

EXHIBIT A

Open Internet Access and Freedom of Speech: A First Amendment Catch-22

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I. INTRODUCTION

The Internet may well be the greatest innovation in speech since the invention of the printing press, but is everyone on the Internet a speaker? If not, how do we differentiate speakers from nonspeakers? These are just two of the questions posed by the first legal issue involving the structure of the Internet itself: whether government (local, state, and federal) can require owners of broadband¹ networks to open their private networks to competing Internet service providers (ISPs).² As cable companies begin to fulfill the promise of the information superhighway by providing residences with broadband access to the Internet, ISPs, including America Online (AOL) and Mindspring, have lobbied for what they euphemistically call "open access," or the opportunity to compete for residential subscribers over the cable system.³ Supporters claim that open access is necessary to preserve competition in the Internet access market and to promote

1. The Federal Communications Commission (FCC) defines "broadband" as "having the capability of supporting, in both the provider-to-consumer (downstream) and the consumer-to-provider (upstream) directions, a speed (in technical terms, 'bandwidth') in excess of 200 kilobits per second (kbps)," which is fast enough to allow users to change webpages as fast as changing pages in a book and is capable of transmitting full-motion video. Inquiry Concerning the Deployment of Advanced Telecomm. Capability to All Americans in a Reasonable & Timely Fashion, & Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecomm. Act of 1996, 14 F.C.C.R. 2398, 2406, ¶ 20 (1999) (report) [hereinafter *Advanced Servs. Report*].

2. See *AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146, 1149 (D. Or. 1999) (upholding a local ordinance requiring cable companies to open their cable networks to competing Internet service providers), *rev'd*, 216 F.3d 871 (9th Cir. 2000) (holding that open access requirements are preempted by federal law); see also Denise Caruso, *Digital Commerce*, N.Y. TIMES, Jan. 31, 2000, at C5 (discussing the concerns raised "about the future of broadband and how best to ensure that no single company abuses its control of the Internet's infrastructure").

3. During the writing of this Article, AOL announced its intention to purchase Time Warner, owner of the second largest cable system in the United States. See *infra* note 62. Not surprisingly, AOL has ended its participation in the lobbying efforts for open access, though it publicly claims to remain "strongly committed to open access." Reuters, *AOL Gives Up Fast-Access Fight*, WIRED NEWS, Feb. 14, 2000, at <http://www.wired.com/news/print/0,1294,34334,00.html>.

freedom of speech on the Internet.⁴ In response, local municipalities across the nation are taking steps to require cable companies to provide competing ISPs with open access.⁵ At the national level, Congress is considering legislation that would preempt state and local law and require open access either as a matter of federal antitrust law or by denying cable companies editorial control over their networks.⁶ These efforts to regulate cable ISPs clearly raise First Amendment concerns on both sides of the issue.⁷ However, in addressing one such effort by the City of Portland to force AT&T, TCI Cablevision, and their ISP, TCI@Home,⁸ to provide access to competing ISPs, a federal district court dismissed the cable operators' First Amendment claims.⁹ The court simply concluded that there was no free speech violation because there was no evidence that "cable subscribers accessing the Internet through AT&T's cable modem platform would associate AT&T with the speech of unaffiliated ISPs."¹⁰ On appeal, the Ninth Circuit avoided the First Amendment issues by concluding that open access is preempted by Congress.¹¹

This summary conclusion hardly does justice to the complexity of the First Amendment issues presented by open access. The district court's decision does not even begin to address, let alone answer,

4. See *AT&T*, 43 F. Supp. 2d at 1150; Marcus Maher, Comment, *Cable Internet Unbundling: Local Leadership in the Deployment [sic] High Speed Access*, 52 FED. COMM. L.J. 211, 221-23, 229 (1999).

5. See John Borland, *Living up to the Broadband Hype*, CNET NEWS.COM, July 28, 1999, at <http://news.cnet.com/news/0-1004-201-343780-0.html>.

6. See H.R. 2637, 106th Cong. § 3 (1999) (authorizing the FCC to require cable operators to open their networks "on terms and conditions that are fair, reasonable, and nondiscriminatory"); H.R. 1686, 106th Cong. § 102 (1999) (prohibiting anticompetitive contracts by broadband access providers); H.R. 1685, 106th Cong. § 502 (1999) (same); see also H.R. 2420, 106th Cong. § 3 (1999) (requiring local exchange carriers to provide Internet users with the ability to subscribe to the high-speed ISP of their choice); S. 877, 106th Cong. § 3 (1999) (same).

7. See *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 214 (1997) [hereinafter *Turner II*] (recognizing that efforts to force cable operators to give access to broadcast networks implicates the free speech rights of the cable operators); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 626 (1994) [hereinafter *Turner I*].

8. Hereinafter collectively referred to as AT&T.

9. *AT&T*, 43 F. Supp. 2d at 1154.

10. *Id.*

11. *AT&T Corp. v. City of Portland*, 216 F.3d 871, 877-79 (9th Cir. 2000); see also *MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712, 717 (E.D. Va. 2000) (concluding that open access is preempted on different statutory grounds). Given the disagreement among the courts, the preemption issue remains unsettled. See Christopher E. Duffy, Note, *The Statutory Classification of Cable-Delivered Internet Service*, 100 COLUM. L. REV. 1251, 1262 (2000). Moreover, the FCC is currently reexamining the open access issue. See Kalpana Srinivasan, *FCC Mulls Regulating Cable Internet*, WASH. POST, Sept. 28, 2000, at http://www.washingtonpost.com/wp-s...ne/20000928/aponline165445_000.html.

questions such as: Are cable ISPs speakers for the purposes of the First Amendment? If so, how is open access consistent with our First Amendment tradition against compelled speech? If cable operators do not have free speech rights under these circumstances, why not? Correspondingly, since access claims are usually based upon the free speech interests of those seeking access, is open access justified as an effort to protect the free speech of competing ISPs? Aside from failing to address these questions, the decision ignores an important reminder—when regulating emerging technologies like the Internet, we must take care “because even commonly understood terms [and legal concepts] may have different connotations or parameters in this new context.”¹²

As we enter the twenty-first century, the Internet is fast becoming an important part of our commercial, political, and social lives.¹³ As one jurist observes, the Internet is the “most participatory form of mass speech yet developed.”¹⁴ It is also big business.¹⁵ Not surprisingly, given the Internet’s explosive growth and financial rewards, the struggle over who will control the information superhighway is well underway.¹⁶ Nowhere is this more clear than in the competition to provide the public with access to the Internet.¹⁷ While the Microsoft antitrust suit demonstrates that the question of who will provide the software that allows us to surf the Net is a high stakes contest,¹⁸ the

12. *ACLU v. Reno*, 929 F. Supp. 824, 865 (E.D. Pa. 1996) (Buckwalter, J., concurring), *aff'd*, 521 U.S. 844 (1997); see also INFORMATION INFRASTRUCTURE TASK FORCE, A FRAMEWORK FOR GLOBAL ELECTRONIC COMMERCE 5 (1997) (“We should not assume . . . that the regulatory frameworks established over the past sixty years for telecommunications, radio and television fit the Internet.”), available at <http://www.iitf.nist.gov/electcomm/ecom.html> (last visited Aug. 25, 2000).

13. See NAT’L TELECOMMS. & INFO. ADMIN., U.S. DEP’T OF COMMERCE, FALLING THROUGH THE NET: DEFINING THE DIGITAL DIVIDE 77 (1999) [hereinafter *FALLING THROUGH THE NET*].

14. *ACLU*, 929 F. Supp. at 883 (Dalzell, J., concurring).

15. For example, in 1998, the market revenue for ISPs alone was projected to grow from \$4 billion in 1996 to \$18 billion in the year 2000. Federal-State Joint Bd. on Universal Serv., 13 F.C.C.R. 11,501, 11,532, ¶ 65 (1998) (report) [hereinafter *Universal Serv. Report*]. Similarly, revenue from e-commerce is estimated to grow from \$23 billion to \$1.5 trillion by 2002. See Arthur J. Cockfield, *Balancing National Interests in the Taxation of Electronic Commerce Business Profits*, 74 TUL. L. REV. 133, 152 (1999). Slow connections jeopardize an estimated \$4.35 billion a year in online sales. Borland, *supra* note 5.

16. See Borland, *supra* note 5.

17. See *id.*

18. See *United States v. Microsoft Corp.*, 65 F. Supp. 2d 1 (D.D.C. 1999).

question of which companies will hard wire us to the Internet itself is just as controversial.¹⁹

Who will provide us with access to the Internet, and how, becomes especially compelling when one recognizes that many individuals have yet to participate in the Internet revolution.²⁰ While commentators have noted the Internet's potential to radically transform the way we behave as individuals, citizens, and consumers,²¹ a rift has developed between the Internet haves and have nots.²² This digital divide separates real space from cyberspace based upon race, income, education, and geography.²³ The digital divide can be largely attributed to one simple fact—accessing the Internet requires money.²⁴ It requires hardware and software capable of interacting with the Internet, such as a personal computer, Microsoft's Internet Explorer, or WebTV; it requires paying for a pipeline or connection to an ISP, such as a telephone line, cable, or satellite hookup; it also requires subscribing to an ISP whose computer network provides the gateway to the information superhighway.²⁵ While companies may provide parts of this package for free or at reduced prices,²⁶ someone always has to be paid in order to utilize the Internet.²⁷ With respect to broadband Internet access, this means that while the wealthy and educated in this nation are able to access a universe of information with the click of a mouse, communicate with political candidates by e-mail, trade stocks on-line, watch the state of the union address live on their computer, and eventually vote for political candidates over the

19. See Borland, *supra* note 5; Caruso, *supra* note 2, at C5; Sandeep Junnarkar, *AT&T to Open up High-Speed Network*, CNET NEWS.COM, Dec. 6, 1999, at <http://news.cnet.com/news/0-1004-200-1480975.html>.

20. See FALLING THROUGH THE NET, *supra* note 13, at 9; Katie Hafner, *We're Not All Connected, Yet*, N.Y. TIMES, Jan. 27, 2000, at G1.

21. See, e.g., Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1806-07 (1995) (describing how the Internet will change our lives); Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1758-59 (1995) (noting the changes promised by the Internet).

22. See generally FALLING THROUGH THE NET, *supra* note 13 (describing the digital divide); Hafner, *supra* note 20 ("If . . . the Internet is on its way to becoming the dominant mode of information exchange, then it is no longer a luxury but, like the telephone, a necessity. Anyone without it is in danger of being shut out.")

23. FALLING THROUGH THE NET, *supra* note 13, at xv.

24. *Id.* at 33, 38-39 (noting that cost is the second leading reason why people who own computers do not have Internet access and the leading reason for discontinuing access).

25. *Id.* at 77 ("While competition has made computers and the Internet increasingly affordable, these technologies still remain beyond the budget of many American households."); see also *infra* Part II.B (describing fees for Internet access).

26. See *infra* notes 40, 53.

27. See *infra* Part II.A.

Internet, the less affluent and less educated will be shut out.²⁸ Because of the digital divide and economic barriers to Internet access, federal and local governments have been particularly concerned about monopolization and market dysfunction with respect to Internet related services.²⁹ In fact, Portland justified its actions as necessary to ensure that the market for providing Internet service would remain competitive in light of the new cable technologies.³⁰ The underlying policy assumption at both the federal and local levels has been that competitive markets will create the conditions necessary for the greatest degree of access to the Internet.³¹ However laudatory these purposes may be, efforts to regulate the Internet to ensure competition cannot ignore the limits upon government embodied in the First Amendment.

While we have readily incorporated the Internet into our daily lives, incorporating it into our laws has been significantly more difficult.³² This Article examines the degree to which open Internet

28. For example, in response to the Arizona Democratic Party's intention to conduct the "first-ever legally binding public election over the Internet," the Voting Integrity Project filed suit to block the plan, alleging that "online voting would discriminate against those without access to computers and the Internet." *Lawsuit Challenges First Election to Be Conducted Via the Internet*, 68 U.S.L.W. 2440, 2440 (Feb. 1, 2000); see also Associated Press, *Governors Speak on Internet Voting*, N.Y. TIMES, Jan. 21, 2000 (noting that the Governor of California believes that Americans will be voting over the Internet in five to seven years), at <http://channel.nytimes.com/library/tech/00/01/biztech/articles/22vote-side.html>.

29. See Applications for Consent to the Transfer of Control of Licenses & Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee, 14 F.C.C.R. 3160, 3205-07, ¶¶ 92-96 (1999) [hereinafter *Transfer Order*]; *Advanced Servs. Report*, 14 F.C.C.R. 2398, 2447, 2449, ¶¶ 94, 100-01 (1999); Maher, *supra* note 4, at 219-26.

30. AT&T Corp. v. City of Portland, 43 F. Supp. 2d 1146, 1150 (D. Or. 1999) ("The Commission found that @Home had no viable competitors in the local retail market for residential Internet access services."), *rev'd*, 216 F.3d 871 (9th Cir. 2000).

31. See S. REP. NO. 104-230, at 1 (1996) (describing Congress's goal in passing the Telecommunications Act of 1996 as establishing a "pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition"); *Advanced Servs. Report*, 14 F.C.C.R. at 2401-02, ¶ 5 ("[The FCC is committed to the rapid deployment of broadband] while also promoting the deregulatory and procompetitive goals of the 1996 Act. Our role is not to pick winners and losers, or to select the best technology to meet consumer demand. We intend to rely as much as possible on free markets and private enterprise."); FALLING THROUGH THE NET, *supra* note 13, at 78 (stating that "further competition and price reductions will be vital to making information tools affordable for most Americans").

32. For example, the legal community has been debating for years over whether or not it is even possible to regulate the Internet. See, e.g., LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 1-6, 43-60 (1999) (arguing that the law must recognize the role that computer code plays in regulating the Internet); Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1200-01 (1998) (arguing that the Internet can be regulated); David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L.

access raises free speech concerns for the cable ISPs, who own the networks and are subject to open access requirements, as well as the competing ISPs seeking access. As we will see, determining whether open access is consistent with our First Amendment traditions depends upon whether and to what degree ISPs are speakers entitled to First Amendment protection. Part II of this Article briefly describes the Internet's architecture to explain how we access the information superhighway, and the various technologies that transport us. Part II demonstrates that open access is not about access to the Internet as a whole, but is instead, a claim for access to what is commonly referred to as the "last mile"—the physical pathways connecting the home from the curb.³³ Part III examines the regulatory context in which the Internet and ISPs operate, and concludes that imposing open access requirements upon cable ISPs is inconsistent with the existing regulatory regime. Assuming that all ISPs are speakers and that open access, therefore, represents a policy of accommodating competing First Amendment claims, Part IV examines whether open access is consistent with the United States Supreme Court's decisions in *Turner Broadcasting System, Inc. v. FCC* in which the Court upheld mandated access to cable television.³⁴ Part IV argues that critical differences between the Internet and cable television lead to the conclusion that open Internet access violates the First Amendment. Part V questions the assumption that ISPs should always be treated as speakers, and outlines three approaches for evaluating the speech rights of ISPs under the First Amendment. Part V demonstrates that open access is caught in a First Amendment catch-22. If we adopt a First Amendment approach that does not recognize cable ISPs as speakers with respect to open access, we must conclude that competing ISPs are not speakers either. Consequently, either ISPs are considered speakers and open access is inconsistent with the First Amendment, or ISPs are not speakers and open access cannot be justified by the First Amendment.

II. INTERNET SERVICE PROVIDERS AND THE INFRASTRUCTURE OF THE INTERNET

In essence, the Internet is simply a collection of computers, a network, in which the computers are capable of communicating with

REV. 1367, 1375 (1996) (arguing that the architecture of the Internet makes it practically impossible and illegitimate to enforce regulations based upon geographical boundaries).

33. See *Advanced Servs. Report*, 14 F.C.C.R. at 2404, ¶¶ 12-13.

34. *Turner II*, 520 U.S. 180, 224 (1997); *Turner I*, 512 U.S. 622, 668 (1994).

each other.³⁵ What makes the Internet special is its reach as the largest network in the world. In fact, it is a global metanetwork linking tens of thousands of other networks together.³⁶ Through this network you can send e-mail to friends and colleagues, do research, play computer games with people from around the world, shop, read the *New York Times*, listen to radio stations, and watch video programming.³⁷ All of this is made possible by shared communication protocols such as the Transmission Control Protocol (TCP) and Internet Protocol (IP) or TCP/IP, which allow information to be transmitted quickly from computer to computer³⁸ and the hardware that links the computers together. This Part outlines the limitations upon access to the Internet imposed by the architecture and hardware of the Internet.

A. On and Off Ramps to the Information Superhighway

As the Internet exists today, one cannot simply plug a personal computer into the Internet through a telephone or cable line any more than one can obtain telephone or cable television service by plugging a telephone into an outlet or hooking your television up to coaxial cable. Just as you contract with the telephone or cable company for telephone and cable service, to connect to the Internet you must have an ISP. Currently, four different groups provide the vast majority of Americans with access to the Internet: federal, state, and local governments; schools; private employers; and private service providers.³⁹ While government, businesses, and schools provide many individuals with access outside of the home, most do not provide service to the general public or to residential users, who must contract with a private provider.⁴⁰ Understanding why an Internet service provider is necessary requires a brief explanation of the Internet's

35. See Steve Bickerstaff, *Shackles on the Giant: How the Federal Government Created Microsoft, Personal Computers, and the Internet*, 78 TEX. L. REV. 1, 44 (1999).

36. See *Reno v. ACLU*, 521 U.S. 844, 849-50 (1997); PRESTON GRALLA, *HOW THE INTERNET WORKS* 5 (1999).

37. See *ACLU*, 521 U.S. at 850-53.

38. The TCP/IP protocols break down information transmitted on to the Internet into packets and reassemble it at its destination. GRALLA, *supra* note 36, at 13-15. This allows the Internet to operate as a packet-switched network where the various data packets may travel different routes to reach the same destination. *Id.* This design allows information to be transmitted through the Internet at faster speeds than circuit-switched networks, where, once a connection is made, that part of the network is dedicated only to that connection. *Id.*

39. *Id.* at 5; FALLING THROUGH THE NET, *supra* note 13, at 34-37.

40. Approximately twenty-two percent of all Americans access the Internet from home, and seventeen percent access it from a site outside of the home. FALLING THROUGH THE NET, *supra* note 13, at 34-37. A small percentage of users, representing approximately nine percent of those Americans who obtain Internet access outside the home, utilize the free access to the Internet provided by libraries and community centers. *Id.* at 36.

architecture and the method by which information is transmitted across this global network of networks.

Accessing the full resources of the Internet from a personal computer requires passing through multiple layers of hardware and telecommunications services. Imagine you are sending a friend an e-mail. First, you must prepare the e-mail on your personal computer or handheld device, and that device must typically be connected to a local area network (LAN).⁴¹ The connection can be established either through local wiring, as in an office, or through telephone, cable, or similar services to a local ISP.⁴² When connecting through an ISP, the ISP acts as your LAN.⁴³ Once connected to the LAN, your computer interacts with the LAN's internal router/server, a more powerful computer and switching device capable of interacting with the multiple computers in a LAN simultaneously and translating different data formats.⁴⁴ The server acts as a repository for various data and applications that allow the user to send and retrieve information on the Internet.⁴⁵ In the case of e-mail, the server translates your e-mail through the TCP/IP protocol and sends it as various data packets.⁴⁶ The LAN's server, in turn, must be connected to a router. Routers connect networks and direct the flow of data on the Internet.⁴⁷ The router looks at the Internet addresses in the data packets and sends them on the best path to the recipient.

Through routers, LANs are connected into midlevel networks or regional networks.⁴⁸ To communicate with other LANs, each LAN must be linked together through privately leased communication services such as telephone lines, T1 lines, Integrated Services Digital Network (ISDN) lines, Digital Subscriber Lines (DSL), coaxial cable, satellite, microwave, or fiber-optic cable.⁴⁹ These types of connections are often leased from local exchange carriers such as Pacific Bell or MCI WorldCom.⁵⁰ If the recipient of your e-mail is within the

41. GRALLA, *supra* note 36, at 9-11.

42. *Id.*

43. *Id.*; see JAMES F. KUROSE & KEITH W. ROSS, *COMPUTER NETWORKING: A TOP-DOWN APPROACH FEATURING THE INTERNET* § 1.8, at 47-50 (preliminary ed. 2000).

44. GRALLA, *supra* note 36, at 9-11.

45. *Id.* at 41-43.

46. *Id.* at 85-93.

47. *Id.* at 37.

48. *Id.* at 9-11.

49. See *infra* Part II.B.

50. See *Advanced Servs. Report*, 14 F.C.C.R. 2398, 2404, ¶ 12 (1999); *Universal Serv. Report*, 13 F.C.C.R. 11,501, 11,532, ¶ 66 (1998); Bickerstaff, *supra* note 35, at 46-47. Local exchange carriers are defined by the Telecommunications Act of 1996 as "any person

midlevel network, a router or series of routers delivers the e-mail message to the recipient's local network server where it is reassembled and eventually downloaded onto the recipient's personal computer.⁵¹ If the recipient is outside the midlevel network, the data packets are sent to a Network Access Point (NAP) where they are sent along high-speed backbones, capable of transmitting data at speeds of 155 Mbps (megabits per second) and higher, to another NAP and regional network, either across the country or around the world.⁵² Consequently, what people think of as the Internet is, in reality, computer equipment and telecommunications connections representing three different layers of networks.

Given the multiple layers of the Internet, it may already be apparent that in order to access what people commonly think of as the Internet one must have access to all three layers of networks: local, regional, and national/international. More importantly, given the current architecture, access fees are inescapable. Individual users must pay an ISP to be connected to a local network.⁵³ Local ISPs must pay regional ISPs, such as MidWestnet or EastCoastnet, for connecting at the regional level, and regional ISP's must pay National Backbone Providers (NBPs) such as MCI WorldCom or PSINet for national and international access.⁵⁴ While some users—for example, universities and large corporations—avoid local ISP fees by purchasing the necessary equipment, such as a router and a modem pool, thereby

that is engaged in the provision of telephone exchange service or exchange access.” 47 U.S.C. § 153(26) (Supp. III 1997).

51. GRALLA, *supra* note 36, at 90-91.

52. *Id.* at 9-11.

53. Some ISPs will connect individuals to the Internet for free, including free DSL service, and in some cases even give away computers in exchange for the right to gather data about the individual or to subject the individual to advertisements that they cannot avoid. See *AOL Europe Mulls Free Service*, WIRED NEWS, June 21, 1999 (discussing Free-PC giveaway and free Internet access), at <http://www.wired.com/news/print/0,1294,20328,00.html>; Kathryn Balint, *The Cost of 'Free' Stuff*, UNION-TRIBUNE (San Diego), Feb. 1, 2000, at 6 (discussing offers of free Internet service); John Borland, *Free DSL Takes Step Closer to Market*, CNET NEWS.COM, Feb. 15, 2000 (discussing free DSL service), at <http://news.cnet.com/news/0-1004-200-1550803.html>; *ExciteAtHome Does Free Access*, WIRED NEWS, Jan. 6, 2000 (discussing free Internet access over telephone lines in exchange for advertising), at <http://www.wired.com/news/print/0,1294,33471,00.html>; NetZero, *Free Internet Access and Free E-Mail Forever* (offering free Internet access in exchange for the ability to advertise to the user), at <http://www.Netzero.com> (last visited Sept. 4, 2000); Andy Patrizio, *AltaVista Joins Free ISP Brigade*, WIRED NEWS, Aug. 12, 1999 (discussing Alta Vista's decision to provide free Internet access), at <http://www.wired.com/news/print/0,1294,21251,00.html>; Matt Richtel, *Plan for Free PC's Has a Few Attachments*, N.Y. TIMES, Feb. 8, 1999, at C8 (describing a plan to offer free computers in exchange for purchasing other services). It is estimated that by the end of the year 2000, between 8.8 and thirty million Americans will use free Internet access. See Balint, *supra*.

54. KUROSE & ROSS, *supra* note 43, § 1.8, at 47-48.

becoming their own ISPs, they must ultimately pay to tap into a regional ISP.⁵⁵ Similarly, while regional ISPs may avoid paying fees to NBPs by tapping into NAPs directly, they must then pay the NAP, which is typically run by a Regional Bell Operating Company.⁵⁶ Therefore, given the Internet's current topography, tolls on the information superhighway are unavoidable.

Under this framework, the business of ISPs is to provide the public with access to the Internet by providing access through proprietary networks.⁵⁷ As such, TCI@Home and would-be competitors like AOL, Mindspring, and Microsoft Network are functionally identical. They all compete to provide Internet access to residential users by creating computer networks connected to other networks: local, regional, and backbone.⁵⁸ The only current difference between ISPs such as TCI@Home or AOL is the technology used to connect the "last mile"—the actual connection to the residential user.⁵⁹ As discussed below, the "last mile" has generally been the most bandwidth-constrained, and the ultimate factor in determining whether a residential user will have broadband access to the Internet.⁶⁰ Cable companies such as TCI and Comcast have invested billions of dollars upgrading their cable systems to make two-way, high-speed data transmission to the home possible.⁶¹ In contrast, companies such as Mindspring and AOL, which do not own a physical conduit into the home,⁶² must rely on traditional telephone access, enter into arrangements with the companies that do own such connections, or bridge the "last mile" with broadband technologies of their own.⁶³ Ultimately, the controversy in Portland and other

55. *Id.* at 49.

56. *Id.*

57. *Id.* at 49-50.

58. *Id.*

59. *See Advanced Servs. Report*, 14 F.C.C.R. 2398, 2422, ¶ 45 (1999) (discussing the methods of providing an Internet connection to a residential user); *see also* Allen S. Hammond, IV, *Regulating Broadband Communications Networks*, 9 YALE J. ON REG. 181, 194-96 (1992) (discussing the debate over the importance of wiring the "last mile").

60. *See Advanced Servs. Report*, 14 F.C.C.R. at 2422, ¶ 45; *infra* notes 88-95 and accompanying text.

61. *See Advanced Servs. Report*, 14 F.C.C.R. at 2418, ¶ 37.

62. AOL announced its intention to purchase Time Warner in January 2000. *See* Seth Schiesel, *A Rush to Provide High-Speed Internet Access*, N.Y. TIMES, Jan. 12, 2000, at C1. In addition to providing AOL with a new source of content for the Internet, the purchase will make AOL the owner of one of the largest cable systems in the nation, and, therefore, its own cable system for providing broadband access to the Internet. *See id.*

63. *See id.*; *see also Advanced Servs. Report*, 14 F.C.C.R. at 2419, ¶ 42 (noting that Bell Atlantic and AOL formed an alliance to offer Internet service through DSL); Bickerstaff, *supra* note 35, at 87-88 (discussing alliances formed by AOL, Microsoft, Qwest, AT&T, GTE, and the Bell Operating Companies).

municipalities is precipitated by the desire of noncable ISPs to force cable companies to give them access to their networks to take advantage of that "last mile" of broadband connection, instead of deploying broadband technologies of their own.⁶⁴

B. *Linking the Internet*

In addition to the limitations upon access imposed by the Internet's architecture, access to the Internet is limited by the technology used to transmit data and connect us to the Internet. Typically, the computers and computer networks of the Internet are physically connected together through copper wire, coaxial cable, or fiber optics.⁶⁵ Computers can also be connected through a variety of technologies that do not require direct physical connections.⁶⁶ The type of connection between computers and networks determines the maximum speed at which information may be transmitted. For example, regular telephone lines typically transmit data at a maximum of 56 Kbps (kilobits per second).⁶⁷ Special leased telephone lines are capable of transmitting data at even higher speeds. For example, ISDN lines can carry data at 128 Kbps and DSL can carry data at 1.5 Mbps;⁶⁸ T1 lines can carry data at 1.5 Mbps and T3 lines can carry data at 44 Mbps;⁶⁹ and fiber-optic cable can carry data at 600 Mbps.⁷⁰ Similarly, cable typically transmits data at 3 Mbps.⁷¹ In the near future, high-speed wireless systems promise data speeds up to 100 Mbps.⁷²

All of this speed and greater connectivity comes at a price for residential users. A second telephone line costs about ten dollars a month, plus an additional twenty dollars for an ISP.⁷³ Cable access can

64. *AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146, 1150 (D. Or. 1999), *rev'd*, 216 F.3d 871 (9th Cir. 2000); Borland, *supra* note 5 (discussing conflicts between ISPs and cable companies in various cities and counties).

65. *See AT&T*, 43 F. Supp. 2d at 1149; Hammond, *supra* note 59, at 189.

66. *See Advanced Servs. Report*, 14 F.C.C.R. at 2424, 2428, ¶¶ 49, 57.

67. *See id.* at 2431 chart 2.

68. *See id.*

69. *See GRALLA*, *supra* note 36, at 10.

70. Jeff Hecht, *Fiber Optics to the Home*, *TECH. REV.*, Mar./Apr. 2000, at 49, 49-50.

71. *See Advanced Servs. Report*, 14 F.C.C.R. at 2431 chart 2.

72. *See Maher*, *supra* note 4, at 215; *see also* Corey Grice, *The Next Wave in Fast Net Access*, CNET NEWS.COM, July 28, 1999 (describing the development of new broadband technologies including wireless and satellite), at <http://news/cnet.com/news/0-1004-201-34378309.html>; *It Came from Outer Space*, WIRED NEWS, Feb. 16, 2000 (describing a joint venture between Microsoft and Gilat Satellite Networks to provide broadband Internet access via satellite), at <http://www.wired.com/news/business/0,1367,34384,00.html>.

73. *See Advanced Servs. Report*, 14 F.C.C.R. at 2444 chart 3 (showing a total of \$680 in the first year); Brian L. Clark, *Wired for Speed*, MONEY, Aug. 1999, at 153, 153.

cost forty dollars a month, plus one hundred dollars for installation.⁷⁴ ISDN lines cost between ninety and one hundred sixty dollars to install, and between thirty and fifty dollars a month for service.⁷⁵ DSL access costs approximately fifty dollars per month for data speeds of 1.5 Mbps, or up to one hundred eighty dollars per month for 6 Mbps, plus an installation fee of two hundred dollars.⁷⁶ Land-based wireless services capable of speeds up to 1.5 Mbps cost approximately two hundred dollars for installation and fifty dollars per month.⁷⁷ As such, accessing the Internet at home is by no means cheap, and faster service comes at a significantly higher price, if it is available at all.⁷⁸

Given the cost, what do these differences in speed mean in practical terms? The bandwidth available to a residential user influences both Internet performance and function.⁷⁹ In short, downloading the latest version of AOL with a traditional telephone line and 56 Kbps modem takes approximately one hour.⁸⁰ In contrast, with a high-speed T1 line or cable modem running at 1.5 Mbps, it would only take two minutes to download the same software.⁸¹ The speed of data transmission translates, therefore, into the amount of time someone must spend on-line to perform even the simplest of functions such as retrieving e-mail. Additionally, bandwidth translates into more types of informational services practically available to the residential user.⁸² At slower rates of transmission, while it is possible to change webpages, download video and music, or watch streaming programming, the process can be painfully slow, making it either unappealing or practically impossible.⁸³ In contrast, the high-speed data transmission promised by cable and other services makes it possible for information providers to deliver true multimedia

74. See *Advanced Servs. Report*, 14 F.C.C.R. at 2444 chart 3 (totaling \$593 in the first year); Clark, *supra* note 73, at 153.

75. See *Advanced Servs. Report*, 14 F.C.C.R. at 2444 chart 3 (totaling \$1,385 in the first year); Pacific Bell, *Personal ISDN (2000)*, at http://www.pacbell.com/Products_Services/Residential/ProdInfo_1/1,1973,123-3-,00.html (last visited Oct. 1, 2000).

76. See *Advanced Servs. Report*, 14 F.C.C.R. at 2444 chart 3 (totaling \$960 in the first year); SBC Global Network, *Digital Subscriber Line (2000)*, at <http://www.pacbell.com/DSL/content/1,2546,11,00.html> (last visited Oct. 1, 2000).

77. See *Advanced Servs. Report*, 14 F.C.C.R. at 2444 chart 3 (totaling \$1,700 in the first year).

78. See *id.* As discussed previously, some services do provide free Internet access through traditional telephone lines. See *supra* note 53.

79. See Clark, *supra* note 73, at 153.

80. *Id.*

81. *Id.*

82. See *Advanced Servs. Report*, 14 F.C.C.R. at 2401, 2406, ¶¶ 3, 20.

83. See *id.* at 2406, ¶ 20 (noting that 200 Kbps is the minimum bandwidth necessary for the most popular forms of broadband).

programming.⁸⁴ With high-speed access, individuals can change webpages as easily as changing channels on a television.⁸⁵ They can communicate with loved ones through telephony with audio and real-time video.⁸⁶ Broadband Internet access would permit us to watch the latest CNN report without purchasing a special video card, listen to radio stations outside their areas of service, or download the latest hit movie for home viewing in a matter of minutes.⁸⁷ In short, broadband technology has the potential to radically transform the ways in which we receive, send, and manipulate information.

C. *The "Last Mile"*

The major obstacle to universal broadband access is the physical connection linking the home to the network—what is commonly referred to as the “last mile.” The regional and national networks that provide Internet service already utilize broadband technologies.⁸⁸ Similarly, businesses have had no difficulty obtaining broadband service.⁸⁹ Residential users, however, are a different story. According to the Federal Communications Commission (FCC), “the connection to the consumer has historically been the least competitive, and most bandwidth-constrained, part of the communications network.”⁹⁰ This is in part due to the fact that wiring the “last mile” requires the modification of existing facilities or the construction of new ones.⁹¹ In 1997 alone, the cable industry reportedly spent six billion dollars to upgrade its systems for cable modems.⁹² Similarly, utilities in Boston, New York, Philadelphia, Washington, and San Francisco budgeted \$850 million to expand fiber-optic connections in 1998 and 1999.⁹³ Local exchange carriers have also invested billions of dollars in DSL and other broadband technologies.⁹⁴ In addition to the cost, the delay in providing residential users with broadband access can also be attributed to the fact that “the Bell System and independent telephone

84. See *id.* at 2401, ¶ 3 (stating that high-speed data transmission allows for real time video); *id.* at 2406, ¶ 20 (stating that high-speed access would allow the transmission of full motion video).

85. *Id.* at 2401, ¶ 3.

86. *Id.*

87. See *id.*; *Transfer Order*, 14 F.C.C.R. 3160, 3192, ¶ 63 (1999).

88. Bickerstaff, *supra* note 35, at 58.

89. *Advanced Servs. Report*, 14 F.C.C.R. at 2403, 2408, ¶¶ 11, 26.

90. *Id.* at 2404, ¶ 13.

91. *Id.* at 2414, ¶ 34.

92. *Id.* at 2418, ¶ 37.

93. *Id.* at 2418, ¶ 40.

94. *Id.* at 2418-19, ¶¶ 41-42.

companies had no incentive [under existing regulations] to incur the significant cost of upgrading the local network[s].”⁹⁵

III. THE REGULATORY CONTEXT

Conventional wisdom tells us that the Internet arose in the absence of government regulation, but that belief is more myth than reality.⁹⁶ The Internet as we know it did not evolve in a regulatory void or modern day state of nature. Instead, the Internet is what it is today largely because of government regulation. As Professor Bickerstaff explains, the current structure of the Internet—comprised of personal computers, ISPs, and the tens of thousands of loosely connected networks—was a result, in part, of federal policies preventing AT&T and, after its break-up, the Bell Operating Companies, from creating a computer utility.⁹⁷ A computer utility would provide users with data processing, storage, retrieval, and information services without the need to purchase an expensive home computer by allowing the user to remotely access the utility’s centralized computers.⁹⁸ “In effect, the FCC directly and indirectly went about creating a regulatory structure that, despite numerous intervening decisions over almost thirty years, still shapes the computer services marketplace and effectively subsidizes public use of the Internet.”⁹⁹ Any discussion of whether ISPs can be required to provide competing ISPs with access to their networks, therefore, would be incomplete without considering whether such access is permissible under the current statutory and regulatory regime. The following Part examines the relevant FCC decisions with respect to ISPs in general, and access to cable ISPs in particular, and demonstrates that the FCC has refused to regulate ISPs as common carriers or to impose special obligations upon cable ISPs.

95. Bickerstaff, *supra* note 35, at 58. As discussed *infra* notes 96-110 and accompanying text, the Bell Operating Companies were denied the opportunity to furnish computer services that required broadband access and had no incentive to make broadband available to the general public when it “could be used by a nonregulated firm to furnish the computer services denied to the Bell System and to transmit communications in competition with the Bell System.” Bickerstaff, *supra* note 35, at 58.

96. See generally Bickerstaff, *supra* note 35 (discussing the regulatory decisions that influenced the development of the Internet); Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*, 7 *COMMLAW CONSPECTUS* 37 (1999) (examining the FCC’s regulation of telecommunications, cable, and Internet service).

97. Bickerstaff, *supra* note 35, at 13-19.

98. See *id.* at 4.

99. *Id.* at 6.

A. *ISPs and Common Carrier Status*

In several key decisions over the last thirty years, the FCC has consistently concluded that providers of services such as Internet service should not be treated as common carriers.¹⁰⁰ This trend began with the FCC's initial inquiry into the relationship between computers and communications, commonly referred to as *Computer I*.¹⁰¹ In *Computer I*, the FCC distinguished data processing services and communication services, leaving the former unregulated because it was essentially competitive.¹⁰² This position led directly to the conclusion that the Bell Systems would be prevented from providing data processing services, and indirectly to the conclusion that data processing services are not common carrier services.¹⁰³ The reason will soon become clear. As part of a 1956 consent decree, the Bell Systems agreed to limit themselves to providing "regulated common carrier services."¹⁰⁴ By concluding that data processing service would not be regulated, the FCC "acknowledged that it was simultaneously deciding that the Bell System would be barred from providing such services."¹⁰⁵ In other words, the FCC decided that data processing services are not regulated common carrier services.

The distinction between data processing services and communications services was subsequently refined by the FCC in its

100. In communications law, common carriers are businesses that make "a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979) (alteration in original) (quoting *Indus. Radiolocation Serv.*, 5 F.C.C.2d 197, 202 (1966) (report & order)). In other words, a common carrier holds itself "out indiscriminately to the clientele [it] is suited to serve." *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976). More importantly, common carriers "receive the lowest level of First Amendment protection by definition, for they do not have a recognized right to speak on their own and are denied editorial control over their communication traffic." HARVEY L. ZUCKMAN ET AL., 1 MODERN COMMUNICATION LAW § 2.3, at 211 (practitioner's ed. 1999).

101. See *Regulatory & Policy Problems Presented by the Interdependence of Computer & Communication Servs. & Facilities*, 28 F.C.C.2d 291 (1970) (tentative decision) [hereinafter *Tentative Computer I*]; *Regulatory & Policy Problems Presented by the Interdependence of Computer & Communication Servs. & Facilities*, 28 F.C.C.2d 267 (1971) (final decision) [hereinafter *Computer I*].

102. See *Tentative Computer I*, 28 F.C.C.2d at 297-98, ¶¶ 20-21; Bickerstaff, *supra* note 35, at 14-15.

103. See *Tentative Computer I*, 28 F.C.C.2d at 298-301, ¶¶ 24-29; Bickerstaff, *supra* note 35, at 14-15.

104. *Tentative Computer I*, 28 F.C.C.2d at 298-99, ¶ 24; Bickerstaff, *supra* note 35, at 14.

105. Bickerstaff, *supra* note 35, at 15; see also *Tentative Computer I*, 28 F.C.C.2d at 298-99, ¶ 24 (recognizing that the Bell Systems would be barred from providing data processing services).

historically translates into low-cost, flat rate service instead of the usage-sensitive access fees charged to other access providers, such as long distance companies.¹¹⁴ This means that local telephone companies provide ISPs and their customers with local connections “at a cost that is probably less than would be justified based on actual usage.”¹¹⁵ The FCC continues to maintain this position as a means of fostering the growth of the Internet, despite arguments that data transmissions involve longer connection times, that they cause congestion on the telephone network, and that the rate structure represents an unconstitutional taking of property.¹¹⁶

Following the Telecommunications Act of 1996, the FCC continued to consider ISPs enhanced or information services, rather than basic or telecommunications services.¹¹⁷ The Commission maintained this position despite arguments that Internet access providers often do nothing more than allow their subscribers to transmit and receive information.¹¹⁸ For example, Senators Stevens and Burns suggested that when ISPs transmit e-mail messages, they are simply transmitting “information of the user’s choosing, without change in the form or content of the information as sent or received.”¹¹⁹ Under those circumstances, the Senators argued that ISPs are merely conduits for other people’s information, and should, therefore, be presumptively treated as a telecommunications service.¹²⁰

The conclusion that Internet access is an information service rather than a telecommunications service has important consequences under the 1996 Act. At stake in the Universal Service Report was whether providers of Internet access would be required to contribute to the Universal Service Fund, which is used to ensure affordable,

114. See MTS & WATS Mkt. Structure, 97 F.C.C.2d 682, 685, ¶¶ 75-83 (1983) (mem. op. & order); Amendments of Part 69 of the Comm’n Rules Relating to Enhanced Serv. Providers, 3 F.C.C.R. 2631, 2633, ¶¶ 17, 20 (1988) (order); see also Bickerstaff, *supra* note 35, at 49-50; Esbin, *supra* note 96, at 76-77.

115. Bickerstaff, *supra* note 35, at 50.

116. See Access Charge Reform; Price Cap Performance Review for Local Exch. Carriers; Transp. Rate Structure & Pricing; End User Common Line Charges, 12 F.C.C.R. 15,982 (1997) (upholding the exemption of ISPs from usage sensitive charges); see also Bickerstaff, *supra* note 35, at 50-51 (noting the FCC’s policy and the complaints of local exchange carriers); J. Gregory Sidak & Daniel F. Spulber, *Cyberjam: The Law and Economics of Internet Congestion of the Telephone Network*, 21 HARV. J.L. & PUB. POL’Y 327, 329-30, 362, 371 (1998) (discussing the arguments in favor of local exchange carriers).

117. *Universal Serv. Report*, 13 F.C.C.R. at 11,532-33, ¶ 66.

118. The FCC distinguished between “(1) end users; (2) access providers; (3) application providers; (4) content providers; and (5) backbone providers,” and recognized that many companies fall into more than one category. *Id.* at 11,531, ¶ 62.

119. *Id.* at 11,536, ¶ 73.

120. *Id.*

national telephone service.¹²¹ Under the 1996 Act, telecommunications services must contribute either directly or indirectly, while information services are exempt from contributions.¹²² More importantly, the classification of ISPs as information services rather than telecommunications services is significant because the 1996 Act presumes that providers of telecommunications services should be treated as common carriers.¹²³ Accordingly, by classifying ISPs as information services, the FCC concluded that they should not be treated as common carriers under federal law.¹²⁴ While the FCC could have concluded that ISPs are telecommunications services and still exercised its discretion to exempt ISPs from common carrier obligations,¹²⁵ it chose not to do so.¹²⁶ If it had concluded that Internet access is a telecommunications service, ISPs could have become subject to state common carrier regulations.¹²⁷

In concluding that Internet access providers should not be treated as telecommunications services, the FCC employed a functional approach toward distinguishing telecommunications services from information services by carefully examining each element of the Internet service package.¹²⁸ According to the Commission, a service is considered a telecommunications service if the user can receive nothing more than pure transmission.¹²⁹ If the user can manipulate information or interact with stored data, the service is deemed an information service.¹³⁰ Internet access is treated as an information or

121. *Id.* at 11,505-07, ¶¶ 8-12.

122. *Id.* at 11,509, ¶ 16.

123. See 47 U.S.C. § 153(44) (Supp. III 1997) ("A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services . . .").

124. See *Universal Serv. Report*, 13 F.C.C.R. at 11,538-39, ¶ 78; Bickerstaff, *supra* note 35, at 32.

125. See 47 U.S.C. § 160(a) (Supp. III 1997) (providing the FCC with the authority to "forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service" if in the public interest); see also *Universal Serv. Report*, 13 F.C.C.R. at 11,525, ¶ 47 ("Notwithstanding the possibility of forbearance, we are concerned that including information service providers within the 'telecommunications carrier' classification would effectively impose a presumption in favor of Title II regulation of such providers. Such a presumption would be inconsistent with the deregulatory and procompetitive goals of the 1996 Act.").

126. See *Universal Serv. Report*, 13 F.C.C.R. at 11,525, ¶¶ 47-48.

127. See *id.* at 11,525, ¶ 48 ("The classification of information service providers as telecommunications carriers, moreover, could encourage states to impose common-carrier regulation on such providers.").

128. See *id.* at 11,530, ¶ 59.

129. *Id.* ("[I]f the user can receive nothing more than pure transmission, the service is a telecommunications service.").

130. *Id.* ("If the user can receive enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service.").

enhanced service because an ISP provides the user with more than a simple transmission path.¹³¹ Internet access users are given a variety of applications, such as e-mail, Web browsing, and Usenet newsreaders, as well as advanced capabilities including data manipulation and storage.¹³² While the service includes data transport, according to the FCC, the data transport is inextricably intertwined with information processing.¹³³

In contrast, the FCC carefully distinguished Internet access providers from the technologies used to carry their informational services. In so doing, the FCC recognized that an ISP's "underlying inputs" constitute telecommunications services.¹³⁴ After all, "Internet access, like all information services, is provided 'via telecommunications.'" ¹³⁵ For example, the provision of leased lines to ISPs and the operation of backbone facilities would be considered telecommunications services, subject to common carrier obligations, even though they are being provided for Internet service.¹³⁶ The fact that informational services are being carried on the links does not change their function.¹³⁷ As most ISPs do not own the lines that connect their networks, this conclusion does not bother them because they are not directly involved in the provision of telecommunications services.¹³⁸

What happens when, as in the case of cable and eventually other broadband technologies, the ISP owns the underlying telecommunications facilities and does not open those facilities to the general public? According to the FCC, the underlying facilities are

131. *Id.* at 11,504, ¶ 7.

132. *Id.* at 11,537-40, ¶¶ 76-80 (describing services provided by Internet access providers).

133. *Id.* at 11,539-40, ¶ 80 (explaining that, while "an Internet access provider must enable the movement of information between customers' own computers and the distant computers with which those customers seek to interact[,] the provision of Internet access service crucially involves information-processing elements as well; it offers end users information-service capabilities inextricably intertwined with data transport").

134. *See id.* at 11,533, ¶ 66 ("[T]o the extent that any of their underlying inputs constitutes interstate telecommunications, we have authority under the 1996 Act to require that the providers of those inputs contribute to federal universal service mechanisms."). In arguing that cable-based Internet access should be considered an information service, Duffy misses the important distinction that, while Internet access is an enhanced service, the underlying data transmission may still be considered a telecommunications service. *See Duffy, supra* note 11, at 1262-75.

135. *Universal Serv. Report*, 13 F.C.C.R. at 11,533, ¶ 68.

136. *See id.* at 11,533, 11,535, ¶¶ 67-68, 71 (noting that the provision of leased lines and backbone services to ISPs constitutes a provision of interstate telecommunications).

137. *See id.* at 11,529, 11,533-34, ¶¶ 57, 67-68.

138. *See id.* at 11,532-33, ¶¶ 66-67.

clearly telecommunications services.¹³⁹ The ISP is simply providing that “transmission capacity to itself,” or its exclusive partner.¹⁴⁰ This does not mean, however, that the ISP should be treated as a telecommunications provider. The FCC’s focus is on the function or service offered by the provider to others.¹⁴¹ While the FCC notes that this conclusion should be subject to further evaluation, currently, the key question remains: What is the core of the business?¹⁴² Under this approach, as long as the ISP is providing telecommunications services as a non-common carrier, the FCC does not treat the ISP as a telecommunications service provider.¹⁴³ The underlying assumption is that unless a company is in the business of providing telecommunications services to the public, those services simply support the information services.¹⁴⁴ This conclusion is significant given that common carriers such as incumbent local exchange carriers are subject to “interconnection, unbundling, and resale requirements” that mandate access for competing ISPs.¹⁴⁵ Accordingly, most, if not all, of the private networks that form portions of the Internet do not have an obligation to provide telecommunications services to anyone seeking to use their networks.¹⁴⁶ As the preceding demonstrates,

139. *See id.* at 11,534, 11,535, ¶¶ 69 n.138, 71.

140. *Id.* at 11,534, ¶ 69.

141. *See id.* at 11,534, ¶ 69 n.138 (“When the information service provider owns the underlying facilities, it appears that it should itself be treated as providing the underlying telecommunications. That conclusion, however, speaks only to the relationship between the facilities owner and the information service provider (in some cases, the same entity); it does not affect the relationship between the information service provider and its subscribers.”).

142. *See id.* at 11,534-35, ¶¶ 69-70.

143. *See id.*; *see also* FCC v. Midwest Video Corp., 440 U.S. 689, 700-02 (1979) (discussing the cable system’s classification as a common carrier); Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC, 525 F.2d 630, 640-42 (D.C. Cir. 1976) (discussing the statutory definition of common carrier).

144. As recognized by the D.C. Circuit:

This does not mean a given carrier’s services must practically be available to the entire public. One may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population. And business may be turned away either because it is not of the type normally accepted or because the carrier’s capacity has been exhausted. But a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal.

Nat’l Ass’n of Regulatory Util. Comm’rs, 525 F.2d at 641.

145. *See Transfer Order*, 14 F.C.C.R. 3160, 3147-48, ¶ 75 (1999); *see also supra* note 109 and accompanying text (quoting the FCC’s declaration of these requirements in *Computer II*).

146. This conclusion applies to the provision of telecommunications services and whether ISPs should be considered common carriers. *See Universal Serv. Report*, 13 F.C.C.R. at 11,524-26, ¶¶ 46-48. Whether ISPs are public accommodations, prohibited from certain forms of discrimination, may well be a different issue. *See AOL Is “Public*

believing that the markets for Internet service in general and broadband service in particular are essentially competitive, the FCC has consistently refused to impose common carrier obligations or access requirements upon ISPs.¹⁴⁷

B. The FCC and Open Cable Access

Not only is a policy of open access inconsistent with the existing statutory and regulatory regime in general, but, on two separate occasions, the FCC specifically rejected proposals to force cable companies to open their networks to competing ISPs. First, in the Advanced Services Report, the FCC was asked by companies such as AOL, Mindspring, and GTE, to give ISPs "rights of access to broadband systems operated by cable television companies."¹⁴⁸ In rejecting this request, the FCC observed that "the record, while sparse, suggests that multiple methods of increasing bandwidth are or soon will be made available to a broad range of customers."¹⁴⁹ The FCC believed that open access was not necessary to ensure greater residential access to broadband, because competition among different technologies and facilities-based providers would occur.¹⁵⁰

Similarly, the FCC rejected the request that AT&T, in particular, be required to open its cable system.¹⁵¹ According to AOL, MCI WorldCom, and others, "AT&T-TCI (through @Home) will have a substantial head start in the provision of high-speed Internet access and could develop an insurmountable position as a monopoly provider (or duopoly provider together with incumbent [telephone companies]) of broadband Internet access services to residential customers."¹⁵² In response, AT&T argued, inter alia, that: (1) the Internet service market in general is competitive, (2) open access could not be implemented due to the technical limitations of coaxial cable broadband networks, and (3) open access would likely delay the deployment of broadband services.¹⁵³ In rejecting open access, the FCC noted that, generally, the market for residential Internet access is quite competitive, and that the

Accommodation" Under ADA, Must Become Accessible to Blind, Suit Avers, 4 ELECTRONIC COM. & L. REP. 1027, 1027 (1999).

147. See *Computer I*, 28 F.C.C.2d 267, 273-74, ¶ 20 (1971) (final decision); *Computer II*, 77 F.C.C.2d 384, 496, ¶ 284 (1980) (final decision).

148. *Advanced Servs. Report*, 14 F.C.C.R. 2398, 2449, ¶ 100 (1999).

149. *Id.* at 2449, ¶ 101.

150. See *id.* at 2447, ¶ 94; see Grice, *supra* note 72 (describing alternative broadband technologies).

151. See *Transfer Order*, 14 F.C.C.R. 3160, 3207, ¶ 96 (1999).

152. *Id.* at 3197, ¶ 75.

153. See *id.* at 3198, ¶ 76.

market for broadband Internet access was or will be subject to significant competition from a “range of other distribution technologies.”¹⁵⁴ Moreover, the FCC found it important that even if an ISP did not enter into an arrangement with AT&T, customers of TCI@Home could, nonetheless, have access to those providers through the Internet.¹⁵⁵ In other words, there was no evidence that in the absence of open access requirements, any customers would be denied the “ability to access the Internet content or portal of his or her choice.”¹⁵⁶

C. *Some Conclusions*

So what does this all mean? First, under the existing federal regulatory regimes, ISPs are not considered regulated telecommunications providers subject to common carrier obligations under federal law.¹⁵⁷ As we will see later, this conclusion has important implications with respect to how the First Amendment is applied to ISPs because, unlike telephone service providers, there is a possibility that ISPs have First Amendment interests in their networks and the services they provide through those networks.¹⁵⁸ Second, it means that Portland and other municipalities are preempted from requiring cable companies to open their cable pipeline to competing ISPs.¹⁵⁹ While TCI@Home is not considered a telecommunications provider, the underlying cable facilities it utilizes clearly provide it with telecommunications services. Under the Telecommunications Act of 1996, local franchising authorities such as Portland are expressly prohibited from requiring a cable operator to “provide any telecommunications service or facilities.”¹⁶⁰ Lastly, consistent with these two conclusions, the FCC specifically refused to adopt a policy under existing law that would force cable companies to give competing ISPs a right of access, because there are or will soon be multiple alternative methods for providing broadband access.¹⁶¹ These

154. *Id.* at 3205-06, ¶¶ 93-94; *see also* Grice, *supra* note 72.

155. *See Transfer Order*, 14 F.C.C.R. at 3206-07, ¶¶ 95-96.

156. *Id.* at 3206, ¶ 96.

157. *See Universal Serv. Report*, 13 F.C.C.R. 11,501, 11,525, ¶ 47 (1998).

158. *See infra* Part V.

159. *See* 47 U.S.C. § 541(b)(3)(D) (Supp. III 1997).

160. *Id.*; *accord* AT&T Corp. v. City of Portland, 216 F.3d 871, 877-80 (9th Cir. 2000); *cf.* MediaOne Group, Inc. v. County of Henrico, 97 F. Supp. 2d 712, 714-16 (E.D. Va. 2000) (concluding that open access is preempted, but not because MediaOne Group is a telecommunications or cable service); Duffy, *supra* note 11, at 1262-75 (arguing that open access should be preempted as an information service).

161. *See supra* Part III.B.

decisions represent a clear federal policy against open access. This policy, however, is based upon the existing statutory and regulatory regime as interpreted by the FCC, and as such, is subject to change either by Congress or the FCC.¹⁶² The following Parts examine whether the First Amendment precludes such a policy shift.

IV. INTERNET SERVICE PROVIDERS AS SPEAKERS

In the United States, the First Amendment and state analogues represent our commitment to the value of free speech. As new technologies, such as the Internet, provide us with new means and forms of communication, we are forced to examine how these innovations fit within our existing value system.¹⁶³ In arguing that Portland's actions violate its First Amendment rights, AT&T assumes that cable ISPs are speakers and, thus, functionally equivalent to cable operators as purveyors of cable programming.¹⁶⁴ In making this assumption, AT&T relied upon the Supreme Court's conclusion that "[c]able programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."¹⁶⁵ In rejecting the First Amendment challenge, the *AT&T* court did not question either the assumption or conclusion that cable ISPs are entitled to First Amendment protection.¹⁶⁶ As the following discussion demonstrates, assuming that cable ISPs are speakers for First Amendment purposes is fatal to current efforts to require cable companies to open their networks to competing Internet service providers. Part V subsequently examines whether such an assumption is justifiable.

162. As of the publication of this Article, Congress was considering several bills that would require open access of cable and other broadband networks, including one that would designate cable systems as common carriers. See *supra* note 6. Likewise, the FCC is reconsidering the open access issue. See *supra* note 11.

163. See Ira Glasser, *The Struggle for a New Paradigm: Protecting Free Speech and Privacy in the Virtual World of Cyberspace*, 23 NOVA L. REV. 625, 628 (1999) ("[T]echnological advances always change the circumstances under which basic values exist, sometimes nourishing those values and sometimes threatening them."); LESSIG, *supra* note 32, at 114 (noting that one approach to constitutional interpretation is translation, which attempts to find "a current reading of the original Constitution that preserves its original meaning in the present context"); Sunstein, *supra* note 21, at 1759 (noting that "technological change promises to test the system of free expression in dramatic ways").

164. See *AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146, 1154 (D. Or. 1999) (evaluating AT&T's First Amendment claims), *rev'd*, 216 F.3d 871 (9th Cir. 2000).

165. *Turner I*, 512 U.S. 622, 636 (1994).

166. See *AT&T*, 43 F. Supp. 2d at 1154.