
OPEN ACCESS OF INTERNET SERVICE PROVIDERS TO THE CABLE OPERATORS' FACILITIES IN THE UNITED STATES

by

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A. Introduction

In the last years, the issue whether cable companies should be required to give unaffiliated Internet service providers open access to their broadband platforms has become a focus of debate in the United States. The debate centers on the question how competing Internet service providers will be able to use the broadband infrastructure of cable operators. Today, cable operators in the United States usually provide Internet access through wholly or partially owned affiliated Internet service providers. Unaffiliated Internet service providers claim that they would only be able to use the affiliated provider's service at the full retail price. Allegedly unable to compete with the affiliated Internet service providers' higher speed, wide availability, and relatively low cost, the unaffiliated providers try to obtain direct access to the cable network. This article outlines the significance of the open access debate and describes the positions of the players and of the Federal Communications Commission ("FCC"). It summarizes the first decisions rendered by US courts as well as the regulatory decisions on the AOL Time Warner merger. It further undertakes a detailed analysis of the statutory classification of broadband cable services and, finally, considers the policy implications of open access.

B. Broadband

I. The Significance of Broadband

Broadband technology allows cable operators to provide Internet applications at very high data rates to their customers, thereby bringing an end to the interpretation of "www" as "world wide wait." The FCC Cable Services Bureau Chief, Deborah A. Lathen, has illustrated the significance of broadband technology by referring to a USA Today study on Internet download times for the 1998 box office smash hit *Titanic*. A regular dial-up modem over telephone lines (at 56 kbps) took 42 hours and 30 minutes to download the 3 hour and 14 minute movie. By

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contrast, the download time for the broadband modem was only 9 minutes.¹ The significantly increased speed of broadband technology will, in addition, provide users with a range of enhanced services such as real time streaming video. Finally, fiber-optic cables, replacing the traditional coaxial cable TV facilities, reduce noise and provide clearer signal transmission facilities that make two-way interactivity, telephony and other new services possible.

II. The Competing Broadband Technologies

Cable broadband is not the only technical solution for providing broadband services. The local telephone companies' "Digital Subscriber Lines" (DSL), as well as wireless technologies (fixed wireless and satellites) compete or are expected to compete with cable modem service.² However, cable broadband has an early lead in deployment of broadband services. Cable operators continue to "upgrade" the traditional cable systems from one-way delivery of analog television signals to two-way interactive broadband systems, replacing the full coaxial cable systems with hybrid systems, i.e. coaxial and fiber-optic lines.³ Based on reports from the largest cable operators, by year-end 1999, cable systems that cover 65% of the 72.4 million American homes passed, have been upgraded - by the year-end 2000, even 80%.⁴ Meanwhile, the companies deploying competing technologies still have to solve several technical issues such as the "distance limitation" problem of DSL, the "line of sight" requirements of fixed wireless systems, and several other technical issues with regard to widespread implementation of broadband services.

In its 2000 Report on the Availability of High-Speed and Advanced Telecommunications Services, the FCC has reported that, as of December 31, 1999, there were a total of 2.8 million high-speed and advanced services subscribers. 1.8 million of these subscribers are residential or small business customers and about 1.0 million subscribers have services with speeds in both directions of at least 200 kbps, thereby meeting the FCC's definition of "advanced services."⁵ Of the 1.0 million subscribers to advanced services, approximately 875,000 subscribed to cable-based services and approximately 115,000 subscribed to DSL, leaving the remaining balance to

¹ *The Mind's Eye*, November 9, 1999, available at <<http://www.fcc.gov>>.

² For in-depth information on the technical background of the existing broadband technologies see Deborah A. Lathen, *Broadband Today: A Staff Report to William E. Kennard, Chairman Federal Communications Commission on Industry Monitoring Sessions Convened by Cable Services Bureau*, October 1999, at 18-22, available at <<http://www.fcc.gov>>; *Picking the Right Data Superhighway*, N.Y. TIMES, November 11, 1999, at G1 and G10. For introductory information on the Internet see Barbara Esbin, *Internet over cable: Defining the Future in Terms of the Past*, 7 *CommLaw Conspectus* 37, at 45-55 (1999); Annabel Z. Dodd, *The Essential Guide to Telecommunications*, at 243-283 (1999).

³ For a description of the transformation of the cable architecture as well as a listing of current cable internet services see Barbara Esbin, *Internet over cable: Defining the Future in Terms of the Past*, 7 *CommLaw Conspectus* 37, at 89-95 (1999).

⁴ Deborah A. Lathen, *Broadband Today: A Staff Report to William E. Kennard, Chairman Federal Communications Commission on Industry Monitoring Sessions Convened by Cable Services Bureau*, October 1999, at 26, available at <<http://www.fcc.gov>>.

⁵ See II.A.3.

the other broadband technologies.⁶ Compared to the numbers in the FCC's first report of 1999, this is a three-fold increase from 1998, when approximately 375,000 subscribers to advanced services (consisting of 350,000 cable modem subscribers and 25,000 DSL subscribers) were reported.⁷

Some analysts predict that by 2005, cable will have up to 23 million subscribers for Internet access services, with DSL at 10 million subscribers and traditional dial-up narrowband at 35.7 million subscribers.⁸ However, it is hard to say at this time how the competing industries will develop.

III. The Open Access Debate

1. The Issue

Given the enormous economic opportunities of broadband technology at stake, it is not surprising that the open access issue has already been subject to litigation.⁹ The open access debate centers on Internet service providers' access to the broadband infrastructure of cable operators. Currently, cable operators usually provide Internet access through wholly or partially owned affiliated Internet service providers. For example, AT&T cable subscribers receive Internet service from Excite@Home.¹⁰ In the *AT&T v. City of Portland* case, unaffiliated Internet service providers claimed that the open access requirement should allow customers to obtain direct access to their Internet service provider of choice without having to pay the full @Home retail rate. They, the Internet service providers, would pay AT&T for the access.¹¹

2. The City of Portland Decisions

The City of Portland and the County of Multnomah, local authorities with the power to grant cable franchises and to approve the transfers of franchises in their localities¹², imposed an

⁶ See *FCC Issues Report on the Availability of High-Speed and Advanced Telecommunications Services*, FCC News Release, August 3, 2000, available at <<http://www.fcc.gov>>.

⁷ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CS Docket No. 98-178, Memorandum and Order, 14 FCC Rcd. 1999, available at <<http://www.fcc.gov>>.

⁸ *Id.* at 32.

⁹ In the United States the discussion of open access as a means to enhance competition has a long tradition. For an early Supreme Court decision dealing with access to an essential facility see the so-called "Express cases." 117 U.S. 1; 29 L.Ed. 791; 6 S.Ct. 542 (1886).

¹⁰ Time Warner cable subscribers used to receive the service from RoadRunner until the FTC in its AOL/Time Warner merger review imposed the "competitive access" conditions.

¹¹ *Id.* at 1150.

¹² For information on franchising see T. BARTON CARTER ET AL., *THE FIRST AMENDMENT AND THE FIFTH ESTATE* 420-428 (1999).

open access requirement in December 1998. The City and County adopted mandatory access provisions as a condition for the approval of the transfer of TCI's franchises to AT&T in the context of the AT&T/TCI merger. AT&T rejected the mandatory access provision set forth in the ordinance and in January, 1999, the City and County decided that AT&T's rejection resulted in a denial of its request for a change in control of the TCI franchises. AT&T sued the City and County alleging that the local authorities had no power to require access to the cable modem platform as a condition of approving TCI's cable franchise transfer to AT&T. The District Court turned AT&T's arguments down and ruled in favor of the City of Portland and Multnomah County.¹³ On AT&T's appeal, the United States Court of Appeals for the Ninth Circuit reversed.¹⁴ In September 2000, the City of Portland announced that it would not seek further review of the Ninth Circuit's decision.

While the appeal was pending, in December 1999, under growing pressure AT&T and MindSpring, an unaffiliated Internet service provider, entered into an agreement regarding access to AT&T's cable modem platform.¹⁵ In addition, AT&T's affiliated Internet service provider, Excite@Home, announced on November 22, 1999, that it would draw a distinction between its Internet access business and its media-content business by creating a separate tracking stock for the media assets.¹⁶ Until 2002, Excite@Home has exclusive contracts with AT&T, Cox and Comcast, which thereby are obliged to use Excite@Home for the cable modem services offered to their cable subscribers.

3. The Decisions of other Local Authorities

Other local franchising authorities have also voted on mandated access provisions. Broward County, Florida, adopted a general ordinance requiring cable companies in its localities to provide unaffiliated Internet service providers non-discriminatory access to the broadband facilities. San Francisco, California, approved the transfer of TCI's franchises to AT&T without an open access condition, but at the same time established a city policy of supporting non-discriminatory access to broadband services and filed an *amicus curiae* brief in support of the Portland ordinance with the U.S. Court of Appeals for the Ninth Circuit. Fairfax City, Virginia, required Cox to provide access to its broadband platform to unaffiliated Internet service providers.

In May 2000, the District Court of Virginia rendered summary judgment for AT&T and Media One in their challenge to an open access requirement imposed by Henrico County, Vir-

¹³ AT&T v. City of Portland, 43 F.Supp.2d 1146 (D. Oregon 1999).

¹⁴ AT&T v. City of Portland, 216 F.3d 871 (9th Cir., 2000). See also *AT&T Fights Push to Open Cable Lines To Its Rivals*, N.Y. TIMES, November 2, 1999, at A20.

¹⁵ *Statement of FCC Chairman William E. Kennard on AT&T-MindSpring Agreement*, FCC News Release, December 6, 1999, available at <<http://www.fcc.gov>>.

¹⁶ *Excite@Home to Separate Cable and Content Divisions*, N.Y. TIMES, November 22, 1999, at C2

ginia.¹⁷ The court held that the ordinance was preempted by the Communications Act and that the county, under Virginia law, lacked the authority to impose such requirement. On appeal, the case was argued before the Fourth Circuit on September 27, 2000.

By contrast, in Los Angeles, California, the Information Technology Agency recommended that the City of Los Angeles should not order any open access provisions.¹⁸

4. The Federal Communications Commission's Position

The FCC is concerned about the threat of inconsistent local regulation "that could disrupt the Commission's national broadband policy."¹⁹ This national broadband policy, adopted by the FCC in pursuance of its monitoring obligations under Section 706 of the Telecommunications Act of 1996²⁰, is one of "vigilant restraint, refraining from mandating 'open access' at this time, while closely monitoring for anti-competitive developments that may require intervention."²¹ The FCC filed an *amicus curiae* brief with the United States Court of Appeals for the Ninth Circuit in the *AT&T v. City of Portland* case.²² In its brief, the Commission stated that it is "the only agency charged with implementing federal communications policy" and that it is "the only agency with jurisdiction over all the current providers of broadband technology." The FCC claimed that inconsistent regulation of different providers of broadband technology "could undermine the development of intermodal competition" between the different providers; that its "regulatory restraint with respect to information services ha[d] significantly facilitated the explosive growth of the Internet;" that "different companies are using different technologies to bring broadband to residential consumers;" and that "multiple methods of increasing bandwidth are or soon will be made available to a broad range of customers."²³ In order to make broadband services over DSL more readily available, the FCC, in November 1999, decided to require major regional phone companies to share their lines with data carriers.²⁴

¹⁷ *Media One Group, Inc. v. County of Henrico*, 97 F.Supp.2d 712 (E.D. Va. 2000), *appeal docketed*, No. 00-1680 (4th Cir. 2000).

¹⁸ For further details see Deborah A. Lathen, *Broadband Today: A Staff Report to William E. Kennard, Chairman Federal Communications Commission on Industry Monitoring Sessions Convened by Cable Services Bureau*, October 1999, at 14-15, available at <<http://www.fcc.gov>>.

¹⁹ *Id.* at 43.

²⁰ Telecommunications Act of 1996, Pub.L.No. 104-104,110 Stat. 56 (1996).

²¹ See Deborah A. Lathen, *Broadband Today: A Staff Report to William E. Kennard, Chairman Federal Communications Commission on Industry Monitoring Sessions Convened by Cable Services Bureau*, October 1999, at 15.

²² *FCC Court Brief Underscores Consumer Benefits from National Internet Policy of Unregulation: Urges Narrow Judicial Resolution*, FCC News Release (August 16, 1999), available at <<http://www.fcc.gov>>.

²³ *Id.*

²⁴ See *F.C.C. Approves Line Sharing for Data Carriers*, N.Y. TIMES, November 19, 1999, at C5. See also *Federal Communications Commission Action To Accelerate Availability Of Advanced Telecommunications Services For Residential And Small Business Consumers*, FCC News Release (November 18, 1999), available at <<http://www.fcc.gov>>.

In September 2000, the FCC launched a formal "Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,"²⁵ seeking comment on the appropriate legal and policy approach to high-speed Internet service provided over various platforms. Announcing the inquiry, the chairman of the FCC at the time, William E. Kennard, for the first time questioned whether a marketplace solution will develop absent some form of intervention. The inquiry is intended to help the Commission to develop a factual record and seeks comments on various aspects of the open access issue, on alternative approaches to classifying cable modem service under the Communications Act and the implications of adopting each such classification, and on the question whether the legal framework for cable modem service should apply to all providers of high-speed services.²⁶ In its Notice, the FCC underlines the need for regulatory consistency that avoids disadvantageous treatment of a particular type of high-speed service provider with respect to its regulatory obligations. In this context, the Notice seeks comment on whether and why there should be competitive neutrality among service providers, which frameworks should apply for which services and whether technological differences should compel different regulatory results. The Notice of Inquiry could be followed by a Notice of Proposed Rulemaking in 2001.²⁷

5. *The AOL/Time Warner Merger Decisions*

The open access issue has also become subject to regulatory decisions that approved the merger between America Online Inc., the world's largest Internet access provider, with Time Warner Inc., the media giant and second-largest US cable company. The Federal Trade Commission ("FTC") and the FCC have imposed open access requirements as a condition of approval of the merger, thereby, among others, preventing the companies from providing Internet access only through AOL.²⁸

After the European Commission had approved the merger in October 2000²⁹, the FTC, on December 14, 2000, entered into a consent decree that outlines the terms of the approval to

²⁵ In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, GN Docket No. 00185 (September 28, 2000) available at <<http://www.fcc.gov>>.

²⁶ For a short summary of the Commission's specific goals in initiating the proceeding see *Federal Communications Commission Launches Inquiry Regarding High-Speed Internet Service*, FCC News Release (September 28, 2000), available at <<http://www.fcc.gov>>.

²⁷ Legislative proposals were introduced in the prior Congress. See H.R. 1686, 106th Cong., 1st sess. (1999); and 1685, 106th Cong., 1st sess. (1999).

²⁸ See *AOL/TW gets mega-scrutiny*, *Broadcasting and Cable*, July 31, 2000, at p. 4 and 8; *AOL, TW find pol pals*, *Broadcasting and Cable*, October 2, 2000, at p. 12-13. The merger, when announced on January 10, 2000 the biggest merger in corporate history, worth \$183 billion, has, since then, dropped in value to \$112 billion as the stock prices of both companies have declined. *FCC Clears Way for AOL Time Warner Inc.*, *Washington Post*, January 12, 2001, at p. A01.

²⁹ The European Commission has approved the merger under the condition that AOL severs all structural links with Bertelsmann AG. The condition is designed to prevent AOL from having access to Europe's leading source of music publishing rights thereby eliminating the risk of dominance in the emerging markets

which AOL and Time Warner have agreed. Under the terms of the decree, AOL Time Warner (1) is required to open its cable system to competing Internet service providers; (2) is prohibited from interfering with content passed along the bandwidth contracted for by unaffiliated Internet service providers and from interfering with the ability of unaffiliated providers of interactive television services to interact with interactive signals, triggers or content that AOL Time Warner has agreed to carry; (3) is prevented from discriminating on the basis of affiliation in the transmission of content, or from entering into exclusive arrangements with other cable companies with respect to ISP services or interactive television services; and (4) is required to market and offer AOL's services to DSL subscribers in Time Warner cable areas where affiliated cable broadband service is available in the same manner and at the same retail pricing as they do in those areas where affiliated cable broadband ISP service is not available.³⁰

Under the FTC's open access conditions AOL Time Warner is required to make available to its subscribers in its larger cable divisions at least the competing ISP service offered by the second largest Internet service provider, Earthlink, before AOL itself may begin offering service in that cable division. A cable broadband ISP service agreement, entered into by Time Warner and Earthlink in November 2000, has been approved by the FTC. Within 90 days after making AOL's broadband ISP service available to subscribers, Time Warner will be required to enter into agreements (to be approved by the FTC as well) with at least two other unaffiliated Internet service providers to provide cable broadband ISP services in that Time Warner cable division. The terms of these agreements are subject to the FTC's prior approval and must be comparable to either the Earthlink agreement or any agreement between AOL and another cable company to provide AOL's broadband service over the cable company's platform. In Time Warner's smaller cable divisions, Time Warner is required to enter into agreements with at least three unaffiliated Internet service providers within 90 days after making AOL's broadband service available. All alternative cable broadband ISP service agreements must contain a "most favored nations" clause providing that, if AOL executes a cable broadband ISP service agreement with another cable company, AOL Time Warner must give the unaffiliated Internet service providers an opportunity to opt in to the same rates and terms secured by AOL in the cable company agreement. Time Warner is required to negotiate and enter into arms' length, commercial agreements with any other unaffiliated Internet service provider that seeks to provide cable broadband ISP service on Time Warner's cable systems. Time Warner may decline to enter in such negotiations only where it is permitted to do so based on reasons enumerated in the consent decree.

The FCC approved the merger on January 11, 2001, but required the companies to comply with several additional conditions.³¹ Under these conditions, AOL Time Warner has to (1)

for on-line delivery of music over the Internet and software-based music players.

³⁰ See *In the matter of America Online, Inc. and Time Warner Inc., Agreement Containing Consent Orders*, File No. 001 0105, Docket No. C-3989, December 14, 2000.

³¹ See *Subject to Conditions, Commission Approves Merger Between America Online, Inc. and Time Warner, Inc.*, Public Notice FCC 01-11 (January 11, 2001), available at <www.fcc.gov>. FCC chairman William E. Kennard has

allow competing Internet service providers on Time Warner cable systems to have an unimpeded 'first-screen' relationship with their subscribers; to have a direct billing relationship with customers; to benefit equally in the technical features, such as caching, of the high-speed Internet platform; and to be afforded fair carriage contracts; (2) open their 'advanced' instant-messaging network to one competitor immediately and to two others within 180 days from the launch of the service³²; and (3) avoid any agreement with AT&T that would make AOL Time Warner the exclusive Internet service provider on AT&T's high-speed cable-modem platform. In addition, the FCC reaffirmed its decision of December 2000 to require AT&T to sell its 25 percent stake in Time Warner Entertainment.³³ However, the FCC fell short from imposing merger conditions related to interactive television. Instead, the FCC launched a new proceeding on the issue.³⁴

C. Open Access under the Telecommunications Act of 1996

As noted, in addition to the FTC's and FCC's merger-specific decisions, the FCC is currently considering the adoption of a general policy on open access. In this context, the question to be answered is whether the unaffiliated Internet service providers should have a right to open access to the cable operators' broadband facilities (other than AOL Time Warner's) under current US law. Since "all of the specific mandates of the 1996 [Telecommunications] Act depend on application of the statutory categories established in the definitions section"³⁵, it is important to classify broadband services under the existing categories of the Telecommunications Act of 1996.

seen the measure as going "a little bit farther" in "plugging the holes" left after the FTC's AOL/Time Warner merger decision. See *FCC Clears Way for AOL Time Warner Inc.*, Washington Post (January 12, 2001), at p. A01.

³² AOL, so far, has blocked other instant-messaging systems from inter-operating with its own because of security and privacy concerns.

³³ Because of antitrust concerns raised by the AT&T-Media One merger, the Department of Justice has already required AT&T to divest its interest in Road Runner. *United States v. AT&T Corp. and MediaOne Group, Inc.*, Case No. 1:00CV01176, Complaint and Proposed Final Judgment (D.D.C., filed May 25, 2000). The FCC conditionally approved the MediaOne merger, provided that AT&T complied with the horizontal cable ownership rules by May 2001. *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T*, FCC 00-202 ¶ 4 (June 5, 2000).

³⁴ See *In the Matter of Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, CS Docket No. 01-7 (January 18, 2001). See also *FCC tackles interactive*, Broadcasting and Cable, January 1, 2001, at 6.

³⁵ Report to Congress, CC Docket No. 96-45, FCC 98-67 at para. 21.

I. The Regulatory Categories under the 1996 Act

1. Cable Services

The local authorities have the power to grant cable franchises and to approve the transfers of franchises in their localities.³⁶ The 1984 Cable Act defined “cable service” as “the one-way transmission to subscribers of video programming or other programming service, and subscriber interaction, if any, which is required for the selection of such programming.”³⁷ By enacting this definition, Congress took into account that cable systems were capable of delivering traditional one-way and two-way data and voice transmission and, therefore, intended “to prevent cable systems delivering video programming from being treated as common carriers, while preserving existing federal and state authority to develop a regulatory scheme for the cable operators’ expected future provision of non-traditional broadband communications services.”³⁸

The 1996 Act amended this definition by adding “or use” before the terms “of such video programming or other programming service” to the former definition.³⁹ Under Section 602 (14) “other programming service” means “information that a cable operator makes available to all subscribers generally.”⁴⁰ Arguably, cable based Internet services fit under the “other programming services” prong of the definition, since the legislative history shows that the transmission and downloading of computer software and video games were meant to be encompassed by this term.⁴¹ It is more problematic to say that the term “or use” is meant to cover two-way communications as Internet services, since the amended definition still speaks of “one-way transmission.” It has been suggested that this obvious conflict may be reconciled by focusing on the cable operator’s ability to transmit to subscribers content and information available through the operator’s computer connections to the Internet as the fundamental “cable service”, including both the subscribers’ “selection” and “use” of such programming.⁴² Thereby the programming service would still be considered as “one-way,” while the cable service as a whole could be considered as “two-way,” including Internet services.⁴³ This would mean that the amendment intended to include exactly that type of services that the former definition wanted to exclude –

³⁶ For information on franchising see T. BARTON CARTER ET AL., *THE FIRST AMENDMENT AND THE FIFTH ESTATE* 420-428 (1999).

³⁷ 47 U.S.C. 522 (6) (A).

³⁸ Barbara Esbin, *Internet over cable: Defining the Future in Terms of the Past*, 7 *CommLaw Conspectus* 37, at 83 (1999), referring to H.R. Rep. No. 98-934, at 29.

³⁹ 47 U.S.C. 522 (6).

⁴⁰ *Id.* at 522 (14).

⁴¹ H.R. Rep. No 98-934, at 41-42. See also Barbara Esbin, *Internet over cable: Defining the Future in Terms of the Past*, 7 *CommLaw Conspectus* 37, at 95 (1999).

⁴² See Barbara Esbin, *Internet over cable: Defining the Future in Terms of the Past*, 7 *CommLaw Conspectus* 37, at 95 (1999).

⁴³ *Id.*

interactive cable broadband services. Such an interpretation may find support in legislative history⁴⁴ but is challenged by the plain meaning of the definition's term "one-way transmission."

2. Telecommunications Services

Under Section 251 (a) of the 1996 Act, telecommunications carriers are required (1) "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers;" and (2) "not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to sections 255 or 256."⁴⁵ "Telecommunications carrier" is defined as "any provider of telecommunications services, except that such a term does not include aggregators⁴⁶ of telecommunications services."⁴⁷

A "telecommunications service" is defined as the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."⁴⁸ Finally, "telecommunications" is 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."⁴⁹

As a consequence, if classified as provider of telecommunications services, cable operators were required to grant, and Internet service providers were allowed to claim, interconnection rights under Section 251 of the 1996 Act. At the same time, local authorities had no power to dictate open access, since their jurisdiction is restricted to cable franchises, while the FCC is the only competent agency for federal regulation of telecommunications services. However, the FCC may also forbear from applying telecommunications-related provisions if it determines that such action is unnecessary to prevent discrimination and protect consumers, and is consistent with the public interest.⁵⁰

3. Advanced Telecommunications Capability

But are broadband services offered by Internet service providers to be classified as telecommunications services? The 1996 Act does not define "broadband services". Instead, the Act sees "broadband" in the context of "advanced telecommunications capability", the latter defined as "high speed, switched, broadband telecommunications capability that enables users to

⁴⁴ *Id.* with reference to S. Rep. No. 104-230 at 169 (1996).

⁴⁵ 47 U.S.C. 251 (a).

⁴⁶ "Aggregator" is "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services." 47 U.S.C. 226 (a) (2).

⁴⁷ 47 U.S.C. 153 (44).

⁴⁸ 47 U.S.C. 153 (46).

⁴⁹ 47 U.S.C. 153 (43).

⁵⁰ 47 U.S.C. § 160(a).

originate and receive high-quality voice, graphics, and video telecommunications using any technology.”⁵¹ Meanwhile, the FCC, in its first report under Section 706 of the 1996 Act⁵² (Section 706 Report), has defined “broadband” as “the capability of supporting, in both the provider-to-consumer (downstream) and the consumer-to-provider (upstream) directions, a speed (in technical terms ‘bandwidth’) in excess of 200 kilobits per second (kbps) in the last mile. This rate is approximately four times faster than the Internet access received through a standard phone line at 56 kbps.”⁵³ “[B]roadband service does not include content, but consists only of making available a communications path on which content may be transmitted and received.”⁵⁴

4. Information Services

This definition suggests that “broadband services” is a content unrelated transmission service and, therefore, has to be regarded as a “telecommunications service” under the 1996 Act. However, an analysis of this definition shows that “telecommunications” includes only transmissions that do not alter the form or content of the information sent by the customers, while Internet service providers alter the format of information through computer processing applications such as protocol conversion and interaction with stored data.⁵⁵ Thus, the FCC in its Non-Accounting Safeguards Order, found that “protocol processing services constitute ‘information services’ under the 1996 Act.”⁵⁶ The Commission observed that “Internet access providers do not offer a pure transmission path; they combine computer processing, information provision, and other computer-mediated offerings with data transport.”⁵⁷

Information services are defined as “the offering of a capability for generating, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”⁵⁸ However, in its Order, the FCC added that although it would be theoretically possible to treat protocol processing services as telecommunications services, that treatment would

⁵¹ 47 U.S.C. 157; 1996 Act, Section 706 (c)(1), 110 Stat. 53.

⁵² *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CS Docket No. 98-178, Memorandum and Order, 14 FCC Rcd. at 2398 (1999), available at <<http://www.fcc.gov>>.

⁵³ *Id.* at 2406. The FCC chose 200 kbps because ‘it is enough to provide the most popular forms of broadband – to change web pages as fast as one can flip through the pages of a book and to transmit full motion video.’ *Id.* See also Deborah A. Lathen, *Broadband Today: A Staff Report to William E. Kennard, Chairman Federal Communications Commission on Industry Monitoring Sessions Convened by Cable Services Bureau*, October 1999, at 17, available at <<http://www.fcc.gov>>.

⁵⁴ *Id.* at 2407.

⁵⁵ Barbara Esbin, *Internet over cable: Defining the Future in Terms of the Past*, 7 *CommLaw Conspectus* 37, at 72 (1999).

⁵⁶ Non Accounting Safeguards Order, 11 FCC Rcd. at 21956, para. 104.

⁵⁷ 13 FCC. Rcd. at 11,536.

⁵⁸ 47 U.S.C. § 153(20) (1996).

subject them to Title II regulation. Continuing its de-regulatory policy considerations, the FCC underlined that protocol services were effectively provided on a competitive, unregulated basis, and that reclassifying such services as basic service could threaten the regulatory boundary between basic and enhanced services.⁵⁹ In 1997, the FCC confirmed this view that the Internet should remain free from regulation in its First Report and Order in the Access Charge Reform proceeding, concluding that Internet service providers would continue to be treated as (unregulated) access service end users and not as telecommunications carriers.⁶⁰

II. The Courts' Decisions in the *AT&T v. City of Portland* Case

1. *The District Court's Decision*

The United States District Court, in its *AT&T v. City of Portland* decision, backed the local franchising authorities' interpretation.⁶¹ The court held that the open access requirement is within the authority of the City of Portland and the County of Multnomah and is not preempted by federal statutes regulating cable television⁶²; that there is no free speech violation⁶³; that the mandatory access provision does not violate the Commerce Clause⁶⁴ or the Contract Clause⁶⁵ of the U.S. Constitution⁶⁶; that the mandatory access provision does not violate the Oregon Constitution's Contract Clause⁶⁷; and that the open access requirement does not conflict with the terms of the existing franchise agreements.⁶⁸

⁵⁹ *Id.* at 21957, para. 105. Under its "Computer Inquiry" proceedings, begun in the late 1960s, the FCC had established two categories of services: "basic" (telephone) services, subject to Title II regulation, and "enhanced" (data processing) services, subject to Title I regulation. Later, the FCC reclassified enhanced services as "information" services under the 1996 Act. For an in-depth description of the FCC's "Computer Inquiry" proceedings see Barbara Esbin, *Internet over cable: Defining the Future in Terms of the Past*, 7 *CommLaw Conspectus* 37, at 57-67 (1999).

⁶⁰ In re Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges, First Report and Order, 12 FCC Rcd. 15982, at 16133, para. 344 (1997), *aff.*, *Southwestern Bell Telephone Co., et al. v. FCC*, 153 F.Supp. 3d 523 (8th Cir. 1998).

⁶¹ *AT&T v. City of Portland*, 43 F.Supp.2d 1146 (D. Oregon 1999).

⁶² *Id.* at 1151-1154.

⁶³ *Id.* at 1154.

⁶⁴ U.S. CONST., art. I, Sec.8, cl.3.

⁶⁵ U.S. CONST., art. I, Sec. 10.

⁶⁶ *Id.* at 1154-1155.

⁶⁷ *Id.* at 1155.

⁶⁸ *Id.* at 1155.

Of particular interest is the preemption⁶⁹ issue. In this context, the court stated first that the franchising authority's power to prohibit a change of control under 47 U.S.C. 533 (d)(2) included the lesser power to impose conditions under which it will permit the change of control.⁷⁰ AT&T claimed that this particular condition, the mandatory access provision, is preempted because it regulates its cable system as a common carrier, while 47 U.S.C. 541 (c) provides that "any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service."⁷¹ The court addressed this argument by referring to the definition of "common carrier" established by precedent, and concluded:

*"Requiring that a business allow its competitors access to an essential facility is not the same as regulating that business as a common carrier. [...] The open access requirement applies only to competing ISPs, so it does not impose a duty to hold out facilities indifferently for public use and thus does not compel cable operators to function as common carriers."*⁷²

This interpretation may be in line with the precedent from 1979⁷³ cited by the court. However, the court did not take into consideration congressional intent underlying the definition of "cable service" under the 1984 Cable Act.⁷⁴ Therefore, the court did not address the question, whether the local franchising authorities' condition did, in fact, treat cable systems as common carriers and make them subject to Title II regulation – the nondiscriminatory interconnection and access requirements.

2. The Court of Appeals' Decision

On appeal, at the oral hearings, Judge Leavy, panel judge at the United States Court of Appeals for the Ninth Circuit, asked the parties: "If we decide that this is a telecommunications service or facility, either one, this case is over, is it not?"⁷⁵ This remark was a first hint what the court's decision would be like.

In its decision, the court held, first, that the cable operators' provision of broadband Internet access was not a "cable service", and, therefore, was not within the jurisdiction of a local franchising authority. Emphasizing that the essence of cable service is one-way transmission of programming to subscribers generally, the Circuit Court stated that, in contrast, "Inter-

⁶⁹ In the United States federal law can preempt state law either explicitly in the language of the statute or implicitly through the structure and purpose of the statute. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525; 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977).

⁷⁰ *Id.* at 1152.

⁷¹ 47 U.S.C. 541 (c).

⁷² *AT&T v. City of Portland*, 43 F.Supp.2d 1146, at 1153 (D. Oregon 1999).

⁷³ *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 n. 16, 99 S.Ct. 1435, 59 L.Ed.2d 692 (1979).

⁷⁴ H.R. Rep. No. 98-934, at 29.

⁷⁵ *AT&T Fights Push to Open Cable Lines To Its Rivals*, N.Y. TIMES, November 2, 1999, at A20.

net access is not one-way and general, but interactive and individual beyond the subscriber interaction” contemplated by the current rules for cable services.⁷⁶ The court declined to apply the scheme of cable TV regulation to broadband Internet access because this would lead to “absurd results, inconsistent with the statutory structure. [...] We cannot rationally apply these cable television regulations to a non-broadcast interactive medium such as the Internet.”⁷⁷ As an example for such “absurd results” the court pointed to the current “must-carry rules”⁷⁸ which then would have to be applied also to the Internet.

Instead, the appellate court held that the services rendered by conventional ISPs are “information services” under the Act.⁷⁹ The court differentiated between two separate services constituting Internet access for most users: the telephone (transmission) service linking the user and the ISP as classic telecommunications service, and the (content) service the ISPs are providing in relation to their subscribers as information services.⁸⁰ However, to the extent a cable operator provides subscribers with access to the Internet through broadband facilities used by an affiliated Internet service provider (such as AT&T’s affiliate @Home over its broadband facility) the Court of Appeals classified it as providing a “telecommunications service”:

“To the extent @Home is a conventional ISP, its activities are one of an information service. However, to the extent that @Home provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.”

In its reasoning the court stated that defining the provision of the cable broadband “pipe” as a telecommunications service would cohere with the existing overall regulatory structure. Consistent with the court’s view on cable broadband, the FCC would regulate DSL service as an advanced telecommunications service subject to common carrier obligations.⁸¹ Finally, the Court pointed to the competitive principles of nondiscrimination and interconnection embodied by the 1996 Act and mandating a “network architecture that prioritizes consumer choice,” underlining that

⁷⁶ AT&T v. City of Portland, 216 F.3d 871, at 876 (9th Cir.).

⁷⁷ *Id.* at 877.

⁷⁸ The must carry provisions in the US require cable operators, subject to certain capacity based limitations, to carry local commercial television stations “up to one-third of the aggregate number of usable activated channels of such systems[s]” and on certain channel positions. In addition, the cable operators are obliged to carry local noncommercial educational television stations according to formula and based upon a cable system’s number of activated channels. 47 U.S.C. §§ 534, 535. For a description of the existing must carry regulations see *In the Matter of Carriage of the Transmission of Digital Television Broadcast Stations; Amendments to Part 76 of the Commission’s Rules*, Notice of Proposed Rulemaking, CS Docket No. 98-120, 13 FCC Rcd. 15092, at 7-16 (1998).

⁷⁹ 47 U.S.C. § 153(20) (1996).

⁸⁰ AT&T v. City of Portland, 216 F.3d 871, at 877-78.

⁸¹ *Id.* at 879.

“[t]he Internet’s protocols themselves manifest a related principle called ‘end-to-end’: control lies at the ends of the network where the users are, leaving a simple network that is neutral with respect to the data it transmits, like any common carrier. On this rule of the Internet, the codes of the legislator and the programmer agree.”⁸²

However, the court expressly noted that the FCC has the power to forbear from imposing telecommunications-related common carrier obligations on cable operators.

3. Analysis

The two court decisions have resulted in some uncertainty in the marketplace as to the regulatory classification of cable broadband services. Therefore, the FCC had, finally, to address the legal issues in its formal Notice of Inquiry. This proceeding will deal, first, with the question how to qualify cable modem services under the Communications Act and the implications of adopting each such classification and, second, whether the framework for cable broadband services should apply to all providers of high speed.⁸³

In classifying broadband services as cable service, the District Court erred because the Internet is, for the reasons stated above⁸⁴, not one-way and general, but two-way (“interactive”) and individual. In addition, the consequence of such classification would have to be the creation of “parallel universes” for regulation of cable- and telephony-provided Internet services. Cable operators would be permitted to provide broadband services under a Title VI regime, free of interconnection and unbundling requirements, while telecommunications carriers would be subject to Title II regulation.⁸⁵ The local authorities and the District Court’s decision ignored the different regulatory approaches by imposing an open access condition within the Title VI regime, thereby disregarding the clear Congressional intent “to prevent cable systems delivering video programming from being treated as common carriers.”⁸⁶

In classifying the provision of broadband facilities as a telecommunications service, the Court of Appeals tried to find a solution that is coherent with the “overall regulatory structure” in general and with the regulation of DSL broadband in particular while granting flexibility to the FCC – the authority to forebear the enforcement of Title II regulation. The court’s differentiation between two separate services Internet access usually consists of, the telephone (transmission) service linking the user and the Internet service provider as a classic telecommunica-

⁸² *Id.* at 879-881.

⁸³ See *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00185 (September 28, 2000). See also *Federal Communications Commission Launches Inquiry Regarding High-Speed Internet Service*, FCC News Release, September 28, 2000, both available at <<http://www.fcc.gov>>.

⁸⁴ See II.A.1. and II.B.2.

⁸⁵ See Barbara Esbin, *Internet over cable: Defining the Future in Terms of the Past*, 7 *CommLaw Conspectus* 37, at 98 (1999).

⁸⁶ H.R. Rep. No. 98-934, at 29.

tions service, and the content service the Internet service providers afford their subscribers as information services,⁸⁷ is based on the definitions of “telecommunications service,” “telecommunications,” and “information service” under the 1996 Act. Thereunder, in short, a telecommunications service is the offering of the transmission of information for a fee directly to the public. In the court’s view, conventional Internet service providers are providers of an information service. But, the court concluded, when an Internet service provider, or its parent cable company billing the customer, owns the “pipeline” - transmission facility - the Internet service provider is rendering transmission services through this facility directly to subscribers as well. The court called this the “@Home transmission element that constitutes telecommunications.”⁸⁸

The court did not want to suggest that “facility-based” Internet service providers (meaning ISPs having control over the transmission facility to the customer’s household) provide a telecommunications service and an information service at the same time. Although the terms “to the extent” and “transmission element” could lead to this conclusion, such a “dual” classification of one service, would not be possible since “all of the specific mandates of the 1996 [Telecommunications] Act depend on application of the statutory categories established in the definitions section.”⁸⁹ Therefore the FCC, in the 1998 Universal Service Report, has concluded “that Congress intended the categories of “telecommunications service” and “information service” to be mutually exclusive, like the definitions of “basic service” and “enhanced service” developed in our Computer II proceeding, and the definitions of “telecommunications” and “information service” developed in the Modification of Final Judgment that divested the Bell Operating Companies from AT&T.”⁹⁰ There can be no dual classification since this would necessarily lead to a “dual regulation” of the same service. However, a single entity may offer information services and telecommunications services separately, but, as the FCC emphasized, “it cannot gain that dual status merely as a result of its offering of a single service.”⁹¹

In the Court of Appeals’ opinion only facility-based Internet service providers, but not conventional Internet service providers, are providing telecommunications services. Only the former, therefore, may be regarded as telecommunications carriers subject to the open access obligation under Section 251(a)(1) of the Communications Act. However, under this provision “telecommunications carriers” are not only the addressee of the obligation but are also the only persons who may claim the right to open access. Therefore, under the court’s decision and provided that the FCC does not impose an open access regulation under Section 706 of the 1996 Act, the conventional, non-facility based Internet service providers, who provide no telecommunications but “only” information services were not entitled to claim open access to the cable operators’ broadband facilities.

⁸⁷ AT&T v. City of Portland, 216 F.3d 871, at 878 (9th Cir.).

⁸⁸ *Id.* at 879.

⁸⁹ Report to Congress, CC Dkt. No. 96-45, FCC 98-67 at para.21.

⁹⁰ *Universal Service Report*, 13 FCC Rec. at 11,508, para.13; and at 11,520, para.39.

⁹¹ *Id.* at 11,520, para.77.

This interpretation is based on the traditional regulatory classification of Internet service providers. The classification depends on the definition of “telecommunications.” “Telecommunications” is defined 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.”⁹² As mentioned earlier, Internet service providers alter the format of information through computer processing applications. Therefore, the FCC has declined to classify “protocol processing services” as telecommunications services.⁹³ However, in the context of high-speed Internet access it may well be asked whether this traditional classification should remain valid. The Ninth Circuit did not address this question but only cited the FCC’s decisions to classify the services provided by ISPs as information services.

The court could have questioned whether the new Internet services, available through broadband technology, such as high quality “phone-to-phone” Internet Protocol (IP)⁹⁴ telephony as well as real-time-streaming audio and video services fit in the traditional categorization of Internet service providers? For example, “phone-to-phone” IP telephony, i.e. voice communications that originate and terminate through a telephone (in contrast to “computer-to-computer” IP telephony that originates and terminates through a computer) may be offered to the public in a way that makes it functionally identical to traditional voice telephone services.⁹⁵ The FCC itself has already recognized that it might be appropriate in the future to classify such services as “telecommunications services.” In 1998, the FCC stated that Internet service providers using pure transmission capacity meet the statutory definition of “telecommunications services.” Thus, the Commission concluded that to the extent that providers of such Internet services are offering their services directly to the public for a fee, the providers of such services would have to be regarded as “telecommunications carriers.”⁹⁶ Nevertheless, so far the FCC - declining to consider the legal status of IP telephony and to establish the regulatory classification of Internet

⁹² 47 U.S.C. 153 (43).

⁹³ Non Accounting Safeguards Order, 11 FCC Rcd. at 21956, para.104.

⁹⁴ The Internet is a network of networks tied together by a common standard, the “TCP/IP”. TCP/IP defines locations on the Internet through the use of “IP numbers” which perform the addressing functions for the networks. However, Internet users do not need to specify the IP number of the destination site, because these are represented by alphanumeric “domain names.” “Domain name servers” match the domain names with their underlying IP numbers. For further information see ANNABEL Z. DODD, THE ESSENTIAL GUIDE TO TELECOMMUNICATIONS (2nd ed. 1999), at 243-266.

⁹⁵ Internet telephony software allows for real-time voice conversations over the Internet instead of using the telephone network. The voice of the calling party is converted into data which, compressed and split into packets, is sent to the receiving party. For further information see *id.*, at 291-298.

⁹⁶ “The provider [of “phone-to-phone” IP telephony services] does not offer a capability for generating, acquiring, storing, transforming, retrieving, utilizing, or making available information. Thus, the record currently before us suggests that this type of IP telephony lacks the characteristics that would render them “information services” within the meaning of the statute, and instead bear the characteristics of “telecommunications services.” See *In the Matter of Federal Joint Board on Universal Service*, Report to Congress, CC Docket No. 96-45 (1998), 11 Comm. Reg. (P&F) at 1341, para.89 and 98.

services provided over cable television facilities⁹⁷ - saw Internet access providers, in essence, as information service provider and refused to classify Internet access services as telecommunications services. The FCC underlined that such classification would have “significant consequences for the global development of the Internet.”⁹⁸ This regulatory approach will be revisited in the current inquiry.

The FCC, as a result of its inquiry, may find that by legal definition some of today’s Internet services have to be regarded as “telecommunications services.” It may then ask whether Internet access providers offering subscribers different services should be regulated differently depending on the type of service they provide. For example, the FCC might wish to regulate only IP telephony as a telecommunications service. In the context of Internet services provided over traditional dial-up modems, the FCC has recognized that such a different legal treatment would be “incorrect.”⁹⁹ But the Commission has also ruled that companies that provide both telecommunications and information services should be considered as a telecommunications carrier to the extent it is acting as a telecommunications carrier.¹⁰⁰ The FCC has reconfirmed this view in its latest Notice of Inquiry.¹⁰¹

However, in the context of the open access issue it seems questionable to restrict the unaffiliated Internet service providers’ right to open access to the offering of a telecommunications service such as “phone-to-phone” IP telephony while excluding other Internet services. Once some Internet services have triggered the right to open access, the FCC could find that this open access should be given for all Internet services rendered by Internet service providers as “telecommunications carriers.” Classified as providers of telecommunications services, Inter-

⁹⁷ *Id.* at para.83 and 90.

⁹⁸ *Id.* at 1335-36, para.82. *See also the Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CS Docket No. 98-178, Memorandum and Order, 14 FCC Rcd. at 2398 (1999), available at <<http://www.fcc.gov>>.

⁹⁹ “[I]t would be incorrect to conclude that Internet access providers offer subscribers separate services - electronic mail, Web browsing, and others - that should be deemed to have separate legal status, so that, for example, we might deem electronic mail to be a “telecommunications service” and Web hosting to be an “information service.” *See In the Matter of Federal Joint Board on Universal Service*, Report to Congress, CC Docket No. 96-45 (1998), 11 Comm. Reg. (P&F) at 1335, para.79.

¹⁰⁰ *See In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, 15990, ¶ 995 (1996). This rulemaking, implementing the 1996 Act, was challenged in court mainly on jurisdictional grounds. The local exchange carriers (LECs) and the state commissions claimed that the primary authority to implement the local-competition provisions belonged to the States rather than to the FCC. The US Court of Appeals for the Eighth Circuit agreed and vacated the pricing rules and certain other aspects of the Order as falling outside its regulatory authority. *Iowa Utilities Board v. FCC*, 120 F.3d 753 (1997). The Supreme Court reversed in part and affirmed in part. It voided only the FCC’s unbundling rules for not adequately considering the “necessary and impair” standards when giving blank access to network elements. *AT&T v. Iowa Utilities Board*, 119 S.Ct. 721 (1999).

¹⁰¹ *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00185, footnote 47 to ¶ 23 (September 28, 2000), available at <<http://www.fcc.gov>>.

net service providers would be allowed to claim open access to the operators' cable modem platform. Nevertheless, the Commission still had the authority to "forbear from applying any regulation or provision of this [1996] Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or services" under certain conditions set out by Section 47 U.S.C. 160 (a). In the open access context the Commission would have to examine whether such regulation is unnecessary to prevent discrimination and protect consumers, and is consistent with the public interest. The FCC's authority to forbear is limited by its obligation not to act arbitrarily or capriciously.¹⁰² The Commission would have to take into consideration the regulatory treatment of other high-speed service providers like the telephone companies using DSL technology or providers using wireless technologies. It would require a very close examination and a valid justification not to impose open access regulation on all of the different high-speed service providers who offer functionally identical services.

III. Comparative Study – Open Access to Cable Networks in Europe?

Beginning in 1985, European liberalization of the telecommunications market finally, in 1998, led also to the dissolution of the monopolies on telephony services.¹⁰³ Earlier, in 1995, the European Commission's Directive 95/51/EC has abolished the member States' restrictions on the use of cable television networks.¹⁰⁴ Referring to the U.S. market and concerned about the relatively slow pace of innovation in the EC, the European Commission recognized that cable networks "offer opportunities for supply of an increasing number of services, apart from TV broadcasts, if additional investment is forthcoming."¹⁰⁵ Therefore, the European Commission stated that "opening such networks would help to overcome the problems of high pricing levels and lack of suitable capacity, which are largely due to [...] exclusive provision of infrastructure [by the government] in most Member States."¹⁰⁶ However, due to difficult conflicts of competence issues between the European Community and its Member States¹⁰⁷, the European Commission underlined that "the distribution of audiovisual programs intended for the general public via those networks, and the content of such programs, will continue to be subject to specific

¹⁰² This obligation follows from the Due Process Clause of the U.S. Constitution and the Administrative Procedure Act.

¹⁰³ For an English version of the German telecommunications laws see PETER CHROCZIEL ET AL., TELECOMMUNICATIONS LAW IN GERMANY (1998). The European telecommunications law texts are available at <<http://www.ispo.cec.be>>.

¹⁰⁴ Commission Directive 95/51/EC of October 18, 1995 amending Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalized telecommunications services, 95/51/EC, OJ L 256/49, 26.10.1995.

¹⁰⁵ *Id.* at (3).

¹⁰⁶ *Id.*

¹⁰⁷ On this conflict (in German) see MICHAEL ROSENTHAL, DIE KOMPETENZ DER EUROPÄISCHEN GEMEINSCHAFT FÜR DEN RECHTLICHEN RAHMEN DER INFORMATIONSGESELLSCHAFT (1998).

rules adopted by Member States in accordance with Community law and is not, therefore, subject to the provisions of this Directive.”¹⁰⁸

More than four years after the Directive became effective, most Member States are still struggling with the transformation of their cable systems to a multifunctional network. The reason for this unsatisfactory situation is that the telephone and the cable networks had been operated by the same entity until, in 1999, the EC Directive 1999/64/EC imposed the break-up of the two businesses in all Member States, while falling short of requiring incumbents to sell their cable network.¹⁰⁹

In Germany, the country with the highest penetration rate of cable TV in Europe, the incumbent, Deutsche Telekom AG has not made much effort to upgrade its cable network. Since Deutsche Telekom's cable TV market share is about 81% (or 17 million of a total 21 million cable households) and Deutsche Telekom dominates the local telephony services market as well, it has little competitive incentive to invest the capital required for such an upgrade. Deutsche Telekom concentrated, instead, on DSL as broadband technology. Deutsche Telekom offers DSL in most of the cities since the end of the year 2000.¹¹⁰ Since February 1, 1999, Deutsche Telekom has been running its cable enterprise through a wholly owned subsidiary, the Kabel Deutschland GmbH. Regional subsidiaries under participation of outside investors are supposed to take over the business as soon as the negotiations with potential investors have been completed - negotiations that have not been taken very seriously in the past.¹¹¹

Resulting from the described unsatisfactory situation, even Deutsche Telekom's affiliated Internet service provider, T-Online, does not offer any broadband services over cable up to now. Therefore, in Germany (and the same is true for other European countries), at the moment, there is no discussion whether to grant unaffiliated Internet service providers open access to Deutsche Telekom's cable network. Such a discussion would have to deal with the highly disputed question whether the TV cable network is subject to Federal open access regulation under the German Telecommunications Act of 1997 or only subject to State (“Laender”) regulation, which currently does not contain any open access provisions.¹¹²

¹⁰⁸ Commission Directive 95/51/EC of October 18, 1995 amending Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalized telecommunications services, 95/51/EC, OJ L 256/49, 26.10.1995, at (17) and Article 1 (a).

¹⁰⁹ Directive 99/64/EC, dated 06/23/1999, O.J. No. L 175, dated 07/10/99, p.39.

¹¹⁰ See <<http://www.dtag.de/t-dsl>>.

¹¹¹ Deutsche Telekom's negotiation tactics caused several national (e.g. Mannesmann) and international companies (e.g. Microsoft) to give up efforts to buy stakes in the cable network.

¹¹² In favor of State regulation are *Martin Bullinger*, *Zeitschrift fuer Urheber- und Medienrecht Sonderheft*, p. 281 (1997); *Raimund Schuetz*, *Breitbandkabel – “Closed Shop” fuer neue Diensteanbieter?*, *Multimedia und Recht*, p. 11 (1998). In favor of the applicability of federal open access provisions under the German Telecommunications Act are *Ralf Weisser & Olaf Meinking*, *Zugang zum digitalen Fernseekabelnetz ausserhalb der must-carry-Regelungen*, *WuW*, 831 (1998). A compromise between the conflicting positions suggests *Andreas Bartosch*, *Die Fernseekabelnetze aus der Perspektive des Europarechts*, *Computer und Recht*, 751

D. Policy Considerations

I. Room for Policy Considerations

In October 1999, the FCC's Cable Services Bureau issued a report to summarize the results of a series of monitoring sessions on the state of the broadband industry. One principal objective of the sessions was to answer the question whether the government should require cable companies to provide access to their cable platform by unaffiliated Internet and online service providers.¹¹³ The Notice of Inquiry, released in September 2000, pursues the same goal. But under which regulatory alternatives¹¹⁴ does the FCC have room to implement its policy considerations without violating the 1996 Act?

As already stated, since some Internet services, by legal definition, may be classified as "telecommunications services", the FCC could impose Title II regulation, thereby granting open access to Internet service providers. In this context, the FCC could decide to forbear such regulation under Section 160 (a).¹¹⁵ This decision would allow the FCC to take policy considerations into account.

In case the FCC, in its current inquiry, reaches a different result and does not classify broadband services as "telecommunications service" but as "information service" under Title I (exempt from both Title II and Title VI regulation), the Commission may proceed under the "advanced telecommunications capability" provision of Section 706 of the 1996 Act. In the past, the FCC has studied the deployment of broadband services in its Section 706 Reports to Congress.¹¹⁶ Section 706 (b) requires the Commission (and each State commission with regulatory jurisdiction over telecommunications services) to periodically initiate and complete inquiries concerning the availability of advanced telecommunications capability to all Americans. If the FCC determines that such capability is not being deployed in a reasonable and timely fashion, the Commission is to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competi-

(1997).

¹¹³ see Deborah A. Lathen, *Broadband Today: A Staff Report to William E. Kennard, Chairman Federal Communications Commission on Industry Monitoring Sessions Convened by Cable Services Bureau*, October 1999, at 8, available at <<http://www.fcc.gov>>.

¹¹⁴ For an in-depth description of the regulatory alternatives with regard to broadband services see Barbara Esbin, *Internet over cable: Defining the Future in Terms of the Past*, 7 *CommLaw Conspectus* 37, at 115-117 (1999).

¹¹⁵ 47 U.S.C. 160 (a)

¹¹⁶ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CS Docket No. 98-178, Memorandum and Order, 14 FCC Rcd. at 2398 (1999); *Report on the Availability of High-Speed and Advanced Telecommunications Services*, FCC 00-290 (August 3, 2000) available at <<http://www.fcc.gov>>.

tion in the telecommunications market.”¹¹⁷ Expressly recognized actions that may be taken include “regulatory forbearance” and “measures that promote competition in the local telecommunications market.”¹¹⁸

II. Policy Considerations in Favor of Open Access

In the *AT&T v. City of Portland* case, the unaffiliated Internet service providers claimed that they could not compete with the higher speed, wide availability, and relatively low cost of @Home, the affiliated provider. They would be driven out of business since cable subscribers could access unaffiliated Internet service providers only through the @Home service at the full retail rate and few subscribers would pay twice for similar services.¹¹⁹ During the Cable Services Bureau’s monitoring sessions, supporters of open access underlined that closed broadband networks would lead to less competition, higher prices, less innovation and limited consumers’ choice.¹²⁰

Both arguments suggest that the cable modem is the only viable broadband technology. This is not the case.¹²¹ Although it is true that cable has an early lead in providing broadband services, the market for alternate technologies, especially for DSL is growing fast. At the end of 1999, there were approximately 115,000 DSL subscribers¹²², compared to 25,000 DSL subscribers in 1998.¹²³ An example for the fast growing market for DSL is Telocity, which at the end of 1999 received an investment push by NBC spending \$70.5 million for a 19.5% stake in Telocity. The company started offering DSL in November 1999 and had, only one month later, already 2,500 subscribers in Chicago and some cities in the Southeast. By the end of 2000, Telocity planned to offer DSL in 35 major markets nationwide and in 50 markets by the end of 2001.¹²⁴

¹¹⁷ 47 U.S.C. 157 (b).

¹¹⁸ 47 U.S.C. 157 (a).

¹¹⁹ See *AT&T v. City of Portland*, 43 F.Supp.2d 1146, at 1150 (D. Oregon 1999).

¹²⁰ See Deborah A. Lathen, *Broadband Today: A Staff Report to William E. Kennard, Chairman Federal Communications Commission on Industry Monitoring Sessions Convened by Cable Services Bureau*, October 1999, at 11, available at <<http://www.fcc.gov>>.

¹²¹ See also William E. Lee, *Open Access, Private Interests, and the Emerging Broadband Market*, Policy Analysis, No. 379, August 29, 2000, at p. 16.

¹²² See *FCC Issues Report on the Availability of High-Speed and Advanced Telecommunications Services*, FCC News Release, August 3, 2000, available at <<http://www.fcc.gov>>.

¹²³ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CS Docket No. 98-178, Memorandum and Order, 14 FCC Rcd.(1999), available at <<http://www.fcc.gov>>.

¹²⁴ See *NBC to Support a High-Speed Internet Service Over Phone Lines*, N.Y. TIMES, December 20, 1999, at A 35.

Besides the fact that the new technologies are evolving fast, the traditional narrowband is expected to be still the dominant subscribed form of Internet access by 2005.¹²⁵ In addition, the FCC requires major regional phone companies to share their lines with data carriers in order to make broadband services over DSL more readily available.¹²⁶ As a consequence, the FCC's cable service bureau has stated in its broadband report that "as deployment of DSL, satellite and wireless advances, in large part spurred by rapid cable modem deployment, consumers will have alternative platforms to use for high-speed data access, telephony, and video services."¹²⁷ Against this background, it is highly unrealistic that not affiliated Internet service providers will be driven out of business or that consumers' choice would be threatened.

Given the several competing technologies, the threat that owners of closed networks could be able to exercise control over the content and navigational services that Internet offers, thereby being a "gatekeeper" to the Internet, is likewise relatively low.¹²⁸ In addition, customers' demand for choice among Internet service providers should not be underestimated. Big Internet service providers, in particular, are in a good position to enter into agreements with cable operators, which do not want to lose customers because of offering only one Internet service provider. This theory found support in an agreement AT&T and MindSpring entered into at the beginning of December 1999.¹²⁹ More recently, the FTC's AOL Time Warner decision has guaranteed Time Warner cable company's customers the possibility to choose between at least three unaffiliated Internet service providers besides AOL.¹³⁰

Incumbent local exchange carriers ("ILECs") in support of open access requirements for cable operators claim regulatory parity. However, this regulatory parity is given. Today neither the ILECs nor the cable operators are required to grant open access because the Internet service providers are not regarded as telecommunications carriers but as providers of information services. If the FCC classified ISPs as telecommunications carriers they were allowed to claim open access from both, the ILECs and the cable operators. However, the FCC has to avoid acting arbitrarily or capriciously when deciding whether to forbear from imposing Title II regulation and has also to take into consideration the regulatory treatment of high-speed providers via wireless technology.

¹²⁵ See Deborah A. Lathen, *Broadband Today: A Staff Report to William E. Kennard, Chairman Federal Communications Commission on Industry Monitoring Sessions Convened by Cable Services Bureau*, October 1999, at 32, available at <<http://www.fcc.gov>>.

¹²⁶ See *F.C.C. Approves Line Sharing for Data Carriers*, N.Y. TIMES, November 19, 1999, at C5. See also *Federal Communications Commission Action To Accelerate Availability Of Advanced Telecommunications Services For Residential And Small Business Consumers*, FCC News Release, November 18, 1999, available at <<http://www.fcc.gov>>.

¹²⁷ *Id.* at 42.

¹²⁸ See also *id.*

¹²⁹ See *Statement of FCC Chairman William E. Kennard on AT&T-MindSpring Agreement*, FCC News Release, December 6, 1999, available at <<http://www.fcc.gov>>.

¹³⁰ See I.C.5.

Finally, supporters of an open access requirement have claimed that cable operators were about to design their networks in a way that irreversibly restricts the ability of unaffiliated Internet service providers to access the cable modem platform in a meaningful way.¹³¹ Under reference to the monitoring activity of the FCC's Office of Engineering & Technology, the Cable Services Bureau concluded, in 1999, that "we have seen no credible evidence that cable network architecture precludes future modifications to allow such access."¹³² Hence, there is no need, at the moment, to impose open access requirements only because of the stated technical reasons.

III. Policy Considerations Against Open Access

The first argument against mandated open access is already that none of the policy considerations stated in favor of such requirement are convincing. Thus, unless and until anti-competitive behavior is shown, the de-regulatory goals of the 1996 Act require encouragement of market-based solutions and restraint from direct intervention in competitive and well functioning markets.¹³³ Given the continuing important investments made by the cable operators as well as by the telephone companies, the market seemed to develop in a positive direction creating competition in the long run. Instead of supporting competition in a growing market, mandated open access could have a negative impact on the cable operators' decision to continue to invest in the transformation of their cable system. This disincentive that applies to cable operators would also affect the telephone companies making important investments in DSL because of the early lead of cable. Once the investment in cable slows down, the incentive to develop DSL products could decrease as well since the urgency to beat cable would disappear.¹³⁴

An open access regulation imposed by local franchising authorities has now become an unlikely scenario. It would have created incoherent local regulation and a lack of predictability and could have lead cable companies to avoid investing in such localities thereby depriving Americans in these parts of the country of the same opportunities that people in de-regulatory localities have. In addition, it is questionable whether the local authorities would have had the expertise to develop a comprehensive regulatory broadband scheme necessary once the open access requirement has been imposed.¹³⁵ The development of such a comprehensive regulation by adopting rules concerning pricing, interconnection and resale issues led in Canada to delays due to regulatory uncertainty of more than three years¹³⁶ – a delay which is highly detrimental to the growing broadband industry.

¹³¹ See Deborah A. Lathen, *Broadband Today: A Staff Report to William E. Kennard, Chairman Federal Communications Commission on Industry Monitoring Sessions Convened by Cable Services Bureau*, October 1999, at 43, available at <<http://www.fcc.gov>>.

¹³² *Id.*

¹³³ *Id.* at 45.

¹³⁴ *Id.* at 34.

¹³⁵ *Id.* at 39-40.

¹³⁶ *Id.* at 45.

After all, the FCC's policy of "vigilant restraint, refraining from mandating 'open access' at this time, while closely monitoring for anti-competitive developments that may require intervention,"¹³⁷ seems to have been the right way to deal with the highly fragile, just emerging broadband industry. A monitoring policy, so far, may also have been helpful to prepare a fundamental revision of communications law based on a better understanding for the converging networks and services. Such revision seems to be inevitable in order to avoid regulatory uncertainty arising from the unpredictable application of traditional regulatory classifications to new integrated services.¹³⁸

IV. Regulatory Consistency

Nevertheless, besides these general policy considerations and because of the AOL/Time Warner decisions it is questionable whether the current monitoring policy should be carried on. As Commissioner Powell (now chairman) in his concurring opinion to the majority's merger decision stated, it may have been more appropriate for the FCC to address the issues relating to open access in the context of establishing an industry wide and national policy rather than in a merger review process. However, now that the decision has been issued, regulatory harmony has become of particular interest. The Commission will have to consider whether it is right to disadvantage AOL/Time Warner (compared to other types of high-speed service providers and other cable operators) with respect to its regulatory obligations. There is a need for regulatory consistency that avoids disadvantageous treatment of a particular type of high-speed service provider.

E. Conclusion

Due to the technological development in the recent years Internet service providers using pure transmission capacity by legal definition may be regarded as "telecommunications carriers" providing "telecommunications services." This is not only true for facility-based Internet service providers, like @Home providing its subscribers Internet service over its own cable broadband facility, but also for conventional, unaffiliated Internet service providers. Under Title II regulation there is only room for communications policy considerations whether to impose open access requirements when it comes to the forbearance decision under 47 U.S.C. 160 (a). The FCC would have to avoid acting arbitrarily or capriciously when deciding whether or not to forbear from imposing Title II regulation. In case the FCC, in its current inquiry, does not classify

¹³⁷ *Id.* at 15.

¹³⁸ Right after the FCC had issued its merger decision Internet service providers, consumer groups, phone companies, broadcasters, DBS providers as well as state and local regulators have started to push for extending the AOL Time Warner merger conditions to the rest of the cable industry. Besides the two FCC proceedings on open access and ITV there may be another forum for them to fight on this issue: an expected bill in the new Congress creating a comprehensive regulatory scheme for all high-speed services. See *FCC's AOL-TW Deal Approval Stokes Open Access, ITV Rules Debates*, Communications Daily, Vol. 21, No. 10 (Jan. 16, 2001), at 1.

broadband services as “telecommunications service” but continues to see them as “information service”, the Commission may proceed under the “advanced telecommunications capability” provision of Section 706 of the 1996 Act.

Most of the arguments stated in support of open access requirements suggest that the cable modem is the only viable broadband technology. But the threat of less competition, higher prices, less innovation and limited consumers’ choice as well as the threat of having cable operators as gatekeepers to the Internet, are unlikely to become reality as long as the market for alternate technologies, especially DSL, continues to grow quickly.

In the absence of convincing arguments in favor of mandated open access, the FCC was right to adopt a policy of vigilant restraint. However, because of the AOL/Time Warner merger review decisions it is questionable whether the current monitoring policy should be carried on. The two decisions have led to a situation that requires the FCC to emphasize the need for regulatory consistency. Such regulatory harmony has to avoid unjustified disadvantageous treatment of a particular high-speed service provider as well as of a particular type of high-speed service provider with respect to its regulatory obligations. In any event, the monitoring policy has helped to prepare a fundamental revision of US communications law based on a better understanding for the converging networks and services. Such revision seems to be inevitable in order to avoid regulatory uncertainty arising from the unpredictable application of traditional regulatory classifications to new integrated services.