AT&T CORP. V. CITY OF PORTLAND

By Christopher K. Ridder

Distinctions between cable and telephone service are blurring because of a phenomenon known as convergence. Convergence is a long sought-after achievement that is beginning to come to fruition: providers of cable, telephone and wireless services can each deliver a range of information services over their pipelines to consumers.[2] In the present market for Internet service, for example, both telephone and cable companies are rolling out high-speed (broadband) Internet access.[3] Yet, even as functional distinctions between broadband services lose their relevance, the regulatory distinctions between pipeline providers persist.

One instance of differential regulatory treatment is the absence of an open access requirement for cable operators analogous to that faced by telecommunications providers. Open access provisions require pipeline providers to open their facilities to third parties providing various telecommunications services, under the justification that in the absence of such provisions consumers will be left with little meaningful choice of Internet Service Providers ("ISPs"). The law currently requires such open access of local telephone service providers,[4] however there is no such provision for cable service providers.

At this stage of development, cable television networks currently provide the sole source of broadband Internet access in many communities.[5] These cable operators generally include only one ISP in the cost of the broadband service. Many local governments are concerned that without open access requirements for cable operators, local ISPs will be driven out of the market because consumers will transition to broadband services via cable as soon as they become available, and will be unwilling to pay for an

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1. *See* Victoria Ramundo, *The Convergence Of Telecommunications Technology And Providers:The Evolving State Role In Telecommunications Regulation*, 6 ALB. L.J. SCI. & TECH. 35, 54 (1996).

2. *See id.*

3. *See id.*

4. *See generally* Telecommunications Act of 1996, 93 Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.).

5. In other markets, cable competes with DSL provided by local telephone companies. Other services, like DirecPC, offer wireless broadband solutions at prohibitive (but decreasing) cost.

alternate ISP service on top of the cable internet service fee.[6] The FCC has generally adopted a posture of restraint in regulating the Internet, and has specifically declined to rule on whether cable television networks are subject to the same unbundling requirements imposed on telephone networks by the 1996 Act.[7] The FCC's rationale is that it wishes to wait until the details of how this technology develops are more settled before it makes any sweeping changes in the cable regulatory regime.

Yet many local communities are not content to wait for the FCC. Unwilling to let a large commercial community of ISPs die on the vine, and seeing an opportunity presented by the application of the city's local cable operator—TeleCommunications, Inc. ("TCI")—for a transfer of control following its merger with AT&T, the city of Portland, Oregon required the local cable television operator to open its facilities to competing information providers as a condition of the transfer.[8] In *AT&T Corp. v. City of Portland*,[9] AT&T challenged the authority of Portland to impose an open access requirement. The court held that, based on the language of the Cable Act,[10] and the historic powers of local governments to regulate cable providers to preserve competition, open access requirements were permissible conditions for transfer.[11] This Note concludes that the court was correct in deciding that localities may impose open access requirements as part of their franchising authority under the Cable Act.

I. FACTUAL BACKGROUND

In June 1998, AT&T and TCI announced a merger agreement in which TCI would become a wholly-owned subsidiary of AT&T.[12] Among other benefits, this merger afforded AT&T the opportunity to offer broadband

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6. *See* openNET Coalition, *What's at Stake* (visited Feb. 6, 2000) ⟨http://opennetcoalition.org/what/⟩.

7. Specifically, the FCC concluded that "the deployment of advanced telecommunications capability . . . appears . . . to be proceeding on a reasonably and timely schedule." Advanced Services Report, 14 F.C.C.R. 2398, ¶ 91 (1999). The FCC therefore found that "at this time," there is no reason to impose open access conditions. *Id.* ¶ *101. See also* Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from TCI to AT&T, 14 F.C.C.R. 3160, ¶¶ 60-91 [hereinafter *TCI Order*] (considering in detail whether to impose an open access restriction on the AT&T/TCI merger, and deciding against it).

8. *See* AT&T Corp. v. City of Portland, 43 F. Supp. 2d 1146, 1150 (D. Ore. 1999).

9. 43 F. Supp. 2d 1146 (D. Ore. 1999).

10. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) (codified as amended at 47 U.S.C. § 521 et seq. (1994)).

11. *See Portland*, 43 F. Supp. 2d, *passim*.

12. *See id.* at 1150.

Internet service through TCI's existing cable television infrastructure, bypassing local phone companies while increasing the speed of Internet access.[13]

Pursuant to TCI's franchise agreements with the City of Portland and Multnomah County, plaintiffs requested approval for a change of control to AT&T. AT&T planned to offer cable Internet access exclusively through its @Home subsidiary, which would require customers seeking alternate ISP services to effectively pay twice—once for access to @Home's cable modem platform, and again for service from another ISP.[14]

In December 1998, the city and county conditioned approval of the license transfer on an open access requirement, which would require the companies to provide access to their cable facilities to unaffiliated ISPs for a reasonable fee.[15] This was in response to public hearings on the effect of the merger on local cable service, which held that @Home had no viable competitors in the market.[16] The local governments reasoned that AT&T's plan constituted an anticompetitive use of an essential facility, because cable is one of few broadband alternatives, and customers would be unlikely to pay twice to use a competing ISP. Further, they found that the advantages of affordable broadband access would undercut the market for competing ISPs, harming the local economy and reducing competition in the Internet service market.[17]

AT&T, TCI and the local franchises rejected the open access condition, which resulted in a denial of their transfer request.[18] They then filed suit seeking a declaratory judgment that the open access restriction was invalid. Plaintiffs argued that the city and county exceeded the limitations that they could lawfully place on approving a change in control, because (a) the federal Cable Act prohibited defendants from requiring open access to their cable facilities; (b) the condition violated the First Amendment and the Contract Clauses of the federal and Oregon Constitutions; (c) the conditions violated the Commerce Clause by burdening interstate commerce; and (d) the open access condition constituted a breach of the franchise agreements.[19] The court found that the city and county had authority

13. *See id.* at 1149-1150.
14. *See id.* at 1150.
15. *See id.*
16. *See id.*
17. *See id.*
18. *See id.*
19. *See id., passim.*

to impose the condition for the purpose of furthering competition in the Internet access market.[20]

II. THE DISTRICT COURT'S DECISION

The United States District Court for the District of Oregon held that local franchising authorities had the power to condition a transfer on AT&T's supplying third parties access to the cable providers' facilities at the same rate it charged @Home. In rendering his decision, United States District Judge Owen Panner claimed he need not look to policy arguments.[21] Rather, he reasoned that these authorities had the power to impose such conditions because there was no federal preemption, the requirement did not implicate the First Amendment or the Commerce Clause, and the requirement did not constitute impermissible common carrier regulation because it was imposed to prevent an antitrust violation.[22] He found perhaps the strongest support for his holding in 47 U.S.C. 533(d), holding that by its plain meaning, this provision expressly permits local franchising authorities to impose open access requirements.[23]

A. Preemption Holdings

The first main question addressed by the court is whether Portland's actions were preempted by the Cable Act, which governs state and federal regulation of cable operators.[24] The Cable Act provides for a franchising system whereby cable companies lease public rights of way from local government entities.[25] Although the cable companies themselves own their cable infrastructure, local governments may exercise a substantial amount of discretion in how these franchises operate. For example, the Cable Act permits franchising authorities to require cable companies to set aside system capacity for public, educational and government access, for leased commercial access, and for certain local broadcast stations.[26] In addition, the Cable Act specifically authorizes local franchising authorities to regulate to preserve competition.[27] However, there are substantial limitations.

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20. *See id.* at 1152.
21. *See id.* at 1151.
22. *See id., passim.*
23. *See id.* at 1152.
24. *See id.* at 1151.
25. *See* 47 U.S.C. § 541 (1994).
26. *See id.* §§ 531(a), 532, 534, 535.
27. *See id.* § 533(d) (providing that the Act shall not be construed to prevent "any State or franchising authority from prohibiting the ownership or control of a cable system . . . in circumstances in which the State or franchising authority determines that the acqui-

Perhaps most significant is that a cable provider may not be regulated as a "common carrier."[28] A common carrier is one that both holds itself out indiscriminately for hire by the public and transmits its customers' content as it was provided.[29] Despite this prohibition, the Cable Act does not specifically prohibit open access requirements as a condition of granting or renewing a company's franchise agreement.[30]

With regard to AT&T's claim that local authority to impose open access was preempted, the court held that section 556 of the Cable Act[31] generally limits the Act's preemptive scope to interfere as little as possible with local authority to regulate cable franchises.[32] Finding that "[c]ourts have long recognized a city's power to promote competition in the local economy,"[33] the district court noted that if Congress wants to preempt a power traditionally held by state or local governments, it must make its intent "unmistakably clear."[34]

The court found such unmistakable clarity in 47 U.S.C. § 533(d)(2). This section explicitly recognizes the power of local franchising authorities to preserve competition in cable services by prohibiting ownership or control of a cable system "in circumstances in which the State or franchising authority determines that the acquisition of such a cable system may eliminate or reduce competition."[35] Noting that courts should defer to the findings of local authorities and the principle that the power to prohibit a change in control includes the power to place conditions on such a change,[36] the court held that this section supported defendants' right to impose an open-access condition.[37]

The court disagreed with the plaintiffs' assertion that the access provision regulated AT&T as a common carrier, which is prohibited by section

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sition of such a cable system may eliminate or reduce competition in the delivery of cable service").

28. *See id.* § 541(c).

29. *See* FCC v. Midwest Video Corp., 440 U.S. 689, 701 (1979).

30. *See* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) (codified as amended at 47 U.S.C. § 521 et seq. (1994)).

31. *See* 47 U.S.C. § 556 (governing when federal cable statutes preempt state and local regulations).

32. *See* AT&T Corp. v. City of Portland, 43 F. Supp. 2d 1146, 1151-52 (D. Ore. 1999).

33. *Id.* at 1152.

34. *See id.*

35. 47 U.S.C. § 533(d)(2) (1994).

36. *See Portland*, 43 F. Supp. 2d at 1152.

37. *See id.* at 1153-54.

541(c).[38] Rather, it distinguished the cable system as an essential facility.[39] The court then held that, because the open access requirement applied only to competing ISPs, it did not impose a duty to hold its facilities out indifferently for public use and thus did not compel cable operators to function as common carriers.[40]

Section 544(e) prohibits franchising authorities from restricting a cable system's use of any particular equipment or technology.[41] Because plaintiffs would need to modify their equipment in order to comply, they argued this provision would be implicated.[42] The court disagreed, stating that the open access regulation did not mandate any particular means for AT&T to implement the provision, nor did it mandate any particular type of technology.[43]

Plaintiffs also claimed that section 544(f)(1), prohibiting requirements regarding the content of cable services, was implicated because the open access requirement would compel them to carry the content of competing ISPs.[44] Yet the court found that AT&T had already agreed to allow subscribers to access such ISPs,[45] albeit at a higher rate.[46] Because it found the open-access provision to be content-neutral, the court held that section 544(f)(1) was not implicated.[47]

With regard to the Cable Act's "must carry" requirements,[48] AT&T argued that open access was sufficiently similar as to be preempted by these provisions.[49] The court disagreed with this argument, because Portland's open access requirement did not concern specific programming, but rather physical access to its facilities.[50] The court again noted AT&T's

38. *See id.* at 1153.
39. *See id.*
40. *See id.*
41. *See* 47 U.S.C. § 544(e) (1994).
42. *See* AT&T Corp. v. City of Portland, 43 F. Supp. 2d 1146, 1153 (D. Ore. 1999).
43. *See id.*
44. *See id.*
45. *See id.*
46. *See id.* at 1150 ("Cable subscribers could access unaffiliated ISPs only through the @Home service at the full retail rate. Few subscribers would pay twice for similar services.").
47. *See id.* at 1153.
48. *See* 47 U.S.C. §§ 531, 532, 534, 535 (1994) (requiring public, educational, government and leased access).
49. *See* AT&T Corp. v. City of Portland, 43 F. Supp. 2d 1146, 1153 (D. Ore. 1999).
50. *See id.* at 1153-54.

prior agreement to provide cable subscribers indirect access to competing ISPs.[51]

B. Constitutional Claims

AT&T argued that a number of constitutional provisions prevented local authorities' imposition of an open access requirement. They contended that the requirement implicated the First Amendment, because transmissions over its lines may be identified with the cable owners, as opposed to the customers themselves, that the restriction constituted an undue burden on interstate commerce, and that the requirement violated the Contract Clause by imposing restrictions not explicitly covered by the franchise agreements.[52] The court rejected all of these arguments.

The court found no free speech violation, because AT&T volunteered to give subscribers access to competing ISPs, and because any speech carried over the network would not likely be identified with the cable owners.[53] Moreover, Judge Panner noted that the open access requirement was a purely economic regulation and did not force plaintiffs to carry any particular speech.[54] Further, plaintiffs submitted no evidence that subscribers would associate AT&T with the speech of unaffiliated ISPs.[55]

Even if the open access requirement did affect plaintiffs' free speech rights, the court held that it would nevertheless pass the Supreme Court's test for reasonableness.[56] In applying the test, the court found that the open access requirement "furthers the substantial governmental interest in preserving competition, the governmental interest is unrelated to the suppression of free speech, and the incidental restriction on free speech is no greater than necessary."[57]

As to the Commerce Clause, the court found that the open access provision affected commerce only in the Portland metropolitan area, and thus did not unduly burden interstate commerce.[58] Although plaintiffs alleged the requirement would impose such a burden by creating additional expense, the court found that plaintiffs had not made a sufficient showing

51. *See id.* at 1154.
52. *See id.* at 1154-55.
53. *See id.* at 1154.
54. *See id.*
55. *See id.*
56. *See id.* (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)).
57. *Id.* at 1155.
58. *See id.* at 1154.

that such a burden would "outweigh the local benefits of encouraging competition."[59]

The court rejected the Contract Clause claims on the ground that the open access regulation was within the purview of the franchise agreements, and thus did not impair plaintiffs' contractual rights.[60] Citing language in the agreements providing that the City and County could condition a transfer on a company's legal qualifications, the court appeared to accept the argument that the open access provision was related to AT&T's legal obligations because local authorities' power to impose conditions on a transfer included the power to prevent an antitrust violation.[61]

C. Franchise Agreements

Finally, the court looked to the franchise agreements and determined that they did not prevent Portland from imposing open access requirements.[62] These agreements provided that local authorities could regulate franchisees "in the public interest . . . so long as such actions do not materially affect [their] rights."[63] The court found that the agreements would control if a City or County regulation "directly conflicts" with their terms, but that the open access requirement didn't conflict, and that local authorities could take into account the effect of a transfer on competition.[64] Therefore, plaintiffs had no contractual rights to exclude competitors from their cable Internet facilities.[65]

III. ANALYSIS

Although the district court ignored the threshold issue of whether internet over cable is a cable service, an issue which could become more important should the FCC rule on the matter, this Note concludes that the court's assumption was appropriate in light of the stipulations of the parties and the legislative history of the Cable Act.

Whether open access restrictions constitute common carrier regulations, which are prohibited under the Cable Act, is a closer question. Although the District Court's reasoning was flawed, this Note concludes that its holding was proper. Finally, this Note concludes that the open access restriction did not violate the Commerce Clause.

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59. *Id.*
60. *See id.* at 1155.
61. *See id.*
62. *See id.*
63. *Id.* (internal quotations omitted).
64. *See id.*
65. *See id.*

A. Cable Internet Service May Not Qualify as a "Cable Service"

Although both the parties and the court assumed that broadband Internet service constitutes a "cable service" under the Cable Act,[66] the law in this area is not fully settled. In fact, the FCC has declined to rule on this issue despite past controversy.[67] Whether or not it affects the outcome of this case, the proper regulatory classification of cable Internet service could play an important role in future open access determinations by other localities.

Under the 1984 Cable Act, Internet access services were not included in the definition of "cable service" in section 522(6).[68] The 1996 Act included a facially ambiguous addition to this definition, adding the words "or use."[69] The legislative history strongly indicates that Congress intended to cover Internet services in the new definition. The Senate Conference Report[70] explains that the amendment to the definition of cable services is intended "to reflect the evolution of cable to include interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services."[71] On the

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66. *See generally Portland*, 43 F. Supp. 2d 1146 (reflecting no discussion of this issue).

67. *See In re* Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferors, to AT&T Corp., Transferee, 14 F.C.C.R., ¶ 83 (1999) [hereinafter *TCI Order*].

68. The Cable Act initially defined 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 of such video programming or other programming service." 47 U.S.C. §522(6) (1984). The legislative history of the Cable Act shows that Congress intended to exempt Internet access-type services from the definition. H.R. Rep. No. 98-934, at 42-43 (1984) states that "services providing subscribers with the capacity to engage in transactions or to store . . . manipulate . . . or otherwise process . . . data would not be cable services." The report specifies that the following would not be cable services: "bank-at-home services, electronic mail, one-way and two-way transmission [of] non-video data and information not offered to all subscribers, data processing, video conferencing, and all voice communications." *Id.* at 44; *see also* Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*, 7 COMMLAW CONSPECTUS 37, 94-97 (1999).

69. Section 522(6) now reads, "(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." 47 U.S.C. § 522(6)(b) (Supp. IV 1998) (emphasis added).

70. S. Conf. Rep. No. 104-230 (1996).

71. *Id.* at § 301. 47 U.S.C. § 153(20) (1994) defines an information service as "the offering of a capability for . . . utilizing, or making available information via telecommunications." The FCC has defined "enhanced services" to include services that "involve subscriber interaction with stored information." 47 C.F.R. §64.702(a).

other hand, "or use" is clearly ambiguous enough that the definition could be construed to exclude the Internet.[72] Some have argued that cable Internet service could instead be considered an "advanced telecommunications capability" under section 706 of the 1996 Telecommunications Act.[73]

Placing cable Internet access outside of the Cable Act's regulatory framework could result in practical benefits, such as a more harmonious regulatory landscape. Because cable Internet access and broadband Internet access offered over local phone lines are essentially the same, classifying both categories under the same structure could lead to a more coherent regulatory framework. Moreover, open access provisions are not expressly permitted within the section 706 framework. Obviously, a determination that Internet access via cable is not a "cable service" would dramatically change the regulatory landscape in this area, as well as the legal foundations of the *Portland* case and others like it. However, given that Congress has strongly indicated that cable Internet access should, at least for now, be considered a "cable service," it seems appropriate to treat cable Internet services as governed by the Cable Act as the parties in *Portland* did.

B. Open Access Provisions Designed to Preserve Competition are Not Preempted

There are two types of preemption—conflict and field. Field preemption occurs where there is an intent by Congress to preempt the field under a comprehensive regulatory scheme.[74] In this case, it is clear that Congress did not intend to preempt the field, because the Cable Act explicitly reserves certain powers to local governments. For example, section 556 expressly reserves to local governments the power to regulate matters of public health, safety and welfare.[75] Perhaps the key provision in resolving the Portland case and other open access issues arising under the Cable Act is Section 533(d). This section expressly provides for local governments to regulate cable services to preserve competition.[76] Because Congress reserved such regulatory power to localities, the field preemption analysis does not apply to the open access requirement.

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72. Note also that "one-way" lends further support to this proposition. For a more complete discussion, see Brief of the FCC as Amicus Curiae at 25-26, AT&T Corp. v. Portland, 43 F. Supp. 2d 1146 (D. Ore. 1999) (No. 99-335609); Esbin, *supra* note 68, at 116-18.

73. *See* Brief of the FCC, *supra* note 72, at 25-26; Esbin, *supra* note 68, at 116-18.

74. *See* Fidelity Fed. Sav. & Loan Ass'n. v. de la Cuesta, 458 U.S. 141, 153 (1982).

75. *See* 47 U.S.C. § 556(a) (1994).

76. *See id.* § 533(d).

Conflict preemption is found where compliance with both the state and federal law is impossible.[77] This concept is explicitly embedded in the Cable Act in Section 556(c), which provides that any state or local provisions inconsistent with the Cable Act shall be deemed preempted.[78] This Note concludes, as did the district court, that open access restrictions are not inconsistent with the Cable Act, and therefore not preempted under a conflict preemption theory.

The preemption analysis "start[s] with the assumption that the historic police powers of the States" are not preempted.[79] In areas where state and local laws in traditional areas of local concern are implicated, the burden of overcoming this assumption is especially heavy.[80] Local regulation of competition has long been reserved to state and local governments. In 1837, for instance, the Supreme Court upheld a city's grant of a bridge franchise to a company competing with a ferry operated by Harvard College, which had the rights to the same right of way under a similar franchise agreement.[81] In so doing, the Court held that the state government had maintained all powers not explicitly granted to the competitors, including the power to preserve competition.[82]

Yet the recent history of cable regulation is perhaps more instructive. The Cable Act in many ways merely codified the way cable had been regulated prior to its passage—through local franchises.[83] The FCC stated that local governments are involved in the process because they are able to bring "a special expertness to such matters."[84] In *City of New York v. FCC*,[85] the Supreme Court noted that, in enacting the Cable Act, Congress had continued to permit local franchising authorities broad authority to regulate non-technical aspects of cable services.[86]

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77. *See* California v. ARC Am. Corp., 490 U.S. 93, 100 (1989).

78. *See* 47 U.S.C. § 556(c) (1994).

79. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

80. *See id.*

81. *See* Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. 420 (1837).

82. *See id.* at 548.

83. *See, e.g.*, H.R. REP. 98-934, at 19, 23 (1984); *see also* TV Pix, Inc. v. Taylor, 304 F. Supp. 459, 460 (D. Nev. 1968), *aff'd per curiam*, 396 U.S. 556 (1970) (noting that state and local governments traditionally exercised their franchise powers to require conditions responsive to community needs).

84. Cable Television Report and Order, 36 F.C.C.2d 143, ¶ 177 (1972) (also recognizing a "deliberately structured dualism" in the cable regulation process between the FCC and local governments).

85. 486 U.S. 57 (1988).

86. *See id.* at 67.

Where Congress attempts to preempt a power traditionally held by local governments, there is a heightened standard of preemption analysis.[87] Under this standard, set forth in *Gregory v. Ashcroft*,[88] "if Congress intends to preempt a power traditionally exercised by a state or local government, 'it must make its intention to do so unmistakably clear in the language of the statute.'"[89]

When an agency (such as the FCC) acts within the scope of its congressionally-delegated authority, its actions preempt state law. In *City of New York v. FCC*,[90] the FCC forbade local authorities to impose more stringent signal quality standards than those set forth in its regulations.[91] In upholding the FCC's ability to preempt state law in this area, the Court held that "a 'narrow focus on Congress' intent to supersede state law [is] misdirected,' for '[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law.'"[92] Yet this was an area spoken to directly by the Cable Act. In cases where the FCC's authority to regulate at all is in question, the Court has not backed away from the *Gregory* doctrine of unmistakable clarity where traditionally local powers are implicated.

For example, in *City of Dallas v. FCC*,[93] the Fifth Circuit held that, where the FCC attempted to preempt local governments' franchising authority over open video system operators under the 1996 Act, it exceeded its authority under the Act's plain meaning.[94] The court held that the FCC's preemption was at odds with the Act's preservation of state and local authority, and with the *Gregory* principle.[95] In the context of *Portland*, Congress's intent is similarly clear that it intended to interfere as little as possible with local authority to regulate cable franchises. Section 556 of the Cable Act sets forth general preemption guidelines that clearly reserve a number of rights generally to the states, provided they are not inconsistent with the Cable Act.[96]

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87. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

88. 501 U.S. 452 (1991).

89. *See* City of Dallas v. FCC, 165 F.3d 341, 347-48 (5th Cir. 1999) (quoting *Gregory* at 460 (citations omitted)).

90. 486 U.S. 57 (1988).

91. *See id.* at 62-63.

92. *Id.* at 64 (quoting Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta, 458 U.S. at 154 (1982)) (alterations in original).

93. 165 F.3d 341 (5th Cir. 1999).

94. *See id.* at 347.

95. *See id.*

96. *See, e.g.*, 47 U.S.C. § 556(a) (1994) (providing that "[n]othing in this subchapter shall be construed to affect any authority of any State, political subdivision, or agency

But not only did Congress intend to interfere as little as possible, it expressly granted local entities the power to impose open access restrictions through Section 533(d). This section provides that, although a franchising authority may not prohibit ownership or control of a cable system because an entity owns other media interests, such a local entity may prohibit ownership "in circumstances in which the state or franchising authority determines that the acquisition of such a cable system may eliminate or reduce competition in the delivery of cable service in such jurisdiction."[97] The power to prohibit a change in control includes the lesser power to impose conditions.[98] In *Portland*, the city and county made the exact determination that appears to be contemplated and authorized under the plain meaning of the Cable Act.[99]

C. The Open Access Requirement Does Not Amount to Common Carrier Regulation.

AT&T also argued that the open access provisions amounted to common carrier regulation, which is prohibited by section 541(c).[100] "A common carrier service in the communications context is one that 'makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing.'"[101] A common

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thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this subchapter").

97. 47 U.S.C. § 533(d). The legislative history to the 1992 Amendments to the Cable Act, Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified at 47 U.S.C. §§ 521 et seq. (1994)), one of which was section 533(d), indicates that this provision was added specifically to overrule *Cable Alabama Corp. v. City of Huntsville*, 768 F. Supp. 1484, 1496 (N.D. Ala. 1991), a decision holding that only the FCC could deny a cable transfer for competitive reasons. *See* H.R. Rep. 102-628, at 91 (§ 4) (1992). Yet even without this new provision, the holding in *Cable Alabama* was incorrect under the preemption analysis that should properly be applied to the facts of the *Portland* case.

98. *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825, 836 (1987) (holding that a state commission's requirement of an easement as a condition for a building permit was not a taking when commission had power to deny permit outright).

99. *See* 47 U.S.C. § 533(d).

100. This provision prohibits "regulation as a common carrier or utility by reason of providing any cable service." 47 U.S.C. § 541(c) (1994). As stated above, this paper assumes that Internet over cable is a "cable service."

101. FCC v. Midwest Video Corp., 440 U.S. 689, 701 (1979) (quoting Industrial Radiolocation Serv., 5 F.C.C.2d 197 (1996)) (alteration in original).

carrier, therefore, must both hold itself out indiscriminately for hire by the public, and transmit its customers' content as it was provided.[102]

This Note concludes that the district court's holding in the *Portland* case as to common carrier regulation was correct. However, its reasoning was in error when it held that the open access restriction did not regulate AT&T as a common carrier because it did not require the company to hold itself out to the general public.[103] In *Midwest Video II*, common carrier regulation was found where the "public" consisted of third-party broadcasters.[104] In *NARUC II*, the D.C. Circuit held that a common carrier need not serve the entire public, but merely the entirety of a small segment.[105]

On the surface, it appears that requiring AT&T to provide interconnection to all ISPs seeking access would thus meet the requirements of common carrier status—the content provided by competing ISPs would not be altered by AT&T, and AT&T would be required to offer interconnection to all competitors willing to foot the bill. In *Midwest Video II,* the Supreme Court invalidated FCC rules requiring a cable company to reserve four channels for use by outside broadcasters, on the ground the regulation imposed common carrier duties.[106] Although the decision was made prior to the enactment of section 541(c), the Court found an implicit prohibition against common carrier regulation, and noted three factors leading it to find that common carrier regulations had been imposed: "Under the rules, cable systems are required to hold out dedicated channels on a first-come, nondiscriminatory basis. Operators are prohibited from determining or influencing the content of access programming. And the rules delimit what operators may charge for access and use of equipment."[107] Yet the regulations at issue, rather than being directed to competition,

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102. *See generally*, Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198, 210 (D.C. Cir. 1982); AT&T Corp. v. FCC, 572 F.2d 17, 24 (2d Cir. 1978); National Ass'n of Regulatory Util. Comm'rs v. FCC 533 F.2d 601 (D.C. Cir. 1976); Phil Nichols, *Redefining "Common Carrier": The FCC's Attempt At Deregulation By Redefinition*, 1987 DUKE L.J. 501 (1987).

103. *See Portland*, 43 F. Supp. at 1153 ("The open access requirement applies only to competing ISPs, so it does not impose a duty to hold out facilities indifferently for public use. . . .") (internal quotations omitted).

104. *See* FCC v. Midwest Video Corp., 440 U.S. 689, 700-01 (1979).

105. *See National Ass'n of Regulatory Util. Comm'rs*, 533 F.2d at 608; *see also* Straley v. Idaho Nuclear Corp., 500 P.2d 218, 221-22 (D. Idaho 1972) (considering a company providing bus service for its employees a common carrier, even though it didn't serve the general public); Terminal Taxicab v. Kutz, 241 U.S. 252, 254 (1916) (considering a taxicab company a common carrier even though it only served the guests of a particular hotel).

106. *See Midwest Video Corp.*, 440 U.S. at 700-01.

107. *Id.* at 701-02 (citations omitted).

were directed at access to persons wishing to broadcast over Midwest's channels.

It is not at all clear that any regulation that causes one aspect of an entity's business to meet the common carrier test must necessarily constitute "regulation as a common carrier" under the Cable Act. Common carrier-type obligations may be imposed under other legal rationales, such as the antitrust laws. For example, in *Midland Telecasting Co. v. Midessa Television Co., Inc.*,[108] the Fifth Circuit held that "no repugnancy exists between the FCC carriage rules and antitrust principles. If the refusal violated antitrust laws, a finding of liability would not undermine or conflict with the regulatory scheme. Given the FCC's policy to promote UHF broadcasting, the regulatory and antitrust principles are, in fact, complementary."[109] In this case, not only did Portland assert an antitrust rationale for imposing open access, it also exercised the authority specifically granted to it in Section 533(d) to regulate a change of control in order to promote competition. Although the District Court held that AT&T's cable was an "essential facility, this finding does not appear necessary to support the open access provision.[110]

The FCC appears to believe that open access requirements may be properly imposed under an appropriate legal rationale without common carrier problems. In its amicus brief in the *Portland* appeal, the FCC noted that "[a]fter evaluating the competing arguments concerning open access, the Commission decided to approve the . . . merger without imposing an open access condition."[111] The FCC further noted that this reasoning was grounded in reliance on AT&T's representations that customers would still be able to gain access to competing ISPs.[112] This suggests that, if the FCC believed customers would not be able to gain access to competing ISPs, the FCC may have imposed an open access restriction, and that it would have believed such a restriction did not run afoul of Section 541(c), which is binding on the FCC as much as on any local government entity.

One primary purpose of the Cable Act, and of the 1996 Act, is to further competition. Because of the franchising structure provided for in the

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108. 617 F.2d 1141 (5th Cir. 1980).

109. *Id.* at 1148.

110. *See* 47 U.S.C. § 533(d). Whether AT&T's cable is indeed an essential facility is beyond the scope of this Note. However, there are a number of other rationales that could justify the open access provision, for instance, the theory that the prohibition of common carrier regulation does not immunize AT&T from the antitrust laws.

111. Brief of the FCC as Amicus Curiae at 14, AT&T v. Portland, 43 F. Supp. 2d 1146 (D. Ore. 1999) (No. 99-335609).

112. *See id.*

Cable Act, this task is vested both in the FCC and in local franchising authorities. Although some regulations would no doubt amount to common carrier regulation, such as specific rate setting requirements, open access requirements do not necessarily constitute common carrier regulation. Both the FCC and local franchising authorities retain the power to prevent antitrust violations through regulation. Finally, Congress made clear in the 1992 amendments that it still intended antitrust laws to apply fully to the Cable Act.[113]

D. The Restriction Does Not Violate the Commerce Clause

The district court correctly held that the open access requirement did not violate the dormant Commerce Clause, although it probably erred in finding that the requirement only affected commerce in the Portland metropolitan area. The court did, however, recognize the "incidental burden on interstate commerce" caused by expenses incurred by AT&T.[114]

There are two types of state regulation which may impermissibly burden interstate commerce under the dormant Commerce Clause:

> A facially nondiscriminatory regulation supported by a legitimate state interest which incidentally burdens interstate commerce is constitutional unless the burden on interstate trade is clearly excessive in relation to the local benefits. However, when a regulation "clearly" discriminates against interstate commerce, it violates the Commerce Clause unless the discrimination is demonstrably justified by a valid factor unrelated to state protectionism.[115]

In the case of "clear discrimination" against out-of-state interests, the state has the burden of establishing that the justification could not be served by less discriminatory alternatives.[116] However, "if the regulations apply evenhandedly to both in-state and out-of-state interests, the party challenging the regulations must establish that the incidental burdens on

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113. 1992 Amendments to the Cable Act, Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("Nothing in this Act or the amendments made by this Act shall be construed to alter or restrict in any manner the applicability of any Federal or State antitrust law."); *see also* Total TV v. Palmer Communications, Inc., 69 F.3d. 298, 302 (9th Cir. 1995) (holding that Cable Act does not preempt California Unfair Practices Act).

114. AT&T Corp. v. City of Portland, 43 F. Supp. 2d 1146, 1154 (D. Ore. 1999).

115. International. Ass'n of Indep. Tanker Owners v. Locke, 148 F. 3d 1035, 1068 (9th Cir. 1998) (citations omitted).

116. *See* Pacific Northwest Venison Producers v. Smitch, 20 F.3d 1008, 1012 (9th Cir.1994).

interstate and foreign commerce are clearly excessive in relation to the putative local benefits."[117]

Portland's open access requirement was facially nondiscriminatory, because it applied to all ISPs equally. Although concern about the local community of ISPs was an issue during local hearings,[118] Portland's regulation, on its face, allows all ISPs, regardless of their location in the country, to connect to AT&T's facilities. Portland, during its hearings, found that @Home had "no viable competitors in the local retail market."[119] Moreover, the costs imposed on AT&T would not necessarily be great, considering that AT&T is already required to individually negotiate each of the franchise agreements governing its cable systems. Although the costs of such negotiations are no doubt high, the franchise model is mandated by the Cable Act. Similarly, whenever there is a transfer of ownership, AT&T is already obligated to negotiate with local franchising authorities, subject to various conditions on transfer. With regard to the actual cost of installing the equipment required to implement open access, these costs would be borne by the third-party ISPs under the Portland requirement.

The open access requirement affects both in-state and out-of-state interests. AOL, for example, has been a strong supporter of open access provisions,[120] and its customers in Portland would benefit greatly from the ability to access AOL at a faster rate. Similar nationwide ISPs would no doubt seek interconnection with AT&T's plant if the open access requirement were in place. Yet because AT&T did not make a sufficient showing of the incidental burdens on interstate commerce, the *Portland* court did not need to weigh the interstate burdens in relation to the local benefits.[121]

IV. FURTHER DEVELOPMENTS

AT&T agreed to merge with MediaOne Group on May 6, 1999, and MediaOne reports that 89 percent of its franchise transfers nationwide have been approved.[122] MediaOne contends that the transfers in New York

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117. *Id.*

118. *See Portland,* 43 F.Supp. 2d at 1150.

119. *Id.*

120. *See* openNET Coalition, *For the Press* (visited Jan 21, 2000) ⟨http://opennetcoalition.org/press/⟩ (describing AOL as "a leading advocate of open access and a continuing member of the openNET Coalition").

121. *See* AT&T Corp. v. City of Portland, 43 F. Supp. 2d 1146, 1154 (D. Ore. 1999).

122. *See* MediaOne, *AT&T and MediaOne Merger Gains Unanimous Support in New York State* (November 23, 1999) ⟨http://www.mediaonegroup.com/investorinfo/index.html⟩.

were all approved unconditionally, although it didn't mention the status of the other transfers.[123] Yet despite MediaOne's apparent success, an increasing number of communities are currently considering or have already imposed open access requirements on transfers relating to the AT&T mergers.[124]

In a very interesting move, on December 6, 1999, AT&T sent a letter to the FCC agreeing to implement Internet access over cable that would provide consumers with a choice of ISPs.[125] Specifically, the company agreed to negotiate (after the expiration of its exclusive contract with @Home in 2002), "Internet transport services ... at prices reasonably comparable to those offered by AT&T to any other ISP for similar services..."[126] Four cities in Massachusetts have seized on the opportunity and requested a hearing before the state's Department of Telecommunications and Energy, arguing that AT&T "conceded all barriers to open access" in the letter.[127]

The recent announcement of the merger of AOL and Time Warner puts a further wrinkle into the open access debate, as Steve Case recently announced that "he's committed to open access over Time Warner's wires."[128] Such announcements from cable Internet access providers could render the open access debate moot, to the extent local franchising authorities are content to accept voluntary access concessions.

Although AT&T and AOL-Time Warner have offered self-regulatory solutions to the problem, for many open access advocates, such a proposed solution is still too vague. Communities in other circuits may therefore impose open access restrictions regardless of the Ninth Circuit's ruling in the *Portland* matter or industry attempts at self-regulation. The battle only

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123. *See id.*

124. Some examples include Henrico County, VA; Culver City, CA; St. Louis, MO; Weymouth, MA; Cambridge, MA; Fairfax City, VA; Broward County, FL; San Francisco, CA, Dallas, TX, Denver, CO and Seattle, WA. The Pennsylvania House of Representatives is also holding hearings on the necessity of open access. *See* openNET Coalition, *For the Press* (visited Jan 21, 2000) ⟨http://opennetcoalition.org/press/⟩.

125. *See* Letter from David N. Baker, Mindspring Enterprises, Inc., James W. Cicconi, AT&T Corp.,and Kenneth S. Fellman, Esq., to Chairman William Kennard, FCC (December 6, 1999), *available at* ⟨http://www.opennetcoalition.org/news/12061999/joint.shtml⟩.

126. *Id.*

127. *See* Patricia Fusco, *Gang of Four takes on AT&T-MediaOne in Massachusetts* (December 14, 1999) ⟨http://www.internetnews.com/isp-news/print/0,1089,8_259141,00.html⟩.

128. James Surowiecki, *More on the AOL-Time Warner Deal* (January 10, 2000) ⟨http://slate.msn.com/code/MoneyBox/MoneyBox.asp?Show=1/10/00&idMessage=4346⟩.

appears to be intensifying, and further litigation and uncertainty about the regulatory landscape in this area are likely to persist. As such, Congress and the FCC should act promptly to resolve this issue even as courts, industry and local governments across the country continue to grapple with it.

At least some elements in Congress have already begun to develop such a solution. The recently proposed Internet Freedom Act would require cable providers with market power to provide open access to competing ISPs.[129] This and other legislation could help to clarify Congress' intent in this area and guide the FCC in making national policy concerning competition in the Internet services market.

V. CONCLUSION

Eventually, Congress will need to harmonize the law in this area to account for convergence of both technologies and companies. There are a number of ways this could be done within the general policy framework set forth in both the Cable Act, the 1996 Act, and the general antitrust framework. How to structure regulation in this area depends on many factors, one of which is the ability of competition in the Internet services market (and competition in various broadband platforms) to speed delivery of advanced telecommunications capability to all Americans.

Until such harmonization arrives, however, local governments and courts across the country need a predictable set of rules to guide them. The Cable Act, which preserves local franchising authorities' discretion over cable franchise transfers, offers a compelling interim solution. Its terms are relatively clear, and take account of the potential for differing competitive environments in different localities.

Because localities are in the best position to make these assessments, and because at least for now, broadband cable Internet services appear to be covered under the Cable Act, local governments should be permitted to act as Portland did under that act. Despite a couple of analytical missteps, the district court in *Portland* was right in ruling that the Cable Act permits local governments to impose open access conditions on transfers of this type.

129. *See* Internet Freedom Act, H.R. 1686, 106th Cong. §§ 102, 103 (1999).