

likely be among the subjects for negotiations between cable operators and ISPs, placing them under government oversight would engender a pervasive and unnecessary regulatory regime that will stifle innovation in technology, services, and business arrangements.

B. Many of the Proposed Requirements Go Far Beyond Access to Cable and Would Enmesh the Commission in Regulation of the Internet Generally.

Proponents of forced access would not be satisfied with government-mandated access to the cable modem platform, as complex and burdensome as that would be. Part and parcel of their agenda is the extension of the Commission's regulatory reach to the Internet itself, in stark contradiction to the Commission's current policy of, and Congress' clear preference for, watchful reliance on market forces. In particular, they demand regulation of caching,⁷² access to broadband content,⁷³ and video streaming services.⁷⁴ In addition to the unprecedented reach entailed in such regulation, commenters cannot make out a credible case for imposing it. The availability of broadband alternatives means that cable operators must satisfy consumer needs – whether for a broad variety of content, quick access to content, or video-streaming – or lose those customers to competitors such as DSL and satellite.⁷⁵ Because it is in the economic interest of cable operators to offer the services desired by customers, regulatory intervention is unnecessary and unwise.

⁷² See, e.g., Big Planet at 10-13; CWA at 5, CAC at 37-39; CompTel at 19-21; Consumers' Union at 21; WorldCom at 20.

⁷³ See, e.g., Association for Maximum Service Television at 3-10; Big Planet at 10-13; CAC at 37-39; CompTel at 19-21; Consumers Union at 3-5, 9-11; OpenNet at 8-11; Pegasus at 9-10; Verizon at 34; WorldCom at 4.

⁷⁴ See, e.g., Rodopi at 12; Big Planet at 11, 14; OpenNet at 8-11.

⁷⁵ See Utilicom at 7-8.

Caching. The well-worn argument by forced access proponents that cable operators might engage in discriminatory caching has no basis in fact. AT&T and other cable operators, like most Internet content providers, use caching servers to store content from heavily trafficked sites that would otherwise have to be transmitted over the network again and again. Content from third-party Web sites is cached through an automatic process that employs an algorithm based on traffic patterns – *i.e.*, the number of “hits” that a site receives from subscribers – to determine which sites to cache. The technology is not utilized to degrade or block delivery of unaffiliated or disfavored content, but instead is designed to ensure optimal network performance and speed, as well as to detect and remedy potential network problems. Virtually all narrowband and broadband online content providers and ISPs can and do take advantage of caching to enhance performance. Moreover, the content providers themselves control whether, and to what extent, their content is cached.

AT&T does not slow down or impair the availability of any content provider or portal, which is not surprising because AT&T does not have any economic incentive to restrict or inhibit subscriber access to any content available on the Internet. High-speed access customers demand delivery of all web-based content as quickly as possible. It is in a company’s best interest to meet that customer demand, and any unreasonable attempt to restrict content would cause customers to switch to one of many other competitors.⁷⁶ The loss of subscribers resulting from such a failure to satisfy consumer needs would far outweigh any purported “benefit” of imposing such restrictions.⁷⁷

⁷⁶ See Competitive Policy Institute at 8; Metricom at 5-6.

⁷⁷ See Ordoover/Willig Dec. ¶ 55.

Broadband Content. Similarly, claims by commenters such as Verizon and WorldCom that cable operators have a significant incentive to limit customer access to outside broadband content⁷⁸ or that the future of content providers is at risk due to the potential for discriminatory treatment by cable operators, are meritless.⁷⁹ These arguments reflect a serious misunderstanding of the economic incentives driving AT&T and other cable operators that have chosen to provide a seamless offering that includes high-speed content, connectivity, and Internet access. Cable operators like AT&T seek to use the content and advertising of their services to create value and revenues to attract subscribers both with the content itself and by using the advertising and other revenue to keep customer prices as low as possible. This business model creates, not dampens, incentives to explore commercial arrangements to optimize the quantity and quality of the content, as well as deployment of new and innovative services, available to subscribers.⁸⁰ Any approach that would reduce the quantity or quality of the content that would be available via a cable operator's modem service would make that service less valuable.

If a cable operator were so foolish as to impose unnecessary limitations on the content available to its customers, it would only succeed in driving existing subscribers into the waiting arms of its broadband competitors, or in encouraging them to remain with a dial-up service

⁷⁸ See Verizon at 34; see also CAC at 37-39; Pegasus at 9-10; AMST at 3-4. *But see generally* Association for Competitive Technology (maintaining that customers generally do not value a choice of ISPs).

⁷⁹ See WorldCom at 4; see also Big Planet at 8, 14; OpenNet at 21.

⁸⁰ Ordovery/Willig Reply Dec. ¶ 49; see also Citizens for a Sound Economy Foundation at 2 (concluding that cable operators do not have an economic incentive to engage in content discrimination).

provider.⁸¹ Equally devastating, potential customers who are considering broadband may increasingly choose one of a cable operation's competitors – or decide to forego broadband altogether – if they learn of shortcomings in a cable operator's service or content.

Video Streaming. Arguments that cable operators will attempt to stifle the development of video streaming technology are also groundless.⁸² As noted in AT&T's initial comments, AT&T has committed to ensuring the availability of streaming video to customers who desire it.^{83/} Commenters ignore this fact and point to the ten minute limit on streaming video in the agreement between AT&T and Excite@Home (and a similar restriction among the Road Runner partners), which even one proponent of forced access acknowledges is “a plausible and not unreasonable response to a concern about bandwidth.”⁸⁴ Given the bandwidth-intensive nature of video streaming traffic, cable operators need to be able to limit its use so that certain customers do not “hog” all the bandwidth, at least until consumption can be measured and priced to reflect higher usage. DOCSIS 1.1, the latest cable modem standard, will do just this by allowing cable operators to provision varying levels of service depending upon the needs of the customer. As the attached declaration of Professor James B. Speta makes clear, moreover, cable operators have strong incentives to offer both traditional video and streaming video in order to

⁸¹ Similarly, if any cable operator were to adopt a closed, proprietary platform, it would limit the applications that could be used, thus alienating both Internet users and applications developers. And if it were to raise prices for advertising on its home page, it would simply send advertisers to the vast number of Web sites and other media eager for their business.

⁸² See OpenNet at 8; CAC at 53, 58-62; Newspaper Association of America at 4, n.5.

⁸³ AT&T at 53, n.155.

⁸⁴ Center for Democracy & Technology, Exh. 1, at 59.

attract more subscribers and maximize profits.⁸⁵ There is no basis for allegations that cable operators will limit their customers' ability to receive streaming video in order to protect their traditional video services from "cannibalization" by these new services. A cable operator will receive revenue whether it provides a customer with traditional video or cable modem services. If a cable operator attempts to deny a customer the ability to obtain streaming video, however, it risks losing the customer to one of its many broadband competitors.⁸⁶

C. Government-Mandated Access Would Harm Consumers By Deterring Investment, Impeding Innovation, and Delaying and Impairing the Provision of Broadband Services.

As demonstrated in AT&T's initial comments, the costs to industry and the public from imposing government-mandated access on cable operators would be significant.⁸⁷ The Pandora's box of implementation and enforcement proceedings that forced access would open will deter investment, stall development of new services and technologies, and discourage innovative business models.

These concerns are shared by a wide range of commenters,⁸⁸ who note that cable operators would be required to bear not only the direct expenses of compliance with the rule adopted, but also more extensive indirect costs including decreased investment due to regulatory uncertainty and unexpectedly low returns on investment;⁸⁹ diversion of employee time and

⁸⁵ Speta Dec. ¶¶ 3, 34-38 (attached hereto as Exh. B). Professor Speta makes the same point with respect to the incentives of cable operators to make available a wide array of Internet content and services. *Id.* ¶¶ 18-32.

⁸⁶ Ordover/Willig Reply Dec. ¶ 57.

⁸⁷ AT&T at 66-85.

⁸⁸ *See, e.g.*, ACA at 7, 9-10; SBCA at 4; TIA at 3-6, 24; Progress and Freedom Foundation at 10-12.

⁸⁹ *See* Progress and Freedom Foundation at 10-11; RCN at i, 5-6; Utilicom at 7, 11-12.

company resources from developing or expanding consumer services to regulatory compliance and litigation;⁹⁰ and stifling of innovation in both technology and business models.⁹¹ Consumers will be harmed as well by delays in the development and deployment of high-speed Internet access facilities and services.⁹²

Commenters also agree on the costs of such regulation to the Commission. As in the common carrier access context, imposing a forced access requirement will require the Commission to devote extensive resources to rulemaking proceedings and litigation addressing numerous complicated issues such as pricing, interconnection, and the meaning of the term “nondiscriminatory.”⁹³ Moreover, the Commission will be required to oversee compliance with the resulting rules by resolving complaints, engaging in tariff proceedings, and providing guidance to consumers and industry participants on the application of the rules to new services and service providers.⁹⁴

Canada’s unsuccessful attempt to regulate access to broadband cable networks demonstrates the harm that can arise from attempting to replace competitive market forces with government regulation.⁹⁵ Even though the Canadian Radio-Television and Telecommunications

⁹⁰ See Progress and Freedom Foundation at 11-12; Utilicom at 7.

⁹¹ See RCN at i, 5-6.

⁹² See SBCA at 3-4; RCN at i, 5-6.

⁹³ See Progress and Freedom Foundation at 11-12; TIA at 24; *Consumer Choice through Competition*, Remarks by William E. Kennard, FCC, at the National Association of Telecommunications Officers and Advisors, 19th Annual Conference, Atlanta GA, at 5 (Sept. 17 1999).

⁹⁴ See Progress and Freedom Foundation at 11-12.

⁹⁵ See *Broadband Today* at 45.

Commission (“CRTC”) adopted its “open access” policy in 1996, and expressly applied it to cable operators in 1998, this costly and time-consuming regulatory intervention has yet to have any significant effect in furthering multiple ISP access.⁹⁶ The Commission can and should avoid this result by reaffirming its successful policy of vigilant restraint.

III. GOVERNMENT-MANDATED ACCESS CANNOT BE RECONCILED WITH THE PLAIN TERMS OF THE COMMUNICATIONS ACT.

Because cable modem services make information available to subscribers generally, using the same telecommunications facilities that cable operators use to provide video programming, cable modem services are “cable services.”⁹⁷ Furthermore, because these services make available “information via telecommunications,” they (like all cable services) are also “information services.”⁹⁸ And because “information services” and “telecommunications services” are “mutually exclusive” categories, these services cannot be “telecommunications services.”⁹⁹

The regulatory consequences of these statutory classifications are equally straightforward. Neither cable services nor information services are subject to the sorts of common carrier regulation advocated by forced access proponents.¹⁰⁰

⁹⁶ See Starband at 15, n.27; Menard at 4, 7.

⁹⁷ See AT&T at 12-19.

⁹⁸ See *id.* at. 20-21.

⁹⁹ See *id.* at 21-25; *Report to Congress*, 13 FCC Rcd. at 11520 (¶ 39).

¹⁰⁰ See AT&T at 25-28.

A. Today's Cable Internet Services Are "Cable Services."

Many commenters agree that today's cable Internet services are "cable services."¹⁰¹ The Act defines "cable service" as "(A) the one way transmission to subscribers of (i) video programming, or (ii) other programming service and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service."¹⁰² The term "other programming service," in turn, is defined to "mean[] information that a cable operator makes available to all subscribers generally."¹⁰³ Today's cable Internet services make available to subscribers generally information with which the subscribers interact by selecting and then using it, and those services are therefore naturally encompassed within this statutory definition. The 1996 Conference Report confirms this interpretation, stating that the statutory definition was designed "to reflect the evolution of cable to include interactive services such as game channels and information services, as well as enhanced services."¹⁰⁴

Several commenters point out that Congress further confirmed this understanding in 1998, when it enacted the Internet Tax Freedom Act ("ITFA"). The ITFA established an Internet tax moratorium, but exempted from that moratorium cable franchise fees.¹⁰⁵ Because cable franchise fees are applied to gross revenues derived from the provision of "cable services,"¹⁰⁶ the

¹⁰¹ See, e.g., City of Los Angeles at 9-10; City of New Orleans at 3-4; Comcast at 16-18; Cox at 26; Marin Telecommunications Agency at 5-7; National Association of Telecommunications Officers and Advisors at 6-7; NCTA at 6-8; National League of Cities at 5-11; Town of East Hampton at 1-6.

¹⁰² 47 U.S.C. § 522(6).

¹⁰³ 47 U.S.C. § 522(14).

¹⁰⁴ H.R. Rep. 104-458 at 169 (1996).

¹⁰⁵ See Internet Tax Freedom Act, § 1104(8)(B), codified as note to 47 U.S.C. § 151.

¹⁰⁶ See 47 U.S.C. § 542(b).

existence of the exemption strongly indicates that Congress believed cable Internet services to be “cable services.”¹⁰⁷

The claims of the commenters that dispute that cable Internet services are “cable services” are directly at odds with the Communications Act’s plain text. For example, several of these commenters contend that the Act’s definition of “cable services” is limited to “one-way” communications, and point out that cable modem services, by contrast, permit the subscriber to interactively communicate on a “two-way” basis.¹⁰⁸ These commenters simply overlook that the statutory definition expressly includes the “subscriber interaction” that involves the “selection” or “use” of the information provided by the cable operator. The “interactive” nature of the service thus patently cannot be a ground for excluding it from the statutory definition. To the contrary, that feature of the service confirms that it is within the definition.¹⁰⁹

Other commenters emphasize that cable modem services are not “video programming.”¹¹⁰ But no one has claimed that they are. Rather, cable modem services are “other programming services” – “information that a cable operator makes available to all subscribers generally” – and these commenters “read[] th[os]e words . . . out of the first component of the cable service definition.”¹¹¹ In that regard, WorldCom’s unexplained assertion

¹⁰⁷ See City of Los Angeles at 9-10; City of New Orleans at 8-9; National League of Cities at 10-11; Town of East Hampton at 4-5.

¹⁰⁸ See CAC at 7, 19, 20; WorldCom at 10; EarthLink at II.

¹⁰⁹ See NCTA at 7 (“the inclusion of the phrase ‘subscriber interaction’ in the definition reflects Congress’ recognition that cable services would include some upstream transmissions from subscribers”).

¹¹⁰ See, e.g., Alliance for Public Technology at 5; CAC at 21-22.

¹¹¹ Marin Telecommunications Agency at 5.

that “cable operators do *not* offer Internet transmission to all subscribers” is baffling.¹¹² Although the necessary upgrades are completed for different cable systems at different times, once a particular cable system offers the service, it offers the service to all subscribers.¹¹³

Still other commenters attempt to challenge the proposition that cable operators providing cable modem service supply information to subscribers. Verizon says (at 11) that consumers can, if they choose, completely “bypass” that local content provided by cable operators and use their cable modem service to connect directly to content provided by others. With respect to the web sites that the cable operator caches in its servers, establishes specific links to, or otherwise enables the subscriber to access by entering into commercial arrangements with Internet backbone providers, EarthLink claims (at 11) that the particular information a subscriber uses is chosen by the subscriber, that “[t]he cable operator providing Internet access has no involvement in the creation or selection of that material,” and that the material is therefore not being provided by the cable operator to subscribers generally.

It is irrelevant that subscribers can choose to bypass the proprietary information developed by the cable operator. The definition of “other programming service” requires merely that the cable operator “make[] available” the information to subscribers, and if subscribers can choose whether or not to access the information, then the information has been “made available”

¹¹² WorldCom at 10 (emphasis in original).

¹¹³ The fact that cable Internet services are “other programming services” also refutes SBC’s and BellSouth’s frivolous claim (at 44) that “[i]f Internet access provided over cable qualifies as a ‘cable service,’ . . . so too would . . . DSL.” SBC/BellSouth at 44. The definition of “other programming service” is “information that a *cable operator* makes available to all subscribers generally.” 47 U.S.C. § 522(14) (emphasis added).

to them.¹¹⁴ Nor, contrary to EarthLink's apparent assumption, does the statutory definition require that the information be "created" or "selected" by the cable operator. Indeed, cable video programming – which all concede is a "cable service" – is "created" by others and merely purchased by the cable operator. The statutory definition further presumes that the "selection" of which specific information to utilize (like the selection of which television program to watch) will be made by the subscriber, not the cable operator.

Finally, some commenters rely on the fact that cable Internet services typically include features, like e-mail, that would not be "cable services" if considered on a stand-alone basis.¹¹⁵ These commenters fail to provide any citation or other support for that claim, and none exists. As AT&T showed in its opening comments (at 19), the legislative history of the Act establishes the opposite. Further, the Commission has itself rejected that precise argument. Specifically, in its *Report to Congress*, the Commission stated that "it would be incorrect to conclude that Internet access providers offer subscribers separate services – electronic mail, Web browsing, and others – that should be deemed to have a separate legal status. . . . The service that Internet access providers offer to members of the public is Internet access."¹¹⁶

Finally, as AT&T explained in its initial comments, the pertinence to this proceeding of the definition of "cable services" is to define the services that regulatory bodies cannot subject to

¹¹⁴ Similarly, the definition of "information service" requires only the offering of "a capability" for obtaining and using information, not that the subscriber utilize every aspect of the capability made available to it. *See* 47 U.S.C. § 153(20).

¹¹⁵ *See* Verizon at 13-14; Association of Communications Enterprises ("ACE") at 7; SBC/BellSouth at 43.

¹¹⁶ *See Report to Congress*, 13 FCC Rcd. at 11539 (¶ 79).

common carrier regulation.¹¹⁷ In deciding whether an access requirement affects cable services and implicates §§ 541(c) and 544(f), the question necessarily is whether the services that are affected by the requirement *include* the “video programming” or “other programming services” that fall within the definition of cable services. If the regulation requires a cable operator to carry services that include this content or if the regulation imposes prohibitions that actually or effectively bar the cable operator from carrying services that provide “video programming” or “other programming services,” then the regulation implicates both § 541(c) and § 544(f).

B. Today’s Cable Internet Services Are Also “Information Services,” And Therefore Cannot Be “Telecommunications Services.”

Cable Internet services independently satisfy the statutory definition of “information services” – “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”¹¹⁸ Even SBC and BellSouth join that conclusion.¹¹⁹

That is also the only interpretation consistent with the Commission’s *Report to Congress*. There, the Commission observed that “the functions and services associated with Internet access were classed as ‘information services’ under the MFJ,” and that “the Commission has consistently classed such services as ‘enhanced services’ under *Computer II*.”¹²⁰ In addition, the Commission found that “[w]hen subscribers utilize their Internet service provider’s facilities to

¹¹⁷ See 47 U.S.C. §§ 541(c), 544(f).

¹¹⁸ See 47 U.S.C. § 153(20).

¹¹⁹ See SBC/BellSouth at 14 (“Broadband Internet service – the bundled package of transport and content – is an ‘information service’”); see also Comcast at 11-18; Cox at 28-29; NCTA at 8-13; National League of Cities at 24.

¹²⁰ *Report to Congress*, 13 FCC Rcd. at 11536-11537 (¶ 75).

retrieve files from the World Wide Web, they are . . . interacting with stored data, typically maintained on the facilities of either their own Internet service provider (via a Web page ‘cache’) or on those of another. Subscribers can retrieve files from the World Wide Web, and browse their contents, because their service provider offers the ‘capability for . . . acquiring . . . retrieving [and] utilizing information.’”¹²¹ Finally, the Commission concluded that other aspects of Internet access services – such as news groups and electronic mail – are likewise information services.¹²² Those holdings are as applicable to the Internet services provided by cable companies as to the dial-up Internet services provided over telephone lines, for both perform the same general functions and, as the Commission has stated, both sets of information are provided “via telecommunications.”¹²³

Because “information services” and “telecommunications services” are “mutually exclusive” categories, the fact that cable modem services are “information services” establishes that they are not “telecommunications services.”¹²⁴ The Act defines “telecommunications service” as “the offering of telecommunications for a fee directly to the public, or to such classes

¹²¹ *Id.* at 11537-11538 (¶ 76) (quoting 47 U.S.C. § 153(20)).

¹²² *Id.* at 11538-11539 (¶¶ 77-78); *see also Howard v. America Online*, 208 F.3d 741, 752-753 (9th Cir. 2000) (holding that ISPs are information service providers, not common carriers, and noting that “[e]ven chat rooms, where subscribers can exchange messages in ‘real-time,’ are under AOL’s control and may be reformatted or edited”).

¹²³ *See AT&T at 20 & n.41* (citing Amicus Curiae Brief of the Federal Communications Commission at 20, *MediaOne Group v. County of Henrico*, No. 00-1680(L) (4th Cir. filed Aug. 9, 2000)); *see also Verizon at 10* (“There is no dispute that cable operators rely on ‘telecommunications’ to deliver data to and from broadband customers”).

¹²⁴ *See Report to Congress*, 13 FCC Rcd. at 11520 (¶ 39); *see also Memorandum Opinion and Order, Application of BellSouth, et al. for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd. 20599, 20780-81 (¶ 314) (1998).

of users as to be effectively available directly to the public, regardless of the facilities used.”¹²⁵ “Telecommunications,” in turn, is “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”¹²⁶ As the Commission has held, a “telecommunications service” involves the offering of a “pure transmission path,” and Internet access services are “information services” because they “go beyond the provision of a transparent transmission path to offer end users the ‘capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information.’”¹²⁷

The commenters who contend otherwise all propose a “bifurcation” analysis in which cable Internet services would be thought of as containing two discrete “services” – an unregulated “information service” consisting of the information processing functions, and a common carrier “telecommunications service” consisting solely of the transmission of the information. Verizon, for example, contends that cable operators provide a telecommunications service to their subscribers when they “deliver[] . . . requests for Web pages, and data from

¹²⁵ 47 U.S.C. § 153(46).

¹²⁶ *Id.* § 153(43).

¹²⁷ *Report to Congress*, 13 FCC Rcd. at 11536 (¶¶ 73-74). Some commenters supporting access requirements emphasize that the definition of “telecommunications services” applies “regardless of the facilities used.” *See, e.g.*, ACE at 4; Circuit City Stores at 3; CAC at 9; Verizon at 11. But that undermines, rather than supports, their argument. Internet access services are information services, and not telecommunications services, regardless of whether they are provided over telephone company lines or cable company lines; what matters is the nature of the service provided to the end user, not the facilities used to provide it. By contrast, the same is not entirely true of the definition of “cable service.” The “facilities used” are pertinent to that definition because an “other programming service” is defined as information made available by a “cable operator” (*see* 47 U.S.C. § 522(14)); a “cable operator” is defined as one who provides service, or otherwise controls or is responsible for, a “cable system” (*see* 47 U.S.C. § 522(5)); and a “cable system” is defined in terms of the facilities used (*see* 47 U.S.C. § 522(7)).

Internet sites, back and forth from customers' homes."¹²⁸ Qwest likewise reformulates the inquiry of this proceeding as "the regulatory status of the transport portion of cable modem service."¹²⁹ These and other commenters rely for their analysis virtually exclusively upon *dictum* from the Ninth Circuit's decision in *AT&T v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000).¹³⁰

As AT&T has explained, that *dictum* was fundamentally wrong and should not be followed here.¹³¹ It is directly contrary to, and would require reversal of, the well-reasoned holdings of the Commission's *Report to Congress*. As the Commission has since reaffirmed, "not every use of telecommunications facilities necessarily involves the provision of a

¹²⁸ Verizon at 10.

¹²⁹ Qwest at ii, 2-5; *see also* EarthLink at I ("What we mean by 'cable modem service' is the cable-based *transport* service necessary to deliver the information service commonly referred to as 'Internet access'") (emphasis in original).

¹³⁰ *See, e.g.*, Qwest at 4-6; Alliance for Public Technology at 4; ACE at 8; CAC at 12; Texas Office of Public Utility Counsel at 9-10.

¹³¹ The Texas Office of Public Utility Counsel claims (at 3-4) that in *Portland* "the legal question [was] directly presented based on a complete record," and that the Commission, since it participated in that case as an *amicus*, may be "bound" by that conclusion "under the principles of *res judicata* and *stare decisis*." These claims are incorrect in every particular. The issue was never presented at all to the Ninth Circuit (much less "directly"), and there was no record on it, because both parties agreed that cable modem services were cable services and not telecommunications services. *See* AT&T at 16. The filing of an *amicus* brief does not bind a party to the decision under principles of *res judicata*. *See, e.g., TRW, Inc. v. Ellipse Corp.*, 495 F.2d 314, 318 (7th Cir.1974) ("TRW limited its role in the prior suit to observing the proceedings and to filing amicus curiae briefs. These are insufficient modes of participation to render applicable the doctrine of *res judicata*") (citation omitted); *Munoz v. Imperial County*, 667 F.2d 811, 816 (9th Cir. 1982) ("the filing of an amicus brief has never been enough to bind a non-party to the result of a proceeding"). And *stare decisis* is not addressed to non-judicial parties at all; it is the term for the "policy of *courts* to stand by precedent." Black's Law Dictionary, p. 1261 (5th ed. 1979) (emphasis added).

‘telecommunications service’ under the Act’s specialized definition of that term.”¹³² The *Report to Congress* correctly established the fundamental statutory difference between the use of telecommunications by an information services provider as an input to its information service and the provision of a telecommunications service to a subscriber – a difference that the position of Verizon, Qwest, and the other commenters supporting their position would improperly eliminate.¹³³

Nor does it make a difference whether the information service provider owns some or all of the transmission facilities it utilizes. CompTel suggests that such a distinction could be consistent with *Computer II*, which, it says, treated as unregulated those enhanced services providers that did not own transmission facilities but required unbundling and tariffing by those enhanced service providers that did (the BOCs).¹³⁴ But that is not what *Computer II* did. To the contrary, the unbundling and tariffing requirements of *Computer II* were limited to “common

¹³² See Amicus Curiae Brief of the Federal Communications Commission at 21, *MediaOne Group v. County of Henrico*, No. 00-1680(L) (4th Cir. filed Aug. 9, 2000)

¹³³ It is particularly ironic – and hypocritical – for Verizon and Qwest to make these claims, because they are simultaneously relying on these same holdings in the *Report to Congress* to argue to the Commission, as they previously argued to the D.C. Circuit, that, because “interLATA services” are defined by the Act to mean “telecommunications” (47 U.S.C. § 153(21)), a BOC cannot be “provid[ing] interLATA services” (47 U.S.C. § 271(a)) when offering interLATA information services. Comments of Verizon and Comments of Qwest, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended* (filed Nov. 29, 2000). As AT&T and others have explained, and as the Commission and the D.C. Circuit have expressly held, the term “provide” in Section 271 must be construed in light of Section 271’s history, structure, and purposes, and need not be construed identically in all provisions of the Act. See *US WEST v. FCC*, 177 F.3d 1057, 1059-61 (D.C. Cir. 1999) (affirming Commission). But there is no conceivable basis for Verizon and Qwest to argue simultaneously that the holdings of the *Report to Congress* should be both eliminated and extended to Section 271, nor is there any way to reconcile these conflicting positions.

¹³⁴ See CompTel at 39; see also EarthLink at 22-24, 31-34 (relying on *Computer II*).

carriers” and “common carrier transmission facilities.”¹³⁵ The ownership of transmission facilities does not itself render a firm a “common carrier,” so other enhanced service providers that owned transmission facilities were not subject to those requirements.¹³⁶

Had the Commission not held, in both *Computer II* and the *Report to Congress*, that the use of telecommunications by an information service provider is not the provision of a telecommunications service to the end user – and were it to hold otherwise now – the consequences would be extraordinary. It would have the effect of imposing Title II common carrier obligations on segments of the communications industry that have historically been free of such requirements, and that have thereby flourished and provided enormous benefits to consumers. Information service providers such as Lexis, Westlaw, and all ISPs – or at least those that own transmission facilities, as many of them do¹³⁷ – would become common carriers. If, as some commenters contend, the fact that “cable Internet subscribers choose what information to view” renders cable Internet service a “telecommunications service,” then all

¹³⁵ See *Computer II*, 77 F.C.C.2d at 474-75 (¶ 231); Memorandum Op. and Order, *Independent Data Communications Manufacturers Assoc., Inc. Petition for Declaratory Ruling that AT&T's Inter-Span Frame Relay Service Is a Basic Service*, 10 FCC Rcd. 13717, 13725 (¶ 59) (1995).

¹³⁶ In the *Report to Congress*, the Commission noted that it might “reconsider” its holding that “an Internet service provider [that] owns transmission facilities, and engages in data transport over those facilities in order to provide an information service,” is not required “to contribute to universal service mechanisms.” *Report to Congress*, 13 FCC Rcd. at 11528 (¶ 55). It posited that such an ISP might be regarded as “furnishing raw transmission capacity to itself.” *Id.* Even if the Commission were to adopt such a view, and thereby require some ISPs to contribute to universal service, it would not be classifying the ISP as a “common carrier.” Under that view, the ISP would be engaging only in private carriage, since it would not be making an indiscriminate offer to the public but instead would be supplying transmission only to itself. See *FCC v. Midwest Video Corp.*, 440 U.S. 689, 699, 701-702 (1979) (defining common carriage).

¹³⁷ See *Cox* at 37-38 (“the Internet world is replete with information service providers that have constructed and use their own private facilities to provide all or some of their services”).

Internet access services are telecommunications services.¹³⁸ It is thus mystifying that EarthLink would suggest that a holding that cable Internet services are information services and not telecommunications services would require the Commission “to reverse its explicit holding in its *Universal Service Report*.”¹³⁹ To the contrary, it is EarthLink’s position that would require such a reversal – and require the sudden imposition of broad-scale regulation on whole categories of providers that it was the whole thrust of that *Report* to leave alone.

C. The Proponents of Government-Mandated Access Identify No Authority For Common Carrier Regulation of Cable Internet Services.

As AT&T explained in its opening comments,¹⁴⁰ the regulatory implications of the proper statutory classification of today’s cable Internet services are clear: the Commission’s existing market-based policy is not only consistent with, but mandated by, the Communications Act. Proponents of government-mandated access nonetheless insist that authority for common carrier regulation of cable Internet services is scattered throughout the Act. Sections 201, 202, 203 and 251 receive the most attention. *See, e.g.*, Qwest at 9 (“Cable modem service, as a local exchange service is subject to the resale, right-of-way and other provisions of Section 251(b) of the Act”). Qwest even goes so far as to urge the Commission to treat cable Internet providers as *dominant* common carriers, notwithstanding Qwest’s own concession that cable operators could not possibly be held to fit the Act’s definition of the “incumbent local exchange carriers” Congress determined should be treated as dominant. *See id.* The short, but complete, answer to all of these Title II theories is that cable Internet services are not common carrier telecommunications

¹³⁸ *See, e.g.*, Circuit City at 2.

¹³⁹ EarthLink at v.

¹⁴⁰ AT&T at 25-32.

services and therefore are not subject to Title II common carrier regulation.¹⁴¹ Indeed, as several commenters note,¹⁴² even future offerings of bare telecommunications to selected ISPs under individually negotiated terms and conditions would not trigger these Title II common carrier obligations, because firms that engage in such “private carriage” are not providing “telecommunications services” within the meaning of the Act.¹⁴³

CompTel’s Title I theory runs into the same statutory roadblock. It is well settled that the Commission’s Title I authority “is restricted to that reasonably ancillary to the effective performance of [its] various responsibilities” under the Act’s other titles.¹⁴⁴ CompTel must therefore retreat to Title II, contending that Title I intervention to regulate services that fall

¹⁴¹ See, e.g., 47 U.S.C. § 153(44) (“[A] telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services.”). As AT&T explained in its opening comments (at 28-29), section 251(a), which requires only “indirect” interconnection and only with “other telecommunications carriers,” would provide no basis for government-mandated ISP access even if cable Internet services were telecommunications services. See AT&T at 28-29. The same is true of section 251(b), which imposes no interconnection obligations whatsoever, but instead requires a local telephone carrier to, for example, allow “resale of its telecommunications services.” 47 U.S.C. § 251(b)(1).

¹⁴² See, e.g., Comcast at 24-25; AT&T at 34-35.

¹⁴³ CAC claims (at 43) that the Commission has authority to abrogate existing contracts between cable operators and the Internet companies that pioneered cable modem services suffers the same fatal flaw. The Commission’s limited authority to abrogate contracts extends only to contracts involving Title II common carriers. See *Cable & Wireless PLC v. FCC*, 166 F.3d 1224, 1231 (D.C. Cir. 1999) (discussing sections 201, 205, and 211 of the Communications Act); *Western Union Tel. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987) (discussing 202 and 205 of the Communications Act). For that reason, CAC’s citation to AT&T’s comments in the competitive networks/multiple tenant building access proceeding is inapposite. That proceeding involves contracts of Title II common carriers (incumbent local exchange carriers) that create insurmountable barriers to competitors’ entry and provision of competing services to multiple tenant environments. Here, in contrast, there is no common carriage and ISPs can reach customers through alternative distribution networks.

¹⁴⁴ *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1479 (D.C. Cir. 1994) (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968)).

squarely within the information services definition is necessary to advance the telecommunications goals of sections 201 and 202 of the Act. As the Commission has recognized, Congress directed precisely the opposite approach in “preserving the definitional scheme under which the Commission exempted information services from Title II regulation.”¹⁴⁵

But even if these express statutory limitations did not exist, there could be no legitimate Title I basis for government-mandated access. As the *Computer Inquiries* orders that CompTel cites confirm, the Commission has repeatedly made clear that it will only exercise its ancillary jurisdiction over enhanced services to correct a clearly identified market failure.¹⁴⁶ There is no such failure here. As detailed above, the record in this proceeding confirms beyond question that the delivery of broadband services is intensely competitive.

Two commenters look beyond the Act for Commission authority to saddle cable Internet providers with common carrier obligations. EchoStar asserts that the Sherman Act “essential facilities” doctrine mandates that cable companies provide “open access” to both ISPs and also “competing distributors.”¹⁴⁷ Even if the Congress had granted the Commission a roving license to seek out and remedy violations of the antitrust laws (and it has not done so), the “essential facilities” doctrine plainly has no application here. A facility is “essential” only if it is a natural monopoly and therefore is economically unfeasible to duplicate.¹⁴⁸ As described above, there

¹⁴⁵ First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of Section 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd 21905, 21956 (¶ 102) (1996).

¹⁴⁶ See CompTel at 42.

¹⁴⁷ See EchoStar at 7.

¹⁴⁸ See *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912); *MCI Commun. Corp. v. American Tel. & Tel.*, 709 F.2d 1081 (7th Cir. 1983).

are many paths from ISPs to subscribers' residences, including DSL and wireless networks, cable overbuilders and EchoStar's own Starband venture that is already offering two-way broadband Internet access throughout the entire United States using a state-of-the-art satellite network.¹⁴⁹ In short, "[c]able operators control no bottleneck monopoly over access to the Internet."¹⁵⁰

Finally, Consumers Union argues that First Amendment principles compel the Commission to mandate "open access."¹⁵¹ The First Amendment in no way provides the government with an affirmative grant of authority to regulate facilities used to carry speech in the name of "preserving competition." Rather, the First Amendment expressly *limits* the government's ability to regulate such facilities.¹⁵² Indeed, one court has now ruled that government-mandated access cannot survive the heightened First Amendment scrutiny that applies to such restrictions on cable operators' editorial discretion.¹⁵³

¹⁴⁹ See <http://www.starband.com/howeare/pr/110600.htm>.

¹⁵⁰ *Comcast Cablevision v. Broward County*, Case No. 99-6934, slip op. at 22 (S.D. Fla. Nov. 8, 2000).

¹⁵¹ See Consumers Union at 3-6.

¹⁵² See, e.g., *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994).

¹⁵³ *Comcast Cablevision v. Broward County*, Case No. 99-6934, slip op. at 15-16 (S.D. Fla. Nov. 8, 2000) (government-mandated access would "impose a significant constraint and economic burden directly on a cable operator's means and methodology of expression" and "invidiously impacts a cable operator's ability to participate in the information market"). Verizon (at 36) claims that the First Amendment "prohibits the Commission from freeing cable operators from regulation while, at the same time, requiring local telephone companies to make their transport services available on nondiscriminatory terms or share their network with other carriers" But Verizon simply assumes its conclusion that "ILECs offering DSL . . . have no ability greater than that of cable operators to exercise monopoly power in the broadband access market." *Id.* at 33. As explained below, the fact that incumbent LECs control bottleneck facilities that can be leveraged to "perpetuate their monopolistic dominance" of "existing" markets and to dominate "emerging" advanced services, Brief of Respondent FCC, *WorldCom Inc. v. FCC*, Case No. 00-
(continued . . .)

IV. “REGULATORY PARITY” CANNOT JUSTIFY CABLE INTERNET ACCESS REGULATION OR ABANDONMENT OF CORE REGULATION AIMED AT LOCAL EXCHANGE MONOPOLIES.

Qwest and Verizon continue to insist that they cannot compete effectively unless cable operators are regulated like local telephone monopolies.¹⁵⁴ The facts tell a different story. It is widely recognized that the incumbent LECs fell behind their cable competitors in the delivery of broadband services not because of “disparate” regulation, but because of the incumbent LECs’ own reluctance to deploy services they feared would cannibalize their existing ISDN and T1 services.¹⁵⁵ And in the few short years since the incumbent LECs have begun competing in earnest using their ubiquitous networks and marketing channels, they have plainly put to rest any concerns that DSL is competitively disadvantaged. As one analyst recently noted: “The proliferation of DSL in the telecom industry has seen one of the fastest technology adoption rates ever recorded. The total installed base of lines has grown from under 500,000 to over 2,000,000 in only one year’s time.”¹⁵⁶

(. . . continued)

1002, at 22 (filed D.C. Cir. Nov. 2, 2000) (“FCC DSL Brief”), is the “important governmental interest[]” supporting the regulatory obligations that Congress imposed on incumbent LECs.

¹⁵⁴ See Qwest at 8 (“There is simply no reason why a cable provider’s cable modem service should be treated any differently from a regulatory perspective than the DSL service provided by an ILEC”); Verizon at 8-9.

¹⁵⁵ See *Broadband Today* at 27 (“Although the ILECs have possessed DSL technology since the 1980s, they did not offer the service, for concern that it would negatively impact their other lines of business.”).

¹⁵⁶ *DSL Market: Demand Doesn’t Seem To Be An Issue, But Carrier Deployment Execution Does*, Robertson Stephens (January 3, 2001) (“For the December quarter, we estimate an incremental increase of over 573,000 lines, establishing an annual run rate in excess of two million units in the U.S. alone”).

Recognizing the implausibility of the competitive disadvantage story, SBC and BellSouth break ranks and, for the first time, concede that broadband services are vigorously competitive, with multiple facilities-based providers. Although SBC and BellSouth assemble impressive support for this by now obvious fact, it does nothing to advance their pleas for regulatory “parity.”¹⁵⁷ The fact that the emerging broadband services business is intensely competitive is only a necessary, not a sufficient, condition for deregulation of the incumbent LECs’ advanced services. The incumbent LECs would also need to demonstrate that competition and consumer interests would not be threatened if the *existing* regulatory scheme were pared back. They have not, and could not, do so, because the local loop, which remains necessary for both voice and DSL services in virtually all markets, remains a “quintessential bottleneck facility for competing telecommunications carriers.”¹⁵⁸ Absent existing access and unbundling regulations, incumbent LECs could use their control over the local loop both to “perpetuate their monopolistic dominance” of “existing” voice markets *and* to dominate “emerging” advanced services.¹⁵⁹

For that reason, the conclusion of Verizon’s impressive economic team that “under competitive conditions, maintaining such a regulatory disparity would be likely to adversely affect consumers,”¹⁶⁰ simply misses the point. Although broadband services viewed alone face “competitive conditions,” the incumbent LECs would retain the ability, absent existing regulations, to use their bottleneck control over the facilities used to provide voice (and DSL)

¹⁵⁷ See SBC/BellSouth at 38-42.

¹⁵⁸ FCC DSL Br. at 22.

¹⁵⁹ *Id.* See also AT&T at 92-96.

¹⁶⁰ Arrow/Becker/Carlton Dec. ¶ 6.

services to impede competition in both the voice and data segments.¹⁶¹ Because Verizon's economists do not even address the core competitive problems associated with unregulated incumbent LEC provision of voice and DSL services over a single bottleneck loop, their conclusions are irrelevant.

Perhaps the best evidence that these competitive concerns are real and substantial comes from examination of the incumbent LECs' "regulatory parity" wish list. First, they would have the Commission relieve them of all line sharing and line splitting obligations.¹⁶² Then, they would have the Commission forbid competitive LECs that pay for entire "loops" from offering data services over those loops.¹⁶³ And, for good measure, they propose terminating broadband-related collocation obligations, lifting the section 254(c)(4) resale requirement, and forbearing from applying the requirements of section 271 to advanced services.¹⁶⁴ If incumbent LECs were permitted to impose such patently anticompetitive limitations on the use of network elements, not only would competitive LECs be wholly foreclosed from competing for DSL customers, but they (and everyone else) would also be foreclosed from competing for those voice customers that want voice and data services on a single line in the vast majority of local markets where incumbent LEC loops remain the only available path for delivering voice services.¹⁶⁵

And this is only one of many ways in which, absent regulation, incumbent LECs could anticompetitively leverage their bottleneck local facilities. Existing regulations prevent

¹⁶¹ See Ordoover/Willig Reply Dec. ¶ 34.

¹⁶² See SBC/BellSouth at 19-23; Verizon at 27-28.

¹⁶³ See SBC/BellSouth at 20 n.55.

¹⁶⁴ See *id.* at 19-23.

¹⁶⁵ See Ordoover/Willig Reply Dec. ¶ 35.

incumbent LECs from harming competition for a non-monopoly DSL service by implicitly pricing it at a non-compensatory level when it is sold as a part of a voice bundle.¹⁶⁶ This type of price squeeze could force out of the market competing suppliers of enhanced services that might otherwise serve as attractive complements to the monopoly basic services offered by the incumbent LEC.¹⁶⁷ Allowing incumbent LECs to bundle basic services with advanced services provided over bottleneck facilities also facilitates non-price discrimination – *i.e.*, the ability to offer lower quality monopoly bottleneck services to broadband competitors’ customers – because bundling enhances the ability of incumbent LECs to mask such discrimination.¹⁶⁸ Finally, regulation is necessary to prevent incumbent LECs from simply migrating captive local telephony customers to an “advanced service” such as voice over DSL before cable telephony or any other alternative to these monopoly services is available.¹⁶⁹

In the end, of course, the powerful economic arguments for continued incumbent LEC regulation are largely academic, because the Act and prior Commission decisions foreclose the deregulation that the incumbent LECs seek. The Commission has repeatedly rejected incumbent LEC requests that it forbear from enforcing section 251(c) of the Act with respect to advanced services,¹⁷⁰ and the D.C. Circuit has now squarely held that there is no advanced service

¹⁶⁶ *see id.* ¶ 37.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *See* Memorandum Op. and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd. 24011, 24017, 24045 (¶¶ 11, 72) (1998) (“*Section 706 Order*”); Order on Remand, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd. 385, 387-89 (¶¶ 6-9) (2000) (“*Section 706 Remand Order*”). In its *Section 706 Order*, the Commission also rejected the claim advanced by CenturyTel (at 5-6) here that section 706(a) permits it to forbear from applying section 251(c) to
(continued . . .)