incomplete analysis of the relevant First Amendment issues. Although Judge Panner's decision has been reversed on other grounds by the Ninth Circuit, the opinion stands as the only judicial analysis of the constitutionality of mandatory open-access rules for cable. The analysis below points out the shortcomings of the district court's approach and presents an alternative analysis consistent with content-neutral free speech doctrine.

To Judge Panner, the open-access requirement was an "economic regulation,"[166] which he believed triggered the lowest form of judicial review. Furthermore, Judge Panner regarded AT&T's choice to allow users to access all Web content as collapsing the First Amendment issues to resemble those presented in a shopping mall case.[167] Yet the Supreme Court has noted that cable systems are entitled to strong First Amendment protection despite cable's "conduit" function. Judge Panner's opinion is stunning because of its complete lack of any reference to the prevailing precedent involving content-neutral regulation of access to "bottleneck" cable systems, *Turner Broadcasting System, Inc. v. FCC.*[168]

In *Turner Broadcasting,* the Court regarded the requirement that cable systems carry certain local television broadcasters as content neutral.[169] Rejecting the claim that the relaxed standard of judicial review applicable to broadcasting should also apply to cable,

Judge Panner's opinion is stunning because of its complete lack of any reference to the prevailing precedent involving content-neutral regulation of access to "bottleneck" cable systems.

Although *Turner Broadcasting* allows legislative bodies to make predictive judgments, those judgments must be based on substantial evidence.

the Court concluded that a content-neutral law that imposes special obligations on cable operators must pass the intermediate level of scrutiny, known as the *O'Brien* test.[170] At its heart, *O'Brien* asks whether a content-neutral regulation furthers a substantial governmental interest through narrowly tailored means. Although the Court found that the government's interests, such as preserving local television broadcasting, were substantial, it required that the government "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[171] Because there were unresolved factual questions, such as whether cable systems would use their market power to harm broadcasters, the Court remanded the case so the district court could review the record relied on by Congress to determine if Congress had "drawn reasonable inferences based on substantial evidence."[172] After examining the legislative record, the district court upheld the law, and the Supreme Court affirmed the district court.[173]

Although *Turner Broadcasting* allows legislative bodies to make predictive judgments, those judgments must be based on substantial evidence. Judge Panner, while not referring to *Turner Broadcasting*, nonetheless offered a sharply truncated *O'Brien* analysis in the following passage:

> The open-access provision is within constitutional power of the City and County, it furthers the substantial governmental interest in preserving competition, the governmental interest is unrelated to the suppression of free speech, and the incidental restriction on free speech is no greater than necessary.[174]

Other than merely noting elsewhere in his opinion that unaffiliated ISPs claimed they couldn't compete with @Home without an open-access requirement, Judge Panner conducted no analysis of the record. Nor did he examine whether the measure was necessary.[175] And Judge Panner's conclusion that the measure did not burden more speech than necessary is unsupported by any analysis of alternatives.[176] On this point, a lesson may be drawn from the different versions of must-carry requirements. As initially crafted, the must-carry rules required cable systems to retransmit each local television station. The Court of Appeals for the District of Columbia Circuit found those rules to be grossly overinclusive because preserving local broadcast service did not require protecting each local broadcaster.[177] Consequently, the revised version of must-carry approved by the Supreme Court in *Turner Broadcasting* limits the number of local television stations a cable system must carry. In the Internet access setting, there is a distinction between preserving competition and protecting each and every ISP.

The Portland open-access requirement is also fatally overinclusive in that it treats every denial of access as motivated by anti-competitive concerns.[178] Yet, as shown in the discussion of the essential facility doctrine, the antitrust laws acknowledge that refusals to deal are legal when justified by legitimate business reasons. For example, @Home's Master Distribution Agreement entitles the company's cable parents (e.g., AT&T, Comcast, and Cox) to require @Home to block access to Web sites containing "pornographic or other immoral or overly violent subject matter."[179] Although this blocking provision has yet to be invoked, if AT&T were to do so, its exercise of editorial discretion as to the content disseminated over its facilities should be protected under the First Amendment and the antitrust laws, just as courts protect the ability of AOL or newspapers—even those with monopoly power—to reject advertising.[180] Given the rhetoric of proponents of open access who paint AT&T as a "gatekeeper" poised to harm the First Amendment, it is especially important to note that any content control AT&T might exercise over its broadband facilities does not affect the First Amendment rights of speak-

ers or willing recipients. AT&T is a private actor, not a state actor, and its facilities are not a public forum.[181]

The fact that AT&T has voluntarily offered subscribers access to all Web sites through @Home does not alter one central fact: the Portland open-access provision prevents AT&T from changing its policy and blocking access to Web sites it regards as unacceptable.[182] The Portland policy grants access rights to online services as well as ISPs; the operator of a sexually explicit Web site has the same right of access as each of Oregon's homegrown independent ISPs. The consequences of this are starkly illustrated by the following scenario. Assume that AT&T denies access to a Web site advocating the murder of physicians who perform abortions.[183] The Mt. Hood Cable Regulatory Commission would be drawn into extraordinarily complex questions such as whether advocacy of illegal action abrogates a Web site's right of access. The members of this regulatory group are ill equipped to decide constitutionally sensitive questions such as whether the Web site's advocacy promotes an abstract principle, which is protected speech, or calls for imminent action.[184]

Portland's policy may also be contrasted with another cable "bottleneck" law, the federal leased-access law that requires that cable operators set aside a portion of their channels for use by unaffiliated video programmers. Congress initially prevented cable operators from exercising any editorial control over those channels, but, fearing that they had become "public porn channels,"[185] Congress later restored limited editorial control to cable operators, enabling them to prohibit obscene and indecent programming.[186] In 1996 the Supreme Court found this provision to be a constitutional means of protecting children from exposure to harmful expression.[187]

Even if Portland's policy is interpreted as allowing AT&T to exercise editorial discretion over the @Home portion of its cable modem service but no control over the content disseminated by unaffiliated ISPs, the policy still restricts AT&T's ability to make choices about content on that portion of its facilities used by the unaffiliated ISPs. Judge Panner completely disregarded the fact that cable systems have finite bandwidth, especially for upstream communication. Whether each ISP is assigned its own channel or all ISPs subdivide a common channel,[188] each unaffiliated ISP takes up bandwidth AT&T could use to disseminate speech of its own selection. Portland's policy impacts AT&T's editorial discretion by restricting the company's ability to define how bandwidth is used for expressive purposes. AT&T's policy for its cable modem service is evolving; the company's current posture toward this service should not determine its ability to redefine the service in the future.

In summary, Judge Panner's so-called First Amendment analysis was nothing more than rational basis scrutiny. Consequently, the "essential facility" justification for the law was not examined. Nor were the law's tailoring flaws explored. As this analysis reveals, cable modem service is not an essential facility and broad measures such as the Portland open-access law are poorly crafted. Even when more narrowly drawn, laws regulating Internet access via cable are likely to be undermined by a rapidly changing market.

Conclusion

When @Home was created in 1995, exclusivity appeared to be a good strategy. But the Internet moves at the speed of light and exclusivity is quickly losing its appeal, as shown by AT&T's agreement with MindSpring and AOL's pledge to allow Time Warner cable subscribers choice among ISPs. Negotiations between cable companies and ISPs are more likely to yield commercially viable uses of cable broadband networks than are the efforts of local cable regulators who have little expertise in determining fair prices and identifying discrimination. And, while the FCC may have more expertise in this area, its efforts are likely to be quickly outdated by a rapidly changing market. Stated differently, the financial conse-

Judge Panner's so-called First Amendment analysis was nothing more than rational basis scrutiny.

AT&T's plan to use cable to deliver local telephone service and Internet access is one of the biggest gambles in the world of business. Within the bounds set by the antitrust laws, cable operators should be free to deploy and adapt broadband networks as they wish.

quences to AT&T or AOL–Time Warner of misallocating resources can be severe. But what are the consequences for regulators when their actions are ineffective?

AT&T's plan to use cable to deliver local telephone service and Internet access is one of the biggest gambles in the world of business. Within the bounds set by the antitrust laws, cable operators should be free to deploy and adapt broadband networks as they wish. As this study shows, regulating cable modem service as an essential facility distorts the antitrust laws. As used by proponents of open access, the term "essential facility" is an epithet that masks an effort to use government power to advance private interests. Just as the police inspector in Casablanca was shocked to learn that gambling was occurring at Rick's, students of regulation will be shocked to see private interests presented as the so-called public interest.

Historians who study the evolution of the Internet will likely mark the open-access dispute as the first instance of large-scale lobbying by Internet firms. Sadly, this dispute signals a marked change in the culture of the Internet. Just like more established media, such as broadcasting, Internet firms are now seeking to influence politicians through Washington-based associations, government relations departments, and political action committees. Anyone who thinks this process will benefit the Internet need only examine the history of broadcasting and cable regulation to see how regulators deform the marketplace.

Notes

1. Bryan Gruley, "AOL Leads Lobbying Campaign to Gain Access to 'Broad-band' Cable-TV Lines for the Internet," *Wall Street Journal*, January 26, 1999, p. A20; and Thomas E. Weber, "AOL Lobbying Move in Cable Fight Is Paying Off," *Wall Street Journal*, July 15, 1999, p. B6.

2. "Open access" lacks a precise definition. The primary advocate of open access, the openNET Coalition, states that it is "dedicated to promoting the rights of all citizens to obtain affordable high-speed access to the Internet from the provider of their choice." openNET Coalition, "Our Mission" (visited June 15, 1999), <http://www.opennetcoalition.org/who/>. Translated into regulation, this means that consumers should not have to use the ISP affiliated with the cable company and that all interested unaffiliated ISPs should be able to purchase high-speed access to consumers on a nondiscriminatory basis. The Federal Communications Commission's Cable Services Bureau recently noted that the lack of a precise definition of "open access" created a number of problems. The bureau said:

> None of the enacted local legislation requiring access has set forth a defined system of interconnection or guidelines for pricing. And most of the enacted or proposed legislation simply mandates that the terms, rates, and conditions of "open access" shall be the same as those the cable operator provides to itself or affiliated ISPs. This nondiscrimination standard offers little guidance when a cable operator does not itself offer Internet access service or is not affiliated with an ISP.
>
> Further, even as to cable operators providing Internet access service through an affiliated ISP, a "nondiscrimination" standard leaves many implementation questions unanswered.

FCC Cable Services Bureau, *Broadband Today*, October 1999, p. 38. Cited hereinafter as *Broadband Today*.

3. Saul Hansell, "America Online Agrees to Buy Time Warner for $165 Billion," *New York Times*, January 11, 2000, p. A1.

4. Quoted in John R. Wilke and Kathy Chen, "Merger Partners Vow Open Access to Cable Lines," *Wall Street Journal*, January 11, 2000, p. B1.

5. Quoted in ibid. In a press release, AOL and Time Warner announced that the new company would be "committed to consumer choice of ISPs and content and that they hope this merger will persuade all companies operating broadband platforms to provide consumers with real choice." AOL and Time Warner, "America Online and Time Warner Will Merge to Create World's First Internet-Age Media and Communications Company," Press release, January 10, 2000, p. 6, <http:www.corp.aol.com/cgi/announce-pr.html?>. As the *Washington Post* reported, this statement "masked a stunning reversal: AOL also renounced government-imposed rules as the means of ensuring open access." Peter S. Goodman and John Schwartz, "Deal Stirs Concerns about Internet Access," *Washington Post*, January 11, 2000, p. E1. See also "AOL's Vradenburg Says Open Access Focus Is Shifting

from Govt.," *Communications Daily*, January 13, 2000.

6. The openNET Coalition announced that it "will continue to fight for open access to all cable networks" and will "continue to urge the federal government to make open access the rule for the entire cable industry." openNET Coalition, "Statement on America Online–Time Warner Merger Agreement," January 10, 2000, <http://www.opennetcoalition.org/news/947541906.shtml>. The Walt Disney Company, recently burned by Time Warner's decision to temporarily drop Disney-owned television stations in major markets, has emerged as a major proponent of government-mandated open access. Kathy Chen, "Disney Campaigns against AOL–Time Warner," *Wall Street Journal*, May 18, 2000, p. B14; and Bruce Orwall and Martin Peers, "Disney Seeks Rules for AOL Purchase of Time Warner," *Wall Street Journal*, May 12, 2000, p. B2.

7. Seth Schiesel, "With Cable Deal, AT&T Makes Move to Regain Empire," *New York Times*, June 25, 1998, p. A1; and Saul Hansell, "Hooking Up the Nation," *New York Times*, June 25, 1998, p. A1. See generally Rebecca Blumenstein and Joann Lublin, "Amid All the Bets, One Stands Out: AT&T Ventures into Cable," *Wall Street Journal*, November 5, 1999, p. A1 (describing the transformation of AT&T's revenue stream as the company moves into broadband communications).

8. Rebecca Blumenstein, Leslie Cauley, and Kara Swisher, "Inside the Tangles of AT&T's Web Strategy," *Wall Street Journal*, August 13, 1999, p. B1. See also Saul Hansell, "A Hitch to Marital Web Bliss: Excite@Home Is Often at Odds with Its Cable Parents," *New York Times*, June 9, 1999, p. C1.

9. National Cable Television Association, "Cable Industry Overview" (visited June 22, 1999), <http://www.ncta.com/overview98_2html> (describing the availability of cable modem and telephony services).

10. Joel Brinkley, "Early Reviews Look Positive; Close Scrutiny Is a Certainty," *New York Times*, June 25, 1998, p. C4; and Bryan Gruley, "Why Laissez Faire Is the Washington Line on Telecom Mergers," *Wall Street Journal*, May 10, 1999, p. A1.

11. Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, 1999 FCC LEXIS 407 ¶ 42 (1999). Cited hereinafter as FCC Broadband Report.

12. Rebecca Blumenstein and Leslie Cauley, "As Worlds Collide, AT&T Grabs a Power Seat: Ma Bell's Plan Is to Serve Up TV, Phone via Cable," *Wall Street Journal*, May 6, 1999, p. B1. See also "It's War, and Web's Future Is the Prize," *Wall Street Journal*, May 4, 1999, p. B1 (describing the strategies of the companies involved in the takeover fight between AT&T and Comcast for MediaOne).

13. FCC Broadband Report ¶ 86.

14. Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc. to AT&T Corp., *Communications Regulation* 15 (1999): ¶ 68. Cited hereinafter as AT&T-TCI Merger.

15. See, for example, Kara Swisher, "Excite At Home to Offer Free Access to Web," *Wall Street Journal*, January 6, 2000, p. B8; and Andrea Petersen, "Upstart ISPs Offer Free Access, But for a Price," *Wall Street Journal*, June 24, 1999, p. B10.

16. AT&T-TCI Merger ¶ 69.

17. FCC Broadband Report ¶ 64.

18. Andrea Peterson, "Small Players Deluge Market with Free Disks," *Wall Street Journal*, August 3, 1999, p. B1; and America Online, "1999 Annual Report" (visited January 5, 2000), <http://corp.aol.com/annual/highlights/highlights.html>. In the past two years AOL "has added a whopping 10 million subscribers, more than the combined membership base of most of its major competitors." Nick Wingfield, "America Online Net More Than Doubled," *Wall Street Journal*, January 20, 2000, pp. A3, A6.

19. FCC Broadband Report ¶ 32.

20. AT&T-TCI Merger ¶ 70. For technical information about cable modem service, see "Cable Modem Overview" (visited June 25, 1999), <http://www.cablemodems.com/whatis.shtml>; and "Frequently Asked Questions" (visited June 25, 1999), <http://www.tci.net/pages/faq.html>. For a listing of markets where cable modem service is offered, see <http://www.catv.org.modem/frame/deply.html>

21. Telephone Interview with John Englund, director of policy and government affairs, Excite@Home, December 3, 1999.

22. Excite@Home, "Excite@Home Rolls Out @Home 2000," Press release, October 19, 1999, <http://corp.excite.com/news/pr_000404_01.html>. Excite@Home's start screen strategy has caused public disputes between AT&T-TCI executives and Excite@Home executives. See, for example, Hansell, "A Hitch to Marital Web Bliss," p. C1; and Lesley Cauley, "AT&T's Top Cable Executive Resigns amid Internet-Access Fracas," *Wall Street*

Journal, October 7, 1999, p. B1.

23. "Cable Modem Advantages" (visited June 25, 1999), <http://www.cablemodems.com/advantages.shtml>.

24. AT&T-TCI Merger ¶ 71 and n. 207. Other factors affecting transmission speed include the subscriber's computer, whether cached or noncached data are accessed, the location of the accessed server, performance of each component of the network, and all users' compliance with the cable modem provider's policies. See, for example, Excite@Home, "@Home Service Acceptable Use Policy" (visited November 23, 1999), <http://www.home.com/support/aup/>. See also Leslie Cauley, "Heavy Traffic Is Overloading Cable Companies' New Internet Lines," *Wall Street Journal*, March 16, 2000, p. B1 (describing the problems posed by users who do not comply with acceptable use policies).

25. National Cable Television Association, "Cable Television Industry Year–End Review 1998" (visited June 22, 1999), <http://www/ncta.com/yearend98_3.html>.

26. *Broadband Today*, p. 26.

27. FCC Broadband Report ¶ 54; Excite@Home, "Excite@Home Surpasses One Million Broadband Subscribers," Press release, December 6, 1999, <http://www.home.net/news/pr_991206_0101.html>; and Leslie Cauley, "Beep! Beep! AOL May Push a Web Laggard Ahead," *Wall Street Journal*, January 13, 2000, p. B1.

28. For a listing of ISPs offering DSL service, see <http://www.dslreports.com>. See generally Scott Thurm, "In a Race to the Web, Phone Upstarts Grab Turf," *Wall Street Journal*, October 18, 1999, p. B1 (describing the efforts of ISPs using DSL technology). For a brief discussion of DSL technology, see Deployment of Wireline Services Offering Advanced Telecommunications Capability, 1999 FCC LEXIS 1327 ¶ ¶ 9–12 (March 31, 1999). For a comparison of the different forms of DSL, see *Broadband Today*, p. 21.

29. Randy Barrett and Carol Wilson, "Digital Phone Lines Gain Speed: Pricing Uncertainty," *Interactive Week*, November 8, 1999, <http://www.zdnet.com/intweek/stories/news/0,4164,2388809-3,00.html>.

30. FCC Broadband Report, Appendix A ¶ 6.

31. TeleChoice, "DSL Deployment Surges Well beyond Projections; Grows 5 Times Faster Than Cable in 6-Month Period," Press release, August 6, 1999, <http://www.telechoice.com/content/ press-releases/ 08171999.asp>.

32. Barrett and Wilson. For other recent estimates of the DSL markets, see Section 706 Notice of Inquiry, 2000 FCC LEXIS 733, Appendix A ¶ 5 (February 18, 2000).

33. SBC, "SBC Launches $6 Billion Initiative to Transform It into America's Largest Single Broadband Provider," Press release, October 18, 1999, <http://www.sbc.com/Project_Pronto/Home.html>. See also Stephanie Mehta, "SBC Communications Plans to Speed Up DSL Service Rollout," *Wall Street Journal*, October 18, 1999, p. B6. SBC also formed a partnership with Prodigy to market DSL service. Stephanie Mehta, "SBC, Prodigy to Combine Internet Plans," *Wall Street Journal*, November 23, 1999, p. A3. For a discussion of DSL activity by other regional Bell operating companies and GTE, see *Broadband Today*, pp. 27–29. Smaller local exchange companies in rural areas are also deploying DSL. See FCC Broadband Report ¶ ¶ 68–69. The deployment of DSL may be accelerated by Lucent Technologies' recent move into the DSL equipment market. See Stephanie Mehta, "Lucent Has Multiform DSL for Telephones," *Wall Street Journal*, September 7, 1999, p. B6. AT&T also recently announced it will use DSL to provide high-speed Internet access to business customers. Rebecca Blumenstein, "AT&T to Offer Internet Access through DSL," *Wall Street Journal*, September 16, 1999, p. B6.

34. Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 1999 FCC LEXIS 6303 (1999). Hereinafter cited as Line Sharing Report. In a separate ruling, the FCC found that, because of the nascent nature of this market, incumbent local exchange carriers (ILECs) do not have to unbundle their packet switches and digital subscriber line access multiplexers (DSLAMs) used for high-speed Internet access. FCC Promotes Local Telecommunications Competition, 1999 FCC LEXIS 4534 (1999). DSL competitors that have their own DSLAMs will still have collocation and interconnection rights in ILEC central offices and will have access to the loop serving the "last mile" to residential customers. "FCC Unshackles Bells' DSL Gear," *Network World*, September 20, 1999, p. 6.

35. Saul Hansell, "Now, AOL Everywhere," *New York Times*, July 4, 1999, sec. 3, pp. 1, 6; Bell Atlantic and AOL, "AOL and Bell Atlantic Form Strategic Partnership to Provide High-Speed Access for the AOL Service," Press release, January 13, 1999, <http://www/ba.com/nr/1999/Jan/ 19990113002.html>; "AOL, Ameritech Ink High-Speed DSL Deal" (visited June 25, 1999), <http://www.news.com/News/

Item/0.4.39537,00.html>; and Corey Grice, "AOL Sows High-Speed Seeds around AT&T" (visited September 15, 1999), <http://www.news.com/News/Item/ 0,4,39608,00.html>.

36. AOL and Hughes Electronics, "America Online and Hughes Electronics Form Strategic Alliance to Market Unparalleled Digital Entertainment and Internet Services," Press release, June 21, 1999, <http://www.direcpc.com/consumer/scoop/pr11.html>. Hughes recently sold its satellite-manufacturing business as part of its strategy to focus on broadband communications. Andy Pasztor, "Hughes Aims to Expand AOL Satellite Venture," *Wall Street Journal*, January 14, 2000, p. B2.

37. FCC Broadband Report, Appendix A ¶ 3. Because DirecPC does not transmit at speeds in excess of 200 Kbps in both downstream and upstream directions, the FCC does not classify it as a broadband service. Ibid. ¶ 22 n. 17.

38. Ibid., Appendix A ¶ 9. See also *Broadband Today*, pp. 22, 30. Another form of wireless Internet connection is offered by Multichannel Multipoint Distribution Service (MMDS) and Local Multipoint Distribution Service (LMDS). FCC Broadband Report, Appendix A ¶¶ 7–8. Although the FCC lacked information on the number of subscribers to these services, it noted that an estimated several million households could obtain service from these companies. Ibid. ¶ 57. See also *Broadband Today*, pp. 29–30. Wireless telephone services are also developing methods of connecting wireless phones to the Internet. See, for example, Nicole Harris, "Wireless Phone Companies Cheer AOL Merger," *Wall Street Journal*, January 13, 2000, p. B14 (estimating that 15 million wireless phone subscribers will be using their phones to get data from the Web by the end of 2000); and Nicole Harris, "AT&T's High Wireless Act: Can It Deliver the Web and a Dial Tone?" *Wall Street Journal*, March 2, 2000, p. B1. For an extensive discussion of wireless methods of Internet access, see "The Internet Cuts the Cord," *Wall Street Journal*, September 20, 1999, pp. R1-31 (special report). For a discussion of AOL's recent moves in the wireless market, see Nick Wingfield, "AOL Expands Links to Wireless Services," *Wall Street Journal*, February 29, 2000, p. B6.

39. For an early exploration of some of the policy questions raised by cable modem services, see Barbara Esbin, "Internet over Cable: Defining the Future in Terms of the Past," FCC Office of Plans and Policy, Working Paper no. 30, August 1998.

40. Telecommunications Act of 1996, Pub. L. No. 104-104 § 509(b)(2), 110 Stat. 56, 138 (1996).

41. Quoted in Bryan Gruley, "Must AT&T Give Internet Rivals Access to TCI's Network?" *Wall Street Journal*, January 15, 1999, pp. A1, A6.

42. One of the cable industry's greatest fears has been common carrier regulation. The industry fought intensely for a provision in the Cable Communications Policy Act of 1984, which states: "Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service." Pub. L. No. 98-549 § 621(c), 98 Stat. 2779, 2786 (1984). The House Committee on Energy and Commerce noted that this exemption applied only to "cable services" and preserved existing regulatory authority over all other communications services offered by a cable system. H.R. Rep. No. 934, p. 29 (1984). As will be discussed below, the legal category applied to cable-Internet service is critical. For a discussion of the limited authority of local governments over telecommunications services, see TCI Cablevision of Oakland County, Inc., 1997 FCC LEXIS 5164 (1997) (stating that Congress intended to separate the functions of cable franchising from the regulation of telecommunications services).

43. Gruley, "Must AT&T Give Internet Rivals Access to TCI's Network?" p. A6. An insight into Olson's regulatory philosophy is provided by his acknowledgment that, while federal law governing third-party access to cable systems does not refer to Internet services, "I come from an environment that says, unless the federal [law] says you can't do something, you can." Quoted in ibid.

44. Intervenors' Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment at 10, *AT&T Corp. v. City of Portland*, 1999 U.S. Dist. LEXIS 8223 (D. Ore. June 3, 1999) (quoting comments of Richard Horswell, president of the Oregon Internet Service Provider Association).

45. Quoted in Gruley, "Must AT&T Give Rivals Access to TCI's Network?" p. A6. The identity of the commissioners and their occupations are available at <http://www.mhcrc.org/staff.htm>. Olson described the vote as reflecting the independent thinking of *Oregonian*s who have stood out from residents of other states on issues such as medicinal marijuana and physician-assisted suicide. "It is a streak that is miles deep and miles wide and very, very Oregon," Olson said. Quoted in Su-jin Yim, "Bad Reception for AT&T," *Oregonian*, December 14, 1998, pp. C1, C5.

46. *AT&T Corp. v. City of Portland* (D. Ore.) at *6.

47. Ibid.

48. James R. Ratner, "Should There Be an Essential Facility Doctrine?" *University of California at Davis*

Law Review 21 (1988): 372 (footnotes omitted).

49. For example, San Francisco's Department of Telecommunications and Information Services recently recommended implementation of an open-access requirement without rate regulation "because the City does not have the resources to develop a detailed regulatory program." City and County of San Francisco Department of Telecommunications and Information Services, "Open Access Report," January 14, 2000, p. 65. Cited hereinafter as "Open Access Report." See also *Broadband Today*, p. 45 (noting the lengthy time it took the Canadian Radio-Television Commission to develop complex rules governing nondiscriminatory access for unaffiliated ISPs).

50. AT&T's general counsel James Cicconi stated, "[W]e can't proceed to roll out the services until this matter is resolved. . . ." Quoted in "AT&T's Armstrong Says Portland Case Won't Stand on Appeal," *Warren's Cable Regulation Monitor*, June 21, 1999. @Home was introduced in limited parts of Washington County and Clackamas County before the decision to impose the open-access requirement. Su-jin Yim, "Lawsuit Slows the Spread of @Home's Internet Hookups," *Oregonian*, May 16, 1999, p. D1. See generally Su-jin Yim, "One Brand of Faster Internet Comes by Cable," *Oregonian*, May 16, 1999, p. D1. DSL, however, has been deployed in Portland since 1999. Covad, "Covad Broadens Portland's Choice of DSL Services to Area Businesses and Homes," Press release, July 12, 1999, <http://www.covad.com/press_071299.cfm>.

51. Quoted in Leslie Cauley, "AT&T to Shun Exclusive Pacts for Cable TV," *Wall Street Journal*, June 15, 1999, p. B8. In its lobbying efforts, AT&T repeatedly emphasized the chill that open-access requirements would have on its plans to upgrade cable systems for telephone and Internet services. Kathy Chen, "AT&T Used Carrot-and-Stick Lobbying Efforts in Local Debates over Access to Cable-TV Lines," *Wall Street Journal*, November 24, 1999, p. A20. Cox Communications also threatened not to provide cable modem service in response to adoption of an open-access requirement by Fairfax, Virginia. Eric Wee and John Schwartz, "Fairfax City Opens Cable Lines," *Washington Post*, October 1, 1999, p. B2. For the argument that open access will not reduce investment incentives, see Jeffrey MacKie-Mason, "Investment in Cable Broadband Infrastructure: Open Access Is Not an Obstacle," 1999, Unpublished manuscript. On file with the author.

52. Bryan Gruley, "FCC Fight Erupts over Internet Access," *Wall Street Journal*, January 22, 1999, p. A3.

53. Telecommunications Act of 1996 § 706(b).

54. FCC Broadband Report ¶ 44.

55. Ibid. ¶ 36.

56. Ibid. ¶ 48.

57. Ibid. ¶ 101.

58. Ibid.

59. Ibid. ¶ 7. See also Section 706 Notice of Inquiry (noting a variety of questions about the broadband market).

60. For a listing of the various policy proposals for cable modem service presented during this proceeding, see AT&T-TCI Merger ¶ 86.

61. Ibid. ¶ 82. See 47 U.S.C. § 522(6)(B).

62. AT&T-TCI Merger ¶ 84. One of the more interesting proposals was advanced by BellSouth, which claimed that the FCC should determine that high-speed Internet access services offered by ILECs are not subject to interconnection, unbundling, and resale requirements. Ibid. ¶ 86. As previously noted, the FCC has given ISPs access to certain network elements for DSL service but has not provided access to other elements.

63. *AT&T Corp. v. City of Portland*, 2000 U.S. App. LEXIS 14383 (9th Cir. June 22, 2000).

64. AT&T-TCI Merger ¶ 77.

65. Ibid. ¶ 78.

66. Ibid. ¶ 93.

67. Ibid. ¶ 94.

68. Ibid.

69. Ibid. ¶ 95.

70. AOL's pricing information is available at <http://www.aol.com/info/pricing.html>.

71. AT&T-TCI Merger ¶ 65.

72. @Home's pricing information is available at <http://www.home.com/pricing.html>. In select markets, @Home affiliates recently ran a promotion that provides subsidies to @Home users wishing to use AOL. Those AOL users get a discount from @Home so they do not have to pay the regular @Home monthly fee plus $9.95 a month to AOL. "@Home Affiliates Subsidizing AOL Access Charges," *Broadband Bob Report*, September 13, 1999 (visited September 28, 1999), <http://www.catv.org/bbbreport/frame/archives99.html>. Excite@Home reported that this has been

its most successful customer acquisition program targeted at on-line customers. Excite@Home, "Excite@Home Reports Third Quarter 1999 Results," Press release, October 19, 1999, <http://www.home.net/news/pr_991019_01.html>.

73. Hansell, "A Hitch to Marital Web Bliss," p. C1.

74. Quoted in Blumenstein, Cauley, and Swisher, p. B4.

75. While AOL's revenue from advertising and e-commerce recently has dramatically increased, 66 percent of its revenue comes from subscription fees. Wingfield, "AOL Online Net More Than Doubled," p. A6.

76. Quoted in Nick Wingfield, "Free Web Services Challenge AOL's Dominance," *Wall Street Journal*, September 23, 1999, p. B8.

77. Scott Rosenberg, "A Corporate Game of Internet Monopoly" (visited November 19, 1999), <http://www.salonmagazine.com/21st/rose/1999/01/20straight2.html>

78. H.R. 1686, 106th Cong., 1st sess. (1999); and H.R. 1685, 106th Cong., 1st sess. (1999). These bills, sponsored by Reps. Bob Goodlatte (R-Va.) and Rick Boucher (D-Va.), are opposed by Rep. Billy Tauzin (R-La.), chairman of the Subcommittee on Telecommunications, Trade, and Consumer Protection of the House Commerce Committee.

79. See *Reno v. ACLU, 117 S. Ct. 2329* (1997) (finding invalid provisions of federal statute governing indecency on the Internet).

80. Internet Ventures, Inc., 2000 FCC LEXIS 720 (February 18, 2000) (ruling that ISP Internet access service is not video programming). For Internet Ventures' petition, see <http://www.ivn.net/ strat/access.html>. See also Michael Hiltzik, "Net Firm to Ask FCC to Open Cable Lines," *Los Angeles Times*, June 2, 1999, p. C1. Internet Ventures' approach was not supported by AOL and its allies because it would limit the number of ISPs that could gain access to a cable system. "NCTA Attacks IV Petition on Legal and Public Policy Grounds," *Warren's Cable Regulation Monitor*, July 19, 1999.

81. See, for example, Kara Swisher, Khanh Tran, and Kathy Chen, "High-Stakes Internet Battle Erupts in San Francisco," *Wall Street Journal*, July 26, 1999, p. A24; and Stephen Labaton, "Fight for Internet Access Creates Unusual Alliances," *New York Times*, August 13, 1999, p. A1.

82. *AT&T Corp. v. City of Portland* (D. Ore.). Recently, another federal district court found an open-access ordinance to be preempted by federal law. *MediaOne Group, Inc. v. County of Henrico*, 2000 U.S. Dist. LEXIS 6517 (E.D. Va. May 10, 2000).

83. *AT&T Corp. v. City of Portland* (D. Ore.) at *10.

84. Ibid. at *11.

85. See, for example, Plaintiffs' Reply Memorandum in Support of Their Motion for Partial Summary Judgment and Memorandum in Opposition to Defendants' Cross-Motion for Summary Judgment at 1–2, *AT&T Corp. v. City of Portland* (D. Ore.) (No. CV 99-65-PA), stating:

> The Municipalities have neither jurisdiction to make an adjudicatory finding that TCI's cable system is an essential facility for Internet access nor any factual basis for imposing the kind of antitrust remedy they seek to apply. The Municipalities are not a court of law or other tribunal capable of finding that TCI's cable system is such an essential facility and they can show no basis for limiting that remedy to TCI's cable system alone.

See also Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment at 30, *AT&T Corp. v. City of Portland* (D. Ore.), criticizing the lack of factual support for the open-access requirement. But see Defendants' Motion for Summary Judgment at 40–41, *AT&T Corp. v. City of Portland* (D. Ore.), which describes the evidence before the local governments.

86. *AT&T Corp. v. City of Portland* (D. Ore.) at *11.

87. 512 U.S. 622 (1994).

88. Ibid. at 666.

89. William E. Kennard, "The Road Not Taken: Building a Broadband Future for America," Address before the National Cable Television Association, Chicago, June 15, 1999, p. 5 (visited June 28, 1999), <http://www.fcc.gov/Speeches/Kennard/spwek921.html>. See also William E. Kennard, "How to End the World Wide Wait," *Wall Street Journal*, August 24, 1999, p. A18.

90. Kennard, "The Road Not Taken," p. 3. See also Stephanie Mehta and Kathy Chen, "U.S. Market for Broadband Is Barely Tapped," *Wall Street Journal*, January 12, 2000.

91. Kennard, "The Road Not Taken," p. 4. See also Jason Oxman, "The FCC and the Unregulation of the Internet," FCC Office of Plans and Policy, Working Paper no. 31, July 1999.

92. Kennard, "The Road Not Taken," p. 5.

93. "AT&T Asks to Speed Appeals Process in Suit over Access to Cable," *Wall Street Journal*, June 17, 1999, p. B11.

94. Amicus Curiae Brief of the Federal Communications Commission at 27, *AT&T Corp. v. City of Portland* (9th Cir. August 16, 1999) (No. 99-35609).

95. Ibid. at 29. In the FCC's recent line-sharing proceeding, US West argued that line sharing for DSL service violated the principle of competitive neutrality because the commission has not imposed a similar requirement on cable operators. The FCC stated:

> We note that the [Communications] Act makes distinctions based on a common carrier's prior monopoly status. . . . We have not yet determined whether the provision of Internet access through a cable modem is a cable service, telecommunications service, or information service . . . . We have determined, however, that lack of access to the high frequency portion of the incumbent's local loop impairs a competitive carrier's ability to offer advanced services. . . . Therefore, we conclude that it is appropriate to unbundle access to the high frequency portion of the local loop, regardless of the regulatory status of cable modem Internet access.

Line Sharing Report ¶ 59 (footnotes omitted).

96. Broward County, Florida, Ordinance no. 1999-41, enacted July 13, 1999 (visited November 23, 1999), <http://www.broward.org>. See generally Kathy Chen, "Another Vote to Open Up Cable Lines Means More Complications for AT&T," *Wall Street Journal*, July 14, 1999, p. B7. This ordinance applied to all cable franchisees in the county and was immediately challenged by Comcast and Advocate Communications. "Comcast Opens 2nd Open Access Litigation Front in Florida," *Communications Daily*, July 22, 1999. AT&T filed a separate suit. Kathy Chen, "AT&T to Appeal Florida Internet Access Ruling," *Wall Street Journal*, July 15, 1999, p. B6. To the amazement of Broward County officials, no ISP has requested access to cable modem facilities. "Cable and ISPs Duel for Cities on Access Issue at NATOA," *Warren's Cable Regulation Monitor*, September 20, 1999. GTE was one of the primary advocates of open access in Broward County and has agreed to pay the county's legal fees in defense of the ordinance.

97. "Open Access Advocates Say Broward County Is Just 2nd of Many," *Communications Daily*, July 15, 1999.

98. See Swisher, Tran, and Chen; and Labaton. After a very expensive lobbying campaign, the San Francisco Board of Supervisors voted to support the principle of open access but did not impose any legal conditions on AT&T's cable modem service. The board also decided to revisit the issue, much to the glee of local lobbyists. See Ann Grimes and Khanh Tran, "San Francisco Transfers Cable System to AT&T, Will Revisit Open Access Issue," *Wall Street Journal*, July 27, 1999, p. A4. Recently, the city's Department of Telecommunications and Information Services recommended that the city adopt an open-access requirement, but without rate regulation. See "Open Access Report."

99. In addition to the Portland/Multnomah County open-access requirement, similar provisions affecting AT&T have been enacted by Culver City, California; Madera County, California; Broward County, Florida; Cambridge, Massachusetts; North Andover, Massachusetts; Quincy, Massachusetts; Somerville, Massachusetts; St. Louis, Missouri; and Henrico County, Virginia. The actions by California local governments are void in light of the Ninth Circuit's opinion in *AT&T Corp. v. City of Portland*. The Henrico County ordinance is void in light of the decision in *MediaOne Group v. County of Henrico*. The actions of the four Massachusetts communities were voided by the state Department of Telecommunications and Energy. Peter Howe, "4 Communities' Drives for 'Open Access' Rejected," *Boston Globe*, May 2, 2000, p. E3. A planned November ballot question that would require open access in Massachusetts was recently dropped after proponents reached a compromise with AT&T. Peter Howe, "Deal with AT&T Halts Ballot Item on Internet Use," *Boston Globe*, June 28, 2000, p. A1. For updated information on local government activity, see <http://www.opennetcoalition.org>.

100. "NCTA's Sachs Declares Forced Access Legislation Is Dead," *Warren's Cable Regulation Monitor*, December 13, 1999.

101. See Wee and Schwartz (discussing requirement imposed on Cox Communications by Fairfax, Virginia); Hector Berrera, "W. Hollywood Joins Backers of Open Access," *Los Angeles Times*, December 22, 1999, p. C2 (discussing West Hollywood's plan to make open access a negotiating point in franchise renewal discussions with Adelphia Communications); and Christopher Carey, "Cable TV Giant Fights Further Regulation," *St. Louis Post-Dispatch*, December 31, 1999 (noting Charter Communications' efforts to deter St. Louis County from enacting an open-access measure similar to that enacted by the city of St. Louis).

102. In addition to local governments, a number of state legislatures have considered open-access legislation, but no state access measures have

been enacted. "Open Access Bill Rendered Moot in Michigan, Its Last Bastion," *Warren's Cable Regulation Monitor*, July 3, 2000.

103. "Kennard Says 'Open Access' Proceeding Would Chill Investment," Washington Telecom NewsWire, August 11, 1999.

104. Kara Swisher et al., "Excite At Home at a Defining Moment," *Wall Street Journal*, October 1, 1999, p. B6; and Leslie Cauley, "AT&T's Top Cable Executive Resigns amid Internet-Access Fracas," *Wall Street Journal*, October 7, 1999, p. B1.

105. David N. Baker, vice president for legal and regulatory affairs, MindSpring Enterprises; James W. Cicconi, general counsel, AT&T; and Kenneth S. Fellman, chairman, FCC Local and State Government Advisory Committee, Letter to William E. Kennard, chairman, Federal Communications Commission, December 6, 1999, p. 1. On file with the author.

106. Ibid., p. 2.

107. AT&T, "AT&T Commits to Give Consumers Choice of ISPS for High-Speed Internet Access via Cable, Fixed Wireless," Press release, December 6, 1999, <http://www.att.com/press/item/0,1354,2320,00.html>. AT&T recently announced it would begin technical trials with multiple ISPs in Boulder, Colorado, and three Massachusetts communities. Leslie Cauley and Nick Wingfield, "AT&T to Test Multiple ISPs on Cable Lines," *Wall Street Journal*, June 8, 2000, p. B10; and AT&T, "Massachusetts Coalition for Consumer Choice and Competition on the Internet and AT&T Agree on Plan for Consumer Choice of ISPs in Massachusetts," Press release, June 27, 2000, <http://www.att.com/press/item/0,1354,3037,00.html>.

108. Quoted in Peter Howe, "Critics Hit AT&T Deal with ISP," *Boston Globe*, December 7, 1999, p. D1.

109. Ibid.; Kara Swisher, Kathy Chen, and Nick Wingfield, "AT&T's Access Plan Draws a Mixed Reaction," *Wall Street Journal*, December 7, 1999, p. B6; and Peter Goodman, "AT&T Rivals Cautious on Cable Access," *Washington Post*, December 6, 1999, p. A16.

110. Quoted in ibid.

111. *United States v. AT&T Corp. and MediaOne Group, Inc.*, Case No. 1:00CV01176, Complaint and Proposed Final Judgment (D.D.C., filed May 25, 2000).

112. AOL and Time Warner, "America Online and Time Warner Will Merge," p. 6.

113. "AOL–Time Warner Deal Leaves Open-Access Adherents Speechless," *Communications Today*, January 12, 2000.

114. Peter Goodman and Craig Timberg, "AOL Ends Its Push for Open Access," *Washington Post*, February 12, 2000, p. A1; and Peter Howe, "AOL Calls Off Open-Access Lobby Efforts," *Boston Globe*, February 15, 2000, p. C1.

115. Memorandum of Understanding between Time Warner, Inc. and America Online, Inc. Regarding Open Access Business Practices, February 29, 2000, <http://media.web.aol.com/media/press.cfm?>.

116. Ibid. at 2.

117. Ibid. at 3.

118. Quoted in "Case and Levin Discount Idea of Mandating Open Access MoU," *Communications Daily*, March 3, 2000.

119. Ibid.

120. Kathy Chen, "Cox Will Consider Open Cable Lines for Different ISPs," *Wall Street Journal*, March 29, 2000, p. A14; and Kathy Chen, "Comcast Hopes to Offer in 2002 Open–Access Policy," *Wall Street Journal*, March 27, 2000, p. A42.

121. William E. Kennard, "Broadband Cable: Next Steps," Address before the California Cable Television Association, Los Angeles, December 16, 1999, p. 4 (visited January 3, 2000), <http://www.fcc.gov/Speeches/Kennard/spweek944.html>.

122. Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T, FCC 00-202 ¶ 4 (June 5, 2000) (outlining the steps AT&T must take to comply with the FCC's horizontal ownership rules).

123. Ibid. ¶ 117 (footnotes omitted).

124. Ibid. ¶ 120.

125. Ibid. ¶ 121.

126. Ibid. ¶ 126.

127. *AT&T Corp. v. City of Portland* (9th Cir.). The Ninth Circuit's opinion may be contrasted with that of the Eleventh Circuit in *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000). The Eleventh Circuit ruled that the FCC has the authority to regulate pole attachment rates for cable and telecommunications service, but Internet service is neither. Ibid. at 1276.

128. *AT&T Corp. v. City of Portland* (9th Cir.) at *18.

129. Ibid. at *19–20.

130. Ibid. at *15.

131. Ibid. at *21.

132. Ibid. at *24.

133. Quoted in "FCC Proceeding to Decide Key Cable Open Access Issue," *Communications Daily,* July 3, 2000.

134. "Portland Ruling Shifts Open Access Battle Back to FCC," *Communications Daily,* June 26, 2000.

135. The comments of the AT&T-led coalition are available at <http://www.handsofftheinternet.com>. For the comments of the AOL-led coalition, see <http://www.opennetcoalition.org>.

136. As Professors Areeda and Hovenkamp wrote, the term "essential facility" is "just an epithet describing the monopolist's situation: The monopolist possesses something the plaintiff wants. It is not an independent tool of analysis but only a label—a label that beguiles some commentators and courts." Phillip E. Areeda and Herbert Hovenkamp, A*ntitrust Law: An Analysis of Antitrust Principles and Their Application,* rev. ed. (Boston: Little, Brown, 1996), vol. 3A, pp. 178–79.

137. See, for example, *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132–33 (7th Cir. 1983) (describing the elements needed to prove liability under the essential facilities doctrine).

138. See, for example, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585, 600 (1985) (a monopolist does not have an unqualified duty to cooperate with business rivals).

139. The exception is GTE, operator of an Internet backbone service, known as GTE Internetworking, and an ISP, known as gte.net. GTE's subsidiaries filed suit against TCI, Comcast, and @Home, alleging that the defendants' "mandatory bundling of their high-speed data transport services with the At Home ISP service is an unlawful tie." *GTE Internetworking Inc. & GTE Intelligent Network Services Inc. v. Tele-Communications, Inc., Comcast Corp., and At Home Corp.,* Complaint, at 3 (W.D. Pa. October 27, 1999). The complaint also alleges that the contracts between the defendants are unlawful exclusive dealing and refusals to deal. Ibid. Although detailed analysis of GTE's claims is outside the scope of this paper, a few comments are warranted. GTE defines the product market solely in terms of broadband forms of access, claiming that dial-up service "is not an adequate substitute for high-speed transport." Ibid. at 6. Given the very low penetration rates of cable modem services (@Home has a 4.8 percent penetration rate of homes served by upgraded cable systems. Excite@Home, "Excite@Home Reports Fourth Quarter and Fiscal Year 1999 Results," Press release, January. 20, 2000, p. 2, <http//www.home.net/news/pr_000120_01.html>, and the marked price difference between dial-up and cable modem services, it may well be that consumer demand for high-speed Internet access is very price sensitive. Furthermore, GTE regards the provision of high-speed transport of data between customers and ISPs as a separate product from the provision of ISP services. Ibid. at 8. Even assuming that the distinction between data transport and ISP services correctly defines product markets, the success of GTE's tying claim depends on showing that the cable defendants have monopoly power in the data transport market. Despite cable companies' current market share of broadband data transport, it seems doubtful that they possess monopoly power, especially in a new and rapidly changing market. In response to this suit, a Comcast executive stated, "No one should be surprised that GTE, which has sued the FCC at every turn to stop local phone competition, should try similar tactics to slow down facilities-based Internet competition." "Communications Daily Notebook," *Communications Daily,* October 27, 1999.

140. 1999 U.S. Dist. LEXIS 7744 (E.D. Pa. May 18, 1999).

141. Ibid. at *7.

142. Ibid. at *62.

143. Ibid. at *70.

144. Ibid. at *74.

145. Ibid. at *75.

146. Ibid. at *78.

147. Ibid. at *7 (emphasis added).

148. *Brown Shoe Co. v. United States,* 370 U.S. 294, 320 (1962).

149. 948 F. Supp. 456 (E.D. Pa. 1996).

150. AT&T-TCI Merger ¶ ¶ 77–78.

151. City of Los Angeles Information Technology Agency, "Broadband Access Report," June 1999, pp. 10–18. Cited hereinafter as "Broadband Access Report." Consequently, the ITA concluded

that "it does not appear at this time that regulatory intervention on the magnitude of open access is either prudent or advisable." Ibid. at 46.

152. *Byars v. Bluff City News Co.*, 609 F.2d 843, 851 n. 19 (6th Cir. 1979).

153. See, for example, *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986) (denial of access to a sports stadium poses a severe handicap due to the inadequacy of other stadia and the tremendous cost to build a new stadium); and *MCI Communications Corp. v. AT&T* (denial of access to local telephone network facilities poses a severe handicap due to the absence of alternatives and the capital investment necessary to build a separate network). Cf. *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977) (trial court erred by failing to give jury instruction concerning the impracticality of building a duplicate football stadium). Of course, AOL's stunning market value, which enabled it to buy Time Warner, places AOL in a different category than other ISPs when one is considering the feasibility of duplicating the incumbent's network.

154. The FCC noted that no current broadband technology is capable of serving all residential areas. The agency stated:

> Although telephone and cable incumbents already have facilities serving the last mile, traditional telephone and cable plant are not ideally suited for broadband. Ameritech, for example, estimates that xDSL will not work on 45% of its loops today, and may never work on 20% of them. Similarly, today's cable television plant, even after upgrading for two-way broadband operations, may not be capable of providing all users in a neighborhood with very high speeds.

FCC Broadband Report ¶ 46 (notes omitted). But see "Broadband Access Report," pp. 13 n. 28, 14 (noting that telephone company representatives acknowledge that there are technical solutions to DSL's problem of geographic reach); Dean Takahashi, "Start-Up Extends Reach of DSL Lines," *Wall Street Journal*, October 14, 1999, p. B8 (describing a new computer chip that lowers the cost of DSL and expands the service area); and SBC, "SBC Launches $6 Billion Initiative" (describing SBC's plan to push fiber deeper into neighborhoods, thus enabling DSL service to be provided to nearly all customers). See also "Open Access Report," p. 19 (stating that DSL is available in all parts of San Francisco because of the city's density and the number of telephone company central offices spread throughout the city).

155. *Hecht v. Pro-Football, Inc.* at 992–93.

156. AT&T-TCI Merger ¶ 88. See also ibid. ¶ 87; and "Broadband Access Report," pp. 28–31.

157. GTE, "GTE Demonstrates Ease of Cable Open Access to Multiple ISPs; Clearwater Trial Shows One-Time Investment of Less Than $1 per Home Would Provide Consumer Choice," Press release, June 14, 1999, http://www.gte.com/ AboutGTE/NewsCenter/ NewsReleases/ClearwaterOpenAccess.html>. Lawrence Gasman, an expert on telecommunications networks, stated that the network management problems presented by three ISPs on a cable system are minuscule in comparison with the issues that would be presented under an open-access requirement. Consequently, he did not regard GTE's test as supporting the technical feasibility of a broader system of access. Telephone interview with Lawrence Gasman, president, Communications Industry Researchers, January 28, 2000.

158. Excite@Home, "The Technical Short-comings of the GTE 'Open Access' Trial," pp. 2–3 (visited July 17, 1999), <http://www.home.net/ source/techdetails. html>. See also Excite@Home, "Excite@Home Responds to Misleading Claims by GTE and AOL," Press release, June 15, 1999, <http://www.home.net/ news/ pr_990615-01.html>.

159. Quoted in "FCC Won't Support Open Cable: Incumbents Write Off GTE-AOL Test Results," *ISP Business News*, June 21, 1999.

160. Line Sharing Report.

161. Ibid. ¶ 74. The commission stated: "We believe that serving multiple customers [ISPs] would be very costly, time consuming, and would lead to complex operational difficulties. Moreover, the record does not sufficiently support the establishment of multiple customer line sharing requirements." Ibid., n. 166.

162. Because ILECs already provide both analog voice and high-speed data services over a single line, the FCC concluded that two-carrier line sharing was technically feasible. Ibid. ¶¶ 63–67. For comments on voice-compatible forms of DSL, see ibid. ¶¶ 70–71.

163. In a recent report, the FCC's Cable Services Bureau found that logistical problems, in addition to technical problems, affect the implementation of open access. The bureau stated, "[O]ne of the greatest logistical obstacles to the deployment of distribution systems is the shortage of engineers and the limited infrastructure necessary to physically create and deploy these systems." *Broadband Today*, p. 39. See also Deborah Solomon and Scott Thurm, "SBC to Give PCs to Internet Customers," *Wall Street Journal*, July 10, 2000, p. B8 (noting the shortage of technicians

available for DSL installations).

164. See, for example, *MCI Communications Corp. v. AT&T* at 1133 (MCI proved that it was technically and economically possible for AT&T to have provided connections to the local telephone network).

165. *Minneapolis Star & Tribune Co. v. Commissioner of Revenue,* 460 U.S. 575, 585 (1983).

166. *AT&T Corp. v. City of Portland* (D. Ore.) at *17.

167. See ibid. (citing *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980)). The part of *PruneYard* that Judge Panner cited dealt with whether a state-mandated right of access to a shopping center violated the First Amendment principles of *Wooley v. Maryland,* 430 U.S. 705 (1977). *Wooley* held that a state may not require an individual to disseminate an ideological message on his private property. The *PruneYard* Court distinguished *Wooley* on the following grounds: (1) In *Wooley* the government prescribed the message, whereas in *PruneYard* the state did not dictate the message. (2) In *PruneYard,* the shopping center by the choice of its owner was not limited to the personal use of the owner, and members of the public were unlikely to identify views expressed by members of the public with those of the owner. (3) The shopping mall owner could disavow any connection with the message by posting signs in the area where speakers and pamphleteers stand. 447 U.S. at 87. Judge Panner found the open-access provision to be similar to *PruneYard* because Portland did not dictate any messages and there was no evidence that cable modem users would associate AT&T with the speech of unaffiliated ISPs. *AT&T Corp. v. City of Portland* (D. Ore.) at *17.

Judge Panner's view of *PruneYard* as establishing the proper analytical framework is faulty for four reasons: First, the access in *PruneYard* did not impair the value of the property or the owner's use of the property. 447 U.S. at 83. But cable systems have limited bandwidth, and any use of bandwidth by unaffiliated ISPs reduces AT&T's ability to use that bandwidth for its own speech. Second, the cable modem platform is not open to the public; only subscribers have access to the Internet through AT&T's facilities. (California appellate courts applying *PruneYard* consider whether or not the owner has so opened his property for public use that it becomes equivalent to a public forum. *Golden Gateway Center v. Golden Gateway Tenants Ass'n,* 73 Cal. App. 4th 908, 914 (Cal. Ct. App. 1999)). And unlike the speakers in *PruneYard,* ISPs will have to permanently occupy AT&T's facilities by housing equipment at the cable head end. Third, the Court, in *Turner Broadcasting,* 512 U.S. 622 (1994), acknowledged that even though cable's "conduit" function meant that viewers would not identify the views carried on broadcast stations with those of the cable system, nonetheless, the must-carry regulations imposed a burden on cable's First Amendment rights. 512 U.S. 622, 655, 662 (1994). Finally, the fact that AT&T's current policy allows users to connect with any Web content does not define the First Amendment's limits on governmental power. AT&T would be within the scope of its editorial discretion if it abandoned its current policy and blocked access to certain Web sites.

168. *Turner Broadcasting.* Applying the statutory classification "telecommunications service" to a portion of cable modem service does not eliminate the protection of the First Amendment. Although cable modem regulations under the rubric of "telecommunications service" may be content neutral, challenges to such regulations should receive at least intermediate scrutiny.

169. Ibid. at 647.

170. Ibid. at 662 (citing *United States v. O'Brien,* 391 U.S. 367, 377 (1968)).

171. Ibid. at 664.

172. Ibid. at 666. For a discussion of this aspect of *Turner Broadcasting,* see William E. Lee, "Manipulating Legislative Facts: The Supreme Court and the First Amendment," *Tulane Law Review* 72 (1998): 1261.

173. 117 S. Ct. 1174 (1997).

174. 1999 U.S. Dist. LEXIS 8223, at *18.

175. As noted earlier, Judge Panner did not believe it was his role to second-guess the findings supporting the open-access requirement. But there is a distinction between second-guessing findings and ensuring that those findings are reasonably based on substantial evidence. See generally Lee, "Manipulating Legislative Facts."

176. For a recent example of narrow-tailoring analysis of a content-neutral cable regulation, see *Horton v. City of Houston,* 1999 U.S. App. LEXIS 13418 (5th Cir. June 18, 1999).

177. *Quincy Cable TV, Inc. v. FCC,* 768 F.2d 1434 (D.C. Cir. 1985).

178. Cf. *Turner Broadcasting* at 682 (O'Conner, J., concurring in part and dissenting in part) (criticizing the must-carry provisions because not every decision by a cable operator to carry a cable programmer rather than a broadcaster is motivat-

ed by anti-competitive impulses).

179. @Home Master Distribution Agreement, quoted in "Broadband Access Report," p. 19.

180. See, for example, *Cyber Promotions, Inc. v. America Online,* 948 F. Supp. 456 (E.D. Pa. November 26, 1996) (to protect its subscribers from unsolicited e-mail advertisements, AOL may control use of its system); *Zimmerman v. Board of Publication of the Christian Reformed Church, Inc.*, 598 F. Supp. 1002, 1010 (D. Colo. 1984) (regardless of whether defendants held a monopoly position, the Sherman Act is not aimed at reasonable conduct such as refusal to publish advertising on the ground that it might be misleading); and *Newspaper Printing Corp. v. Galbreath,* 580 S.W.2d 777, 780 (Tenn.), cert. denied, 444 U.S. 870 (1979) (freedom of the press means freedom not to publish, as well as freedom to publish, as the publisher sees fit). See generally William Lee, "Cabled Leased Access and the Conflict among First Amendment Rights and First Amendment Values," *Emory Law Journal* 35 (1986): 563, 569–71, 616–17 (discussing the limited reach of the antitrust laws).

181. Cf. *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 436 (E.D. Pa. December 19, 1996) (AOL is not a state actor and has the right to prevent unsolicited e-mail advertisements from reaching its subscribers).

182. Cf. *Turner Broadcasting II,* 117 S. Ct. at 1215 (O'Connor, J., dissenting) (even though cable systems voluntarily carry most television stations, the must-carry requirement burdens a cable operator's First Amendment freedom to exercise unfettered control over a number of channels).

183. See *Planned Parenthood of the Columbia/ Willamette, Inc. v. American Coalition of Life Activists,* 1999 U.S. Dist LEXIS 4332 (D. Ore. March 16, 1999) (issuing permanent injunction preventing defendants from using the Internet to disseminate expression that threatens certain physicians and health facilities). See also "Web Site Group Hit by Verdict; Anti-abortion Activists Must Pay $107 Million, Jury Says," *Atlanta Journal and Constitution,* February 3, 1999, p. A3.

184. See *Yates v. United States,* 354 U.S. 298 (1957) (distinguishing between abstract advocacy of violent overthrow of government and advocacy designed to instigate action).

185. Sen. Strom Thurmond of South Carolina speaking of cable operators' lack of editorial control, *Congressional Record* 138 (January 30, 1992): 648.

186. 47 U.S.C. § 532(h) (1997). For an example of a cable operator's policy concerning sexually oriented leased-access programming, see *Loce v. Time Warner Entertainment,* 1999 U.S. App. LEXIS 1379 (2nd Cir. June 14, 1999).

187. *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC,* 116 S. Ct. 2374 (1996). For a discussion of this case, see Lee, "Manipulating Legislative Facts," pp. 1296–1306.

188. Typical cable modem service uses a standard 6-MHz television channel for downstream communications. "How Do Cable Modems Work?" (visited June 25, 1999), <http://www.cablemodems.com/work.html>. Internet Ventures sought to lease a 6-MHz channel from TCI's Spokane, Washington, cable system. Internet Ventures, at *1. AOL and its allies do not support this approach because the legal limit on the number of channels a cable system must make available for leased access means that only a limited number of ISPs would gain access. See Internet Ventures. But see "FCC Is Told Leased Cable Channels Could Support Multiple ISPs," *Warren's Cable Regulation Monitor,* August 16, 1999. Under a shared bandwidth approach, there is the possibility of degrading the level of service and other technical problems, as discussed in the subsection "Technical Issues."

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