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EX PARTE OR LATE FILED

October 18, 2000

By Hand

Ms. Magalie Roman Salas
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation Regarding the Applications of America Online, Inc. and Time Warner Inc. for Transfers of Control; CS Docket No. 00-30

Dear Ms. Salas:

On behalf of EarthLink, Inc. (EarthLink) we hereby submit an original and one copy of this notice regarding a permitted *ex parte* presentation in the above-referenced proceeding. On October 17, 2000, Dave Baker, EarthLink Vice President for Law and Public Policy, and Earl Comstock and John Butler of Sher & Blackwell met with Commissioner Susan Ness and Jordan Goldstein and David Goodfriend of her staff.

Mr. Baker addressed the need for the Commission to adopt in any merger approval a condition requiring the applicants to provide to competing Internet Service Providers (ISPs) access to the applicants' cable transport services on non-discriminatory terms and conditions. With reference to potential market-based or commercially negotiated open access solutions, EarthLink indicated that unenforceable proposals made to date are inadequate to establish a competitive market for cable-based Internet access, and that the history of negotiations on such proposals suggests that a commercial solution is unlikely to emerge in time to avoid serious competitive distortions. In this regard, EarthLink noted that terms and conditions reportedly offered to a number of ISPs include provisions under which the applicants would set ultimate end user rates, as well as provisions under which the applicants would retain percentages of total revenues from both Internet access service and incremental revenues from other services provided by the ISP. These proposals are similar to those EarthLink has experienced in its own negotiations with the applicants,

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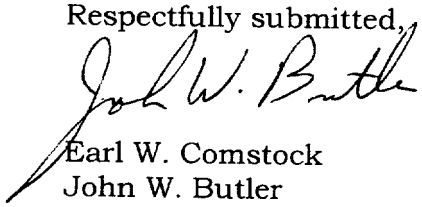
and such conditions would make the arrangements economically infeasible for ISPs not affiliated by ownership with the applicants.

Also discussed were AT&T's cable Internet access technical trials and the parallels and differences between DSL broadband Internet access and cable-based broadband access. Finally, EarthLink stated its position that the cable transport service used in the transmission of Internet access services and other information services over a cable network should be recognized as a telecommunications service governed by Title II of the Communications Act. As background on this issue, staff was provided a copy of the law review article attached hereto as Attachment 1.

Finally, also discussed was what appears to be an emerging trend among cable access facility owners of requesting that ISPs seeking to use such facilities agree to non-disclosure provisions with respect to the proposed terms and conditions for use of such facilities. It was pointed out that such non-disclosure provisions have an adverse impact on the ability of the market to operate freely and on the ability of government agencies to evaluate the competitiveness of the market.

Please direct any questions regarding this filing to the undersigned.

Respectfully submitted,



Earl W. Comstock
John W. Butler

Counsel for EarthLink, Inc.

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ACCESS DENIED: THE FCC'S FAILURE TO IMPLEMENT OPEN ACCESS TO CABLE AS REQUIRED BY THE COMMUNICATIONS ACT

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ACCESS DENIED: THE FCC'S FAILURE TO IMPLEMENT OPEN ACCESS TO CABLE AS REQUIRED BY THE COMMUNICATIONS ACT

Earl W. Comstock and John W. Butler*

I. INTRODUCTION

As demand for high-speed, or broadband, internet connections grows at an ever-increasing rate, so too has competition grown between cable companies and traditional telephone companies for the opportunity to serve that demand. With cable companies seeking to strengthen their present position as the leading providers of residential high-speed internet access,[1] the issue of which rules govern the marketplace behavior of those cable companies becomes increasingly important. The answer to the question of what rules apply to the provision of internet access and other information services over cable facilities has tremendous implications not only for information service providers ("ISPs"), cable companies and telephone companies, but also for consumers of all communications services.

The issue has been prominently debated under the label of "open access"[2] to cable facilities[3] that are used for internet access. The open access debate has had its most recent practical applications in the merger of AT&T and TCI, the pending merger of AT&T and MediaOne and the just announced merger of AOL and Time Warner.[4] These merger proceedings before the Federal Communications Commission (the "Commission"), and those before local cable franchise boards around the country, will continue to focus well-deserved attention on the question of

* Earl Comstock and John Butler are partners in the Washington, D.C., law firm of Sher & Blackwell. The firm represents clients engaged in the competitive provision of communications services, including competitive local exchange carriers, internet service providers, resellers, and internet backbone providers. Prior to joining Sher & Blackwell, Mr. Comstock served as legislative director for Sen. Ted Stevens (R-Alaska) and as a special telecommunications counsel for the Senate Committee on Commerce, Science, and Transportation. While working for Senator Stevens and the Commerce Committee Mr. Comstock was a principal participant in the negotiation and drafting of the Telecommunications Act of 1996. Mr. Butler has represented telecommunications clients before the Federal Communications Commission and the courts for the past seven years. The views presented here are solely those of the authors.

1 *See In re* Annual Assessment of the Status of Competition in the Markets for Delivery of Video Programming, *Sixth Annual Report*, CB Dkt. No. 99-230, FCC 99-418, at paras. 58, 62 (released Jan. 14, 2000) (noting that 32 million homes are passed by cable modem access, with 1 million subscribers; there are 159,000 xDSL subscribers) [hereinafter *Sixth Cable Report*]. Internet access is not defined under the Communications Act of 1934. In general the term is used to refer to services that permit the user to access information content and other users through transmission services that utilize the internet protocol. *See infra* note 47.

2 As the Commission noted in its *Amicus* brief to the court in *AT&T Corp. v. City of Portland*, there is no agreed upon definition of "open access." *See* Amicus Curiae Brief of the Federal Communications Commission at 8 n.2, AT&T Corp. v. City of Portland, No. 99-35609 (9th Cir. Aug. 16, 1999), *available at* <www.techlawjournal.com/courts/portland/19990816fcc.htm> [hereinafter *FCC Amicus Brief*]. In this article, the term "open access" is used to mean the same "open" access to the underlying transmission conduit that the Commission granted to all enhanced service providers in the *Computer II* proceeding. That proceeding required all common carrier facility operators to permit enhanced service providers, including ISPs, to purchase the underlying conduit or "transmission service" on the same terms and conditions on which the common carrier provides that transmission to itself or its affiliated ISP. *See In re* Amendment of Section 64.702 of the Commission's Rules and Regulations, *Final Decision*, 77 F.C.C.2d 384, 474–75, para. 231 (1980) [hereinafter *Computer II*].

3 The term "cable facilities" is used in this article to refer to the physical transmission infrastructure of a "cable system" as defined in section 602(7) of the Communications Act of 1934. *See* 47 U.S.C. § 522(7) (1994 & Supp. III 1997). A "cable system" is "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming[.]" *Id.*

4 *See, e.g., AOL Seen Unlikely to Remain Advocate of Open Access Rules*, COMM. DAILY, Jan. 12, 2000, at 1.

whether cable companies that provide internet access using their cable facilities must make the underlying transmission capacity available on a nondiscriminatory basis to ISPs that are not affiliated with the cable company. Under the governing federal law, there are two related issues: the first is whether the Communications Act of 1934[5] ("the Communications Act" or "the Act") defines the transmission of internet access and other information services to the public over cable facilities as a common carrier service that is regulated under Title II of the Act; the second is whether those services can be transmitted to consumers as a cable service protected from common carrier regulation under Title VI of the Act.

Although the issue appears on its face to be (and is in fact) one of straight statutory construction, the debate over open access has led the industry and the Commission away from the statute and into a policy squabble that bears no relation to the decisions made by Congress when it amended the Communications Act in 1996.[6]

This article attempts to return the focus to the words of the statute, as amended, which is the sole authority for the regulatory actions of the Commission and the ultimate arbiter of what cable companies can and cannot do in the internet access marketplace. Because this issue, like other major issues arising out of the 1996 amendments, will most likely be heard by a panel of federal judges whose first concern will be the actual language of the statute, the authors suggest that interested observers and participants would be well served now to return their focus to the Communications Act. A review of the statute as amended indicates that the Commission is on the wrong course, and that it must return to a path within the authority of the Communications Act before its present "parallel universe" policy[7] becomes so embedded in the internet access marketplace that it causes irreparable harm to competition, consumers, thousands of independent ISPs and the structure of the global internet itself.

That the Commission's approach will harm consumers stems from the fact that the underlying premise of cable regulation is that the facility owner in general may control the content and who may offer services that are transmitted over its cable facilities.[8] Such control is the antithesis of the present day internet.[9] In contrast, the underlying premise of common carrier regulation is that the facility owner must make those facilities available to all who wish to use them, and in general may not control the content or services offered by others over those facilities.[10] What the authors advocate is that the Communications Act as amended by Congress in 1996 requires the Commission to apply to cable facilities used to transmit internet access and other information services to the public the same open access rules that require all telecommunications facility owners to share the underlying transmission "conduit" with unaffiliated ISPs and others who wish to offer their content and services to consumers over those fa-

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[5] Communications Act of 1934, Title I, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–221).

[6] Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §§ 151–710.).

[7] *See* Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*, 7 COMMLAW CONSPECTUS 37, 98 (1998) (noting that "the Commission could reasonably interpret the 1996 Act as permitting the creation of 'parallel universes' for cable and telephony Internet-based services"). As this article demonstrates, such a result would be in conflict with the statutory language. *See also* THE COMMUNICATIONS ACT: A LEGISLATIVE HISTORY OF THE MAJOR AMENDMENTS, 1934–1996, at 374–77 (Max D. Paglin ed., Pike & Fischer 1999) [hereinafter A LEGISLATIVE HISTORY].

[8] *See* 47 U.S.C. § 532(b) (restricting federal, state, and local authority to require cable channels for use by programmers unaffiliated with the cable operator); 47 U.S.C. § 541(c) (prohibiting common carrier regulation of cable services).

[9] The "internet" is a term that has many meanings depending on who is using it. *See* HARRY NEWTON, NEWTON'S TELECOM DICTIONARY (14th ed. 1998) at 375–76 ("It is very hard to define the Internet in a way that is meaningful or easy to grasp . . . [the Internet] is basically transparent to what it carries. It doesn't care if it carries electronic mail, research material, shopping requests, video, images, voice phone calls, requests for information, faxes, or anything that can be digitized, placed in a packet of information, and sent."). Part of the confusion in the present debate stems from the fact that the term is used loosely to describe both the underlying transmission facilities (the "conduit"), the TCP/IP protocols used to transmit information over those facilities, and the myriad of computer servers used to store and transform information provided by both service providers and users. For purposes of this article the term "internet" refers to the information content and services provided by and to users over telecommunications facilities, and not to the underlying conduit. The Commission treats all "internet" services as "information services" under the Communications Act. *See infra* section IIB.

[10] *See* NEWTON, *supra* note 8, at 168 (definition of common carrier); *In re* Application for Consent of Transfer of Control of Licenses of MediaOne Group, Inc., to AT&T Corp., *Written Ex Parte of Prof. Mark A. Lemley and Prof. Lawrence Lessig*, CS Dkt. No. 99-251, at para. 20 (noting that "the [common] carrier is not to exercise power to discriminate in the carriage") [hereinafter *Lemley-Lessig Ex Parte*].

cilities. Application of existing rules requiring open access to the conduit to cable facility "conduit" used to transmit internet services is not new "regulation" of the internet. Rather, it is simply a continuation of the successful government policy that resulted in the competitive market for internet services that exists today.[11]

A. The Commission Believes it Can Take a Discretionary Approach

The current debate over "open access" to cable facilities used for the provision of internet access and other information services flows largely from a failure by the Commission to carry out its statutory duty under the 1996 Act.[12] A fundamental assumption of the current Commission appears to be that persons engaged in the transport of information services to the public at large are only common carriers if, and when, the Commission affirmatively determines their status.[13] Thus, for example, the Commission appears to believe that it can simply refuse to determine the regulatory status of internet access and other information services provided over cable facilities, thereby protecting cable operators from basic open access requirements that would otherwise apply to the transport of information services.[14] Under this discretionary approach, the Commission believes that it can promote its policy goal of rapid broadband access by not regulating the underlying transmission service used to provide information services over cable facilities until there is a "market failure" that requires some affirmative action.[15]

B. The Courts and Congress Have Both Determined That Actions, Not a Commission Determination, Decide Who Is Regulated

The Commission's discretionary approach is contrary to the plain language of the Communications Act. As the D.C. Circuit Court of Appeals noted in *National Association of Regulatory Utility Commissioners v. FCC*, "we reject an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve."[16] Further, the court stated that a "particular system is a common carrier by virtue of its functions, rather than because it is declared to be so."[17]

None of the amendments made by Congress in the more than 20 years since the *NARUC I* court made its ruling has changed or undermined the validity of that ruling. In fact, since 1993, Congress has twice considered and rejected the discretionary approach that the Commission has adopted in its quest to be viewed as a non-regulatory body whose primary task is to promote broadband deployment. In both cases Congress opted instead to follow the *NARUC I* approach, classifying an entity for purposes of the Communications Act based on the services it provides, rather than the affirmative judgements of the Commission.

In the 1993 amendments to the Communications Act that added section 332(c) regarding "commercial mobile services," Congress required that all commercial mobile service providers, including those formerly determined by the Commission and the courts to be non-common carriers, "shall" be treated as common carriers to the extent of such service.[18] Further, Congress gave the Commission explicit authority to deal with market power issues, by providing statutory authority to forbear from applying to wireless common carriers many otherwise applicable provi-

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11 *See Lemley-Lessig Ex Parte, supra* note 10, at paras. 30–36.

12 Section 1 of the Communications Act states that the Commission "shall execute and enforce the requirements of this Act." 47 U.S.C. § 151 (1994).

13 *See* FCC CABLE SERVICES BUREAU, BROADBAND TODAY: INDUSTRY MONITORING SESSIONS 44 (staff report authored by Deborah A. Lathen) (1999) [hereinafter BROADBAND TODAY]; *see also* FCC, OPP, THE FCC AND THE UNREGULATION OF THE INTERNET 25 (authored by Jason Oxman) (1999); Esbin, *supra* note 7, 118 (1998).

14 *See FCC Amicus Brief, supra* note 2, at 9 ("the Commission saw no reason 'at this time' to require cable operators to open their broadband systems to all ISPs").

15 *See* FCC Chairman William E. Kennard, *How to End the Worldwide Wait*, WALL ST. J., Aug. 24, 1999, at A18; *see also* FCC Chairman William E. Kennard, *Consumer Choice Through Competition*, Remarks to the National Association of Telecommunications Officers and Advisors (Sept. 17, 1999); *FCC Amicus Brief, supra* note 2, at 18.

16 525 F.2d 630, 644 (D.C. Cir. 1976) [hereinafter *NARUC I*].

17 *Id.*

18 *See* 47 U.S.C. § 332(c)(1)(A) (1994 & Supp. III 1997). In *NARUC I* the court found that the proposed specialized mobile radio service at issue, which was classified as a private mobile radio service, was not a common carrier service. *See*

sions of Title II of the Communications Act.[19]

Congress repeated and expanded upon its 1993 approach in the 1996 Act amendments. A "telecommunications carrier *shall* be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services . . ."[20] No discretion is left to the Commission to determine whether or not telecommunications carriers are or are not common carriers. It is the act of offering a service to the public for a fee, in this case offering "telecommunications,"[21] that determines a provider's regulatory status under the statutory definition of "telecommunications service."[22] The statute does not delegate to the Commission the authority to determine whether the common carrier requirements of the Act apply based on a determination of market power, market failure, or any other criteria the Commission may decide.[23] Instead, Congress once again chose to provide discretion to the Commission to forbear from applying requirements of the Act otherwise applicable to persons who by their actions are telecommunications carriers under the criteria set forth in the statute.[24] In the absence of the Commission exercising that forbearance authority in accordance with the Act (and it has not), a provider that meets the statutory definition of a telecommunications carrier is subject to common carrier regulation under title II.[25]

C. The 1996 Act Was Intended to Create a Level Playing Field, Where the Same Rules Apply to the Same Services, Regardless of the Facilities Used

Unfortunately for consumers and competitors, the Commission's current approach undermines the very regulatory parity and technological neutrality that Congress sought to adopt in the 1996 Act.[26] Worse, it will likely result in a decrease in the number of competitive choices for consumers instead of the increase Congress intended. The 1996 Act eliminated state and local barriers to entry in the business of providing telecommunica-

NARUC I, 525 F.2d at 644. In the 1993 amendments Congress changed the classification of specialized mobile radio services and several other private mobile radio services to commercial mobile services subject to the common carrier requirement. *See* Omnibus Budget Reconciliation Act of 1993 § 6002(c)(2)(B) & (d)(3)(B), Pub. L. No. 103-66, 107 Stat. 312, 396–97 (1993) (amending the Communications Act of 1934, codified at 47 U.S.C. § 332).

[19] *See* 47 U.S.C. § 332(c)(1)(A)(i)–(iii) (1994 & Supp. III 1997).

[20] 47 U.S.C. § 153(44) (1994 & Supp. III 1997).

[21] 47 U.S.C. § 153(43) (1994 & Supp. III 1997) (defining "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received").

[22] 47 U.S.C. § 153(46) (1994 & Supp. III 1997) (defining telecommunications service as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used").

[23] In the 1996 Act, Congress elected not to adopt the Senate's "market power" approach, which would have authorized the Commission to determine market power among local exchange carriers and, thus, when the open access provisions of the statute now codified at 47 U.S.C. § 251 would apply. *See* S. Conf. Rep. No. 104-230, at 117 (1996). Congress instead imposed interconnection requirements on all telecommunications carriers regardless of their market power; imposed certain additional requirements on all local exchange carriers, including new entrants without market power; and compelled additional cost based unbundling and collocation requirements on all incumbent local exchange carriers, again, regardless of their market power. *See id. at* 121–22. Thus, in cornerstone provisions of the 1996 Act, Congress has explicitly rejected the "market-based harm" predicate to regulatory action advanced by the FCC staff. *See* Broadband Today, *supra* note 13, at 47.

[24] As part of the 1996 Act amendments, Congress added new sections 10 and 11 (47 U.S.C. §§ 160 & 161), regarding regulatory forbearance and regulatory reform, respectively. Section 10 permits the Commission, either by its own initiative or upon request, to waive *any* provisions of the Communications Act that would otherwise apply to a telecommunications carrier if the Commission determines that application of such provisions is neither necessary to protect consumers nor ensure that rates are just, reasonable, and non-discriminatory, and that it is otherwise in the public interest to do so. *See* 47 U.S.C. § 160(a) (1994 & Supp. III 1997). Section 11 directs the Commission to biennially review all of its regulations applicable to providers of telecommunications services, and to repeal or modify any regulations that it finds to no longer be in the public interest. That both of these sections are limited to providers of telecommunications service and make no mention of cable service or cable providers clearly indicates that Congress believed that convergence between the cable and telecommunications sectors would likely lead to most, if not all, facilities based providers being engaged to some degree in telecommunications service. *See* A Legislative History, *supra* note 7, at 55–58 (regarding universal interconnection) and 316–20 (regarding "convergence" between cable and telephony).

[25] *See* 47 U.S.C. § 153(44) (providing that a telecommunications carrier shall be treated as a common carrier to the extent that it provides telecommunications service).

[26] *See In re* Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 13 FCC Rcd. 24012, 24013, para. 11 (Aug. 7, 1998) [hereinafter *Advanced Services Order*] (noting, "Congress made clear that the 1996 Act is technologically neutral and designed to ensure competition in all telecommunications markets").

tions service.[27] It also lifted the ban on the provision of cable service by companies that also provide local telecommunications service in the same geographic area.[28] By removing these barriers to competition, Congress intended for the two types of providers to enter each other's lines of business and compete directly.[29] As a result numerous changes had to be made to "level the playing field"[30] between the disparate regulatory regimes applicable to the different industry segments.

At issue in the present "open access" debate is whether Congress intended to apply different rules to the cable and telecommunications facilities that were now expected to compete directly with each other to transmit information services to consumers. The Commission itself recently stated that "there are two types of communications service networks, . . . broadcast . . . and . . . switched . . . The first type of network best describes cable service; the second type most accurately depicts telecommunications and information services."[31] Given Congressional intent that the two main wires into the home compete on a "level playing field" with each other, and the Commission's apparent understanding that information services are provided over telecommunications networks, it seems incongruous that the Commission refuses to apply the same open access requirements that apply to all other telecommunications facilities to cable facilities when those cable facilities are used to transport internet access and other information services to the public.[32]

The Commission and some FCC staff have suggested that perhaps the Commission could develop a new regulatory regime for internet access provided over cable facilities as an "advanced telecommunications capability" under the aegis of section 706 of the 1996 Act.[33] Section 706 defines "advanced telecommunications capability" as a "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology."[34]

This definition would certainly appear to include internet access and other information services delivered over a cable facility. However, this proposed solution once again ignores the statutory reality of what Congress did in the 1996 Act. As the Commission properly observed in the *Advanced Services Order*, section 706 does not confer any independent regulatory authority on the Commission. Instead, "the better interpretation of section 706 is that it directs [the Commission] to use, among other authority, our forbearance authority under section 10(a) [of the Communica-

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27 *See* 47 U.S.C. § 253(a) (1994 & Supp. III 1997).

28 *See* Telecommunications Act of 1996 § 302(b)(1), Pub. L. No. 104-104, 10 Stat. 124 (repealing the cable-telephone cross ownership ban in section 613(b) of the Communications Act); 47 U.S.C. § 533(b).

29 *See* S. CONF. REP. NO. 104-230, at 148 (stating that meaningful facilities-based competition to incumbent local exchange carriers is possible given that cable services are available to 95 percent of United States homes). *See also* 47 U.S.C. § 572 (1994 & Supp. III 1997) (providing that cable operators and local exchange carriers are prohibited from buying each other's facilities in areas where their services compete or overlap); 47 U.S.C. § 543(l)(1)(D) (adding provision of video programming by a local exchange carrier as one of the tests for effective competition that will remove rate regulation from a cable company).

30 *See* 142 CONG. REC. S691-01 (Feb. 1, 1996) (statement of Sen. Stevens) (". . . now we have tried to find a way to literally level the playing field and set down the rules for competition."). *See also id.* at S710 (statement of Sen. Kerrey) ("these fundamental features . . . are designed to create a level playing field"); 142 CONG. REC. H1145-06, 1177 (statement of Rep. Castle) ("the legislation has sought to ensure that different industries are competing on a level playing field").

31 *See FCC Amicus Brief, supra* note 2, at 26.

32 The structure of the Communications Act fully supports this result. Congress added the definition of "information services" as part of the complete overhaul it made to the Communications Act. *See* 47 U.S.C. § 153(20). *See also* A LEGISLATIVE HISTORY, *supra* note 7, at 31 ("The [1996 Act] brought the most substantial changes in the regulation of telecommunications services since adoption of the Communications Act in 1934."). All of the amendments made by the 1996 Act that include the term "information service" were placed in Title II of the Communications Act. *See, e.g.*, 47 U.S.C. §§ 228, 230, 251, 254, 256, 257, 259, 271, 272 & 274. None of the amendments made by Congress to Title VI in the 1996 Act used the term "information service." Instead, the major thrust of the changes Congress made to Title VI of the Communications Act in the 1996 Act were devoted to maintaining the demarcation line between "cable services" and non-cable services (*i.e.*, telecommunications and information services). *See* 47 U.S.C. §§ 571–573 (1994 & Supp. III 1997). Finally, in Title V of the 1996 Act, Congress made numerous changes to the existing law to address concerns about obscenity and violence on the internet and on television. *See* Public Law 104-104, Title V, 110 Stat. 133–43. All of the provisions addressing the internet or computer services were included in Title II of the Communications Act, while no mention of either computers or the internet was included in the provisions dealing with video programming and cable services. *See generally* S. CONF. REP. NO. 104-230, at 187–97.

33 *See FCC Amicus Brief, supra* note 2, at 25; *See also* Esbin, *supra* note 13, at 117.

34 47 U.S.C. § 157 (1994 & Supp. III 1997).

tions Act] to encourage the deployment of advanced services."[35] Section 10 of the Act permits the Commission to forbear from applying *any* provision of the Communications Act to a telecommunications carrier or telecommunications service (but not a cable service) if application of such provision is not necessary to protect consumers, ensure rates are just and reasonable, or protect the public interest.[36] Further, Congress provided in section 3(b) of the 1996 Act that the terms used in 1996 Act have the same meaning as those terms have in section 3 of the Communications Act (as amended by the 1996 Act), so there is no question that the term "telecommunications" has the same meaning in both section 706 and the Communications Act.[37] Thus it is clear that Congress believed that "advanced" services would be offered to the consumer over telecommunications facilities, which in general are subject to the open access obligations of Title II.

D. Instead of Promoting Competition, the Commission's Present Policy May Allow an Oligopoly to Use Control of Last Mile Facilities to Dominate the Internet

Carried to its logical conclusion, the Commission's present policies may result in the establishment of a communications oligarchy dominated by a few national integrated service providers. Each of these providers will seek to use its control of local exchange facilities—either the existing local exchange networks or cable facilities—to offer consumers an exclusive package of internet access, other information services, wireless services, video services and voice services.[38] In each case, the local connection will be used to control the customer's choice of providers for other services.[39] Internal cross-subsidization from a bundled package of services will make it difficult for small or single service providers to compete.[40] As a result, competition will be diminished, and, in a bizarre reversal of fortunes, residential subscribers will be used by the few large, integrated services providers to subsidize competition among themselves for business customers. A review of the arguments demonstrates that the law clearly compels that a cable facility used to provide internet access to the public for a fee is subject to the same requirements that apply to every other competitive telecommunications carrier.[41] Given that these same rules do not seem to be hampering the ability of other competitive local exchange carriers ("CLECs"), which are common carriers, it appears that the Commission's fears of over-regulation and a delay or stifling of cable broadband investment are both unfounded and dangerously misplaced.

II. CONGRESS ADOPTED THE *COMPUTER II* MODEL IN WHICH UNREGULATED INFORMATION SERVICES "CONTENT" MUST BE CARRIED TO THE PUBLIC ON A REGULATED TELECOMMUNICATIONS "CONDUIT."

A. The Statutory Definitions Show That Congress Intended That All Information Services Would Be Provided Using Telecommunications Facilities

The 1996 Act added numerous new provisions, including the definitions of "information service" and "telecommunications." An "information service" is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications* . . ."[42] "Telecommunications" is defined as "the transmission, between or among points specified by

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35 *Advanced Services Order*, 13 FCC Rcd. at 24047, para. 77.

36 *See* 47 U.S.C. § 160 (1994 & Supp. III 1997).

37 *See* Pub. L. No. 104-104, § 3(b) (110 Stat. 61).

38 *See Sixth Cable Report*, *supra* note 1, at 34, para. 68. Analysts believe that bundling of multiple services, offered either entirely over an operator's own network . . . reduces churn and increases equity values." *Id.*; *see also Lemley-Lessig Ex Parte*, *supra* note 10, at 20–21.

39 *See Lemley-Lessig Ex Parte*, *supra* note 10, at 20–21.

40 *See Cable Operators Finding Success in Local Phone Service*, COMM. DAILY, June 17, 1999, at 4 (noting that "Cablevision VP Kevin Curran said his company bundles its telephony offering with cable, giving discounts on cable bill in relation to how much consumer spends on telephone. About six percent of customers wind up with free cable as result.").

41 These include the *Computer II* requirement that a facilities based common carrier that seeks to offer information services must make the underlying transmission conduit available to all other information service providers on the same price, terms and conditions that it makes that transmission available to itself or its affiliates. *See Computer II*, 77 F.C.C.2d at 474, para. 231; *see also* Esbin, *supra* note 7, at 67 ("[T]he [Commission's] order did not distinguish dominant from non-dominant carriers for purposes of the unbundling requirement [for packet-switched frame relay transmission services]."

42 47 U.S.C. § 153(20) (1994 & Supp. III 1997) (emphasis added).

the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[43]

Incorporating the defined term "telecommunications" in the definition of "information service" clearly indicates, as the Commission itself recently noted in its *amicus* brief in the *Portland* case, that "information service is distinct from, but uses, telecommunications."[44] The plain meaning of the definition of "telecommunications" provided by Congress is that the transmission is at the direction of the user, and the information concerned is under the control of the user.[45] As a result, the definition leaves little room for doubt that, for purposes of the Communications Act, a service is only an "information service" if it provides the listed capabilities for use with information chosen or supplied, and transmitted to or from any point on the network as directed by the user.

B. The Commission Has Reported to Congress That Internet Access is an Information Service That Uses Telecommunications

In April 1998, the Commission sent a report to Congress on the key definitions adopted in the 1996 Act.[46] The report, conducted pursuant to a Congressional mandate, reviewed all of the Commission's rulemakings up to April 1998 with respect to internet access[47] and information services.[48] In the *Report to Congress*, the Commission reaffirmed several notions including: (1) its understanding that Congress adopted the *Computer II*[49] framework in the 1996 Act; (2) *Computer II* continued to apply with respect to information services and internet access, and (3) all "enhanced services"[50] are "information services" under the 1996 Act.[51] In addition, the Commission determined that internet access is a type of information service[52] and said that when a provider offers an information service it "uses telecommunications to do so."[53] Finally, the *Report to Congress* stated emphatically that sections 251 and 254 of the Communications Act should "apply regardless of the underlying technology those service providers employ, and regardless of the applications that ride on top of their services."[54] Further, the Commission has said that, to promote equity and efficiency, it "should avoid creating regulatory distinctions based purely on tech-

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[43] 47 U.S.C. § 153(43) (1994 & Supp. III 1997).

[44] *FCC Amicus Brief, supra* note 2, at 4. The Commission also stated that it has "long distinguished between basic 'telecommunications' or 'transmission' services, on the one hand, and 'enhanced services' or 'information services' . . . that are provided by means of telecommunications facilities, on the other hand. Congress in 1996 codified the FCC's long-standing distinction by adding new definitions to the Communications Act." *Id.* at 3.

[45] *See* 47 U.S.C. § 153(43) (the term "telecommunications" means "the transmission, between or among points specified by the use, of information of the user's choosing . . .) (emphasis added).

[46] *See generally In re* Federal-State Joint Board on Universal Service, *Report to Congress*, 13 FCC Rcd. 11501 (1998) [hereinafter *Report to Congress*]. None of the Commission's subsequent orders to date have overturned these findings, and in fact the Commision frequently cites the Report to Congress in its orders. *See, e.g., Advanced Services Order*, 13 FCC Rcd. 24012; *In re* Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Order on Remand*, FCC 99-413 (Dec. 23, 1999) [hereinafter *Advanced Services Order on Remand*]; *Report to Congress*, 13 FCC Rcd. 11501.

[47] Internet access is not defined in the Communications Act. In the *Report to Congress*, the Commission defined internet access as a combination of "computer processing, information storage, protocol conversion, and routing with transmission to enable users to access Internet content and services." *Report to Congress*, 13 FCC Rcd. at 11531, para. 63.

[48] *See generally* 47 U.S.C. § 153(20) (1994 & Supp. III 1997).

[49] In *Computer II* the Commission classified all services offered over a telecommunications network as either *basic* or *enhanced*. A basic service consisted of the offering, on a common carrier basis, of pure 'transmission capacity for the movement of information.' The Commission noted that it was increasingly inappropriate to speak of carriers offering discrete 'services' such as voice telephone service. Rather, carriers offered communications paths that subscribers could use as they chose.

. . .

An enhanced service, by contrast, was defined as 'any offering over a telecommunications network which is more than a basic transmission service.'

. . .

The Commission therefore determined that enhanced services, which are offered '*over* common carrier transmission facilities,' were themselves not to be regulated under Title II of the Act no matter how extensive their communications components.

Report to Congress, 13 FCC Rcd. at 11512, paras. 24–28 (emphasis in original, citations omitted).

[50] The Commission's regulations define "enhanced service" as "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications[.]" 47 C.F.R. § 64.702(a) (1998). These regulations were not changed by the passage of the 1996 Act.

[51] *See Report to Congress*, 13 FCC Rcd. at 11507, 11516–17, 11524, paras. 13, 33, 45.

[52] *See id.* at 11536, para.73.

[53] *Id.* at 11520, para. 39.

[54] *Id.* at 11552, para. 105. Section 251 of the Act requires, among other things, interconnection among all telecommu-

nology"[55] and that "this functional approach is consistent with Congress' direction that the classification of a provider should not depend on the type of facilities used. A telecommunications service is a telecommunications service regardless of whether it is provided using wireline, wireless, *cable*, satellite, or some other infrastructure."[56]

The issue of open access and control of facilities was at the heart of the debate in the *Computer II* decision 16 years prior to the enactment of the 1996 Act. In 1980, the Commission stated that the "essential thrust" of the *Computer II* proceeding was to "provide a mechanism whereby non-discriminatory access can be had to basic transmission services by all enhanced service providers. Because enhanced services are dependent upon the common carrier offering of basic services, a basic service is the building block upon which enhanced services are offered."[57] In reaching its decision, the Commission also found that the "[i]mportance of control of local facilities, as well as their location and number, cannot be overstate[d]. As we evolve into more of an information society, the access/bottleneck nature of the telephone local loop will take on greater significance."[58] That access to local facilities is as critical today as it was then—as is evidenced by the expensive steps some companies have taken to obtain local access, for example, AT&T's purchase of TCI and now Media One, and the AOL merger with Time Warner.[59] Yet it appears that the present Commission has decided to choose the opposite solution from the open access approach that it picked in 1980.

With respect to internet access providers, the Commission in the Report to Congress seemly took no notice of the fact that, with the passage of the 1996 Act amendments to promote local competition for both telecommunications and cable service, the rules had changed. The Commission stated, "Internet access providers typically own no transmission facilities . . . they lease lines and otherwise acquire telecommunications from telecommunications providers—interexchange carriers, incumbent local exchange carriers, competitive local exchange carriers, and others."[60] The Commission's statement reflects the world as it was until recently, when local exchange service—the "last mile" access to the consumer—was generally provided through a single company that was the de facto monopoly provider of the transmission service.[61] However, these companies were required to share the underlying transmission service with all internet access and other information service providers.[62] The 1996 Act broke open that de facto monopoly,[63] making it possible for internet access providers, for example AT&T through its affiliated entity @Home, to own both the ISP and the last mile facility needed to offer internet access and other information services directly to consumers. Even after the acquisition of TCI by AT&T, and the further proposed acquisition of Media One and the AOL-Time Warner merger, the Commission has yet to indicate that it understands that its core assumption—that ISPs generally do not own facilities—is no longer valid with respect to some national players.[64]

The Commission did indicate in the *Report to Congress* that there may be some information service providers that own the facilities that they use to provide transmission services to themselves.[65] While declining to consider those information service providers as common carriers for purposes of universal service contributions, the Commission noted that "[i]t is the facilities owners that, in a real sense, provide the crucial telecommunica-

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nications carriers. *See* 47 U.S.C. § 251(a) (1994 & Supp. III 1997). Section 254 requires that all telecommunications carriers contribute to universal service. *See* 47 U.S.C. § 254(d) (1994 & Supp. III 1997).

55 *Report to Congress*, 13 FCC Rcd. at 11548, para. 98.

56 *Id.* at 11530, para. 59 (emphasis added).

57 *Computer II*, 77 F.C.C.2d. at 475, para. 231.

58 *Id.* at 468, para. 219.

59 *See In re* Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from TCI to AT&T Corp., *Application, Description of Transaction, Public Interest Showing and Related Demonstrations*, CS Dkt. No. 98-178, at 20 n.36 (Sept. 14, 1998). *See also Cable Carried Incentive for AOL Merger*, WASH. POST, Jan. 18, 2000, at E1.

60 *Report to Congress*, 13 FCC Rcd. at 11540, para. 81.

61 *See* A LEGISLATIVE HISTORY, *supra* note 7, at 35–37 ("the Bell System was able to refuse connection to any communications system beyond its effective control"). *See also Lemley-Lessig Ex Parte, supra* note 10, at para. 25.

62 *See Computer II*, 77 F.C.C.2d. at 475, para. 231.

63 *See* 47 U.S.C. § 253 (removing barriers of entry for interstate and intrastate telecommunications service by any provider). *See also* A LEGISLATIVE HISTORY, *supra* note 7, at 54–55.

64 *See Advanced Services Order on Remand, supra* note 46, at para. 38 (recognizing that their analysis of "exchange access" does not cover traffic where the ISP itself provides the transport component of its internet service, but noting that such circumstances are "rare").

65 *See Report to Congress*, 13 FCC Rcd. at 11528, 11534, paras. 55, 69.

tions inputs underlying internet service[.]"[66]

It is the Commission's refusal to recognize that the world has changed that is creating the central problem discussed in this article. In light of these statements regarding technological neutrality and the detailed analysis of the definitions provided to Congress, it is difficult to understand how the Commission can be so confused by the statute that it is uncertain whether Congress intended that the same regulatory regime should apply—"regardless of the facilities used"[67]—to all transmission facilities used to provide internet access to the consumer.[68] We turn now to a detailed examination of the statutory language.

III. GIVEN THE STATUTORY REQUIREMENT THAT INFORMATION SERVICES ARE PROVIDED "VIA TELECOMMUNICATIONS," CABLE FACILITIES USED TO PROVIDE INTERNET ACCESS MUST BE TELECOMMUNICATIONS FACILITIES.

A. The Cable Industry Claims That Internet Access is a "Cable Service"

The cable industry currently refuses to provide unaffiliated ISPs with common carrier access to the underlying transmission capability that the cable operators and their affiliates use to transmit internet access and other information services to consumers who are cable accessible. Cable facility owners like AT&T base their refusal on the grounds that internet access and other information services, when provided by a cable operator, are "cable services."[69] As a result, AT&T claims that it

> merely uses broadband cable facilities to provide information services or other advanced cable services to cable subscribers . . . Accordingly, none of the common carrier obligations of Title II can be applied to any [AT&T owned] TCI cable system either today or during the period after the [AT&T and TCI] merger when these systems will continue providing only "cable services."[70]

The advantage of AT&T's approach to the cable operator is obvious. Section 621(c) of the Communications Act specifically states that a cable operator may not be subjected to the common carrier requirements of Title II of the Act "by reason of providing a cable service."[71] As a result, under the AT&T approach, a cable operator can use its cable facilities to provide internet access and other information services in direct competition with the telephone companies, but without having to provide open access to the underlying transmission facility as its competitors are required to do.

B. Internet Access is Not a "Cable Service" as Defined by the Communications Act.

AT&T and the cable industry are incorrect as a matter of law that internet access and other information services meet the definition of "cable service" as set forth in section 602(6) of the Communications Act.[72] The statutory definition of "cable service" in the Communications Act has remained substantially unchanged since Congress first adopted it in 1984.[73] In particular, subparagraph (A) of the definition, which contains the two mandatory criteria for determining when a service qualifies as a cable service, has never been amended. Congress did make a minor change in 1996 to subparagraph (B) of the definition, but the statutory construction of the definition makes it clear that the additional criteria in subparagraph (B) are discretionary. They become relevant to the definition only if a service first meets the two required criteria in subparagraph (A). If the service does not meet both of those criteria, then nothing in the language of subparagraph (B), even as amended, can make an otherwise ineligible service qualify as a cable service.

As amended, Section 602(6) of the Communi-

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66 *Id.* at 11535–36, para. 72. The Commission did observe that they "have not yet established the regulatory classification of Internet services provided over cable television facilities." *Id.* at 11535 n.140.

67 47 U.S.C. § 153(46) (1994 & Supp. III 1997).

68 *See FCC Amicus Brief, supra* note 2, at 19; *see also* Esbin, *supra* note 7, at 98.

69 *See In re* Petition of Internet Ventures, Inc. and Internet On-Ramp, Inc., *Reply Comments of AT&T Corp.*, Dkt. No. CSR-5407-L, at 6 (Aug. 11, 1999) [hereinafter *AT&T Reply Comments*].

70 *In re* Joint Application of AT&T Corp. and Tele-Communications, Inc., *AT&T's and TCI's Joint Reply to Comments and Joint Opposition to Petitions to Deny or to Impose Conditions*, CS Dkt. No. 98-178, at 53 (Nov. 13, 1998) [hereinafter *AT&T/TCI Joint Reply*]. *See also AT&T Reply Comments, supra* note 69, at 6 n.19 (noting, "Federal law prohibits regulating cable systems providing cable services as a common carrier").

71 47 U.S.C. § 541(c) (1994 & Supp. III 1997).

72 47 U.S.C. § 522(6) (1994 & Supp. III 1997).

73 *See* Cable Communication Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2779, 2781 (1984) (codified at 47 U.S.C. § 522(6)) [hereinafter *Cable Act of 1984*].

cations Act defines "cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service."[74] This definition tracks the fundamental distinction relied on by the courts and the Commission prior to 1984 to treat cable television systems as non-common carrier facilities, namely that they were being used to retransmit television programming normally regulated under Title III.[75] From the plain language of the definition, it is clear that the two conditions set forth in subparagraph (A) must always be met for a service to be classified as a "cable service." First, the service must provide "a one-way transmission to the subscriber." Second, that transmission must consist of either "video programming" or an "other programming service."

Therefore, for internet access or any other information service to be provided as a "cable service," the information at issue would have to be provided via a "one-way transmission to the subscriber," *and* the information the service provided would have to meet the definition of either "video programming" or an "other programming service."[76] Under the specific criteria set forth by Congress to define an "information service" it is apparent that neither of these two required conditions in the definition of "cable service" can be met.

The definitions of "video programming" and "other programming service" have also remained unchanged since Congress first included them in the Communications Act in 1984. Section 602(20) defines "video programming" as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station."[77] Section 602(14) defines "other programming service" as "information that a cable operator makes available to all subscribers generally."[78]

It is fairly plain that "video programming," which is programming provided by, or comparable to, that provided by a television station (*i.e.*, a station licensed for one-way, over-the-air broadcasting of signals to any subscriber equipped with a television set to receive those signals) does not qualify under the statutory definition of "information services." Under no circumstance can a television station, much less programming provided by a television station, be said to be engaged in the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . ;"[79] *i.e.*, a transmission of information that is chosen by and transmitted under the direction of a user.[80] With "video programming" eliminated as a possible option, in-

74 47 U.S.C. § 522 (6)(B) (1994 & Supp. III 1997).

75 "The Committee intends to exempt video programming from common carrier regulation in accordance with the traditional conception that the one-way delivery of television programs, movies, sporting events and the like is not a common carrier activity." H.R. REP. No. 98-934, at 53 (1984) [hereinafter referred to in text as *House Cable Act Report*]. In fact, the legal underpinning of the exemption of "cable service" from common carrier obligations is the editorial control exercised by the cable operator over the information sent to the subscriber. *See* U.S. v. Southwestern Cable Co., 392 U.S. 157 (1968). If the cable industry is correct, which it is not, then the industry is essentially claiming that the cable facility operator exercises editorial control over all information received by subscribers who obtain internet access over a cable facility. Given that the very value of the internet is that it provides nearly unlimited access to content without any editorial control by any single entity, a less plausible contention is difficult to imagine.

76 The Commission agrees: As it stated to the Court in its *Amicus* brief, "[a] service cannot be a 'cable service' unless it qualifies as 'video programming' or 'other programming service.' The 1996 Telecommunications Act did not alter the definitions of 'video programming' or 'other programming service.' Unless [i]nternet access fits one of these definitions, it cannot qualify as 'cable service.' " *FCC Amicus Brief, supra* note 2, at 23.

77 47 U.S.C. § 522(20) (1994 & Supp. III 1997).

78 47 U.S.C. § 522(14) (1994 & Supp. III 1997).

79 47 U.S.C. § 153(20) (1994 & Supp. III 1997).

80 AT&T, the National Cable Television Association, and Time Warner Cable all seem to be in complete agreement on this point, arguing in their comments and reply comments in the *IVI Petition* that internet access clearly does not meet the definition of "video programming." *See In re* Petition of Internet Ventures, Inc., Reply Comments of Time Warner, Inc., Dkt. No CSR-5407-L, at 4. (emphasizing that "no serious claim is, or can be, made by IVI or any other ISP that the internet, as a *two-way,* interactive service, is in any fashion comparable, from the consumer's perspective, to the *one-way* video programming generally offered by broadcast stations in 1984"); *see also In re* Petition of Internet Ventures, Inc. and Internet On-Ramp, Inc., *Comments of AT&T Corp.*, Dkt. No. CSR-5407-L, at 9 (stating "[t]his is not video programming at all, but rather access to content"); *see also In re* Petition of Internet Ventures, Inc., *Reply Comments of the National Cable Television Association,* Dkt. No. CSR-5407-L, at 6–7 (Aug. 11, 1999) (explaining that "[t]he [i]nternet as a whole is hardly comparable to the programming provided by a television broadcast station"); *see AT&T Reply Comments, supra* note 69, at 5 (stating that "ISPs provide connectivity, not content").

ternet access, and apparently any other information service accessible through a cable facility, must be an "other programming service" if it is to be considered a "cable service" subject to exclusion from common carrier obligations under section 621(c) of the Communications Act.[81]

In 1984, the similarity between the editorial control over content exerted by a broadcaster, and that exerted by a cable operator, was the nexus Congress chose for determining which services would be exempt from the common carrier requirements of the Communications Act. As a result, Congress maintained the linkage to broadcasting services in the other statutory component of the definition of "cable service." An "other programming service" is defined as "information that a cable operator makes available to all subscribers generally."[82] Further, Congress explained in the legislative history that the definition was intended to include services that are ancillary to broadcasting.[83]

AT&T claims that because it makes internet access "available" to all subscribers, its service meets the definition of an "other programming service."[84] For AT&T's argument to be even facially plausible, one would have to believe that the term "information" has the same meaning as the term "information service" for purposes of the Communications Act. Clearly it does not.[85]

Both the statutory language used by Congress and the explicit legislative history demonstrate that "information services" are not included in the definition of "other programming service."[86] Looking at the plain meaning of the words used, an "information service" is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . ."[87] A cable operator that makes available to all subscribers information selected by the cable operator cannot be said to be offering each subscriber the "capability for" individually manipulating that information.[88] The statutory criteria describe two completely different services. They are not interchangeable.

Information selected by the cable operator is provided to all users under the statutory definition of "other programming service."[89] The subscriber or user is a passive participant, in much the same manner that a television broadcast viewer is. In contrast, the subscriber or user of an "information service" is clearly an active participant under the terms of the statutory definition.[90] Information selected, created, or changed by a user, or which the user is "making available" to others, cannot be said to be "information that a cable operator makes available" and therefore cannot be an "other programming service" as defined by the Communications Act.[91]

Even if the plain language of the statute leaves any room for doubt, the legislative history of the Cable Act does not.[92] In the 1984 Cable Act Congress adopted the House definition of "other programming service,"[93] and the *House Cable Act Report* states that the "definition of other programming services requires that the information provided in a cable service must be made available to all subscribers generally and may not include information that is subscriber-specific . . . services providing subscribers with the capacity to engage in transactions or to store, transform, forward, manipulate, or otherwise process informa-

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81 47 U.S.C. § 541(c) (1994 & Supp. III 1997). Section 621(c) provides that "[a]ny cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service." *Id.*

82 47 U.S.C. § 602(14) (1994 & Supp. III 1997).

83 *See* H.R. REP. NO. 98-934, at 41 (stating that "[o]ther programming services that make non-video information generally available to all subscribers are included as cable services because they are sufficiently like video programming to warrant a similar regulatory exemption.") This approach makes sense and tracks court decisions regarding the Commission's jurisdiction over cable services. *See also Southwestern Cable*, 392 U.S. at 177 (1968) (commenting that the Commission's authority over cable services is restricted to that reasonably ancillary to its effective performance of its responsibilities for regulation of television).

84 *See AT&T Reply Comments, supra* note 69, at 6.

85 The term "information" is not defined under the Communications Act. It should be noted that in the 1996 Act Congress chose not to amend the definition of "other programming service" to include the newly defined term "information service," despite adding that definition and making changes to other definitions in Title VI of the Communications Act.

86 *See* 47 U.S.C. § 552 (14) (1994 & Supp. III 1997).

87 47 U.S.C. § 153(20) (1994 & Supp. III 1997).

88 *See id.*

89 47 U.S.C. § 522(14).

90 *See* 47 U.S.C. § 153(20).

91 *See* 47 U.S.C. §§ 153(20) & 522(14).

92 The Commission quoted extensively from this detailed and clearly stated legislative history in its *amicus* brief in the *Portland* case. *See FCC Amicus Brief, supra* note 2, at 21.

93 *See* Cable Act of 1984, § 2, 98 Stat. 2779, 2781.

tion or data would not be cable services."[94]

It was no accident that the *House Cable Act Report* tracks so closely the terms the Commission and the courts defined as "enhanced" or "information" services. The Commission adopted its Computer II "basic/enhanced" dichotomy in 1980, just four years before the enactment of the Cable Act. Two years before the Cable Act, the Modification of Final Judgment in the antitrust case against AT&T defined "information services" as "the offering of a capability for . . . storing, transforming, processing, retrieving, utilizing . . . information by means of telecommunications . . ."[95]

Thus, the very activities that are at the heart of information services and internet access were clearly intended by Congress in 1984 to be excluded from the definition of "cable service." In fact, the *House Cable Act Report* could not make the point more clearly when it states "[s]ome examples of non-cable services would be: shop-at-home and bank-at-home services, electronic mail, one-way and two-way transmission o[f] non-video data and information not offered to all subscribers, data processing, video-conferencing, and all voice communications."[96]

Even though the world wide web was still nearly 10 years in the future, Congress in fairly unambiguous terms included what are now internet services in the list of services *excluded* from the definition of "cable service" that was enacted in the Cable Act.[97] However, the cable industry claims that in 1996 Congress completely reversed itself, adopting through a two word change a sweeping evisceration of the limitations it so clearly and deliberately adopted in 1984.[98] It is on this slender thread that the cable industry hangs its entire legal argument.

C. The 1996 Amendment to the Definition of Cable Service Did Not Expand the Definition of "Cable Service" to Include "Information Services."

In the 1996 Act, Congress amended the definition of "cable service" to include the phrase "or use" in subparagraph (B).[99] As amended, "cable service" is now defined to mean "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection *or use* of such video programming or other programming service."[100]

Other than the addition of "or use," the definition has not changed. The basic mandatory criteria remain: Cable service is limited to "the one-way transmission to subscribers of (i) video programming or (ii) other programming service."[101] Nevertheless, the cable industry argues that the addition of "or use" was intended by Congress to overturn the explicit statutory limitations adopted by Congress in 1984.[102] In support of its position the cable industry and others rely on a single sentence in the *1996 Act Conference Report*, as well as a floor statement made by a single member of the House of Representatives.[103]

Unfortunately for the cable industry, the statutory construction of subparagraph (B) makes that subparagraph an optional add-on to, and not a part of, the subparagraph (A) definition. Thus, subscriber interaction, "if any," may be provided as part of the "cable service," but only if it is "required for the selection or use of such video programming or other programming service."[104] It is only *after* a service has met both statutory criteria in subparagraph (A) that the "or use" amend-

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94 H.R. REP. No. 98-934, at 42.

95 United States v. AT&T, 552 F. Supp. 131 at 179. (D.D.C. 1982), *aff'd sub. nom.* Maryland v. United States, 460 U.S. 1001 (1983). A footnote in the opinion referred to the definition of "information services" in the Modification of Final Judgement (MFJ) as "essentially . . . equivalent" to the Commission's definition of "enhanced services" in *Computer II*. *See id.* at 178 n.198. In the 1996 Act, Congress adopted a modified version of the MFJ definition as the statutory definition of "information services" now found in section 3 of the Communications Act. *See* S. CONF. REP. No. 104-230, at 115–16.

96 H.R. REP. No. 98-934, at 44.

97 *See id.*

98 *See FCC Amicus Brief, supra* note 2, at 22 (noting that "AT&T and TCI have argued that Congress, by adding the words 'or use,' intended to expend the definition of 'cable service' to include the wide range of interactive services encompassed by Internet access").

99 *See* 47 U.S.C. § 522(6)(B) (1994 & Supp. III 1997).

100 *Id.* at § 522(6) (emphasis added).

101 *Id.*

102 *See FCC Amicus Brief, supra* note 2, at 22.

103 *See* Esbin, *supra* note 7, at 96 (citing S. REP. No. 104-230 at 169 (1996) and 142 CONG. REC. H1156 (daily ed. Feb. 1, 1996) (statement by Rep. Dingell)).

104 47 U.S.C. § 522(6)(A) & (B) (1994 & Supp. III. 1997).

ment applies, and only to the extent that the cable operator chooses to permit such selection or use.

The *House Cable Act Report* stated that "a cable service may not provide subscribers with the capacity to communicate instructions or commands to software packages such as computer or video games . . ."[105] Arguably, the addition of "or use" could imply some limited two-way interaction by the subscriber, for example to send commands to a video game stored and operated at the computer headend. This would expand the 1984 Act definition slightly to allow interactive gaming among multiple cable subscribers without the exception "swallowing the rule," as the cable industry would have the Commission believe.[106] Whatever intentions AT&T and the cable industry might suggest, the statutory construction of the definition as amended makes the amendment insignificant to the determination of whether or not an "information service" can also be a "cable service." Notwithstanding the confusing reference to "information services made available to subscribers by a cable operator" in the *1996 Act Conference Report*,[107] "an apparent congressional intent as revealed in a conference report does not trump a pellucid statutory directive."[108]

IV. DESPITE THE COMMISSION'S CONFUSION, THE CONGRESS DID NOT LEAVE THE REGULATORY CLASSIFICATION OF INFORMATION SERVICES PROVIDED OVER CABLE FACILITIES UNRESOLVED.

A. Congress Intended the Definition of Cable Service to Clearly Mark the Boundary Between Services

The legislative history of the Cable Act also demonstrates that Congress carefully limited the definition of "cable service" in order to "mark the boundary between those services provided over a cable system which would be exempted from common carrier regulation under section 621(c) and all other communications services that could be provided over a cable system."[109]

Congress recognized that "non-cable communications services [provided over cable systems] are subject to regulatory authority"[110] and that "state and Federal authority over non-cable communications services [offered over cable systems] under the status quo shall be unaffected by the provisions of Title VI."[111] The *House Cable Act Report* also states that "nothing in Title VI shall be construed to affect authority to regulate any cable operator to the extent that such operator provides *any communications service other than cable service*, whether offered on a common carrier or private contract basis."[112]

Finally, the report goes on to state, for example, that "[m]aking available a cable system for voice communication between subscribers would not be a cable service . . . Similarly, offering cable system capacity for the transmission of private data . . . would not be a cable service . . ."[113]

Given these very specific examples, it is apparent that in 1984 Congress did not intend to permit cable facilities to be used to provide telecom-

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105 *See* H.R. REP. NO. 98-934, at 42.

106 A LEGISLATIVE HISTORY, *supra* note 7, at 374 ("The [amendment] expanded an *exception* to the definition's general requirement that 'cable service' be 'one-way.' Without some limit on the interactivity permitted, the exception would swallow the rule.") (emphasis in original).

107 *See* S. CONF. REP. NO. 104-230, at 169.

108 *See* City of Dallas, Texas v. FCC, 165 F. 3d 341, 349 (5th Cir. 1999). *See also FCC Amicus Brief*, supra note 2, at 24 (observing that "Congress stated that its 1996 amendment of the definition of cable service was not intended to eliminate the longstanding regulatory distinction between telecommunications service and cable service" (citing S. CONF. REP. NO. 104-230, at 169)).

109 H.R. REP. NO. 98-934, at 41.

110 *Id.* at 60.

111 *Id.* The Cable Act of 1984 also specifically states, "The provisions in this Act and the amendments made by this Act shall not be construed to affect any jurisdiction the Federal Communications Commission may have under the Communications Act of 1934 with respect to any communication by wire or radio (other than cable service, as defined by section 602(5) of such Act) which is provided through a cable system, or persons or facilities engaged in such communications." Cable Act of 1984, § 3(b), 98 Stat. 2779, 2801 (1984).

112 H.R. REP. NO. 98-934, at 63 (emphasis added). Section 621(d) of the Communications Act allows the Commission or a state to require the filing of informational tariffs for any intrastate communication service other than a cable service. *See* 47 U.S.C. § 541(d). The legislative history accompanying this section makes clear that Congress intended the informational tariff requirement to provide the Commission and the states information necessary to determine if a service should be regulated as a common carrier service. *See id.*

113 *Id.* at 42.

munications services under a different regulatory regime than the one that applied to common carriers.[114] The "level playing" field concept of the 1996 Act continued this longstanding intent.

B. Cable Facility Operators Providing Information Service to Subscribers Act as Competitive Local Exchange Carriers to the Extent They Provide Non-Cable Services

If internet access and information services are not "cable services," then AT&T and other cable facility operators act as competitive local exchange carriers when they provide broadband internet access and other information services to the public over cable facilities. When discussing internet access provided by incumbent local exchange carriers, the Commission stated recently that an end-user may utilize a telecommunications service together with an information service, as in the case of internet access. In such a case, however, the two services are treated separately: The first service is a telecommunications service (*e.g.*, the xDSL-enabled transmission path), and the second service is an information service—in this case internet access.[115] The internet access provided by a cable operator through @Home is no different from the internet access provided by any other local exchange carrier (incumbent or competitive) through its own affiliated ISP. The Commission itself describes cable modem service—and in particular the service provided to AT&T's customers through @Home—in terms of separate services that are bundled together when offered to the consumer.[116] One of the services is "the underlying transport service" or "use of the cable network for data delivery services," while the others are described as "internet access" and "content."[117] Further, AT&T itself has already admitted that it would be a competitive local exchange carrier when it provides "telecommunications service" over its cable facilities, albeit with the caveat that it is not yet one because it may provide internet access and other information services over its cable system as a "cable service," rather than "via telecommunications" as all other local exchange carriers do.[118] Unfortunately for AT&T's position, it is the statute—and not the carrier—that determines who is a local exchange carrier.

Since 1984 Congress has made it clear that a cable operator can be regulated as a telephone company when it provides non-cable services. The new definitions Congress added in the 1996 Act make it even clearer.[119] One of the goals of the 1996 Act was to provide competitively neutral requirements for the provision of similar services.[120]

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[114] *See generally* Esbin, *supra* note 7, at 66 ("Of particular concern with respect to cable's increasing capacity for two-way transmission services was the effect of telephone subscriber by-pass of the regulated local exchange networks in favor of the potentially unregulated provision of voice and data services by the cable companies."). In the 1996 Act, Congress specifically required that all telecommunications carriers must contribute to universal service. *See* 47 U.S.C. § 254(d). This requirement would have little meaning if cable facilities could be used to escape universal service contributions.

[115] *See Advanced Services Order*, 13 FCC Rcd. at 24030, para. 36 (citation omitted).

[116] *See In re* Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from TCI to AT&T, *Memorandum Opinion and Order*, 14 FCC Rcd. 3160, 3195, para. 70 (1999) [hereinafter *TCI Order*]; *see also FCC Amicus Brief*, *supra* note 2, at 12–13.

[117] *See TCI Order*, 14 FCC Rcd. at 9195, para. 70.

[118] *See Joint Reply of AT&T and TCI*, *supra* note 51, at 53–54. In fact, the Pennsylvania Public Utilities Commission recently approved AT&T tariffs for local exchange service offered over TCI's cable network in Pittsburgh and its suburbs. *Pa. PUC Approved AT&T Tariffs for Local Exchange Service*, COMM. DAILY, Dec. 17, 1999, at 10.

[119] The authors are aware that some commentators have argued that the new definition of "information service" and the addition of section 230(b) to the Communications Act have removed from the Commission any jurisdiction over internet access or other information services, even when those services are provided by a local exchange carrier. *See* Leonard Kennedy & Lori Zallaps, *If It Ain't Broke . . . The FCC and Internet Regulation*, 7 COMMLAW CONSPECTUS 17, 26 (1999). The authors disagree with the legal analysis of the article, which relies heavily on a "policy" statement by Congress in section 230 of the Communications Act dealing with indecent content. The article overlooks completely the legislative history of section 230. The section as passed by the House contained an explicit prohibition on FCC regulation of the internet, but that restriction was deleted in conference. *See* A LEGISLATIVE HISTORY, *supra* note 7, at 379 ("the House bill's Cox-Wyden . . . declaration that the FCC was given no new jurisdiction to regulate the Internet was dropped"). In short, there is nothing in section 230—which in any case is concerned solely with internet content and not transmission—that supports rejection of the fundamental regulatory structure of the Communications Act and the plain meaning of the definitions contained in sections 3 of the Act.

[120] *See* 142 CONG. REC. S710 (1996) (statement of Sen. Kerry) (commenting that "[t]hese fundamental features of the conference report on S. 652 [the 1996 Act] are designed to create a level playing field where every player will be able to compete on the basis of price, quality, and service"); 142 CONG. REC. H1177 (1996) (statement of Rep. Castle) (stating that "the legislation has sought to ensure that different industries will be competing on a level playing field"); 142 CONG. REC. S691 (1996) (statement of Sen. Stevens) (explaining that "we have tried to find a way to literally level the playing

Thus Congress made it clear that a cable facility operator can also be a telephone company, or more precisely a "local exchange carrier"[121] under the statutory definitions in the Act. As part of the proceedings to implement both section 251 of the Act and section 706 of the 1996 Act, the Commission found that advanced services like packet-switching and xDSL service are "telecommunications" and that when advanced services are provided by an incumbent local exchange carrier they are either "telephone exchange service" or "exchange access."[122] Any person—incumbent or not—who provides "telephone exchange service"[123] or "exchange access"[124] is a "local exchange carrier" for purposes of the Communications Act.[125] Further, the Commission noted, "[n]othing in the statutory language or legislative history limits [the terms "telephone exchange service" and "exchange access"] to the provision of voice, or conventional circuit switched service . . . The plain language of the statute thus refutes any attempt to tie these statutory definitions to a particular technology."[126]

Other than the nature of the facilities used, there is no significant difference between broadband internet access offered over cable facilities and that offered by local exchange carriers using DSL transmission. As a matter of law there is no support in the Communications Act for different regulatory treatment of these identical services based solely on the type of facilities used,[127] nor does the Communications Act draw any distinction between types of local exchange carriers (*i.e.*, incumbent or competitive) or the facilities used to provide a transmission service for purposes of deciding who is a "local exchange carrier"[128] or a "telecommunications carrier."[129]

C. The Changes Made to Title VI by the 1996 Act Demonstrate that Congress Intended to Preserve the Distinction Between Cable Services and Telecommunications Services

If one broadens their review of the changes made in the 1996 Act beyond the addition of "or use" that is so often cited by the cable industry, a clearer pattern emerges. Congress made extensive changes to Title VI with respect to the heart of the issue raised in this debate, namely the relationship between cable services, information services, and telecommunications services.

In particular, Congress took considerable pains to add several new sections to Title VI. Part V of Title VI, titled "Video Programming Services Provided By Telephone Companies," seems to have escaped the Commission's notice entirely when it comes to examining the relationship between information services provided over cable facilities and those same services provided over more traditional facilities.[130] In addition, Congress added explicit provisions to existing sections of Title VI to prohibit local franchising authorities from requiring a cable operator to provide a telecommunications service as part of its franchise obligations.[131]

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field . . . I do believe we have succeeded").

121 47 U.S.C. § 153(26) (1994 & Supp. III 1997).

122 *See In re* Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Order on Remand*, FCC 99-413, at para. 3 (rel. Dec. 23, 1999) [hereinafter *Order on Remand*].

123 "Telephone exchange service" is service "operated to furnish to subscribers intercommunicating service . . . or comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service." 47 U.S.C. § 153(47) (1994 & Supp. III 1997).

124 1998)

"'[E]xchange access'" means the "offering of access to telephone exchange services or facilities[.]" 47 U.S.C. § 153(16) (1994 & Supp. III 1997).

125 *See* 47 U.S.C. § 153(26) (1994 & Supp. III 1997).

126 *Advanced Services Order*, 13 FCC Rcd. at 24011, para.41. *See also Order on Remand, supra* note 122, at para. 21.

127 As the Commission recently noted to the Court in *Portland*, "it is not readily apparent why the classification of the service should vary with the facilities used to provide the service." *FCC Amicus Brief, supra* note 2, at 25.

128 The Act merely states, " 'Local exchange carrier' means *any person* that is engaged in the provision of telephone exchange service or exchange access." 47 U.S.C. §153(26) (1994 & Supp. III 1997) (emphasis added). *See also* City of Dallas, Texas v. FCC, 165 F.3d 341, 354 (5th Cir. 1999) (explaining that "Congress also knew how to distinguish among respective groups of LECs . . . When Congress wanted to distinguish traditional, incumbent LECs from the new "competitive" LECs (including cable companies) whose entry the Act facilitated, it did so in plain terms.").

129 A "telecommunications carrier" is any person who offers telecommunications to the public for a fee, regardless of the facilities used. *See* 47 U.S.C. §153(44) & (46) (1994 & Supp. III 1997).

130 Part V of Title VI is not discussed at all in any of the works cited in footnote 13 in which various FCC staff examined or opined on the issue of internet access and other information services provided over cable facilities.

131 *See* 47 U.S.C. § 541(b). Section 303 of the 1996 Act, added a new paragraph (3) to section 621(b) It also amended section 622(b) to limit franchise fees to "cable service" only. *See* 47 U.S.C.§ 542(b); *see also* S. CONF. REP. NO.

Section 651(a) of the Act[132] establishes a common regulatory treatment of video programming provided by a common carrier for each different type of transmission media regulated by the Act. Common carriers and any other person using radio communication to provide video programming are all to be regulated under Title III.[133] Common carriers only transmitting video programming on a common carrier basis are to be regulated only under Title II. Any other use of common carrier facilities to provide video programming to subscribers must be done either through a cable system subject to parts I through IV of Title VI[134] or through an open video system subject to section 653 of the Act.[135] In either case the facilities are subject to regulation under Title II for all non-cable services and to the appropriate sections or section of Title VI for cable services.

Section 651(b) of the Act most clearly illustrates that Congress had a specific demarcation point between services in mind. That section states that "[a] local exchange carrier that provides cable service through an open video system or a cable system shall not be required, pursuant to Title II of this Act, to make capacity available on a nondiscriminatory basis to any other person for the provision of cable service directly to subscribers."[136]

This section demonstrates that Congress was concerned that, absent this explicit limitation reinforcing the exemption from common carrier requirements for "cable service" in section 621(c), common carrier requirements might be applied to permit competing cable service providers to use the local exchange facilities of a "telephone company" that also used those common carrier facilities to provide its own cable service. This would undo the "level playing field" Congress sought to create, because cable operators do not have to share their facilities with competing cable service providers. As a result, as the legislative history of section 651(b) indicates, Congress intended that a common facility could be used for both cable services and telecommunications services, and specific language was included so that the common facility would be regulated appropriately under Title II for telecommunications services and under Title VI for cable services.[137]

That a cable facility could be used for more than one type of regulated service was not a new or novel idea on the part of Congress in 1996. In the *NARUC II* case the court stated that "it is at least logical to conclude that one can be a common carrier for some activities but not others."[138] During consideration of the 1984 Cable Act the House Commerce Committee expressed a similar view, stating "[w]hile cable operators are permitted under the provisions of Title VI to provide any mixture of cable and non-cable services they choose, the manner in which a cable service is marketed would not alter its status as a cable service . . . the combined offering of a non-cable shop-at-home service with service that by itself met all the conditions for being a cable service would not transform the shop-at-home service into a cable service, or transform the cable service into a non-cable communications service."[139] Twelve years later the view of Congress had not changed. Services that are not cable services remain subject to regulation under other titles of the Act.

The cable industry, and perhaps the Commission, appears to believe that part V of Title VI only applies to companies that started life as a telephone company.[140] However, there is nothing in the Act or the legislative history of the 1996 Act that supports such a limited view.[141] If internet access and other information services are in-

104-230, at 180.

132 47 U.S.C. § 571(a) (1994 & Supp. III 1997).

133 This provision was intended to "create parity among providers of services using radio communications." S. CONF. REP. No. 104-230, at 172; *see also* 47 U.S.C. § 336 (Supp. II 1996)(addressing the regulation of the provision of ancillary and supplementary services by broadcast licensees).

134 47 U.S.C. §§ 521& 561.

135 47 U.S.C. §§ 571 & 573 (1994 & Supp. III 1997).

136 47 U.S.C. § 571(b) (1994 & Supp. III 1997).

137 *See* S. CONF. REP. No. 104-230, at 172 ("an integrated cable system utilizing its own telephone exchange facilities"); *see also id.* at 178 ("In another effort to ensure parity among video providers, the conferees state that [open video system] fees may only be assessed on revenues derived from comparable cable services"); *id.* at 180 (stating that "the franchise fee provision is not intended to reach revenues that a cable operator derives for providing new telecommunications services over its system").

138 National Association of Regulated Utilities Commissioners v. FCC, 533 F.2d 601, 608 (1976) [hereinafter *NARUC II*].

139 H.R. REP. No. 98-934, at 44.

140 As noted earlier, AT&T has in fact been certified as a local exchange carrier in Pennsylvania for the provision of local exchange service using its cable facilities. *See supra* note 112.

141 "[A]s a result of the walls brought down and the forces unleashed by this bill, it is not clear what will constitute a telephone company in the future—perhaps every firm that transmits information by any electronic means." 142 CONG. REC. S698 (1996) (statement of Sen. Kerrey).

cluded under the definition of cable service, as the cable industry advocates, then any local exchange carrier, including an incumbent local exchange carrier such as Bell Atlantic, could escape any obligation to provide open access to ISPs or unbundled network elements and interconnection to competitive local exchange carriers who wish to provide internet access services.[142] This would be the case because section 651(b) of the Act states a local exchange carrier is under no Title II obligation to make capacity available for the provision of cable service.[143] The explicit limitations Congress so carefully imposed in the definition of "cable service" would be made meaningless, and facilities-based ISPs, including incumbent local exchange carriers like Bell Atlantic and SBC, would be free to determine their own regulatory regime.[144] It is clear that Congress did not intend for this to be possible under the plain language of the Communications Act.

V. CONCLUSION

The Commission's choice so far to ignore the explicit requirements of the Communications Act as they apply to cable facilities used to provide internet access cannot ultimately be upheld by the courts. By allowing cable companies to create oligopolies in the high speed internet access marketplace, the Commission dooms to extinction any number, perhaps even thousands, of smaller ISPs whose presence is the driving force behind internet access competition and technological innovation. Ironically, it is the competitive internet marketplace that the Commission insists it is seeking to promote when it willfully abdicates its statutory responsibilities and allows increasingly concentrated and powerful cable facility operators to avoid their obligation to make their underlying telecommunications transmission facilities available on a common carrier basis.

Destruction of a vital and competitive internet services market would in itself be disastrous, and it would represent a perverse outcome for a policy largely justified by the disingenuous cry of "don't regulate the internet." If the Commission allows the cable industry to "interpret" the language of the Communications Act out of existence in order to avoid its common carrier responsibilities, how can the Commission continue to require that an incumbent or competitive telephone company providing the same service make its facilities available to all ISPs on a non-discriminatory basis? The answer, of course, is that it cannot, with the result that the entire regime designed by the Commission and Congress to foster meaningful competition and consumer choice is gutted, to be repaired, if at all, at the cost of years of unnecessary litigation. Both industry and the consuming public would be far better served if the Commission were to re-examine its policies—this time in the full light of the statute—and correct its course before it is too late.

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142 These requirements are found, among other places in Title II, in new section 251 of the Communications Act, as added by the 1996 Act. As the Commission found in the *Advanced Services Order*, section 251 is one of the "cornerstones of the framework Congress established in the 1996 Act." *Advanced Services Order*, 13 FCC Rcd. at 24011, para. 76. Given the intensity of the debate surrounding the 1996 Act and importance Congress attached to it, it seems unlikely that Congress would overlook, much less permit, such a possibility.

143 47 U.S.C. § 571(b) (stating that "[a] local exchange carrier that provides cable service through an open video system or a cable system shall not be required, pursuant to subchapter II of this chapter, to make capacity available on a nondiscriminatory basis to any other person for the provision *of cable service directly to subscribers*") (emphasis added).

144 The Commission noted this problem as well in its *Amicus* brief, stating, "Under [the cable industry's] broad statutory interpretation, however, 'other programming service' would arguably include any transmission capability that enables subscribers to select and receive information, including basic telephone service." *FCC Amicus Brief, supra* note 2, at 24. AT&T's interpretation that "cable service" includes internet access and other information services could also permit the Regional Bell companies to escape the in-region interLATA restrictions so carefully imposed by Congress in section 271 of the Act, because the definition of "incidental interLATA services" in section 271(g)(1)(A) of the Act—which are not subject to the ban—includes "video programming" and "other programming service" as defined in section 602 of the Act. *See* 47 U.S.C. § 271(g)(1)(A) (1997).