

# THE AUTHORITY TO REGULATE BROADBAND INTERNET ACCESS OVER CABLE

By Jim Chen<sup>†</sup>

## ABSTRACT

What, in the eyes of the law, is cable broadband? The regulation of cable-based platforms for high-speed access to the Internet has become the most controversial subject in communications law. A trilogy of judicial decisions on the statutory status of cable broadband is forcing the Federal Communications Commission to confront a question it has consistently dodged. High-speed Internet access over cable is neither a “cable service” nor a “telecommunications service” under the Communications Act, but rather an “information service.” From a statutory patchwork including the Clayton Act, the “advanced telecommunications capability” provision of the Telecommunications Act of 1996, and long-standing grants of rulemaking authority, the Commission may require the operators of cable broadband facilities to offer their customers a choice of Internet service providers. This Article concludes that the Commission should exercise its power to impose open access requirements for cable broadband.

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<sup>†</sup> Professor of Law and Julius E. Davis Professor of Law, 2000-2001, University of Minnesota Law School; chenx064@maroon.tc.umn.edu. This Article was presented on February 28, 2001, at the University of Washington School of Law and on March 3, 2001, at the Boalt Hall School of Law, University of California, Berkeley. I thank the Berkeley Center for Law and Technology, the *Berkeley Technology Law Journal*, and Professor Mark A. Lemley for the opportunity to participate in the “Beyond Microsoft: Antitrust, Technology, and Intellectual Property” Conference and to present this Article before an extraordinarily talented and energetic audience. Dan L. Burk, Anthony C. Epstein, Daniel A. Farber, W. Kenneth Ferree, Gil Grantmore, James B. Speta, Philip J. Weiser, Laurence H. Winer, and Christopher S. Yoo provided helpful comments. Nicole A. Saharsky supplied very capable research assistance. Special thanks to Kathleen Howard.

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## I. CABLE’S KILLER APP

Broadband access to the Internet has arrived. Broadband means never having to say you are waiting: high transmission speeds enable users “to change web pages as fast as one can flip through the pages of a book and to transmit full-motion video.”<sup>1</sup> “Always on” Internet at or beyond 200 kilobits per second (“kbps”) renders dial-up access at 56 kbps a mere memory.<sup>2</sup> Only broadband can deliver real-time streaming video, Internet protocol videoconferencing, and access to a remote local area network.<sup>3</sup> The intense thirst for speed and the dramatic difference in quality have given rise to distinct markets for residential broadband and narrowband Internet access.<sup>4</sup>

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1. *In re Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Ams. in a Reasonable & Timely Fashion*, 14 F.C.C.R. 2398, 2406 (1999).

2. *See id.* at 2406 (setting the Commission’s baseline definition of broadband access). *But cf. In re Am. Online, Inc. & Time Warner Inc.*, No. C-3989, 2000 F.T.C. LEXIS 170 (Dec. 14, 2000) (setting the broadband threshold at 128 kbps). For an etymological essay on the origins of the term “broadband,” see William Safire, *On Language: Broadband*, N.Y. TIMES, Feb. 13, 2000, § 6, at 22.

3. *See generally* T.C. Kwok, *Residential Broadband Internet Services and Applications Requirements*, 35 INST. OF ELECTRICAL & ELECTRONICS ENGINEERS COMMS. 76 (1997).

4. *See* Jerry A. Hausman et al., *Residential Demand for Broadband Telecommunications and Consumer Access to Unaffiliated Internet Content Providers*, 18 YALE J. ON REG. 129, 135-48 (2001); *see also* AT&T Corp. v. City of Portland, 216 F.3d 871, 874 (9th Cir. 2000) (distinguishing the “@Home cable broadband infrastructure . . . from that of most ISPs,” which currently consists of “leased telecommunications lines” to which customers connect “through ‘dial-up’ connections over ordinary telephone lines”). *But see* DEBORAH A. LATHEN, BROADBAND TODAY: A STAFF REPORT TO WILLIAM E. KENNARD, CHAIRMAN OF THE FEDERAL COMMUNICATIONS COMMISSION ON INDUSTRY MONITORING SESSIONS CONVENED BY CABLE SERVICES BUREAU 32 (1999), available at <http://www.fcc.gov/Bureaus/Cable/Reports/broadbandtoday.pdf> (expressing “no view on whether the residential broadband market is a separate market from the residential narrowband market”).

Thanks in no small part to cable television's deep reach,<sup>5</sup> hybrid fiber coaxial cable has become the residential broadband conduit of choice. Of the 3.12 million residential broadband subscribers in the United States as of June 2000, almost 70 percent reached the Internet through cable.<sup>6</sup> The nearest competitor, digital subscriber line ("DSL") service over legacy telephone networks, registered a relatively modest 28 percent of this market.<sup>7</sup> The leading wireline technologies outpace their wireless counterparts by a wide margin. Terrestrially based, fixed wireless technologies are projected to serve "4.4 million subscribers by 2004"—roughly one-eighth of the market for high-speed Internet access.<sup>8</sup> For their part, "satellite high-speed systems [may] become the dominant means" of broadband Internet access "outside urban areas and in areas of low subscriber density," with the potential to capture "between 5 and 10% of high-speed subscribers."<sup>9</sup> Because wireless technologies remain constrained by line-of-sight requirements, weather-related issues of reliability, and reliance on a telephone line for the return path,<sup>10</sup> satellite and fixed wireless providers of high-speed Internet access had captured roughly 64,000 subscribers as of June 2000, or 2.1 percent of the market.<sup>11</sup> "New technology" may be "the easy answer to everything,"<sup>12</sup> but three years is an eternity in Internet time. Forty-nine out of fifty broadband customers have evidently decided that they cannot wait.

Contemporary technology and market conditions leave no doubt. Broadband Internet access is a two-player, wireline game, and cable en-

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5. See *In re* Annual Assessment of Competition for the Delivery of Video Programming, 15 F.C.C.R. 978, 988-89 (2000) (reporting that cable now reaches 96.6 percent of all homes with at least one television set); cf. GEORGE ABE, RESIDENTIAL BROADBAND 283 (1997) (predicting, accurately, that cable operators would translate their "speed, ubiquity, and experience in offering residential services" into dominance of the broadband market).

6. See Press Release, FCC, Federal Communications Commission Releases Data on High-Speed Data for Internet Access, at 8, tbl.3 (Oct. 31, 2001), available at [http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/IAD/hspd1000.pdf](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd1000.pdf), excerpted in Daniel L. Rubinfeld & Hal J. Singer, *Open Access to Broadband Networks: A Case Study of the AOL/Time Warner Merger*, 16 BERKELEY TECH. L.J. 631 (2001).

7. See sources cited *supra* note 6.

8. *In re* Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Ams. in a Reasonable and Timely Fashion, No. 00-290, 15 F.C.C.R. 20913, 20989-90, at ¶ 200 (Aug. 21, 2000).

9. *Id.* 20990, ¶ 202.

10. See *id.* 20938, ¶ 59; LATHEN, *supra* note 4, at 31-40.

11. See sources cited *supra* note 6.

12. Thomas W. Hazlett, *Predation in Local Cable TV Markets*, 40 ANTITRUST BULL. 609, 643 (1995).

joys by far the stronger position. Not too bad for a medium that emerged in the 1940s as broadcast television's technological handmaiden.<sup>13</sup>

Whether the government should guarantee competitors' access to America's two million cable modems has become one of communication law's "most controversial current issues."<sup>14</sup> Much of the strife stems from a singular oddity in American communications law. Though history should have taught us to abhor dissimilar regulatory treatment of similar markets,<sup>15</sup> the Federal Communications Commission ("FCC") has chosen to regulate only one of the two principal modes of high-speed Internet access—and the less dominant mode at that. By virtue of the local competition provisions of the Telecommunications Act of 1996,<sup>16</sup> incumbent local exchange carriers ("ILECs")<sup>17</sup> must grant unbundled access to competing carriers seeking to provide DSL service.<sup>18</sup> A cluster of FCC rules that sur-

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13. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 627 (1994) (describing cable as a way "to bring broadcast television signals to remote or mountainous communities," intended not "to replace broadcast television but to enhance it"). *See generally* *United States v. Southwestern Cable Co.*, 392 U.S. 157, 161-64 (1968) (explaining the early history and purposes of cable television); DANIEL L. BRENNER & MONROE E. PRICE, *CABLE TELEVISION AND OTHER NONBROADCAST VIDEO: LAW AND POLICY* § 1.02 (1992) (describing the history and purpose of cable television).

14. Stuart Minor Benjamin, *Proactive Legislation and the First Amendment*, 99 MICH. L. REV. 281, 295 (2000).

15. *See generally, e.g.*, Alfred E. Kahn, *Deregulation: Looking Backward and Looking Forward*, 7 YALE J. ON REG. 325, 333-34 (1990) (describing the inefficient "distortions and tensions" that can arise from partial deregulation); Dennis L. Weisman, *Default Capacity Tariffs: Smoothing the Transitional Regulatory Asymmetries in the Telecommunications Market*, 5 YALE J. ON REG. 149 (1988) (describing the phenomenon of "bypass" as a symptom of inefficiencies arising from a partially deregulated market).

16. Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

17. The Telecommunications Act of 1996 defines "local exchange carrier" as "any person that is engaged in the provision of telephone exchange service or exchange access." 47 U.S.C. § 153(26) (Supp. IV 1998). In any local telephone service area, the "incumbent local exchange carrier" is "the local exchange carrier that . . . on February 8, 1996, provided telephone exchange service in such area" and on that date "was deemed" under FCC rules "to be a member of the exchange carrier association." *Id.* § 251(h)(1). A successor or assign of an FCC-recognized exchange carrier association member is also an ILEC. *Id.* § 251(h)(1)(B)(ii).

18. *Id.* § 251(c)(3) (requiring ILECs to provide access to network elements on an unbundled basis); *In re* Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, 11 F.C.C.R. 15,499, 15,689 (1996) (including the local loop within this obligation); *In re* Deployment of Wireline Servs. Offering Advanced Telecomms. Capability and Implementation of the Local Competition Provisions of the Telecomms. Act of 1996, 14 F.C.C.R. 20,912, 20,916 (1999) (defining the high-frequency portion of the loop used for residential DSL as a network element to which an ILEC must provide unbundled access); *cf. In re* Deployment of Wireline Servs. Offering Advanced Tele-

vived the passage of the 1996 Act similarly entitles unaffiliated Internet service providers ("ISPs") to request interconnection and unbundled sale of network elements from the largest ILECs for the purpose of providing DSL service.<sup>19</sup>

By contrast, cable operators offering broadband Internet access bear no obligation under federal law to deal with unaffiliated ISPs. In what may have been the FCC's best opportunity to seize the regulatory initiative, the Commission declined to impose open access rules as a condition for its approval of AT&T's acquisition of TCI.<sup>20</sup> In its review of the AT&T/MediaOne merger, the Commission has twice declined to require open access.<sup>21</sup> Instead, the FCC has consistently foresworn any intention of intervening in the ongoing development of cable broadband markets,<sup>22</sup> even though this recalcitrance has deprived the Commission of the *Chevron* deference that such a complex question of law would otherwise

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comms. Capability, 13 F.C.C.R. 24,011, 24,037-38 (1998) (requiring an ILEC, upon request from another carrier, to prepare the local loop for DSL carriage). *See generally* James B. Speta, *Handicapping the Race for the Last Mile?: A Critique of Open Access Rules for Broadband Platforms*, 17 YALE J. ON REG. 39, 67-69 (2000) (detailing the legal obligation of ILECs to deal with competing DSL carriers).

19. *See In Re Expanded Interconnection with Local Tel. Co. Facilities*, 7 F.C.C.R. 7369 (1992); *In re Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, 11 F.C.C.R. 15,499, 15,808-09 (1996); *In re Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 F.C.C.R. 24,011, 24,030-31 (1998). *See generally* PETER W. HUBER ET AL., FEDERAL TELECOMMUNICATIONS LAW §§ 12.5.2-3 (2d ed. 1999) (explaining the significance and ongoing vitality of the "Expanded Interconnection" and "Open Network Architecture" rules).

20. *See In re Tele-Communications, Inc. & AT&T Corp.*, 14 F.C.C.R. 3160, 3192, 3197, 3206 (1999). On the FCC's use of conditions in approvals of major telecommunications mergers to fine-tune its regulatory policies, see Jim Chen, *The Magnificent Seven: American Telephony's Deregulatory Shootout*, 50 HASTINGS L.J. 1503, 1571-75 (1999).

21. *See In re MediaOne Group, Inc. & AT&T Corp.*, 15 F.C.C.R. 9816, 9866-71 (2000); *see also In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T Corp.*, No. 01-47, 2001 F.C.C. LEXIS 1485, at 12-17, ¶¶ 9-11 (Mar. 14, 2001).

22. *See, e.g., In re Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Ams. in a Reasonable & Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecomms. Act of 1996*, 14 F.C.C.R. 2398, 2423-24 (1999); William E. Kennard, *How to End the World Wide Wait*, WALL ST. J., Aug. 24, 1999, at A18 (defending the Commission's policy of "unregulation" with respect to issues of Internet access); *cf.* 47 U.S.C. § 230(b)(2) (Supp. IV 1998) (declaring "the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation"). *See generally* Heather T. Hendrickson, *Cable Open Access: The FCC Should Establish a National Policy of Staying Out of the Way of Broadband Competition*, 8 GEO. MASON L. REV. 749 (2000).

merit.<sup>23</sup> The market for high-speed Internet access and other broadband services, estimated to embrace as many as forty million consumers,<sup>24</sup> hangs in the balance.

For a statute that rather notoriously paid little heed to the Internet<sup>25</sup> (except perhaps as a pornographic medium),<sup>26</sup> the Telecommunications Act looms large over the cable broadband debate. The Act's definitions of "cable,"<sup>27</sup> "telecommunications,"<sup>28</sup> and "information" services<sup>29</sup> determine whether the FCC or its local counterparts can require the operator of a cable-based Internet access platform to deal with unaffiliated ISPs on a non-discriminatory basis. Cable operators insist that the imposition of any open access requirement will retard their economic incentive to roll out broadband services. Their competitors, by contrast, warn that an unfettered cable monopoly will stifle innovation among ISPs. Once again the Act's effusive promise of "rapid deployment" of "new telecommunications technologies" hinges on sober questions of statutory interpretation.<sup>30</sup>

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23. See *AT&T Corp. v. City of Portland*, 216 F.3d 871, 876 (9th Cir. 2000) (declining to accord the FCC the deference otherwise owed to the agency under *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)); see also *id.* at 879 ("Thus far, the FCC has not subjected cable broadband to any regulation."); cf. *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981) (emphasizing that courts owe "substantial judicial deference" to the FCC's "judgment regarding how the public interest is best served").

24. See Speta, *supra* note 18, at 43.

25. See generally John D. Podesta, *Unplanned Obsolescence: The Telecommunications Act of 1996 Meets the Internet*, 45 DEPAUL L. REV. 1093 (1996).

26. See Telecommunications Act of 1996, Pub. L. No. 104-104, §§ 501-509, 110 Stat. 56, 133-39; *ACLU v. Reno*, 521 U.S. 844, 857 (1997) (noting that "[t]he major components of the [Telecommunications Act] have nothing to do with the Internet"); Barbara Esbin, *Internet over Cable: Defining the Future in Terms of the Past*, 7 COMMLAW CONSPECTUS 37, 55 (1999) (noting that Congress paid more attention to the Internet's pornographic potential than any other aspect of what was then an emerging mode of communication).

27. See 47 U.S.C. §§ 153(7), 522(6) (Supp. IV 1998).

28. See *id.* § 153(43), (46).

29. See *id.* § 153(20).

30. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, pmbl. at 56; see also 47 U.S.C. § 157(a) (Supp. IV 1998) (declaring a broader "policy of the United States to encourage the provision of new technologies and services to the public"); *Time Warner Entm't Co.*, 8 F.C.C.R. 7106, 7107-08 (1993) (presuming that "the provision of new technologies and services to the public" and "the development of an advanced telecommunications infrastructure" are "in the public interest"); cf. 47 U.S.C. § 257(b) (Supp. IV 1998) (directing the FCC to "promote . . . policies and purposes . . . favoring diversity of media voices, vigorous economic competition, [and] technological advancement").

In its initial look at cable broadband in 1999, the FCC pledged to “continue to monitor broadband deployment closely to see whether there are developments that could affect [its] goal of encouraging deployment of broadband capabilities.”<sup>31</sup> Those developments have come to pass. In the immediate wake of the Ninth Circuit’s decision in *AT&T Corp. v. City of Portland*,<sup>32</sup> which invalidated open access requirements imposed through the local franchising of cable systems, FCC Chairman William E. Kennard proposed a formal proceeding to clarify “the FCC’s role in establishing a national broadband policy.”<sup>33</sup> In September 2000, the Commission announced that it would reexamine its approach to broadband Internet access over cable and other facilities.<sup>34</sup>

The first step in that inquiry consists of establishing the FCC’s statutory authority to regulate cable modem platforms and broadband services provided via cable.<sup>35</sup> In effect, the Commission has invited some cool, deliberate doctrinal analysis in response to the hot policy debate over cable broadband. Although “[e]conomic analysis and market predictions” are nowhere “an exact science,”<sup>36</sup> least of all on the Internet’s unstable turf, “brilliant first-order theories” about open access and its regulation abound.<sup>37</sup> The secondary literature to date is heavy on policy recommendations and light on legal analysis.<sup>38</sup> Most commentators have debated the impact of open access on cable operators’ behavior and incentives without resolving predicate questions of legal authority to impose such restrictions. Rather unfortunately, so has the FCC. The Commission has all but admit-

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31. *In re Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Ams. in a Reasonable & Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecomms. Act of 1996*, 14 F.C.C.R. 2398, 2449 (1999).

32. 216 F.3d 871 (9th Cir. 2000). *See generally infra* Part II.B.

33. Press Release, FCC, FCC Chairman to Launch Proceeding on “Cable Access”: Kennard Says Time Is Right to Establish Record on Marketplace Developments (June 30, 2000), available at 2000 F.C.C. LEXIS 3502 [hereinafter Kennard Press Release].

34. *See In re Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 15 F.C.C.R. 19,287 (2000).

35. *See id.* at 19,293-98.

36. *United States v. W. Elec. Co.*, 900 F.2d 283, 297 (D.C. Cir.), *cert. denied*, 498 U.S. 911 (1990).

37. Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917, 929, 930 n.56 (1986).

38. *See* Earl W. Comstock & John W. Butler, *Access Denied: The FCC’s Failure to Implement Open Access to Cable as Required by the Communications Act*, 8 COMM.LAW CONSPECTUS 5, 6 (2000) (lamenting how “the debate over open access has led the industry and the Commission away from” a question of “straight statutory construction . . . and into a policy squabble that bears no relation to . . . decisions made by Congress”).

ted that it does not know the precise legal underpinnings for its policy of maintaining “‘parallel universes’ for cable and telephony Internet-based services.”<sup>39</sup> That policy will hinge on relatively pedestrian, even unglamorous questions of statutory interpretation. Mindful that grand theory is particularly “ill-suited to fix [the Internet’s] flow,” we might more profitably “draw our bearings from the legal landscape, and chart a course by the law’s words.”<sup>40</sup>

This Article seeks to identify the source of authority, if any, to regulate broadband Internet access via cable under the Communications Act of 1934,<sup>41</sup> as amended by the Telecommunications Act of 1996. I will make no serious attempt to “assess the wisdom” of open access rules as regulatory policy.<sup>42</sup> Nor will I address any constitutional<sup>43</sup> or state-law<sup>44</sup> issues that may be at stake. Part II describes how the federal courts have defined cable broadband. Part III argues that cable broadband should be classified neither as a cable service nor as a telecommunications service, but rather as an information service. The FCC may also extend its regulatory reach under the Clayton Act, its general rulemaking powers, and *sui generis* provisions such as its mandate to promote the nation’s advanced telecommunications capability. Part IV concludes that the FCC should exercise its authority to harmonize the regulation of all platforms for high-speed Internet access without regard to their underlying technology.

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39. Esbin, *supra* note 26, at 98.

40. AT&T Corp. v. City of Portland, 216 F.3d 871, 876 (9th Cir. 2000).

41. Ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.).

42. Louisiana Pub. Serv. Comm’n v. FCC, 476 U.S. 355, 359 (1986).

43. See AT&T Corp. v. City of Portland, 43 F. Supp. 2d 1146, 1154-55 (D. Or. 1999) (identifying potential first amendment, commerce clause, and contract clause claims), *rev’d on other grounds*, 216 F.3d 871 (9th Cir. 2000); Comcast Cablevision of Broward County, Inc. v. Broward County, 124 F. Supp. 2d 685 (S.D. Fla. 2000) (striking down an open access ordinance as a violation of cable operators’ first amendment rights); Christopher K. Ridder, Note, AT&T Corp. v. City of Portland, 15 BERKELEY TECH. L.J. 397, 412-13 (2000). Compare Raymond Shih Ray Ku, *Open Internet Access and Freedom of Speech: A First Amendment Catch-22*, 75 TUL. L. REV. 87 (2000) (analyzing open access as a matter of free speech) with Harold Feld, *Whose Line Is It Anyway? The First Amendment and Cable Open Access*, 8 COMMLAW CONSPECTUS 23 (2000) (criticizing the argument that cable operators’ freedom to broadband access with ISP services has any significant impact on free speech).

44. See MediaOne Group, Inc. v. County of Henrico, 97 F. Supp. 2d 712, 716-17 (E.D. Va. 2000) (discussing limits on local lawmaking under Dillon’s rule); *Portland*, 43 F. Supp. 2d at 1155 (addressing an alleged breach of franchise).

## II. THE JUDICIAL BATTLE ROYALE OVER CABLE BROADBAND

What, in the eyes of the law, is cable broadband? Within ten weeks during the spring of 2000, three federal courts gave three different answers. Consistent with a 1999 district court decision in Oregon,<sup>45</sup> a federal district court in Virginia described broadband Internet access over cable as a "cable service."<sup>46</sup> Despite agreeing on the statutory classification of cable broadband, these courts divided on the underlying question of municipal authority to impose open access rules. The Oregon court upheld such authority, reasoning that it was implicit in the nature of local cable franchising. By contrast, the Virginia court negated locally imposed open access rules, inter alia, as a forbidden form of common carrier regulation. Six weeks later, the Ninth Circuit reversed the Oregon decision. Distinguishing between video programming and Internet-related services provided by cable operators, the court of appeals treated cable broadband not as a cable service but as a "telecommunications service."<sup>47</sup> On radically different legal theories, locally imposed open access rules in Virginia and in Oregon lay in ruins. Meanwhile, in a dispute over the Pole Attachment Act<sup>48</sup> and the FCC's implementing regulations,<sup>49</sup> the Eleventh Circuit concluded that the provision of Internet access over cable is neither a cable service nor a telecommunications service.<sup>50</sup> These three decisions have caught the FCC's attention and lie at the heart of the Commission's notice of inquiry into high-speed Internet access.<sup>51</sup>

I will first describe the *Henrico* decision from Virginia and the Ninth Circuit's *Portland* decision. These two decisions squarely addressed the question of whether local franchising authorities may impose open access requirements. I will then turn to the Eleventh Circuit's decision in *Gulf Power*. Admittedly, the connection between open access and the FCC's jurisdiction over utility pole attachments is somewhat tenuous, and the Eleventh Circuit rendered a palpably mistaken interpretation of the Pole

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45. See *AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146, 1153-54 (D. Or. 1999), *rev'd*, 216 F.3d 871 (9th Cir. 2000).

46. See *MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712, 715 (E.D. Va. 2000).

47. See *AT&T Corp. v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000).

48. 47 U.S.C. § 224 (Supp. IV 1998).

49. 47 C.F.R. §§ 1.1401-.1418 (1999).

50. *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1278 (11th Cir. 2000), *cert. granted*, 121 S. Ct. 879 (2001).

51. See *In re Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 15 F.C.C.R. 19,287, 19,292-93 (2000).

Attachment Act. The FCC's ratemaking power is not circumscribed by the statutory definitions of cable service and telecommunications service. In interpreting these definitions, however, *Gulf Power* exposed the weaknesses in *Henrico* and *Portland*'s approaches to the central statutory question of the open access debate. Broadband Internet access over cable fits neither the Communications Act's definition of a cable service nor the statute's definition of a telecommunications service. Because the Supreme Court has granted certiorari in *Gulf Power*, the statutory status of cable broadband may be resolved in a seemingly tangential controversy.

**A. *Portland I* and *Henrico*: "Cable Service"**

The district court decision in *AT&T Corp. v. City of Portland*<sup>52</sup> ("*Portland I*") was the first to define cable broadband as a "cable service" for purposes of the Communications Act. In connection with its acquisition of TCI, AT&T requested municipal approval for a transfer of TCI's cable franchise in Portland, Oregon. Portland conditioned its approval on a major concession from AT&T: the new cable operator would be required to admit unaffiliated ISPs to its proprietary cable modem platform on terms no less favorable than those enjoyed by Excite@Home, an AT&T affiliate.<sup>53</sup> In a mutually beneficial litigation strategy, the parties stipulated that cable broadband should be regarded as a cable service.<sup>54</sup> This stipulation framed the dispute as one arising under subtitle VI of the Communications Act, which governs transmission by cable. Portland expected to exert local franchising authority over broadband access services.<sup>55</sup> AT&T, by contrast, expected to insulate its broadband operations from "regulation as a common carrier."<sup>56</sup>

The U.S. District Court for the District of Oregon accepted the parties' stipulation but rejected all of AT&T's arguments.<sup>57</sup> In particular, the court held that Portland's open access requirement more closely resembled the regulation of essential facilities under federal antitrust law than the

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52. 43 F. Supp. 2d 1146 (D. Or. 1999), *rev'd*, 216 F.3d 871 (9th Cir. 2000).

53. *See id.* at 1150.

54. *See* Christopher E. Duffy, Note, *The Statutory Classification of Cable-Delivered Internet Service*, 100 COLUM. L. REV. 1251, 1268-69 (2000) (observing that the parties' stipulation to this effect may have influenced the court's resolution of the statutory issue).

55. *See* 47 U.S.C. § 541(b)(1) (Supp. IV 1998) ("[A] cable operator may not provide cable service without a franchise.").

56. *Id.* § 541(c) ("Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.").

57. *Portland*, 43 F. Supp. 2d at 1153-54.

imposition of common carrier status.<sup>58</sup> The court reasoned that requiring access for competing ISPs did not constitute the forbidden imposition of “a duty to hold out facilities indifferently for public use.”<sup>59</sup> It further held that Portland had not imposed unlawful conditions on AT&T’s use of transmission technology or unlawful content requirements on AT&T’s provision of cable services.<sup>60</sup> According to the court, the city’s “content-neutral” open access requirement was not of the sort of “content-based rule” that the Communications Act removes from the reach of local franchising authorities.<sup>61</sup>

While the *Portland I* appeal remained pending in the Ninth Circuit, another federal district court also decided to treat cable broadband as a “cable service” under the Communications Act. This time, however, classification of cable broadband as a cable service eliminated local authority to mandate open access. In *MediaOne Group, Inc. v. County of Henrico*,<sup>62</sup> the U.S. District Court for the Eastern District of Virginia invalidated a local open access ordinance under four provisions of the Communications Act.

First, the court held that Henrico County’s open access ordinance violated 47 U.S.C. § 541(b)(3)(D), which provides that “a franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise.”<sup>63</sup> Requiring “MediaOne to provide ‘its cable modem platform’ facility to any requesting ISPs ‘unbundled from the provision of content,’” the court held, would compel the cable operator to provide “telecommunications,”<sup>64</sup> defined in the Communications Act as “the transmission, between or among points specified by the user, of information of the user’s

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58. See *id.* at 1153 (“Requiring that a business allow its competitors access to an essential facility is not the same as regulating that business as a common carrier.”). See generally Thomas A. Piraino, Jr., *An Antitrust Remedy for Monopoly Leveraging by Electronic Networks*, 93 NW. U. L. REV. 1 (1998); John T. Soma et al., *The Essential Facilities Doctrine in the Deregulated Telecommunications Industry*, 13 BERKELEY TECH. L.J. 565 (1998); Marisa A. Piropato, Comment, *Open Access and the Essential Facilities Doctrine: Promoting Competition and Innovation*, 2000 U. CHI. LEGAL F. 369.

59. *Portland*, 43 F. Supp. 2d at 1153 (quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 n.16 (1979)).

60. See *id.* at 1153 (interpreting 47 U.S.C. § 544(e), (f)(1) (Supp. IV 1998)).

61. *Id.* (quoting *United Video, Inc. v. FCC*, 890 F.2d 1173, 1189 (D.C. Cir. 1989)).

62. 97 F. Supp. 2d 712 (E.D. Va. 2000).

63. *Id.* at 714 (quoting 47 U.S.C. § 541(b)(3)(D) (Supp. IV 1998)).

64. *Id.*

choosing, without change in the form or content of the information as sent and received.”<sup>65</sup>

Second, the *Henrico* court held that the county could not compel MediaOne “to use some kind of multiple access technology and equipment that will accommodate . . . third-party ISPs” that request interconnection with MediaOne’s cable broadband platform.<sup>66</sup> Such a requirement, the court held, would violate the 1996 Act’s command that “[n]o State or franchising authority may prohibit, condition, or restrict a cable system’s use of any type of subscriber equipment or any transmission technology.”<sup>67</sup>

Third, the court held that an open access requirement would violate the Communications Act’s ban on the regulation of a cable system “as a common carrier or utility by reason of providing any cable service.”<sup>68</sup> “[P]rohibited common carrier regulation,” the court held, inheres in any “requirement that a cable system carry the programs or services of a specified category of users.”<sup>69</sup>

Finally, Henrico County “impose[d] requirements regarding the provision or content of cable services” in alleged violation of 47 U.S.C. § 544(f)(1).<sup>70</sup> The court reasoned that an open access rule would constitute “statutory interference with programming and related decisions of cable operators.”<sup>71</sup>

In sum, though *Portland I* and *Henrico* both treated cable broadband as a cable service, these decisions stressed different aspects of the Communications Act’s cable provisions. *Portland I* emphasized the power of local governments under section 541(a) to franchise cable systems. *Henrico*, by contrast, developed four distinct limitations on that power.

## B. *Portland II*: “Telecommunications Service”

The Ninth Circuit eventually reversed the district court decision in *Portland I*. The court of appeals asked initially whether Portland had the authority to subject AT&T to cable system franchising.<sup>72</sup> According to 47

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65. *Id.* (quoting 47 U.S.C. § 153(43) (Supp. IV 1998)).

66. *Id.* at 715.

67. *Id.* (quoting 47 U.S.C. § 544(e) (Supp. IV 1998)).

68. *Id.* (quoting 47 U.S.C. § 541(c) (Supp. IV 1998)).

69. *Id.*

70. *Id.* at 716 (quoting 47 U.S.C. § 544(f)(1) (Supp. IV 1998)).

71. *Id.* (citing *Time Warner Cable v. City of New York*, 943 F. Supp. 1357, 1367, 1399 (S.D.N.Y. 1996), *aff’d sub nom.* *Time Warner Cable v. Bloomberg L.P.*, 118 F.3d 917 (2d Cir. 1997)).

72. *See AT&T Corp. v. City of Portland*, 216 F.3d 871, 876 (9th Cir. 2000).

U.S.C. § 541(b)(1), “a cable operator may not provide cable service without a franchise.”<sup>73</sup> This requirement in turn triggers the definition of “cable service” under the Communications Act: “(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.”<sup>74</sup> The court noted that “‘video programming’ means ‘programming provided by, or generally considered comparable to programming provided by, a television station.’”<sup>75</sup> Furthermore, the court observed, “‘other programming service’ means ‘information that a cable operator makes available to all subscribers generally.’”<sup>76</sup> “The essence of cable service,” the court concluded, “is one-way transmission of programming to subscribers generally.”<sup>77</sup>

According to the court, the “interactive and individual” nature of Internet use extends far “beyond the ‘subscriber interaction’ contemplated by the [Communications Act].”<sup>78</sup> The court sharply distinguished between the “one-way [receipt] of cable or pay-per-view television programming” and the vastly more interactive activities of “[a]ccessing Web pages, navigating . . . hypertext links, corresponding via e-mail, and participating in live chat groups.”<sup>79</sup> Moreover, the court continued, “applying the carefully tailored scheme of cable television regulation to cable broadband Internet access would lead to absurd results.”<sup>80</sup> Many of the regulatory burdens borne by cable operators arise from the physical limits on any cable system’s capacity and the rigid, sequential nature by which channels are arranged.<sup>81</sup> By contrast, the Internet is a potentially boundless, nonhierarchi-

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73. *Id.* (quoting 47 U.S.C. § 541(b)(1) (Supp. IV 1998)).

74. *Id.* (quoting 47 U.S.C. § 522(6) (Supp. IV 1998)); *see also* 47 U.S.C. § 153(8) (Supp. IV 1998) (defining “cable service” by reference to § 522(6)).

75. *Portland*, 216 F.3d at 876 (quoting 47 U.S.C. § 522(20) (Supp. IV 1998)) (citation omitted).

76. *Id.* (quoting 47 U.S.C. § 522(14) (Supp. IV 1998)) (citation omitted).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 877.

81. *See, e.g.,* *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 201-02 (1997) (describing cable operators’ incentive to disfavor signals originated by local over-the-air broadcasters); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 632, 632-34 (1994); *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 733-36 (1996) (Breyer, J., plurality opinion) (describing differences between public access and leased access stations, two categories of channels over which cable operators exercise almost no editorial control); *cf. United States v. Playboy Entm’t Group*, 529 U.S. 803, 807-08

cally organized communications medium. Applying cable television requirements such as public access, leased access, and must-carry obligations “to a nonbroadcast medium such as the Internet” would therefore “make[] no sense in any respect, and would be infeasible in many respects.”<sup>82</sup> “Surfing cable channels is one thing,” the Ninth Circuit concluded; “surfing the Internet over a cable broadband connection is quite another.”<sup>83</sup>

The court then asked “whether Portland [could] condition AT&T’s provision of standard cable service upon its opening access to the cable broadband network for competing ISPs.”<sup>84</sup> The court recognized that “Internet access for most users consists of two separate services.”<sup>85</sup> First, connecting through telephone lines at the “‘point of presence’ assigned” to a “conventional dial-up ISP” constitutes “classic ‘telecommunications,’ which the Communications Act defines 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.’”<sup>86</sup> Emphasizing how the Act treats any “provider of telecommunications services [as] a ‘telecommunications carrier,’ . . . ‘regardless of the facilities used,’”<sup>87</sup> the court concluded that a cable platform could support the provision of telecommunications services.

The Ninth Circuit distinguished this provision of access from “information services” supplied by ISPs.<sup>88</sup> The Communications Act defines an information service as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, or making available information via telecommunications.”<sup>89</sup> The court thereupon identified “two elements” in the package of services supplied by any ISP: “a ‘pipeline’ . . . and Internet service transmitted through that pipeline.”<sup>90</sup> “To the extent that @Home is a conventional ISP,” the court held, “its activities are that of an information service.”<sup>91</sup> On the central question in *Portland II*,

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(2000) (describing the problem of “signal bleed” from imperfectly scrambled premium channels).

82. *Portland*, 216 F.3d at 877 (quoting Nat’l Cable Television Ass’n v. FCC, 33 F.3d 66, 75 (D.C. Cir. 1994)).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* (quoting 47 U.S.C. § 153(43) (Supp. IV 1998)).

87. *Id.* (quoting 47 U.S.C. § 153(44), (46) (Supp. IV 1998)).

88. *See id.*

89. *Id.* (quoting 47 U.S.C. § 153(20) (Supp. IV 1998)).

90. *Id.* at 878.

91. *Id.*

however, the Ninth Circuit turned elsewhere. Observing that @Home, “unlike other ISPs, . . . controls all of the transmission facilities between its subscribers and the Internet,” the court concluded that “Internet transmission over [a] cable broadband facility” constitutes “a telecommunications service as defined in the Communications Act.”<sup>92</sup>

In light of this holding, 47 U.S.C. § 541(b)(3) once again proved pivotal in eliminating local authority over open access rules for cable broadband. As *Henrico* did under a different set of statutory assumptions, *Portland II* identified a fatal breach of section 541(b)(3)’s firewall between local cable franchising and the provision of telecommunications service.<sup>93</sup> According to the Ninth Circuit, “[s]ubsection 541(b)(3) expresses both an awareness that cable operators could provide telecommunications services, and an intention that those telecommunications services be regulated as such, rather than as cable services.”<sup>94</sup> The court even suggested that a local open access rule would trigger the Communications Act’s provision preempting any “state or local statute or regulation . . . [that] prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide any . . . telecommunications service.”<sup>95</sup>

Finally, the Ninth Circuit attempted to harmonize its holding with other provisions of “the Communications Act [that] contemplate[] the provision of telecommunications services by cable operators over cable systems.”<sup>96</sup> By comparing open access to telecommunications carriers’ “dual duties of nondiscrimination and interconnection,” the court left little doubt that the FCC could subject cable broadband to precisely the sort of common carrier regulation that AT&T had sought to avoid throughout the *Portland* litigation.<sup>97</sup> The court went so far as to extol the FCC’s regulation of “DSL service, a high-speed competitor to cable broadband, as an advanced telecommunications service subject to common carrier obligations.”<sup>98</sup> Invoking the power of the FCC to forbear from full enforcement of its statutory authority,<sup>99</sup> the Ninth Circuit reaffirmed Congress’s decision to “repose[] the details of telecommunications policy in the FCC” and forswore any intention to “impinge on [the agency’s] authority over these

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92. *Id.*

93. *See id.* (quoting 47 U.S.C. § 541(b)(3) (Supp. IV 1998)).

94. *Id.*

95. *Id.* (citing 47 U.S.C. § 253(a) (Supp. IV 1998)).

96. *Id.* at 879.

97. *Id.* (citing 47 U.S.C. §§ 201(a), 251(a)(1) (Supp. IV 1998)).

98. *Id.* (citing GTE Operating Cos., 13 F.C.C.R. 22,466 (1998)).

99. *See* 47 U.S.C. § 160(a) (Supp. IV 1998).

matters.”<sup>100</sup> In declining to reconsider its approval of the AT&T/MediaOne merger, the FCC took refuge in what it perceived as the Ninth Circuit’s endorsement of the agency’s record of inaction on the issue of open access.<sup>101</sup>

### C. *Gulf Power*: Neither Cable Nor Telecommunications Service

Utility pole attachments seem an unlikely source of high-profile controversy in communications law. In the immediate aftermath of the Telecommunications Act, the fiercest battles over implementation raged over unbundled access to the local exchange,<sup>102</sup> Bell operating company (“BOC”) entry into long-distance markets,<sup>103</sup> universal service,<sup>104</sup> and access charge reform.<sup>105</sup> The legal furor over open access to cable broadband facilities began in earnest with the FCC’s review of the AT&T/TCI merger<sup>106</sup> and the district court decision in *Portland I.*<sup>107</sup> In this maelstrom, the *Gulf Power* litigation at one time was perhaps best known for providing the occasion for the first judicial use of the phrase “deregulatory takings.”<sup>108</sup> A strange twist in statutory interpretation has now thrust this formerly obscure controversy into the debate over cable broadband.

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100. *Portland*, 216 F.3d at 879-80.

101. See *In re MediaOne Group, Inc. & AT&T Corp.*, 15 F.C.C.R. 9816, 9822, at ¶ 11 & n.55 (2000).

102. See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *cert. granted*, 121 S. Ct. 877, 878 (2001).

103. See, e.g., *AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000) (affirming the FCC’s approval of a BOC’s petition to provide in-region long distance service in New York).

104. See *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 2212, 2214, 2237 (2000), and *cert. dismissed*, 121 S. Ct. 423 (2000).

105. See *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998). See generally Thomas W. Hazlett, *Economic and Political Consequences of the 1996 Telecommunications Act*, 50 HASTINGS L.J. 1359 (1999).

106. See *In re Tele-Communications, Inc. & AT&T Corp.*, 14 F.C.C.R. 3160, 3192, 3197, 3206 (1999).

107. See *AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146 (D. Or. 1999), *rev’d*, 216 F.3d 871 (9th Cir. 2000).

108. See *Gulf Power Co. v. United States*, 998 F. Supp. 1386, 1394-95 (N.D. Fla. 1998), *aff’d*, 187 F.3d 1324 (11th Cir. 1999); Jim Rossi, *The Irony of Deregulatory Takings*, 77 TEX. L. REV. 297, 314 (1998). For a fuller discussion of the debate over deregulatory takings, see J. GREGORY SIDAK & DANIEL F. SPULBER, *DEREGULATORY TAKINGS AND THE REGULATORY CONTRACT: THE COMPETITIVE TRANSFORMATION OF NETWORK INDUSTRIES IN THE UNITED STATES* (1997); William J. Baumol & Thomas W. Merrill, *Deregulatory Takings, Breach of the Regulatory Contract, and the Telecommunications Act of 1996*, 72 N.Y.U. L. REV. 1037 (1997); William J. Baumol & Thomas W. Merrill, *Does the Constitution Require That We Kill the Competitive Goose? Pricing Local Phone*

The Eleventh Circuit's decision in *Gulf Power Co. v. FCC*<sup>109</sup> involved, among other things, the FCC's "authority to regulate [utility pole] attachments for Internet service."<sup>110</sup> The original Pole Attachment Act of 1978<sup>111</sup> enabled the FCC to regulate the rents charged by power companies, which owned ample utility poles, to cable operators, which also relied on poles but owned few of their own.<sup>112</sup> When "underground installation of . . . cables is impossible or impracticable," "[u]tility company poles provide . . . virtually the only practical physical medium for the installation of television cables."<sup>113</sup> The Telecommunications Act of 1996 amended the Pole Attachment Act<sup>114</sup> to give not only "cable television system[s]" but also "telecommunications carrier[s]" the right of "nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled" by a utility,<sup>115</sup> except where "insufficient capacity" or "reasons of safety, reliability and generally applicable engineering purposes" dictate otherwise.<sup>116</sup> The 1996 amendments also directed the FCC to set "just, reasonable and nondiscriminatory rates" for "pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges."<sup>117</sup> In short, the amended statute gave two classes of carriers access to utility poles and authorized the FCC to mediate the rates, terms, and conditions under which such access should occur.

The FCC regulations implementing the 1996 amendments to the Pole Attachment Act required utility companies to provide pole access in support of broadband Internet connections over cable. The Commission adopted its subsection (d)(3) rate—designated by statute for "any pole attachment used by a cable television system solely to provide cable service"—as "the just and reasonable rate for commingled cable and Internet

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*Services to Rivals*, 73 N.Y.U. L. REV. 1122 (1998); Jim Chen, *The Second Coming of Smyth v. Ames*, 77 TEX. L. REV. 1535 (1999); Herbert Hovenkamp, *The Takings Clause and Improvident Regulatory Bargains*, 108 YALE L.J. 801 (1999); Susan Rose-Ackerman & Jim Rossi, *Disentangling Deregulatory Takings*, 86 VA. L. REV. 1435 (2000).

109. 208 F.3d 1263 (11th Cir. 2000), *cert. granted*, 121 S. Ct. 879 (2001).

110. *Id.* at 1266.

111. Pub. L. No. 95-234, 92 Stat. 33 (1978) (codified as amended at 47 U.S.C. § 224).

112. See generally S. REP. NO. 95-580 (1978), *reprinted in* 1978 U.S.C.C.A.N. 109.

113. *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987).

114. See Telecommunications Act of 1996, Pub. L. No. 104-104, § 703, 110 Stat. 56, 149.

115. 47 U.S.C. § 224(f)(1) (Supp. IV 1998).

116. *Id.* § 224(f)(2).

117. *Id.* § 224(e)(1).

service.”<sup>118</sup> The Commission admitted that “specifying this rate” was “intend[ed] to encourage cable operators to make Internet services to their customers.”<sup>119</sup> The FCC stressed, however, that it was invoking its general mandate under subsection (b)(1) to “ensure that the rates, terms, and conditions for pole attachments . . . are just and reasonable.”<sup>120</sup> Though it conceded that broadband Internet access over cable was not a “telecommunications service” under the Communications Act at large, the Commission expressed no opinion on whether such service fits the statute’s definition of “cable service.”<sup>121</sup>

A divided Eleventh Circuit panel held that the Commission lacked power to set rates for pole attachments used to provide broadband Internet access over cable. The Pole Attachment Act as amended in 1996, the court reasoned, “allows the Commission to regulate the rates [solely] for cable service and telecommunications service.”<sup>122</sup> “Internet service,” according to the court, “is neither.”<sup>123</sup> The court held that the “1996 Act calls for the Commission to establish two rates for pole attachments,” one for “any pole attachment used by a cable television system solely to provide cable service” and another for “charges for pole attachments used by telecommunications carriers to provide telecommunications services.”<sup>124</sup> “For the FCC to be able to regulate the rent for an attachment that provides Internet service,” the court reasoned, “Internet service must qualify as either a cable service or a telecommunications service.”<sup>125</sup>

This reading of the Pole Attachment Act committed the court to interpret the Communications Act’s definitions of cable service and telecommunications service. Quoting the definition of cable service in 47 U.S.C. § 522(6), the court observed that the 1996 amendments had added two words: “or use.”<sup>126</sup> To repeat: since 1996, cable service has been defined

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118. See *In re Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 F.C.C.R. 6777, 6794 (1998) (codified at 47 C.F.R. §§ 1.1401-.1418).

119. *Id.*

120. See *id.* (quoting 47 U.S.C. § 224(b)(1) (Supp. IV 1998)).

121. See *id.* at 6794-95.

122. *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1276 (11th Cir. 2000), *cert. granted*, 121 S. Ct. 879 (2001).

123. *Id.*

124. *Id.* (quoting 47 U.S.C. § 224(d)(3), (e)(1) (Supp. IV 1998)); see also *id.* at 1276 n.29 (“The straightforward language of subsections (d) and (e) directs the FCC to establish two specific just and reasonable rates, one for cable television systems providing solely cable service and one for telecommunications carriers providing telecommunications service; no other rates are authorized.”).

125. *Id.* at 1276.

126. *Id.* (quoting 47 U.S.C. § 522(6) (Supp. IV 1998)).

as “(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.”<sup>127</sup> The Eleventh Circuit also quoted what it understood to be “the only sentence in the legislative history that attempts to explain Congress’ change to the definition of ‘cable service.’”<sup>128</sup> Congress evidently included the words “or use” in order to “reflect[] the evolution of video programming toward interactive services.”<sup>129</sup> The court declined to read this “minor” addition of “two words” so as “to expand the scope of the ‘cable service’ definition from its traditional video base to include all interactive services, video and non-video.”<sup>130</sup> Instead, the court confined the new phrase, “or use,” to the task of “expand[ing] the definition” of cable service “to include services that cable television companies offer to their customers to allow them to interact with traditional programming.”<sup>131</sup>

The Eleventh Circuit dismissed any suggestion that cable broadband could be defined as a telecommunications service. Citing the FCC’s own pronouncements on the matter, the court concluded that “there is no statutory basis for the FCC to regulate the Internet as a telecommunications service.”<sup>132</sup> In passing, the court “note[d] that the FCC itself has defined the Internet as an information service, not as a cable service.”<sup>133</sup>

Dissenting from this aspect of the Eleventh Circuit’s decision, Judge Carnes argued that “the plain language” of the Pole Attachment Act “mandates the . . . conclusion” that the FCC does have “authority to regulate . . . Internet service providers.”<sup>134</sup> He quoted section 224(b)(1)’s direc-

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127. 47 U.S.C. § 522(6) (Supp. IV 1998).

128. *Gulf Power*, 208 F.3d at 1276.

129. *Id.* (quoting H.R. REP. NO. 104-204, at 97 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 64).

130. *Id.*

131. *Id.* at 1277.

132. *Id.* (citing *In re Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 F.C.C.R. 6777, 6795 (1998) (codified at 47 C.F.R. §§ 1.1401-1418) (“The Universal Service Order concluded that Internet service is not the provision of a telecommunications service under the 1996 Act.”); *In re Federal-State Joint Bd. on Universal Serv.*, 12 F.C.C.R. 87, 123-24 (1996) (“Internet service does not meet the statutory definition of a ‘telecommunications service.’”)).

133. *Id.* (citing *In re Federal-State Joint Bd. on Universal Serv.*, 13 F.C.C.R. 11,501, 11,533 (1998) (“Internet service providers themselves provide information services . . .”)).

134. *Id.* at 1280 (Carnes, J., concurring in part and dissenting in part). Judge Carnes agreed with the majority’s dismissal of the utility companies’ takings clause challenge. *See id.* at 1279-80.

tive that the FCC “shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable.”<sup>135</sup> He emphasized the breadth of the statute’s definition of “pole attachment”: “any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.”<sup>136</sup> According to Judge Carnes, these sections in concert “require[] the FCC to ensure just and reasonable rates for all pole attachments, including those used to provide Internet service.”<sup>137</sup>

On January 22, 2001, the Supreme Court granted certiorari.<sup>138</sup>

### III. THE PROPER CLASSIFICATION OF CABLE BROADBAND

#### A. The Clarifying Role of *Gulf Power*

Collectively, *Henrico*, *Portland*, and *Gulf Power* bode ill for coherence in the regulation of high-speed Internet access. *Henrico* did not cite the district court decision in *Portland I*. The two decisions managed to take opposing positions on the legality of state and local open access rules despite agreeing that cable broadband should be classified as a cable service. Although it also hinged on the statutory difference between cable and telecommunications service, *Gulf Power* similarly ignored the *Portland* litigation. Among other provisions, *Portland II* cited the Pole Attachment Act<sup>139</sup> but did not mention *Gulf Power*—which had been decided ten weeks earlier—even though pole attachment litigation had been raging in the Eleventh Circuit since 1998. The cable broadband trilogy of 2000 thus represents a legal battlefield “where ignorant armies clash by night.”<sup>140</sup>

Of these decisions, the one that appears least directly related to the issue of open access for cable broadband platforms might carry the greatest weight. In due course, *Gulf Power* may become the case that resolves questions of regulatory authority over open access in cable broadband. Neither *Portland*, *Henrico*, nor any other case directly presenting that issue is before the Supreme Court. *Gulf Power* is.

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135. *Id.* at 1279 (quoting 47 U.S.C. § 224(b)(1) (Supp. IV 1998)).

136. *Id.* (quoting 47 U.S.C. § 224(a)(4) (Supp. IV 1998)).

137. *Id.* at 1281.

138. *See* FCC v. *Gulf Power Co.*, 121 S. Ct. 879 (2001).

139. *See* AT&T Corp. v. *City of Portland*, 216 F.3d 871, 879 (9th Cir. 2000) (citing, *inter alia*, 47 U.S.C. § 224(d)(3) (Supp. IV 1998)).

140. MATTHEW ARNOLD, *Dover Beach*, in *DOVER BEACH* 9, 10 line 37 (Jonathan Middlebrook ed., 1970).

*Gulf Power's* potential impact on the cable broadband debate will fade with the Supreme Court's probable resolution of that controversy. The Eleventh Circuit grossly misinterpreted the Pole Attachment Act. That statute, shorn to its essentials, imposes a single duty on utility companies and grants a correlative power to the FCC. Every covered utility<sup>141</sup> "shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."<sup>142</sup> The Act directs the FCC broadly to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable."<sup>143</sup> "The term 'pole attachment,'" in turn, "means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility."<sup>144</sup>

Both the duty to grant access to utility poles and the power to regulate pole attachment rental rates speak in terms of "cable television system[s]." Under the Communications Act, "the term 'cable system' means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community."<sup>145</sup> All that matters is that the cable facility at issue be "designed to provide cable service which includes video programming."<sup>146</sup> The use of the verb "include" in the statutory definition suggests that a cable system may provide services in addition to "video programming." Consequently, the addition of a broadband Internet access platform neither strips a "cable television system" of its right to use utility poles nor limits the FCC's power to prescribe just and reasonable rates. A "system that distributes both video and non-video communications does not necessarily disqualify itself from being a cable television system."<sup>147</sup>

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141. See 47 U.S.C. § 224(a)(1) (Supp. IV 1998) ("The term 'utility' means any person who is a local exchange carrier or an electric, gas, water, steam or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications.").

142. *Id.* § 224(f)(1).

143. *Id.* § 224(b)(1).

144. *Id.* § 224(a)(4); see also *id.* § 224(a)(5) (excluding ILECs from the definition of "telecommunications carrier" for purposes of the Pole Attachment Act).

145. *Id.* § 522(7); see also *id.* § 153(8) (adopting the definition given in § 522(7)).

146. See *id.* § 522(7).

147. *Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925, 931 (D.C. Cir. 1993); see also *id.* at 933 (upholding the FCC's power to "regulate . . . any attachment by a cable operator so long as it [is] part of its cable television system").

The exceptions from the definition of a cable system offer no escape from this conclusion. The only plausibly applicable exception among the five named in section 522(7) would require the characterization of a cable system with a high-speed Internet access platform as “a common carrier which is subject, in whole or in part to the provisions of subchapter II.”<sup>148</sup> Since subchapter II regulates telecommunications carriers, achieving this legal feat would merely sweep the cable operator back within the coverage of the Pole Attachment Act insofar as the operator had become a “provider of telecommunications service.”<sup>149</sup>

As Judge Carnes indicated in his Eleventh Circuit dissent,<sup>150</sup> the *Gulf Power* majority misconstrued the significance of subsections (d)(3) and (e)(1) of the Pole Attachment Act. The Eleventh Circuit assumed that these subsections confined the FCC’s authority to pole attachments used for cable service or telecommunications service, but not other purposes. A closer look at statutory language and structure reveals that these provisions channel the FCC’s implementation of the Pole Attachment Act after its 1996 amendments, but they do not otherwise circumscribe the Commission’s jurisdiction according to hermetically sealed compartments for “telecommunications service” and for “cable service.”

Subsection (d)(1), embedded in the statute before its 1996 amendments, clarifies the meaning of “just and reasonable” rates by placing a floor beneath and a ceiling above the FCC’s ratemaking discretion:

[A] rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space . . . which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs . . . attributable to the entire pole, duct, conduit, or right-of-way.<sup>151</sup>

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148. 47 U.S.C. § 522(7)(C) (Supp. IV 1998). This provision also excludes from the definition of cable system

(A) a facility that serves only to retransmit the television signals of . . . television broadcast stations; (B) a facility that serves subscribers without using any public right-of-way; . . . (D) an open video system . . . ; or (E) any facilities of any electric utility used solely for operating its electric utility system.

*Id.* § 522(7).

149. *Id.* § 224(a)(4).

150. *See Gulf Power Co. v. FCC*, 208 F.3d 1263, 1280-81 (11th Cir. 2000) (Carnes, J., concurring in part and dissenting in part), *cert. granted*, 121 S. Ct. 879 (2001).

151. 47 U.S.C. § 224(d)(1) (Supp. IV 1998).

Subsections (d)(3) and (e)(1) reconcile this preexisting limitation on the Commission's ratemaking power with the expansion of the Act in 1996 to cover pole attachments used for telecommunications services. Subsection (e)(1) directs the Commission, "no later than 2 years after February 8, 1996, [to] prescribe [new] regulations . . . to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services."<sup>152</sup> Subsection (d)(3) specifies that the traditional floor-and-ceiling approach to just and reasonable rates "shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service."<sup>153</sup> It further provides that until the FCC's new regulations on pole attachments used for telecommunications service take effect, the traditional approach "shall . . . apply to . . . any pole attachment used by a cable system or any telecommunications carrier . . . to provide any telecommunications service."<sup>154</sup>

Narrower in scope than the general ratemaking mandate stated in subsection (b)(1), subsections (d)(3) and (e)(1) do no more than channel the Commission's discretion in developing a new ratemaking formula for pole attachments used in telecommunications. Contrary to the Eleventh Circuit's holding, these new subsections do not define the FCC's jurisdiction under the Pole Attachment Act strictly according to the Communications Act's definitions of "cable service" and "telecommunications service."

The relevant legislative history does not contradict the plain meaning of the 1996 amendments to the Pole Attachment Act. The FCC interpreted the pre-1996 version of the Pole Attachment Act to confer ratemaking authority over all pole attachments by cable systems, without regard to the type of service transmitted over such attachments.<sup>155</sup> In the *Texas Utilities* litigation, the Fifth Circuit upheld this interpretation of the Act.<sup>156</sup> Cable operators' entry into new lines of business created a regulatory imbalance. In amending the Pole Attachment Act, the Senate "intended to remedy the anomaly of [previous] law, under which cable systems providing telecommunications [were] able to obtain a regulated pole attachment rate . . . , while other providers of telecommunications services" were forced to pay unregulated market rates.<sup>157</sup> The House likewise decried "the inequity

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152. *Id.* § 224(e)(1).

153. *Id.* § 224(d)(3).

154. *Id.*

155. See *Heritage Cablevision Assocs. of Dallas, L.P.*, 6 F.C.C.R. 7099, 7100-01 (1991), *reconsideration dismissed*, 7 F.C.C.R. 4192 (1992).

156. See *Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925, 933 (D.C. Cir. 1993).

157. S. REP. NO. 103-367, at 65 (1994).

for pole attachments among providers of telecommunications services.”<sup>158</sup> But the 1996 amendments addressed the imbalance in the pole attachment market by “*expand[ing]* the definition of a ‘pole attachment’ to include attachments by all providers of telecommunications services.”<sup>159</sup> It would be truly anomalous for this amendment and its supporting provisions to restrict the FCC’s previously asserted power to set rates for cable operators’ pole attachments. Silent on *Texas Utilities*, but emphatic on extending the ratemaking reach of the FCC, the legislative history evinces no such intent.

In short, the Supreme Court can, should, and probably will reverse the Eleventh Circuit without having to decide whether the cable broadband is a cable service, telecommunications service, or neither. The Commission interpreted the Pole Attachment Act to permit regulation of the terms, conditions, and rates governing pole attachments used for cable broadband service. Of their own force, the statute’s references to “cable television system[s]” support this reading, and the legislative history favors an expansive rather than restrictive reading of the 1996 amendments. Any remaining ambiguity will be resolved in the agency’s favor.<sup>160</sup> *Gulf Power’s* significance in the open access debate lies in its conclusion that cable broadband cannot be classified as either a cable service or a telecommunications service. Although a proper interpretation of the Pole Attachment Act would have obviated the need to resolve the proper statutory classification of broadband Internet access over cable, the Eleventh Circuit correctly defined this activity as an information service once it reached the issue.

## B. Laying the “Cable” Interpretation to Rest

From *Gulf Power’s* incidentally correct legal conclusion, it follows that *Henrico* and both decisions in *Portland* erred. Little if any value can be salvaged from *Henrico*. In particular, that court’s decision to equate the adoption of an open access rule with the imposition of common carrier

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158. H.R. REP. NO. 104-204, at 92 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 58; H.R. CONF. REP. NO. 104-458, at 206 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 220; S. REP. NO. 104-230, at 206 (1996).

159. H.R. REP. NO. 104-204, at 92 (1996) (emphasis added), *reprinted in* 1996 U.S.C.C.A.N. 10, 58; H.R. CONF. REP. NO. 104-458, at 206 (1996) (emphasis added), *reprinted in* 1996 U.S.C.C.A.N. 124, 220; S. REP. NO. 104-230, at 206 (1996) (emphasis added).

160. *See Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Texas Utils.*, 997 F.2d at 930.

status is a double-barreled, devastating error.<sup>161</sup> *Henrico* not only mischaracterized cable broadband as a cable service but also misconstrued the nature of common carrier regulation. This twofold mistake is devastating insofar as it would transform 47 U.S.C. § 541(e)'s flat command—that no cable system “be subject to regulation as a common carrier or utility by reason of providing any cable service”—into an absolute prohibition against open access requirements at any level, federal, state, or local.<sup>162</sup>

*Portland II*, by contrast, is at least three-quarters correct. Although the Ninth Circuit fell short in its valiant effort to distinguish the “content” and “conduit” components of the product delivered by ISPs, the court of appeals decisively eliminated the possibility of treating cable broadband as a cable service. Much wisdom lies in the Ninth Circuit's observation that “[t]he essence of cable service . . . is one-way transmission of programming to subscribers generally.”<sup>163</sup> Both of the elements in this succinct formula—one-way transmission from the cable headend and the delivery of programming to subscribers as a general class—are “[c]ritical” to the definition of cable service.<sup>164</sup>

The Communications Act, we should recall, defines cable service as “(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.”<sup>165</sup> According to the Act, “the term ‘video programming’ means programming provided by, or generally comparable to programming provided by, a television broadcast station.”<sup>166</sup> Rather ironically, the type of Internet-based information that most closely resembles video programming is streaming video—the very sort of Internet-based information that most cable-based ISPs prohibit their subscribers from receiving. The term “other programming service” covers “information that a cable operator makes available to all subscribers generally.”<sup>167</sup> The definition of “cable system” similarly distinguishes between “the transmission of video programming directly to subscribers,” which is regulated as a cable service, and the provision of “interactive on-demand

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161. See *MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712, 715 (E.D. Va. 2000).

162. 47 U.S.C. § 541(c) (Supp. IV 1998).

163. *AT&T Corp. v. City of Portland*, 216 F.3d 871, 876 (9th Cir. 2000).

164. Esbin, *supra* note 26, at 88.

165. 47 U.S.C. § 522(6) (Supp. IV 1998); see also *id.* § 153(7) (adopting the definition given in § 522(6)).

166. *Id.* § 522(20).

167. *Id.* § 522(14).

services,” which is not.<sup>168</sup> As far back as 1984, Congress recognized that “unlimited keyword searches of information stored in databases”—a strikingly prescient description of Internet surfing—“goes beyond providing information retrieval and becomes a variety of data processing” outside the definition of “other programming service.”<sup>169</sup>

The Telecommunications Act of 1996 added “or use” to the definition of cable service in section 522(6).<sup>170</sup> This legislative change has acquired talismanic significance out of proportion to its true meaning. AT&T relied on the phrase “or use” to undermine the FCC’s power to impose open access rules during the AT&T/TCI merger proceedings.<sup>171</sup> That strategy backfired when the district court opinion in *Portland I* used this amendment to define cable broadband as a cable service within the franchising jurisdiction of state and local governments.<sup>172</sup>

Congress evidently intended the addition of the words “or use” to “reflect[] the evolution of video programming toward interactive services.”<sup>173</sup> According to the conference report accompanying the 1996 Act, this amendment was 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.”<sup>174</sup> Even one commentator favoring the classification of cable broadband as a cable service concedes that “the text” of section 522(6) “arguably does not support the result the conferees intended.”<sup>175</sup> Congress failed to “delete the phrase ‘one-way transmission’ from the definition of cable services.”<sup>176</sup> Though the phrase “one-way transmission” does not

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168. *Id.* § 522(7)(C).

169. H.R. REP. NO. 98-934, at 43 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4680; *accord* Duffy, *supra* note 54, at 1271 (deriving further evidence against the classification of Internet access as cable service from the legislative history of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended in scattered sections of 47 U.S.C.)).

170. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 301(a)(1), 110 Stat. 56, 114.

171. *See In re Tele-Communications, Inc. & AT&T Corp.*, 14 F.C.C.R. 3160, 3200 (1999).

172. *See AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146, 1153 (D. Or. 1999), *rev'd*, 216 F.3d 871 (9th Cir. 2000).

173. H.R. REP. NO. 104-204, at 97 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 64.

174. H.R. CONF. REP. NO. 104-458, at 169 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 182.

175. Speta, *supra* note 18, at 73; *cf. id.* at 74 (“I think that [cable broadband] services are ‘cable services’ . . .”).

176. Antonia M. Apps & Thomas M. Dailey, *Non-Regulation of Advanced Internet Services*, 8 GEO. MASON L. REV. 681, 690 (2000).

directly govern subsection (B), the term “subscriber interaction” is defined by reference to “video programming” and “other programming services.” Both of these terms appear after subsection (A)’s reference to “one-way transmission” and are therefore controlled by that phrase. *Gulf Power* correctly declined to interpret the addition of the words “or use” as “expand[ing] the scope of the ‘cable service’ definition from its traditional video base to include all interactive services, video and non-video.”<sup>177</sup>

A deeper look at the legislative background reveals what Congress really intended. The conference report’s reference to “game channels” is clear enough; cable operators had already begun to offer video game services “for a flat monthly fee, much like premium cable channels such as HBO and Showtime.”<sup>178</sup> The more cryptic reference to “interactive services” must be understood in context. While Congress debated the 1996 Act, the cable industry was working to develop an interactive television technology primarily designed to enable viewers to order merchandise while watching television.<sup>179</sup> Interactive television, though frequently mocked, may yet become technologically feasible and commercially viable. If it does, conventional cable operators may well dominate the market.<sup>180</sup>

Perhaps the 1996 conference report came closer to the mark than anyone imagined when it stated that the addition of the words “or use” to section 522(6) was “not intended . . . to cause dial-up access to information services over telephone lines to be classified as a cable service.”<sup>181</sup> Whether accessed over narrowband phone lines or any sort of broadband connection, Internet-based communication is two-way and subscriber-specific. Those are the very characteristics that disqualify it from being classified as a cable service.<sup>182</sup> In other words, “classifying cable-delivered Internet service as cable service is like forcing a square peg into a round hole: It just does not fit.”<sup>183</sup>

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177. *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1266-67 (11th Cir. 2000), cert. granted, 121 S. Ct. 879 (2001); accord Apps & Dailey, *supra* note 176, at 690 n.50.

178. Jason Whiteley, Note, *AT&T Corp. v. Portland: Classifying “Internet over Cable” in the “Open Access” Fight*, 2000 BYU L. REV. 451, 465-66.

179. *See id.* at 465.

180. *See In re Nondiscrimination in the Distribution of Interactive Television Services over Cable*, No. 01-15, 2001 F.C.C. LEXIS 1155 (Jan. 18, 2001).

181. H.R. CONF. REP. NO. 104-458, at 169 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 182.

182. H.R. REP. NO. 98-934, at 43 (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4679; accord Apps & Dailey, *supra* note 176, at 690 & n.49.

183. Duffy, *supra* note 54, at 1269.

Eliminating “cable service” as the proper statutory classification of cable broadband bars state and local authorities from demanding open access. Clarifying this legal issue prevents state and local governments from mandating open access not only under their general power to franchise cable operators,<sup>184</sup> but also under their federally guaranteed power to “prohibit[] the 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 in the delivery of cable service in such jurisdiction.”<sup>185</sup> Although some commentators believe that this provision could authorize open access requirements at the local level,<sup>186</sup> the power to regulate in anticipation of “eliminate[d] or reduce[d] competition” withers away once we recognize that cable broadband is not a cable service.<sup>187</sup>

The vitality of *Portland II* depends on a different proposition—that cable broadband is a telecommunications service. I now turn to the task of refuting that argument.

### C. An Informative Look at Telecommunications Service

“[T]he Internet is not simply a means of communication, but a conduit for transporting digitized information goods such as software, data, music, graphics, and videos. . . .”<sup>188</sup> We are now entering a transition from a market in which “most Internet service providers . . . do not provide either the local transport for their data . . . or the long-distance backbone transportation” to a market in which a single firm provides both the conduit connecting users with the Internet and the content they see when they arrive.<sup>189</sup> The economically significant boundary between conduit and content separates the twin cash registers of a cable-based ISP.<sup>190</sup> *Portland II* relied on the difference between content and conduit when it distinguished between “Internet service” and the “pipeline” through which such service is con-

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184. 47 U.S.C. § 541(b)(1) (Supp. IV 1998) (“a cable operator may not provide cable service without a franchise”); *cf. id.* § 544(a) (“Any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this subchapter.”).

185. *Id.* § 533(d)(2).

186. See Marcus Maher, Comment, *Cable Internet Unbundling: Local Leadership in the Deployment High Speed Access [sic]*, 52 FED. COMM. L.J. 211, 235-36 (1999); Rider, *supra* note 43, at 406-09.

187. See Whiteley, *supra* note 178, at 482.

188. Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095, 1125-26 (1996).

189. Apps & Dailey, *supra* note 176, at 688.

190. See Rubinfeld & Singer, *supra* note 6, at 600.

veyed.<sup>191</sup> The Ninth Circuit gave this distinction legal significance by classifying the provision of content as “information service” while treating “Internet transmission over [a] cable broadband facility” as “a telecommunications service.”<sup>192</sup>

This facile distinction would open the door to full-blown FCC regulation of cable broadband, including the imposition of common carrier regulation.<sup>193</sup> This argument’s awesome breadth explains why the Ninth Circuit invited the FCC to consider the use of its forbearance authority<sup>194</sup> and why the Commission has solicited comments on the use of this power.<sup>195</sup> Of course, the FCC can invoke its forbearance authority only insofar as the Communications Act or the Commission’s implementing regulations apply “to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services.”<sup>196</sup>

Only two things foreclose the Ninth Circuit’s conclusion that the provision of access to the Internet over a cable platform is a telecommunications service. One of them is the Communications Act. The other is the FCC’s application of that statute to ISPs.

The Communications Act defines “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing.”<sup>197</sup> The term “does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”<sup>198</sup> Not once, not twice, but three times the statute takes pains to distinguish information services from telecommunications.

By contrast, “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.”<sup>199</sup> “The term ‘telecommunications service’ means the offering of telecommunications for a fee directly to the public . . . regardless of

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191. AT&T Corp. v. City of Portland, 216 F.3d 871, 878 (9th Cir. 2000).

192. *Id.*

193. *See id.* at 879.

194. *See id.* at 879-80 (citing 47 U.S.C. § 160(a) (Supp. IV 1998)).

195. *See In re Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 15 F.C.C.R. 19,287, 19,307-08 (2000).

196. 47 U.S.C. § 160(a) (Supp. IV 1998).

197. *Id.* § 153(20).

198. *Id.*

199. *Id.* § 153(43).

the facilities used.”<sup>200</sup> Although “any provider of telecommunications services” is a “telecommunications carrier,” a “telecommunications carrier shall be treated as a common carrier . . . only to the extent that it is engaged in providing telecommunications services.”<sup>201</sup>

The boundary between information and telecommunications service predates the Telecommunications Act of 1996. The Bell breakup decree restricted the newly divested BOCs from providing “information services,” which were defined as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications.”<sup>202</sup> The decree confined the BOCs primarily to the business of “providing telephone service among parties within each local exchange and granting access to the exchanges to [independent] long-distance carriers.”<sup>203</sup> The BOCs eventually secured a waiver of the information services restriction.<sup>204</sup> Though there never was more than an “amorphous risk that the Bell companies, in their zeal to diversify, will neglect relatively pedestrian . . . operations” in favor of “more glamorous, albeit more speculative, business[es],”<sup>205</sup> the information services restriction was the only line-of-business provision of the Bell breakup decree that Judge Harold Greene relaxed during his twelve-year tenure as the de facto chief commissioner of American telecommunications.<sup>206</sup>

The Bell breakup decree’s category of information services “substantially overlap[ped], but [was] not identical to, the FCC’s [definition of] ‘enhanced services.’”<sup>207</sup> That category consisted of “services . . . which

200. *Id.* § 153(46).

201. *Id.* § 153(44).

202. *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 229 (D.D.C. 1982), *aff’d mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983), *terminated by Telecommunications Act of 1996*, Pub. L. No. 104-104, § 601(a)(1), 110 Stat. 56, 143-44, *reprinted in* 47 U.S.C. § 152 note (Supp. IV 1998); *see also United States v. W. Elec. Co.*, 569 F. Supp. 1057 (D.D.C.), *aff’d mem. sub nom. California v. United States*, 464 U.S. 1013 (1983).

203. *Illinois Bell Tel. Co. v. FCC*, 988 F.2d 1254, 1257 (D.C. Cir. 1993).

204. *See United States v. W. Elec. Co.*, 993 F.2d 1572 (D.C. Cir.), *cert. denied*, 510 U.S. 984 (1993).

205. *United States v. W. Elec. Co.*, 673 F. Supp. 525, 599 (D.D.C. 1987), *aff’d in part, rev’d in part*, 900 F.2d 283 (D.C. Cir.), *cert. denied*, 498 U.S. 911 (1990).

206. *See generally* Joseph D. Kearney, *From the Fall of the Bell System to the Telecommunications Act: Regulation of Telecommunications Under Judge Greene*, 50 HASTINGS L.J. 1395 (1999) (tracing the history and the enduring legal significance of the Bell breakup decree); Glen O. Robinson, *The Titanic Remembered: AT&T and the Changing World of Telecommunications*, 5 YALE J. ON REG. 517 (1988).

207. *California v. FCC*, 905 F.2d 1217, 1226 & n.13 (9th Cir. 1990).

employ computer processing applications [that] . . . act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the subscriber additional, different or restructured information, or involve subscriber interaction with stored information."<sup>208</sup> The distinction between "basic" and "enhanced" helped the FCC patrol the boundary between "regulated common carrier communications services, which consist largely of plain old telephone service ("POTS"), and unregulated data processing services which use the telephone network to convey information from remote computers to customers' terminals."<sup>209</sup>

The 1996 amendments transformed the administrative category of "enhanced service" into the legislative category of "information service."<sup>210</sup> Today's ISPs are but a subclass of the "enhanced service providers" that "offer[ed] data processing services," often by "linking customers and computers via the telephone network."<sup>211</sup> Time and again, the FCC has placed Internet access on the "information" side of the divide, not the "telecommunications" side. For example, in a report on universal service, the Commission stated that "Internet access services are appropriately classified as information, rather than telecommunications, services," because "Internet access providers do not offer a pure transmission path; they combine computer processing, information provision, and other computer-mediated offerings with data transportation."<sup>212</sup> Just as consistently as it has declined to adopt open access rules for cable broadband, the Commission has declared that Internet access cannot be defined as a telecommunications service,<sup>213</sup> much less regulated as common carriage.<sup>214</sup>

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208. *In re* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384, 387 (1980) (codified at 47 C.F.R. § 64.702(a)).

209. *California v. FCC*, 905 F.2d at 1223 n.3. For subsequent developments in the FCC's struggle to tame "enhanced" services, see *California v. FCC*, 4 F.3d 1505 (9th Cir. 1993); *California v. FCC*, 39 F.3d 919 (9th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995); *California v. FCC*, 75 F.3d 1350 (9th Cir. 1996). On the difference between POTS and PANS ("pretty amazing new services"), see HENK BRANDS & EVAN T. LEO, *THE LAW AND REGULATION OF TELECOMMUNICATIONS CARRIERS* 703 (1999).

210. See *In re* Federal-State Joint Bd. on Universal Serv., 13 F.C.C.R. 11,501, 11,520 (1998); *Inter-Carrier Compensation for ISP-Bound Traffic*, 14 F.C.C.R. 3689, 3689 n.1 (1999), *vacated on different grounds*, *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

211. *Bell Atlantic*, 206 F.3d at 7; see also *MCI Telecomms. Corp. v. FCC*, 57 F.3d 1136, 1138 (D.C. Cir. 1995) (identifying ISPs as a subclass of the older category of enhanced service providers).

212. *In re* Federal-State Joint Bd. on Universal Serv., 13 F.C.C.R. at 11,536.

213. See, e.g., *In re* Implementation of Section 703(e) of the Telecommunications Act of 1996, 13 F.C.C.R. 6777, 6795 (1998); *In re* Access Charge Reform, 12 F.C.C.R.

Basic service, or “pure transmission over a communications path,”<sup>215</sup> eventually became “telecommunications service” under the Telecommunications Act of 1996.<sup>216</sup> This category cannot overlap with the definition of “information service.” The 1996 Act, after all, defines telecommunications as “the transmission . . . of information . . . *without change* in [its] form or content.”<sup>217</sup> No ISP can meet this stringent statutory test. Even the least intrusive of ISPs supplies some modest measure of information caching, if only to overcome limitations on available bandwidth.<sup>218</sup> Indeed, every deviation from strict end-to-end transmission moves an ISP away from the statutory definition of telecommunications and toward the definition of information service. “[I]f the user can receive nothing more than pure transmission, the service is telecommunications service. If the user can receive enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service.”<sup>219</sup>

Function, not form, dictates the statutory classification of Internet access; the “nature of the service” and not the technological basis for delivery is the central inquiry.<sup>220</sup> The exception proves the rule: in some rare instances, Internet services are in fact telecommunications. Internet telephony is the paradigmatic example of a telecommunications service provided through the Internet.<sup>221</sup>

Finally, excluding cable broadband from the definition of telecommunications service clarifies the meaning of 47 U.S.C. § 541(b)(3). Despite disagreeing on the statutory classification of cable broadband, *Henrico* and

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15,982, 16,131 n.498 (1997); *In re* Federal-State Joint Bd. on Universal Serv., 12 F.C.C.R. 87, 123-24 (1996); *In re* Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, 11 F.C.C.R. 21,905, 21,955-56 (1996). See generally Esbin, *supra* note 26, at 40.

214. See *Howard v. Am. Online, Inc.*, 208 F.3d 741, 752 (9th Cir. 2000).

215. *In re* Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d at 420.

216. See Apps & Dailey, *supra* note 176, at 687.

217. 47 U.S.C. § 153(43) (Supp. IV 1998) (emphasis added).

218. See I. Trotter Hardy, *Computer RAM “Copies”: Hit or Myth? Historical Perspectives on Caching as a Microcosm of Current Copyright Concerns*, 22 U. DAYTON L. REV. 423, 436 (1997).

219. *In re* Federal-State Joint Bd. on Universal Serv., 13 F.C.C.R. 11,501, 11,530 (1998).

220. *Id.*

221. *Id.* at 11,544. See generally Robert M. Frieden, *Dialing for Dollars: Should the FCC Regulate Internet Telephony?*, 23 RUTGERS COMPUTERS & TECH. L.J. 47 (1997); Seth A. Cohen, Note & Comment, *Deregulating, Defragmenting and Interconnecting: Reconsidering Commercial Telecommunications Regulation in Relation to Internet Telephony*, 18 J.L. & COM. 133 (1998).

*Portland II* both relied on this section to preempt a local open access rule. *Portland II* stressed the statutory guarantee that “a cable operator [that] . . . is engaged in the provision of telecommunications services . . . shall not be required to obtain a franchise.”<sup>222</sup> *Henrico* emphasized that “a franchising authority may not require a cable operator to provide any telecommunications service or facilities . . . as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise.”<sup>223</sup>

Congress, however, scarcely imagined that section 541(b)(3) would apply in a circumstance resembling cable broadband. The legislative history of the Telecommunications Act of 1996 suggests that Congress meant to facilitate cable operators’ entry into the market for local telephone carriage.<sup>224</sup> Throughout its deliberations, Congress consistently envisioned cable operators as “meaningful facilities-based competition” for local telephone companies.<sup>225</sup> No other set of assumptions can explain why Congress worked so diligently to restrict the cross-ownership of cable operators and local exchange carriers<sup>226</sup> by erecting “one of the strongest forms of structural separation in the entire 1996 Act.”<sup>227</sup>

Internet access over cable facilities is neither cable service nor telecommunications service under the Communications Act of 1934. Of the statutory definitions made available by the Telecommunications Act of 1996, information service seems to provide the best fit. The sole remaining statutory question involves the authority *vel non* of the FCC to regulate an activity that is neither cable service nor telecommunications service.

#### D. Toward Sui Generis Classification—and FCC Authority

The amount of attention devoted to the statutory definitions of cable, telecommunications, and information services has obscured the hidden wealth of the Communications Act. Contrary to the impression that this Article has conveyed so far, federal communications law is studded with

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222. 47 U.S.C. § 541(b)(3)(A)(i) (Supp. IV 1998); see *AT&T Corp. v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000).

223. 47 U.S.C. § 541(b)(3)(D) (Supp. IV 1998); see *MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712, 714 (E.D. Va. 2000).

224. See H.R. REP. NO. 104-204, at 93 (1996), reprinted in 1996 U.S.C.C.A.N. 10, 60; Whiteley, *supra* note 178, at 479-80.

225. H.R. CONF. REP. 104-458, at 148 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 160; accord Jim Chen, *Titanic Telecommunications*, 25 SW. U. L. REV. 535, 561-62 (1996).

226. See 47 U.S.C. § 572 (Supp. IV 1998). See generally Michael Botein, *Cable/Telco Mergers and Acquisitions: An Antitrust Analysis*, 25 SW. U. L. REV. 569 (1996).

227. Chen, *supra* note 20, at 1523.

definitions that fit ISPs—narrowband and broadband—far more appropriately than the definitions of cable, telecommunications, and information services. In its effort to provide a safe harbor for the blocking and screening of offensive materials, the Communications Decency Act defines an interactive computer service as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet.”<sup>228</sup> Several courts have defined America Online as an interactive computer service,<sup>229</sup> one has gone so far as to hold that this classification and common carriage are mutually exclusive.<sup>230</sup> The Child Online Protection Act of 1998 defines the “term ‘Internet access service’ [as] a service that enables users to access content, information, electronic mail, or other services over the Internet,” including “access to proprietary content, information, and . . . services.”<sup>231</sup> Notably, “[s]uch term does not include telecommunications services.”<sup>232</sup> The Internet Tax Freedom Act of 1998 adopts an almost identical definition of Internet access service.<sup>233</sup>

None of these definitions, however, unequivocally authorizes the FCC to issue open access rules in all branches of the market for broadband Internet services. In the quest for such a grant of jurisdiction, commentators have focused on two potential sources of law.<sup>234</sup> First, section 706 of the Telecommunications Act of 1996 instructs the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” through “price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulatory methods that remove

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228. 47 U.S.C. § 230(f)(2) (Supp. IV 1998).

229. See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 n. 2 (4th Cir. 1997); *Blumenthal v. Drudge*, 992 F. Supp. 44, 49-50 (D.D.C. 1998). See generally David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147 (1997).

230. See *Am. Online, Inc. v. Greatdeals.net*, 49 F. Supp. 2d 851, 855-56 (E.D. Va. 1999).

231. 47 U.S.C. § 231(e)(4) (Supp. IV 1998), *enjoined*, *ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000).

232. *Id.*

233. See Pub. L. No. 105-277, Div. C, Title XI, § 1101(e)(3)(D), 112 Stat. 2681, 2681-719 (1998) (codified as a note to 47 U.S.C. § 151 (Supp. IV 1998)).

234. See Steven A. Augustino, *The Cable Open Access Debate: The Case for a Wholesale Market*, 8 GEO. MASON L. REV. 653, 675-77 (2000); Esbin, *supra* note 26, at 99, 117 n.77; Duffy, *supra* note 54, at 1267-68, 1275; Whiteley, *supra* note 178, at 483-88.

barriers to infrastructure investment.”<sup>235</sup> For purposes of section 706, the “term ‘advanced telecommunications capability’” means, “without regard to any transmission media or technology . . . high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications.”<sup>236</sup> Any authority granted to the FCC under section 706, however, is concurrently awarded authority to “[s]tate commission[s] with regulatory jurisdiction over telecommunications services.”<sup>237</sup> This provision may therefore lack the preemptive effect of other means for asserting FCC jurisdiction.<sup>238</sup>

The definition of advanced telecommunications capability readily embraces broadband access to the Internet over cable. What is less clear is whether an open access rule would fall within any of the four prongs of jurisdiction granted under section 706. Open access bears no resemblance to “price cap regulation.” Moreover, affirmatively requiring the operator of a cable broadband platform to deal with unaffiliated ISPs would be the antithesis of “regulatory forbearance.”

The full weight of this statutory claim therefore falls upon the third and fourth prongs of section 706. Open access most comfortably fits within section 706’s authorization of “measures that promote competition in the local telecommunications market.” Some difficulty arises from the language of the fourth prong: “other regulatory methods that remove barriers to infrastructure investment.” One could plausibly argue that *all* measures authorized by section 706 must “remove barriers to infrastructure investment.” The Supreme Court has occasionally endorsed such an “across-the-board” reading of a condition following the last item in a series. In *United States v. Bass*,<sup>239</sup> for example, the Court confronted a statute that punished “[a]ny person who . . . receives, possesses, or transports in commerce or affecting commerce [any] firearm.”<sup>240</sup> The *Bass* majority construed “the phrase ‘in commerce or affecting commerce’” to be an element “of all three offenses.”<sup>241</sup> It seems silly, however, to subject price cap regulation to a requirement that it “remove barriers to infrastructure

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235. Telecommunications Act of 1996, Pub. L. No. 104-104, § 706(a), 110 Stat. 56, 153 (codified as a note to 47 U.S.C. § 157 (Supp. IV 1998)).

236. *Id.* § 706(c).

237. *Id.* § 706(a).

238. See Whiteley, *supra* note 178, at 488; cf. Maher, *supra* note 186, at 236-37 (arguing that section 706 should sustain state and local power to impose open access requirements).

239. 404 U.S. 336 (1971).

240. 18 U.S.C. § 1202(a) (1994).

241. 404 U.S. at 347.

investment.” At best the condition is redundant; courts and regulators routinely praise price caps for their ability to reduce the law’s tendency to distort the investment incentives of regulated firms.<sup>242</sup> Moreover, even if such a requirement governed all four jurisdictional prongs of section 706, an open access rule would arguably satisfy it. The entire debate focuses on the impact of open access or its absence on private incentives to invest in broadband infrastructure. The requirement of “remov[ing] barriers to infrastructure investment” should therefore be confined to the fourth and final item in section 706. The last antecedent rule prevails in the request, “I would like to have a cat, a dog, or a cow that jumps over the moon.”<sup>243</sup> That rule of construction should also govern section 706.

In addition to section 706, the FCC may issue an open access rule for cable broadband platforms under any of several general grants of rulemaking power. The Communications Act embraces “all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio.”<sup>244</sup> The FCC correspondingly enjoys “a comprehensive mandate . . . [with] not niggardly but expansive powers.”<sup>245</sup> Under 47 U.S.C. § 154(i), the “Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the Communications Act], as may be necessary in the execution of its functions.”<sup>246</sup> Section 201(b), at the head of the Act’s subchapter on common carriers, declares that the “Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.”<sup>247</sup> The Supreme Court “think[s] that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the ‘provisions of this Act . . . .’”<sup>248</sup> Finally, 47 U.S.C. § 303(r) gives the Commission power to “[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter.”<sup>249</sup> In unison, these provisions authorize the Commission to issue regulations “reasona-

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242. See, e.g., *Nat’l Rural Telecom Ass’n v. FCC*, 988 F.2d 174, 178 (D.C. Cir. 1993).

243. *Bass*, 404 U.S. at 352 (Blackmun, J., dissenting).

244. 47 U.S.C. § 152(a) (Supp. IV 1998).

245. *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 219 (1943); accord *United States v. Southwestern Cable Co.*, 392 U.S. 157, 173 (1968).

246. 47 U.S.C. § 154(i) (Supp. IV 1998).

247. *Id.* § 201(b).

248. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999).

249. 47 U.S.C. § 303(r) (Supp. IV 1998).

bly ancillary to the effective performance of [its] various responsibilities.”<sup>250</sup>

#### IV. CHANGES IN ATTITUDE, CHANGES IN LATITUDE

Before comprehensive reform of communications law in 1996, touting the convergence of “telecommunications technologies and media” was the field’s favorite “trivial ritual.”<sup>251</sup> Developments since 1996 have added an equally popular, equally empty gesture: trashing the Telecommunications Act. “It would be gross understatement,” the Supreme Court itself has complained, “to say that the Telecommunications Act of 1996 is not a model of clarity.”<sup>252</sup> “[F]or a piece of legislation that profoundly affects a crucial segment of the economy worth tens of billions of dollars,” the Telecommunications Act is allegedly “in many important respects a model of ambiguity or indeed self-contradiction.”<sup>253</sup> On the question of open access for cable broadband platforms, however, the Act speaks clearly enough. The FCC has the power to demand open access in all segments of the market for broadband Internet services.

The FCC should equalize the regulatory treatment of DSL and cable broadband. There is no need to prove that the regulatory treatment of the leading methods of high-speed Internet access is as conspicuously uneven as the asymmetrical regulation at issue in *FCC v. Beach Communications, Inc.*<sup>254</sup> In that case the failure to subject a satellite master antenna television system to cable franchising requirements sparked a minor constitu-

250. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

251. Thomas G. Krattenmaker & L.A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719, 1719 (1995).

252. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999); *accord* *MCI Telecomms. Corp. v. U.S. West Communications*, 204 F.3d 1262, 1266 (9th Cir. 2000); *Pacific Bell v. Cook Telecom, Inc.*, 197 F.3d 1236, 1244 n.3 (9th Cir. 1999); *Puerto Rico Tel. Co. v. Telecomms. Regulatory Bd.*, 189 F.3d 1, 19 (1st Cir. 1999); *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 641 (2d Cir. 1999); *Michigan Bell Tel. Co. v. MCI Metro Access Transmission Servs., Inc.*, 128 F. Supp. 2d 1043, 1050 (E.D. Mich. 2001); *AT&T Communications of the Southwest, Inc. v. Southwestern Bell Tel Co.*, 86 F. Supp. 2d 932, 939 (W.D. Mo. 1999), *rev'd in part and vacated in part sub nom.* *Southwestern Bell Tel. Co. v. Missouri Pub. Serv. Comm'n*, 236 F.3d 922 (8th Cir. 2001).

253. *Iowa Utils. Bd.*, 525 U.S. at 397; *accord, e.g.*, *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 449 (5th Cir. 1999); *Bell Atlantic-Pa., Inc. v. Pennsylvania Pub. Util. Comm'n*, 107 F. Supp. 2d 653, 655 (E.D. Pa. 2000); *see also* *Aegerter v. Delafield*, 174 F.3d 886, 887 (7th Cir. 1999) (describing the Act as the ambiguous product of a “complex balancing act among many conflicting” interests); *BellSouth Telecomms., Inc. v. MCI Metro Access Transmission Servs., Inc.*, 97 F. Supp. 2d 1363, 1368 (N.D. Ga. 2000) (describing the Act as a “quagmire”).

254. 508 U.S. 307 (1993).

tional crisis until the Supreme Court restored order to the D.C. Circuit's analysis of equal protection claims. Rather, bolstered by the "intuitive appeal" of equalizing the regulatory status of cable and DSL as the leading modes of broadband Internet access,<sup>255</sup> the FCC can require open access to cable-based Internet platforms on the strength of multiple rulemaking mandates.

Open access matters, not only as a matter of static equity, but also as a matter of innovation and dynamic economic development.<sup>256</sup> "An architecture that maximizes the opportunity for innovation maximizes innovation."<sup>257</sup> Reluctant to seize the regulatory initiative over cable broadband, the FCC has argued that its policy of "unregulation" has fostered much of the growth and innovation attributable to the Internet.<sup>258</sup> This assertion has no basis in fact. "Policy intervention, not 'unregulation,' [has] forced network incumbents to open their networks to [the] new entrants"<sup>259</sup> who fueled much of the growth in the U.S. high-technology sector and in the American economy at large throughout the 1990s.<sup>260</sup> The Internet is a far cry from an object lesson in the virtues of laissez-faire economics; much of the wealth accumulated in the Internet owes its origins to a systematic policy of favoring Internet use.<sup>261</sup> ISPs are simultaneously exempt from

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255. Howard A. Shelanski, *The Speed Gap: Broadband Infrastructure and Electronic Commerce*, 14 BERKELEY TECH. L.J. 721, 743 n.99 (1999).

256. See generally Mark A. Lemley & Lawrence Lessig, *Open Access to Cable Models*, 22 WHITTIER L. REV. 3 (2000). Cf. Julian Epstein, *A Lite Touch on Broadband: Achieving the Optimal Regulatory Efficiency in the Internet Broadband Market*, 38 HARV. J. ON LEGIS. 37 (2001) (urging legislative reform of the Communications Act to prevent the loss of innovation that results from the "tipping" of communications media to a uniform standard).

257. Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925, 938 (2001). See generally LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999).

258. See JASON OXMAN, *THE FCC AND THE UNREGULATION OF THE INTERNET* 6 (1999) (FCC, Working Paper No. 31, 1999), available at [http://www.fcc.gov/Bureaus/OPP/working\\_papers/oppwp31.pdf](http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp31.pdf).

259. François Bar et al., *Access and Innovation Policy for the Third-Generation Internet*, 24 TELECOMM. POL'Y 489, 494 (2000).

260. For evidence that the inflation-free growth experienced by the United States during the 1990s may represent a fundamental and enduring economic change, see ANDREA BASSANINI, *KNOWLEDGE, TECHNOLOGY AND ECONOMIC GROWTH: RECENT EVIDENCE FROM OECD COUNTRIES* (2000); U.S. DEP'T OF COMMERCE, *ECONOMICS & STATISTICS ADMIN., DIGITAL ECONOMY 2000* (2000). See generally CARL SHAPIRO & HAL R. VARIAN, *INFORMATION RULES* (1999) (describing the rules of the "New Economy").

261. See Steve Bickerstaff, *Shackles on the Giant: How the Federal Government Created Microsoft, Personal Computers, and the Internet*, 78 TEX. L. REV. 1, 53-55, 82-

interstate access charges<sup>262</sup> and eligible to receive reimbursement from the Universal Service Fund for the below-cost component of Internet access prices charged to schools, libraries, and rural health-care providers.<sup>263</sup> These decisions privilege ISPs over “all other players in the telecommunications industry.”<sup>264</sup> These modest advantages pale in comparison with the massive infrastructural support that the federal government gave to the networks that became the Internet.<sup>265</sup>

One objection to open access for cable broadband is legal in nature. The other is rooted in policy. Neither withstands closer scrutiny.

Opponents of open access criticize it as a badge and incident of common carrier regulation. Cable operators evidently fear that their relationship with ISPs will resemble certain aspects of their video programming business. Vis-à-vis the unaffiliated programmers who are entitled by law to lease a certain number of channels, cable operators “act less like editors . . . than like common carriers, such as telephone companies.”<sup>266</sup> But open access is not the same as common carriage.<sup>267</sup> Admittedly, the Telecommunications Act offers little help. It tautologically defines “‘common carrier’ or ‘carrier’ . . . [as] any person engaged as a common carrier for hire.”<sup>268</sup> Absent meaningful statutory guidance, courts and regulators have adopted a functional definition of common carriage.<sup>269</sup> Any “particular [communications] system” qualifies as a common carrier solely “by virtue of its functions,” and not according to “the regulatory goals” that the FCC “seeks to achieve.”<sup>270</sup> The Supreme Court’s 1979 decision in *FCC v.*

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85 (1999). For further discussion of the interaction between government and private standard-setting organizations, see Philip J. Weiser, *Internet Governance, Standard-Setting, and Self-Regulation*, 28 N. KY. L. REV. (forthcoming 2001).

262. See *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 423, 541-44 (8th Cir. 1998).

263. See *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 445-46 (5th Cir. 1999).

264. Chen, *supra* note 20, at 1532.

265. See generally, e.g., Michael A. Geist, *The Reality of Bytes: Regulating Economic Activity in the Age of the Internet*, 73 WASH. L. REV. 521, 525-30 (1998); Maureen A. O'Rourke, *Fencing Cyberspace: Drawing Borders in a Virtual World*, 82 MINN. L. REV. 609, 615-19 (1998).

266. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 739 (1996) (Breyer, J., plurality opinion).

267. See generally Ridder, *supra* note 43, at 409-12.

268. 47 U.S.C. § 153(10) (Supp. IV 1998).

269. See, e.g., *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 n.10 (1979); *Frontier Broad. Co. v. Collier*, 24 F.C.C. 251, 254 (1958).

270. *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 644 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976); accord *Comstock & Butler*, *supra* note 38, at 7.

*Midwest Video Corp.*<sup>271</sup> clarified the meaning of common carriage “in the communications context.”<sup>272</sup> According to *Midwest Video*, a common carrier “makes a public offering to provide [communications facilities] whereby all members of the public who choose such facilities may communicate or transmit intelligence of their own design and choosing.”<sup>273</sup>

The filing of tariffs and accession in the setting of just and reasonable rates by a governmental agency are two of the traditional indicia of common carriage.<sup>274</sup> Open access demands neither. Nor does it require collocation of equipment or interconnection at a special place in a cable broadband platform.<sup>275</sup> Cable operators would retain the freedom “to set reasonable terms and conditions in private negotiations” with ISPs, “as long as the same terms and conditions they grant to their affiliates are available to nonaffiliate[s].”<sup>276</sup> Interconnection and nondiscrimination, two concepts often associated with common carrier status, are present. Those factors alone, however, do not constitute common carriage.

Nor does open access hinge upon the imposition of common carrier status. Antitrust law routinely requires monopolists to deal with rivals on nondiscriminatory terms.<sup>277</sup> Although antitrust and public utility regulation

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271. 440 U.S. 689 (1979).

272. *Id.* at 701.

273. *Id.* (quoting *Indus. Radiolocation Serv.*, 5 F.C.C.2d 197, 202 (1966)).

274. *Cf. id.* at 702 (observing that the FCC’s unlawful cable access rules “delimit[ed] what operators may charge for access and use of equipment”). “The tariff-filing requirement,” in particular, is “the heart of the common-carrier section of the Communications Act.” *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994). *See generally* *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126-29 (1990) (discussing the centrality of the filed rate doctrine to the regulation of common carriers).

275. Lemley & Lessig, *supra* note 257, 969; *cf.* 47 U.S.C. § 251(c)(6) (Supp. IV 1998) (requiring incumbent local exchange carriers to facilitate “physical collocation of equipment necessary for interconnection or access to unbundled network elements” unless “physical collocation is not practical for technical reasons or because of space limitations”); *cf.* *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1446-47 (D.C. Cir. 1994) (rejecting pre-1996 collocation rules on the grounds that the FCC lacked the authority under the Communications Act of 1934 to condemn a carrier’s property and reassign it to a competitor).

276. Mark Cooper, *Open Access to the Broadband Internet: Technical and Economic Discrimination in Closed, Proprietary Networks*, 71 U. COLO. L. REV. 1011, 1023 (2000).

277. *See, e.g.*, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *United States v. Terminal R.R. Ass’n*, 224 U.S. 383 (1912); *cf.* *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (punishing a monopolist for refusal to deal with a competitor’s customers). These decisions, I hasten to note, are the exception rather than the rule. Antitrust law ordinarily permits a firm to declare the terms and conditions under which it will buy and

represent dramatically different approaches to the similar economic problems,<sup>278</sup> “regulatory and antitrust principles are, in fact, complementary.”<sup>279</sup> If anything, simply requiring a carrier to interconnect with its competitors, much less on nondiscriminatory terms, is alien to the common law understanding of common carriage.<sup>280</sup>

To be sure, DSL carriage *is* subject to common carrier obligations.<sup>281</sup> But this classification flows more from the historical posture of telecommunications regulation than from anything inherent in the definition of common carriage. An open access regime for DSL is also justified by the telephone companies’ sorry record of deployment. Despite having possessed DSL technology since the late 1980s, incumbent local exchange carriers were loath to roll out DSL service because this broadband technology would cannibalize the phone companies’ lucrative side business of selling T1 broadband service to businesses.<sup>282</sup> In any event, the regulation of DSL under a common carrier model does not dictate that open access for cable proceed on identical legal terms. Even though the Ninth Circuit’s decision in *Portland I* had apparently authorized the Commission to subject cable broadband to the rules governing common carriage,<sup>283</sup> FCC Chairman William Kennard immediately retreated from any suggestion that “[this] service [would be] subject to all the common carrier regulations that apply to telephone companies.”<sup>284</sup>

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sell, at least in the absence of a showing of monopoly power. *See United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

278. *See generally* Jim Chen, *Regulatory Education and Its Reform*, 16 YALE J. ON REG. 145, 147-49 (1999) (contrasting the legal legacies of the Interstate Commerce Act of 1887 and the Sherman Act of 1890).

279. *Midland Telecasting Co. v. Midessa Tel. Co.*, 617 F.2d 1141, 1148 (5th Cir. 1980) (finding “no repugnancy . . . between . . . FCC carriage rules and antitrust principles”); *accord* Ridder, *supra* note 43, at 411.

280. *See The Express Package Cases*, 118 U.S. 1 (1886).

281. *GTE Operating Cos.*, 13 F.C.C.R. 22,466 (1998).

282. *See* LATHEN, *supra* note 4, at 27; William P. Rogerson, *The Regulation of Broadband Telecommunications, the Principle of Regulating Narrowly Defined Input Bottlenecks, and Incentives for Investment and Innovation*, 2000 U. CHI. LEGAL F. 119, 140-41 & n.27 (2000).

283. *See AT&T Corp. v. City of Portland*, 216 F.3d 871, 879 (9th Cir. 2000).

284. Kennard Press Release, *supra* note 33, *quoted in* Apps & Dailey, *supra* note 176, at 693; *cf.* *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 533 F.2d 601, 608 (D.C.Cir.1976) (“Since it is clearly possible for a given entity to carry on many types of activities, it is at least logical to conclude that one can be a common carrier with regard to some activities but not others.”); *McDonnell Douglas Corp. v. Gen. Tel. Co.*, 594 F.2d 720, 725 n.3 (9th Cir.1979).

The Telecommunications Act's provisions facilitating telephone company entry into video programming demonstrate that legal obligations to deal with competitors do not of their own force impose common carrier status. "Open video systems" operated by telephone companies must comply with special antidiscrimination rules designed to curb self-preference and cross-subsidization.<sup>285</sup> One such rule prevents the "operator . . . and its affiliates from selecting the video programming services for carriage on more than one-third of the activated channel capacity on [the] system" whenever "demand exceeds the [system's] channel capacity."<sup>286</sup> Despite this preference for competitors, the Telecommunications Act takes care to distinguish video programming over an open video system from "common carriage of video traffic."<sup>287</sup> Open video systems can bear one obligation to deal with competitors while enjoying an exemption from other interconnection obligations associated with common carrier status.<sup>288</sup> Indeed, open video systems are freed from numerous regulatory burdens—including leased access, public access, and mandatory carriage obligations—that other cable systems must discharge.<sup>289</sup> These are the very burdens borne by a class of regulated entities to whom the Communications Act extends the promise of freedom from "regulation as a common carrier."<sup>290</sup>

Suffice it to say that an open access rule, standing alone, does not transform the operator of a cable broadband platform into a common carrier.<sup>291</sup> The FCC long ago declared that "the term 'common carriers' . . .

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285. See 47 U.S.C. § 573(b) (Supp. IV 1998). See generally Glen O. Robinson, *The New Video Competition: Dances with Regulators*, 97 COLUM. L. REV. 10, 16 (1997) (examining the legal requirements governing open video systems).

286. 47 U.S.C. § 573(b)(1)(B) (Supp. IV 1998).

287. Compare *id.* § 572(a)(2) (outlining legal obligations of "a common carrier [that] provid[es] transmission of video programming on a common carrier basis") with *id.* § 571(a)(3) (outlining the legal obligations for open video systems, which presumptively "provid[e] video programming . . . in [a] manner other than that described in" § 571(a)(2)); see also *id.* § 571(a)(4) (providing that a common carrier of video traffic may elect instead to follow the rules governing open video systems).

288. See *id.* § 571(b) (exempting a "local exchange carrier that provides cable service through an open video system" from common carrier obligations "to make capacity available on a nondiscriminatory basis to any other person for the provision of cable service directly to subscribers").

289. See *id.* § 573(c). See generally *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 733-36 (1996) (Breyer, J., plurality opinion).

290. 47 U.S.C. § 541(c) (Supp. IV 1998).

291. See Ridder, *supra* note 43, at 311 (observing that a single requirement such as open access does not necessarily "constitute 'regulation as a common carrier'").

does not include ISPs.”<sup>292</sup> Nothing in the Commission’s notice of inquiry on high-speed Internet access or any other legal document hints at a reversal of this policy. The archaic cable-law precedent that illuminates the contemporary controversy over cable broadband is not the definition and condemnation of common carriage in *Midwest Video*,<sup>293</sup> but rather the initial endorsement of FCC jurisdiction over cable in *Southwestern Cable*.<sup>294</sup> The decision that launched contemporary federal regulation of the cable industry, *Southwestern Cable*, authorized any FCC action that is “reasonably ancillary to the effective performance of [its] various responsibilities.”<sup>295</sup> In a field as dynamic as communications in general and Internet communications in particular,<sup>296</sup> courts will seek to maximize “the flexib[ility] . . . of federal regulatory agencies to industries in transition.”<sup>297</sup> “[R]egulatory measures,” after all, “are temporary expedients, not eternal verities.”<sup>298</sup>

The policy-based argument against open access fares no better. The strongest defense of the unregulated status quo is the preservation of incumbents’ incentives to roll out cable broadband.<sup>299</sup> In practice, however, this argument translates directly into a plea that cable operators cannot re-

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292. *In re Non-Accounting Safeguards*, 11 F.C.C.R. 21,905, 22,034 (1996) (citing 47 U.S.C. § 153(10) (Supp. IV, 1998)); *accord In re Federal-State Joint Bd. on Universal Serv.*, 12 F.C.C.R. 87, 479 (1996); *see also* *Howard v. Am. Online, Inc.*, 208 F.3d 741, 753 (9th Cir. 2000) (“AOL is not a common carrier under the Communications Act.”); *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1025 (S.D. Ohio 1997) (“[ISPs] have been held not to be common carriers.”); *Religious Tech. Center v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1369 n.12 (N.D. Cal. 1995) (holding that an ISP is not a common carrier).

293. *See FCC v. Midwest Video Corp.*, 440 U.S. 689, 700-01 (1979) (holding that FCC rules requiring a cable company to reserve four channels for use by unaffiliated broadcasters violated an implicit norm against regulating cable operators as common carriers).

294. *See United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). *See generally* Jim Chen, *The Last Picture Show (On the Twilight of Federal Mass Communications Regulation)*, 80 MINN. L. REV. 1415, 1459-64 (1996).

295. *Southwestern Cable*, 392 U.S. at 178.

296. *See, e.g.*, *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 235 (1994) (Stevens, J., dissenting); *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 219 (1943); *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940); *Phila. Tel. Broad. Co. v. FCC*, 359 F.2d 282, 284 (D.C. Cir. 1966).

297. Jim Chen, *TELRIC in Turmoil, Telecommunications in Transition: A Note on the Iowa Utilities Board Litigation*, 33 WAKE FOREST L. REV. 51, 80-81 (1998).

298. *FPC v. East Ohio Gas Co.*, 338 U.S. 464, 489 (1950) (Jackson, J., dissenting).

299. *See Shelanski, supra* note 255, at 739; Christopher S. Yoo, *Vertical Restraint Theory and Media Regulation in the New Economy*, 19 YALE J. ON REG. (forthcoming 2002).

coup their investment in broadband facilities unless they are permitted to exclude nonaffiliated ISPs and charge all that the market can bear.<sup>300</sup> An extreme, even bizarre variation on this argument posits that cable operators should be allowed to restrict ISP choice so that other broadband modes will become more attractive by comparison.<sup>301</sup> The underlying assumption that cable operators have no incentive to discriminate against nonaffiliated providers of content and Internet access<sup>302</sup> is contradicted by sophisticated econometrics<sup>303</sup> and by simple empirical observations. Already we are witnessing cable-affiliated ISPs ban the downloading of streaming videos of any substantial length.<sup>304</sup> Cable operators, so it seems, will go to any length to shelter the revenues they derive from premium channels.

Accumulated experience with open access in another segment of the broadband market undermines the cable industry's complaints. Contrary to the ILECs' argument that open access rules for DSL have retarded that technology,<sup>305</sup> DSL rollout has proceeded apace under full-blown common carrier regulation.<sup>306</sup> Seen in this light, the argument that cable operators be allowed to restrict their subscribers' choice among ISPs in order to optimize the Internet's performance is reminiscent of the old Bell System's relentless battle against "foreign attachments."<sup>307</sup> The cable companies' recitation of "technical reasons" is no more persuasive than Bell's stun-

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300. See Speta, *supra* note 18, at 87; James B. Speta, *The Vertical Dimension of Cable Open Access*, 71 U. COLO. L. REV. 975, 995 (2000); Phil Weiser, *Competing Paradigms in Telecommunications Regulation*, 71 U. COLO. L. REV. 819, 830 (2000).

301. See Daniel Shih, *Open Access or Forced Access: Should the FCC Impose Open Access on Cable-Based Internet Service Providers?*, 52 ADMIN. L. REV. 793, 807 (2000).

302. See, e.g., Speta, *supra* note 18, at 84-85; Speta, *supra* note 300, at 1007.

303. See Rubinfeld & Singer, *supra* note 6, at 35-42.

304. See *id.* at 12-18 (describing the economics of producing streaming content deliverable over high-speed Internet connections).

305. See, e.g., Tele-Communications, Inc. & AT&T Corp., 14 F.C.C.R. 3160, 3188-89, 3197-98, 3202 (1999). See generally Thomas M. Jorde, J. Gregory Sidak & David J. Teece, *Innovation, Investment, and Unbundling*, 17 YALE J. ON REG. 1 (2000).

306. See Lemley & Lessig, *supra* note 257, at 961 n.102.

307. See, e.g., Jordaphone, Inc., 18 F.C.C. 644, 671 (1954); Hush-a-Phone Corp., 20 F.C.C. 391, 420 (1955) (concluding that the Hush-a-Phone was "deleterious to the telephone system" and that, in general, "telephone equipment should be supplied by and under control of the carrier") *rev'd*, 238 F.2d 266 (D.C. Cir. 1956); *In re* Use of the Carterfone Device in Message Toll Tel. Servs., 13 F.C.C.2d 420 (1968). See generally Jim Chen, *The Legal Process and Political Economy of Telecommunications Reform*, 97 COLUM. L. REV. 835, 843-44 (1997).

ning claim that a rubber attachment to a telephone mouthpiece would damage the national telephone network.<sup>308</sup>

Continued inaction on cable broadband reinforces the impression that federal communications law has learned nothing from its experience with the Bell divestiture. The restructuring of local and long-distance telephone markets sparked "an unprecedented flowering of innovation."<sup>309</sup> In today's market for broadband Internet access, asymmetrical regulation threatens to retard intermodal competition. Much of the growth in DSL is attributable to the efforts of a single ISP: America Online.<sup>310</sup> Once merged with Time Warner, AOL will no longer have such a strong incentive to promote high-speed alternatives to cable broadband.<sup>311</sup>

These are the precise grounds on which the Federal Trade Commission ("FTC") based its consent order in the AOL/Time Warner merger.<sup>312</sup> For the next five years, the combined firm has agreed to allow its subscribers a choice of at least three nonaffiliated ISPs offering Internet access over a cable broadband platform. The order's five-year term, described by FTC chairman Robert Pitofsky as "the shortest duration of [any] competition order," reflects "the uncertainty of developments in" broadband markets and "the dynamic quality of innovation."<sup>313</sup> The combined firm has also committed to continue offering DSL as an alternative mode of broadband access, and it has promised not to interfere in the delivery of Internet content or interactive television by independent suppliers. Perhaps one should not make too much of the FCC's relative passivity vis-à-vis the FTC; after all, the FCC is completing its fifth consecutive decade of forgoing its power to enforce the Clayton Act.<sup>314</sup> The FTC did not hesitate to fashion

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308. See *Hush-a-Phone Corp. v. United States*, 238 F.2d 266, 269 (D.C. Cir. 1956) (describing the overly broad tariff provisions against foreign attachments as "an unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental").

309. *United States v. W. Elec. Co.*, 890 F. Supp. 1, 9 (D.D.C. 1995), *vacated as moot*, 84 F.3d 1452 (D.C. Cir. 1996).

310. See *Cooper*, *supra* note 276, at 1040-41.

311. See *id.* at 1041.

312. See *In re Am. Online, Inc. & Time Warner Inc.*, No. C-3989, 2000 F.T.C. LEXIS 170 (Dec. 14, 2000).

313. Robert Pitofsky, *Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy*, 16 BERKELEY TECH. L.J. 535 (2001).

314. Compare 15 U.S.C. § 21(a) (2000) (empowering the FCC to enforce the Clayton Act "where applicable to common carriers engaged in wire or radio communication or radio transmission of energy") with James R. Weiss & Martin L. Stern, *Serving Two Masters: The Dual Jurisdiction of the FCC and the Justice Department over Telecommunications Transactions*, 6 COMMLAW CONSPECTUS 195, 198 (1998) (declaring that a review of the FCC's record in reviewing mergers had "not found a case in the last forty

an open access rule when confronted with a combination of Time Warner's media and cable empire with AOL's dominant posture in the market for online services. To the extent that any merger involving a common carrier within the FCC's jurisdiction may "substantially . . . lessen competition, or . . . tend to create a monopoly,"<sup>315</sup> the FCC's antitrust enforcement powers are no less robust, at least in theory, than those of the FTC.

One kernel of the FCC's "unregulation" policy nevertheless retains its vitality. No court has conclusively upheld—and the FCC has not encouraged—the power of state and local governments to impose a patchwork of open access laws across the nation. As in an earlier age when cable was the ascendant technology for the delivery of video programming, "only federal pre-emption of state and local regulation can assure cable systems the breathing space necessary to expand vigorously."<sup>316</sup> As it adjusts its own approach to high-speed Internet access over cable, the FCC would do well to issue an "authoritative . . . determination that" broadband Internet services are "best left *unregulated* by the states."<sup>317</sup>

Certainty, always a rare commodity in the law of economic regulation, has proved frustratingly elusive in the cable broadband debate. The daunting complexity of telecommunications law has undermined the ability of the FCC and reviewing courts to fashion a cogent approach toward rationalizing the market for high-speed Internet access. The line between broadcasting and common carriage, once technologically and legally clear, has blurred beyond recognition.<sup>318</sup> Cable broadband falls into the fissure between cable services and telecommunication services, and the Commission's authority to issue rules regarding this market is anything but intui-

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years where the Commission proceeded under the Clayton Act"). See generally Rachel E. Barkow & Peter W. Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 U. CHI. LEGAL F. 29.

315. 15 U.S.C. § 18 (Supp. IV 1998).

316. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 708 (1984); accord *Duffy*, *supra* note 54, at 1279.

317. *Arkansas Power Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983); accord, e.g., *Transcontinental Gas Pipe Line Corp.*, 474 U.S. 409, 422 (1986); cf. 47 U.S.C. § 230(b)(2) (Supp. IV 1998) ("It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.")

318. See generally Howard A. Shelanski, *The Bending Line Between Conventional "Broadcast" and Wireless "Carriage"*, 97 COLUM. L. REV. 1048 (1997). See also Frank H. Easterbrook, *Statutes' Domain*, 50 U. CHI. L. REV. 533, 537-39 (1983) (illustrating the problem of statutory applicability through a description of the regulation of cable operators under a Communications Act originally drafted to "regulate[] the practices of radio and television broadcasts").

tively clear. Once again regulation's "embarrassing question[s]"<sup>319</sup> have exposed telecommunications law and its cousins as "the most speculative undertaking[s] . . . in the history of [Anglo-American] jurisprudence."<sup>320</sup>

In short, "neither law nor economics has yet devised generally accepted standards for the evaluation" of regulatory success.<sup>321</sup> In governing the Internet and formulating communications law at large, we routinely "wager our salvation upon some prophecy based upon imperfect knowledge."<sup>322</sup> Wisdom begins with the recognition that "the body of the law" regulating telecommunications, "at any time or place, is an unstable mass in precarious equilibrium."<sup>323</sup> For the moment, and perhaps no longer, that equilibrium consists of one statutory truth and one rule of thumb. The FCC does have the authority to require open access to all cable-based broadband platforms. And mindful that the law owes incumbent monopolists no indemnification "against the risks of changing technology and new entrants,"<sup>324</sup> the Commission should unflinchingly adopt an open access regime. Timely intervention in the flawed market for high-speed Internet access would help fulfill the Telecommunication Act's as yet unrealized promise to "promote competition and reduce regulation," "secure lower prices and higher quality services . . . and encourage the rapid deployment of new telecommunications technologies."<sup>325</sup>

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319. *Smyth v. Ames*, 169 U.S. 466, 546 (1898); *accord Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308 (1989).

320. *West v. Chesapeake & Potomac Tel. Co.*, 295 U.S. 662, 689 (1935) (Stone, J., dissenting).

321. *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968).

322. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

323. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 110 (1977).

324. Jim Rossi, *The Irony of Deregulatory Takings*, 77 *TEX. L. REV.* 297, 316 (1998).

325. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, pmb. at 56.

**V. STATUTORY APPENDIX: SELECTED PROVISIONS OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996**

*(All citations are to 47 U.S.C. unless otherwise indicated)*

**A. Definitions and Other General Provisions**

§ § 153(7), 522(6): “[T]he term ‘cable service’ means—(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 . . . .”

§ 522(14): “The term ‘other programming service’ means information that a cable operator makes available to all subscribers generally . . . .”

§ 522(20): “[T]he term ‘video programming’ means programming provided by, or generally considered comparable to programming provided by, a television station.”

§ § 153(8), 522(7): “[T]he term ‘cable system’ means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of . . . television broadcast stations; (B) a facility that serves subscribers without using any public right-of-way; (C) a common carrier which is subject, in whole or in part to the provisions of subchapter II . . . ; (D) an open video system . . . ; or (E) any facilities of any electric utility used solely for operating its electric utility system . . . .”

§ 153(10): “The term ‘common carrier’ or ‘carrier’ means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy . . . ; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.”

§ 153(20): “The term ‘information service’ means the offering of a capability for generating, acquiring, storing, transforming, processing, retriev-

ing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”

§ 153(43): “The term ‘telecommunications’ means 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.”

§ 153(44): “The term ‘telecommunications carrier’ means any provider of telecommunications services . . . . A telecommunications carrier shall be treated as a common carrier only to the extent that it is engaged in providing telecommunications services . . . .”

§ 153(46): “The term ‘telecommunications service’ means the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used.”

## **B. Pole Attachment Act**

§ 224(a)(1): “The term ‘utility’ means any person who is a local exchange carrier or an electric, gas, water, steam or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications.”

§ 224(a)(4): “The term ‘pole attachment’ means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.”

§ 224(b)(1): “[T]he Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable . . . .”

§ 224(d)(1): “For purposes of [§ 224(b)], a rate is just and reasonable if it assures the utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space . . . which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs . . . attributable to the entire pole, duct, conduit, or right-of-way.”

§ 224(d)(3): “This subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service.

Until the effective date of the regulations required under [§ 224(e)], this subsection shall also apply to . . . any pole attachment used by a cable system or any telecommunications carrier . . . to provide any telecommunications service.”

§ 224(e)(1): “The Commission shall, no later than 2 years after February 8, 1996, prescribe regulations . . . to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges. Such regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.”

§ 224(f)(1): “A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.”

### **C. Cable Provisions**

§ 541(b)(1): “[A] cable operator may not provide cable service without a franchise.”

§ 541(b)(3)(A)(i): “[A] cable operator [that] . . . is engaged in the provision of telecommunications services . . . shall not be required to obtain a franchise.”

§ 541(b)(3)(D): “[A] franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise.”

§ 541(c): “Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.”

§ 544(a): “Any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this subchapter.”

§ 544(e): “No State or franchising authority may prohibit, condition, or restrict a cable system’s use of any type of subscriber equipment or any transmission technology.”

§ 544(f)(1): “Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this subchapter.”

#### **D. Miscellaneous Provisions**

Communications Decency Act of 1996, 47 U.S.C. § 230(f)(2): “The term ‘interactive computer service’ means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet.”

Child Online Protection Act of 1998, 47 U.S.C. § 231(e)(4); *cf.* Internet Tax Freedom Act of 1998, § 1101(f)(2)(B): “The term ‘Internet access service’ means a service that enables users to access content, information, electronic mail, or other services over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. Such term does not include telecommunications services.”

§ 154(i): “The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.”

§ 201(b): “The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.”

§ 303(r): “[T]he Commission from time to time, as public convenience, interest, or necessity requires, shall— . . . [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this title.”

