

4. Cable Modem Services Are Not “Cable Services” Under The Act.

In its December 1 comments, EarthLink discussed at length why cable modem service is not a “cable service.”⁴¹ To summarize the points made in that discussion, cable modem service does not meet the definition of “cable service” provided in section 602(6) of the Act⁴² because it is not primarily a “one-way transmission to the subscriber” and it is neither “video programming” nor “other programming service.”

Cable modem service is used to provide the “telecommunications” that is a necessary component of an information service like Internet access.⁴³

“Telecommunications” is the “transmission, between or among points specified by the user, of information of the user’s choosing. . . .”⁴⁴ Under the plain language of the statute, services involving telecommunications are excluded from being a “cable service” under the Act by the statutory requirement that a cable service must consist of a “one-way transmission to subscribers.”

“Telecommunications” involves transmissions “between or among points” specified by the subscriber,⁴⁵ a service that is clearly not limited solely to the

⁴¹ *EarthLink Comments* at 5-18.

⁴² 47 U.S.C. § 522(6).

⁴³ “Information service” “means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications...*” 47 U.S.C. § 153(20) (emphasis added).

⁴⁴ 47 U.S.C. § 153(43).

⁴⁵ “Telecommunications” “means the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content as sent and received.” 47 U.S.C. § 153(43).

reception of transmissions by the subscriber.⁴⁶ As the 9th Circuit Court of Appeals recently summarized, “[t]he essence of cable service, therefore, is one-way transmission of programming to subscribers generally.”⁴⁷

a. The 1996 Addition Of The Words “Or Use” To The Definition Of Cable Service Does Not Make Cable Modem Service A “Cable Service” Under The Act.

EarthLink notes at the outset that cable industry commenters appear to have largely abandoned their oft-repeated argument that the minor statutory addition of the term “or use” to the definition of cable service in the 1996 Act was intended by Congress to include Internet access and other information services. As discussed at length in Earthlink’s December 1 comments, there is simply no support in the statute itself or the legislative history of the definition of cable service, even as amended by the 1996 Act, for this argument.⁴⁸

Nothing in the amendment made by the 1996 Act changed the analysis made by the U.S. Court of Appeals for the D.C. Circuit in *National Cable Television Association v. Federal Communications Commission* that “the qualification ‘if any’ in the definition of ‘cable service’ clearly implies that the subscriber

⁴⁶ As the Commission noted recently to the D.C. Circuit Court of Appeals, the “Commission found that the channel service offering, which transmitted cable television signals from the CATV headend to cable subscribers, was not telephone exchange service because, among other reasons, it did not pass through an exchange (i.e., it was not switched), and provided only one-way transmission of signals.” Brief for Respondents in *Worldcom v. Federal Communications Commission*, D.C. Circuit Court of Appeals, 00-1002 (Nov. 2, 2000) (hereinafter *FCC Worldcom Brief*) at 39 (citing *General Telephone Co. of California*, 13 FCC 2d 448 (1968) at 460 (para. 24). Thus, even before the enactment of the statutory definition of cable service in 1984, the Commission has a long history of distinguishing between cable services and telecommunications services on the basis of the one-way nature of cable services.

⁴⁷ *AT&T Corp v. City of Portland*, 216 F.3d 871(hereinafter *Portland*) at 876.

⁴⁸ *Earthlink Comments* at 15-17. *Accord, In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket 00-185, Comments of OpenNet Coalition (Dec. 1, 2000)(hereinafter *OpenNet Comments*) at 16.

interaction to which the NCTA refers is not a necessary component of cable service.”⁴⁹ Both of the appellate courts that considered this argument six years later reached conclusions that clearly agree with the D.C. Circuit’s assessment.⁵⁰

b. Simply By Providing Internet Connectivity, Cable Companies Do Not “Make Available” All Information On The Internet Within The Meaning Of The Definition Of “Other Programming Service.”

None of the commenters argued that Internet access and other information services provided over a cable modem service constitutes “video programming” as defined in section 602(20) of the Act.⁵¹ Earthlink agrees that cable modem services, and information services transported using cable modem services, are not video programming as defined in section 602(20) of the Act.⁵²

The primary argument made by proponents of the position that cable modem service is a “cable service” is that such service is an “other programming service” under the Act. This argument is articulated most completely by AT&T, and we therefore focus on that company’s comments here.

⁴⁹ *Nat. Cable T.V. Ass’n v. Fed. Communications Com’n*, 33 F.3d 66 (D.C. Cir. 1994) (hereinafter *NCTA v. FCC*) at 72.

⁵⁰ *Gulf Power Company et al v. Federal Communications Commission*, 208 F.3d 1263 (11th Cir. 2000) (hereinafter *Gulf Power II*) at 1276 (“If Congress by the addition of these two words meant to expand the scope of the ‘cable services’ definition from its traditional video base to include all interactive content, video and non-video, it would have said so.”) and *Portland* at 876 (“Internet access is not one-way and general, but interactive and specific beyond the ‘subscriber interaction’ contemplated by the statute.”).

⁵¹ 47 U.S.C. § 522(20).

⁵² *Id.*

The Act defines “other programming service” as “information that a cable operator makes available to all subscribers generally.”⁵³ Beginning with this definition, AT&T argues that there five types of information that it “makes available” to its cable modem service customers, and that all five meet the statutory definition of “other programming service.” The five types of information identified by AT&T are: (1) “local content” that appears on AT&T affiliated home pages or pages selected from AT&T home pages; (2) national news, sports, entertainment, etc. that is also accessed from AT&T affiliated home pages; (3) contents of non-affiliated web sites that are hyperlinked to an AT&T affiliated home page; (4) “cached” information from third party web sites, whether or not linked to the AT&T home page; and (5) information from the public Internet that is not cached.⁵⁴ Under AT&T’s analysis, by making each of these types of information “available” to subscribers, the statutory definition is met.

The Commission has already told the *Portland* court that AT&T’s argument cannot be accepted because to do so would clearly conflict with the plain meaning of many provisions of the Act:

AT&T and TCI appear to argue that a cable operator makes information “available to all subscribers generally” simply by providing subscribers with the capability to gain access to the Internet. Under this broad statutory interpretation, however, “other programming service” would arguably include any transmission capability that enables subscribers to select and receive information, including basic telephone service. And Congress stated that its 1996 amendment of the definition of cable service was not intended to eliminate the longstanding regulatory distinction between telecommunications service and cable services: “This amendment is not intended to affect Federal or State regulation of telecommunications service offered through cable facilities,

⁵³ 47 U.S.C. § 522(14).

⁵⁴ *AT&T Comments* at 14-15.

or to cause dial-up access to information services over telephone lines to be classified as a cable service.” Conference Report at 169.⁵⁵

The Commission’s *amicus* argument is clearly correct. If a cable operator had to do no more than provide a transmission path in order for a service to fall within the “make available” language in the definition of “other programming service,” then the definition loses all of its meaning. In addition to rendering the language of the Act nugatory, a violation of one of the fundamental canons of statutory construction,⁵⁶ AT&T’s interpretation conflicts with the clear legislative history regarding the meaning of “making available”:

Making available a cable system for voice communication between cable subscribers would not be a cable service because the information transmitted between the parties would not be generally available to all. Similarly, offering cable system capacity for the transmission of private data such as bank records or payrolls (for instance, to and from data processing centers or between the separate locations of a single business in a local area) would not be a cable service because only specific subscribers would have access to this information.⁵⁷

As the House Committee Report makes clear, “making available” means something more than simply the provision of a transmission facility. Instead, it is the nature of the information transmitted, not the details of its transmission, that determines whether a service is a “cable service”:

This distinction between cable services and other services offered over cable systems is based on the nature of the service provided, not upon a technological evaluation of the two-way transmission capabilities of cable systems. For instance, any service that allows customers to buy a product by sending a signal over cable facilities, regardless of the

⁵⁵ FCC *Amicus Brief in AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), at 24 (August 16, 1999) (hereinafter *FCC Portland Amicus Brief*) (citing the Conference Report that accompanied S.652, which was enacted as the 1996 Act.).

⁵⁶ See, e.g., *NCTA v. F.C.C.*, 33 F.3d 66, 74 (D.C. Cir. 1994).

⁵⁷ *House Committee Report* at 42.

precise mechanism used to transmit the signal, would not be a cable service.⁵⁸

Understanding the importance of drawing a clear line between cable services and common carrier services so that the different regulatory regimes could be applied with consistency, the Committee provided numerous illustrative examples of what is, and what is not, a “cable service”:

Some examples of cable services would be: video programming, pay-per-view, voter preference polls in the context of a video program[,] video rating services, teletext, one-way transmission of any computer software (including, for example, computer o[r] video games) and one-way videotex[t] services such as news services, stock market information, and on-line airline guides and catalog services that do not allow customer purchases.

Some examples of non-cable services would be: shop-at-home and bank-at-home services, electronic mail, one-way and two-way transmission o[f] non-video data and information not offered to all subscribers, data processing, video-conferencing, and all voice communications.⁵⁹

EarthLink recognizes that some of the examples described in the legislative history appear similar to services that may be obtained by customers through an Internet access service. Examples of these would be news services, stock market information, and on-line airline guides. AT&T in fact refers to similar examples in describing the content of its first two classes of information. In order for each of these services to be an “other programming service” as described in the legislative history, however, one or more critical aspects of what consumers presently expect from such services today would have to be deleted.

⁵⁸ *Id.* at 43 (emphasis added).

⁵⁹ *Id.* at 44 (brackets added).

In particular, the cable operator would have to create a limited number of categories or options for use of the information for the subscriber to choose among. Unlimited key word searches, for example to search a news service database for a particular article specified by the user by typing in the search terms, could not be permitted.⁶⁰ Likewise, consumers could not be provided with a link to an airline listed in the airline guide to purchase a flight they have found,⁶¹ and arguably could not run a processing program to search for alternative schedules to a particular destination.⁶² Given these restrictions, it is not clear that such a limited offering would be of interest to consumers when compared with the alternatives they are used to getting through Internet access services. Accordingly, regardless of the superficial similarities with examples of “other programming services” described in the *House Committee Report*, the interactive services described by AT&T in its examples are not cable services because they fail to meet the statutory requirements for such services under the

⁶⁰ *Id.* at 43 (“This definition of interaction [would] mean, for example, that unlimited keyword searches of information stored in data bases is not permitted in a cable service. Such unlimited interaction goes beyond providing information retrieval and becomes a variety of data processing. For instance, it would allow a user to search a data base for all occurrences of a particular piece of information such as a name, a location, or a date... This type of service is indistinguishable from data processing services that allow subscribers to use sophisticated software programs... to transform, rearrange, and present data in a manner tailored to the subscriber’s particular interests and needs.”) (brackets added).

⁶¹ *Id.* at 42 (“a cable service may not include ‘active’ information services... that allow transactions between subscribers and cable operators or third-parties.”)

⁶² *Id.* at 43 (“The Committee intends that the interaction permitted in a cable service shall be that required for the retrieval of information from among a specific number of options or categories delineated by the cable operator or the programming service provider. Such options or categories must themselves be created by the cable operator or programming service provider... This definition of interaction is necessary in order to ensure that providing subscribers with the capacity to retrieve information... does not also provide subscribers with the ability to engage in off-premises data processing—an additional capacity that may not be offered as part of a cable service.”).

plain language of the definition of “other programming service” as described by Congress in the detailed legislative history.⁶³

Finally, even if it were possible for AT&T to overcome the obstacles discussed above with respect to the first two of the five categories of information that it describes (and it is not), it is immediately clear that AT&T’s last three categories of information cannot be cable services under any theory. This is the case because AT&T goes out of its way to make clear that it does not control the content of the information it claims to “make available.”⁶⁴ Indeed, since AT&T

⁶³ Earthlink also notes that there is a fundamental tension in the statutory definitions of “cable operator” and “cable system” that argue against AT&T’s “making available” interpretation. A “cable operator” is a person who owns, controls, or operates a cable system. 47 U.S.C. 622(5). A “cable system” is “a facility, consisting of a set of closed transmission paths and associated... equipment that is designed to provide cable service that includes video programming and which is provided to multiple subscribers within a community...” 47 U.S.C. 522(7) (emphasis added). Since “other programming service” is “information that a cable operator makes available to all subscribers generally,” it follows that to meet the definition AT&T must be making available its information over a closed transmission facility. Given that the information AT&T describes may be stored on web servers located anywhere in the world, and AT&T states that subscribers may use the AT&T affiliated web pages to reach other affiliated and non-affiliated sites that are accessible through the Internet, it is apparent that AT&T is not talking about making available the information using a closed system as required by the statutory definition. EarthLink believes the term “closed” reinforces Congressional intent to limit cable services to those that are primarily one-way broadcast type services.

⁶⁴ In this regard, it is ironic that the “AT&T Website Agreement,” found at www.att.com/terms, goes to great lengths to distance AT&T from any content on the Internet that AT&T does not directly control. Paragraph 3 of that agreement states in part as follows:

You understand that, except for information, products or services clearly defined as being supplied by AT&T, AT&T does not operate, control or endorse any information, products or services on the Internet in any way. Except for AT&T-identified information, products or services, all information, products and services offered through the Service or on the Internet generally are offered by third parties that are not affiliated with AT&T.

It would appear from this language that AT&T would wish to be deemed to “make available” these third-party services in a very limited sense indeed. For the full text of the agreement, see Exhibit 7 hereto or the web site described above.

describes this information as essentially being anything on the public Internet, it is logically impossible for AT&T even to identify, much less describe, the nature of this information. Given this, and given the clear Congressional directive that the “distinction between cable services and other services offered over cable systems is based on the nature of the service provided,”⁶⁵ AT&T’s inability to identify, much less describe, the nature of the information in its last three categories makes absurd its claim that this information constitutes “cable service.”

c. That Some Services Offered Over A Cable System May Be Cable Services Does Not Mean That All Services Offered Over That System Are Cable Services.

Even if AT&T could demonstrate that all of the five classifications of information that it describes were “cable services” (a legal impossibility for the reasons explained above), AT&T freely admits that its cable-based Internet offerings include services that are not “other programming services.” Having made this admission, however, AT&T argues that it is irrelevant that many of its services clearly are not “cable service”:

The Ninth Circuit also appeared influenced by the fact that cable Internet services generally include “e-mail” and other types of services that do not themselves constitute “other programming services.” But for purpose[s] of deciding whether particular cable Internet services are “cable services” under the Communications Act’s definition, it is irrelevant that @Home and Road Runner offer e-mail, transactional services, and other individual features that are not cable services in their own right, and the decisive issue under the Communications Act is not whether a service includes such features. Rather, the relevant question is whether the service offers the “video programming” or “other programming services” that satisfy the definition of cable services. If it does, it is unequivocally a “cable service.”⁶⁶

⁶⁵ *House Committee Report* at 43.

⁶⁶ *AT&T Comments* at 19 (footnote omitted; brackets added; emphasis added).

EarthLink understands that AT&T is asserting that any package of services or “bundled” offering is a “cable service” in its entirety if any portion of that service consists of “video programming” or “other programming service,” even when certain elements of the bundle clearly do not fit either of those categories. To the extent that there is any doubt that this is what AT&T means on page 19 of its comments, that doubt is removed by its statement on page 14:

Indeed, while each of these five categories of information constitute an “other programming service” and thus a “cable service” within the statutory definitions, cable modem services must be classified as “cable services” so long as any of the categories satisfies these definitions.⁶⁷

In support of its novel assertion that if any part of a bundled service is a cable service, then the entire service must be a cable service, AT&T relies entirely on the statement it makes in its comments set forth below:

This point is made explicit in the 1984 congressional report. It notes that many “commercial information services today offer a package of services, some of which would be cable services and some of which would not be cable services.” It then explained that the manner in which “a cable service is marketed would not alter its status as a cable service” and that the inclusion of non-cable service such as e-mail in the package “would not transform” the news or other “cable service into a non-cable communications service.”⁶⁸

Although it is cleverly worded so as to avoid being flatly untrue when read in isolation, this passage is represented as an “explicit” congressional endorsement of the proposition that mixing cable services with non-cable services makes the entire offering a cable service. As such, the passage constitutes a gross misrepresentation of the legislative history. The full text of

⁶⁷ *Id.* at 14 (emphasis added). AT&T offers no support for the quoted argument on page 14.

⁶⁸ AT&T Comments at 19.

the paragraph of the *House Committee Report* from which AT&T collects and rearranges snippets is set forth below:

Many commercial information services today offer a package of services, some of which (such as news services and stock listings) would be cable services and some of which (such as electronic mail and data processing) would not be cable services. While cable operators are permitted under the provisions of Title VI to provide any mixture of cable and non-cable service they choose, the manner in which a cable service is marketed would not alter its status as a cable service. For instance, the combined offering of a non-cable shop-at-home service with service that by itself met all the conditions for being a cable service would not transform the shop-at-home service into a cable service, or transform the cable service into a non-cable communications service.⁶⁹

Rather than supporting AT&T's novel theory that the bundling of cable and non-cable services somehow "contaminates" the non-cable services and makes the entire offering a cable service, the legislative history that AT&T cites in fact supports precisely the opposite conclusion. As the legislative history clearly states, cable operators may mix and match services however they see fit, but the regulatory classification of such services will be determined on an individual basis.

Other sections of the legislative history provided in the *House Committee Report* make plain that Congress not only understood, but in fact intended, that a cable facility could be used to provide both cable services and non-cable services, for example voice communications or data services, and that the non-cable services would be regulated under Title II to the extent they are common carrier services.⁷⁰ Further, court cases both before and after the passage of the

⁶⁹ *House Committee Report* at 44 (emphasis added).

⁷⁰ *House Committee Report* at 27-29, 41, 56-57, 60-63.

1984 Cable Act arrived at this same conclusion.⁷¹ For AT&T to suggest that either the legislative history or court precedent suggests that any form of contamination theory applies to the use of cable facilities for non-cable services is entirely unsupported by the law or the facts.

That approach was reaffirmed when Congress amended the Act in 1996. There, speaking of the addition of the phrase “or use” to 47 U.S.C. § 522(6)(B), the Conference Report accompanying S. 652 stated that: “This amendment is not intended to affect Federal or State regulation of telecommunications service offered through cable system facilities, or to cause dial-up access to information services over telephone lines to be classified as a cable service.”⁷²

That this service-by-service (not network-by-network) regulatory approach was explicitly chosen by Congress is also reflected in the definition of “telecommunications service,” which is the “offering of telecommunications . . . , regardless of the facilities used.”⁷³ Sections 651 and 653 of the Act (47 U.S.C. §§ 571 and 573) provide another example of this service-by-service approach. Those sections recognize that carriers can simultaneously provide telecommunications services and cable services, and that the regulatory scheme that applies depends on the type of service offered, not the nature of the facilities over which it is offered.

In short, the entire structure of the Act and the legislative history dating back prior to 1984 indicate that the combination of cable services with non-

⁷¹ See, e.g., *National Ass'n of Reg. Util. Commissioners v. F.C.C.*, 533 F.2d 601, 608 (D.C. Cir. 1976) (hereinafter *NARUC II*); *City of Dallas*, 165 F.3d at 353.

⁷² S. Conf. Rep. No. 104-230, at 169 (1996).

⁷³ 47 U.S.C. § 153(46) (emphasis added).

cable services does not turn the non-cable services into cable services.

Accordingly, in light of its admission that not all of its cable-based services are “cable services” within the meaning of the Act, AT&T’s second argument in support of its attempt to have cable modem service classified in its entirety as a cable service must fail.

5. Cable Modem Service Used By A Cable Operator To Provide Internet Access Indiscriminately To The Public Is A Common Carrier Telecommunications Service.

Because it is clear from the foregoing that Internet access service as it is being widely provided today does not meet the definition of “cable service,” the issue at hand is one of which regulatory classification fits this service. The Commission, in its *Universal Service Report to Congress*, addressed this question at some length and concluded repeatedly that Internet access is an information service⁷⁴ that is generally delivered over a common carrier telecommunications service. It is that separate and distinct underlying telecommunications service to which EarthLink refers when it uses the phrase “cable modem service.” When this underlying telecommunications service is provided by a facilities-based common carrier, it must be offered separately from the information service that is carried on that transmission service and offered for resale on publicly available, non-discriminatory, and reasonable terms and conditions.⁷⁵ Further, the Commission has repeatedly found that a common carrier may not use the fact that it is providing an information service to end-users to “contaminate” the underlying transmission service in a manner

⁷⁴ See, e.g., 13 FCC Rcd at 11540.

⁷⁵ *Computer II* at 386 and 474.

that permits the common carrier to escape providing that basic transmission service separately to other information service providers who wish to use that transmission service to provide their own information services.⁷⁶

a. Internet Access Service Is An Information Service That Is Provided Via The Underlying Cable Modem Service.

EarthLink discussed in detail in its December 1 comments how the Act, the Commission's rulings in *Computer II*, the *Frame Relay Order*⁷⁷, and the more recent *Universal Service*⁷⁸ and *Advanced Services*⁷⁹ proceedings are all consistent in affirming the conclusion that Internet access service, which is itself an information service, is delivered using a separate and distinct transmission component. In the case of such information services being offered using cable facilities, the underlying telecommunications transport is known as "cable modem service."⁸⁰ We do not repeat our earlier arguments in full here, but we do provide a brief synopsis of the Commission's rulings that conclusively demonstrate that "cable modem service" is a "telecommunications service" when it is used to serve end-users indiscriminately.

⁷⁶ *Independent Data Communications Manufacturers Association, Inc.*, Memorandum and Order, 10 FCC Rcd 13171 (1995) ("*Frame Relay Order*").

⁷⁷ *Id.*

⁷⁸ *In the Matter of Federal-State Joint Board On Universal Service*, Fourth Order On Reconsideration in CC Docket No. 96-45, Report and Order In CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, 13 FCC Rcd 15318 (hereinafter *Universal Service Fourth Order on Reconsideration*).

⁷⁹ *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Remand, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91; 15 FCC Rcd 385 (1999) (hereinafter *Advanced Services Remand Order*).

⁸⁰ *EarthLink Comments* at 19-36.

Twenty years ago, in its *Computer II*⁸¹ decision, the Commission established a fundamental distinction between “basic services” and “enhanced services.” The “basic services” and “enhanced services” designations articulated in *Computer II* have been incorporated in the defined terms “telecommunications services” and “information services,” respectively, by the definitions and other provisions of the 1996 Act:

Thus, the FCC has long distinguished between basic “telecommunications” or “transmission” services, on the one hand, and “enhanced services” or “information services” that are provided by means of telecommunications facilities, on the other. Congress in 1996 codified the FCC’s long-standing distinction by adding new definitions to the Communications Act. The Act now defines “telecommunications” as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(43). The Act defines “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”

As these definitions make clear, an information service is distinct from, but uses, telecommunications.⁸²

Applying these definitions of “information service” and “telecommunications service” to the Internet, the Commission has held that the service generally described as “Internet access” is an information service, which is provided “via telecommunications”:

⁸¹ See n.19, *supra*.

⁸² FCC *Portland Amicus Brief* at 3-4 (emphasis added); see also *Universal Service Report to Congress*, 13 FCC Rcd 11501, 11511 (“Reading the statute closely, with attention to the legislative history, we conclude that Congress intended these new terms to build upon frameworks established prior to the passage of the 1996 Act. Specifically, we find that Congress intended the categories of “telecommunications service” and “information service” to parallel the definitions of “basic service” and “enhanced service” developed in our Computer II proceeding, and the definitions of “telecommunications” and “information service” developed in the Modification of Final Judgment breaking up the Bell system.”) (emphasis added).

An Internet access provider, in that respect, is not a novel entity incompatible with the classic distinction between basic and enhanced services, or the newer distinction between telecommunications and information services. In essential aspects, Internet access providers look like other enhanced -- or information -- service providers. Internet access providers, typically, own no telecommunications facilities. Rather, in order to provide those components of Internet access services that involve information transport, they lease lines, and otherwise acquire telecommunications, from telecommunications providers – interexchange carriers, incumbent local exchange carriers, competitive local exchange carriers, and others. In offering services to end users, however, they conjoin the data transport with data processing, information provision, and other computer-mediated offerings, thereby creating an information service. Since 1980, we have classified such entities as enhanced service providers. We conclude that, under the 1996 Act, they are appropriately classed as information service providers.⁸³

The Commission has, since the issuance of *Computer II*, regulated information service providers only under its Title I ancillary jurisdiction. EarthLink agrees that this is the proper approach. Even though information services per se are not regulated, however, the Commission has always held that a facilities-based common carrier that offers information services over its own network must make its underlying telecommunications services available on an unbundled⁸⁴ and non-discriminatory basis, on terms and conditions that are publicly available, to other providers of information services.

Even NCTA, one the most adamant opponents of classification of cable modem service as a “telecommunications service,” explicitly recognizes the

⁸³ *Universal Service Report To Congress*, 13 FCC Rcd 11501, 11540 (1998) (footnotes omitted) (emphasis added); see also *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Remand, 15 FCC Rcd 385, 401.

⁸⁴ EarthLink does not here use the term “unbundled” in the same sense that the concept of “unbundled network elements” is used in section 251(c) of the Act. Rather, we use it as the Commission did in *Computer II*, namely, to mean only that the facilities-based carrier must offer separately the underlying telecommunications service used to transport the information services that ride over those telecommunications services. *Accord*, NCTA Comments at 26 n.87.

fundamental point that common carriers that provide information services using their own transmission facilities must provide the transmission services underlying their information services to other information service providers on the same terms that they provide those services to themselves:⁸⁵

So that “non-discriminatory access [could] be had to basic transmission services by all enhanced service providers,” the Commission required all common carriers that offered enhanced services to unbundle their basic transmission offerings from their advanced service offerings.⁸⁶

b. Cable Operators Cannot Avoid Their Common Carrier Obligations Simply By Bundling Telecommunications Services With Information Services And Offering The Bundled Service For A Single Price (i.e. The Commission Theory Does Not Apply).

Having acknowledged the existence and continued viability of *Computer II*, *Frame Relay*, and their progeny, NCTA nevertheless argues that the *Computer II* resale obligations do not apply to cable operators that provide Internet access over their cable facilities. The basis for this argument is that

⁸⁵ In sharp contrast to NCTA, AT&T pretends that the fundamental unbundling and resale requirements of *Computer II* and the *Frame Relay Order* do not exist. Indeed, AT&T goes beyond merely ignoring those precedents (which, as noted above, the Commission has repeatedly found that Congress adopted in the 1996 Act), stating that:

[T]he implications would be truly staggering if the Commission could somehow “sever” a “telecommunications component from other” components of an information service and separately regulate the telecommunications component as a common carrier telecommunications service.

This, of course, is precisely what the Commission did in *Computer II*. AT&T is correct that the ramifications have been “staggering,” but staggering in the positive sense that the *Computer II* regime has allowed information service providers to innovate without regulation while at the same time preserving the common carrier base upon which all information services depend. As the Commission described, the rationale behind the distinction between “information services” and “telecommunications services” is that “[l]imiting carrier regulation to those companies that provide the underlying transport ensures that regulation is minimized and is targeted to markets where full competition has not emerged.” *Universal Service Report To Congress*, 13 FCC Rcd at 11546.

⁸⁶ *NCTA Comments* at 27 (footnote omitted; quotations and brackets in original).

the *Computer II* requirements do not apply to carriers that are not common carriers, and that cable operators are not providing transmission (i.e., “cable modem services”) on a common carrier basis. According to NCTA, “cable operators are not classified as common carriers because they do not provide pure transmission to the public for a fee.”⁸⁷ AT&T makes essentially the same argument, asserting that it cannot be a common carrier with respect to its cable modem services because it does not “offer these pure transmission services generally to the public at large or to a subset of it.”⁸⁸

Before discussing the proper legal standard for determining whether a carrier is a “common carrier” and applying that standard to the cable modem service here at issue, it is necessary first to address the cable industry argument outlined in the immediately preceding paragraph. That argument is based on a fundamentally flawed reading of *Computer II*, which, if left unanswered, would provide a mechanism for all common carriers with the capability to offer information services to escape their Title II obligations.

The cable industry argument that cable operators are not common carriers because they do not offer a “pure” transmission service to the public for a fee in fact consists of two separate arguments, both of which the Commission has conclusively rejected.

The first argument, and the one made most explicitly, is that the offering of an information service by a facilities-based carrier does not constitute the

⁸⁷ NCTA Comments at 29.

⁸⁸ AT&T Comments at 24.

offering of telecommunications.⁸⁹ Although the commenters do not use these words, this is simply an argument that the Commission should apply the “contamination theory” to facilities-based carriers. Under the contamination theory, when a common carrier transmission service is combined with an information service and provided to an end user as a single information service, the information service “contaminates” the communications service and removes it from common carrier regulation.⁹⁰

The problem with the cable industry request for the application of the contamination theory in this case is that the Commission has never applied it to facilities-based carriers:

To date, the Commission has not applied the contamination theory to the services of AT&T or any other facilities-based carrier. Indeed, the Commission rejected that alternative in *Computer III* and other proceedings.⁹¹

The Commission went on to explain why the application of that theory to facilities-based carriers would be undesirable:

Moreover, application of the contamination theory to a facilities-based carrier such as AT&T would allow circumvention of the Computer II and Computer III basic-enhanced framework. AT&T would be able to avoid Computer II and Computer III unbundling and tariffing requirements for any basic service that it could combine with an enhanced service. This is obviously an undesirable and unintended result.⁹²

The second argument implicit in the proffered argument that cable operators are not common carriers is that, because they offer an information

⁸⁹ We here in fact complete the argument for the cable industry commenters, because their comments make no mention of the fact that cable operators are facilities-based carriers, a critical point under *Computer II* and the *Frame Relay Order*.

⁹⁰ See *Frame Relay Order*, 10 FCC Rcd at 13719.

⁹¹ *Id.* at 13732.

⁹² *Id.* (emphasis added) (footnote omitted).

service for a single fee that includes both the information service and the transmission service used to deliver it, the cable operator is not offering a “pure” transmission service “to the public for a fee,” and is thus not a common carrier. The Commission has also explicitly rejected this argument. It is worth quoting the Commission at length on this point, because the discussion regarding “price contamination” also sheds important light on the other “contamination theory” discussed immediately above:

We disagree with ITAA’s contention that, because systems integrators provide both basic telecommunications services as well as enhanced services for a single price, systems integrators are engaged exclusively in the provision of enhanced or information services. Traditionally, the Commission has not regulated value-added networks (VANs) because VANs provide enhanced services. VAN offerings are treated as enhanced services because the enhanced component of the offering, i.e., the protocol conversion, “contaminates” the basic component of the offering, thus rendering the entire offering enhanced. Citing the Commission’s position that all enhanced services are information services, ITAA argues that, because systems integrators offer information and telecommunications for a single price, the information services “taint” the telecommunications services, thereby rendering the entire package an information service for purposes of applying the universal service contribution requirements. The Commission’s treatment of VANs, however, does not imply that combining an enhanced service with a basic service for a single price constitutes a single enhanced offering. The issue is whether, functionally, the consumer is receiving two separate and distinct services. A contrary interpretation would create incentives for carriers to offer telecommunications and non-telecommunications for a single price solely for the purpose of avoiding universal service contributions.⁹³

To summarize, it is clear from the Commission’s unequivocal statements that a facilities-based carrier may not claim it is not providing transmission to the public simply by bundling that transmission with an unregulated information service. It is equally clear that a carrier may not transform a transmission service into an information service simply by charging a single

⁹³ *Universal Service Fourth Order on Remand*, 13 FCC Rcd 5474-75.

price for the combined offering. Accordingly, the cable industry cannot defeat common carrier regulation of their cable modem services on these grounds.

Having disposed of the preliminary objections of the cable industry to cable modem services being classified as common carrier services, we turn next to the defining the proper test for determining whether “cable modem services” are in fact common carrier telecommunications services. We then apply that test to the current Internet access and cable modem services being offered to the public by cable operators.

c. NARUC I States The Proper Test For Determining When A Carrier Is Offering A Common Carrier Service.

In addition to the “contamination” theories discussed immediately above, the cable industry also argues separately that, to the extent that it is providing telecommunications, it is doing so on a “private” carriage rather than a “common carrier” basis. This is the case, NCTA argues, because:

Cable operators will not serve all ISPs in the exact same manner – for good reason, as discussed below in Section III. Rather, cable operators plan to contract with certain unaffiliated ISPs to provide cable modem service under private, individually negotiated agreements. The terms and conditions of these agreements, such as pricing, speed, and system usage, depend both on technical aspects of the cable system and the services that cable operators and ISPs plan to provide over the system.⁹⁴

This argument entirely misses the mark, because the relationship that is critical to determining whether cable operators are today offering cable modem services on a common carrier basis is not some hypothetical future relationship between the cable operator and an ISP. Instead, the relationship that must be

⁹⁴ NCTA Comments at 15; see also Comcast Comments at 6.

examined, and which no cable operator addresses, is the relationship between the cable operator and its subscribers. As EarthLink demonstrates below, there can be no doubt that cable operators are providing Internet access on indiscriminate terms to millions of cable subscribers using the cable operators' own transmission facilities. Because every information service (e.g. Internet access) is provided via a telecommunications link, those cable operators are also necessarily providing telecommunications service to those same customers when that information service is provided on an indiscriminate basis.

Before turning to the facts that demonstrate that cable operators are providing cable modem services on a common carrier basis, it is necessary briefly to address the proper legal standard for distinguishing between common and private carriers. Luckily, the commenters generally agree that *NARUC P*⁵ states the proper test of whether a service is being offered on a common carriage basis or a private carriage basis.⁹⁶ The *NARUC I* court stated the test as follows:

It is not necessary that a carrier be required to serve all indiscriminately; it is enough that its practice is, in fact, to do so.

This requirement, that to be a common carrier one must hold oneself out indiscriminately to the clientele one is suited to serve, is supported by common sense as well as case law. The original rationale for imposing a stricter duty of care on common carriers was that they had implicitly accepted a sort of public trust by availing themselves of the business of the public at large. The common carrier concept appears to have developed as a sort of quid pro quo whereby a carrier was made to bear a special burden of care, in exchange for the privilege of soliciting the public's business.

Moreover, the characteristic of holding oneself out to serve indiscriminately appears to be an essential element, if one is to draw a

⁹⁵ *National Association of Regulatory Utility Commissioners v. F.C.C.*, 525 F.2d 630 (D.C. Cir. 1976) (hereinafter *NARUC I*).

⁹⁶ See, e.g., *NCTA Comments* at 14-15.

coherent line between common and private carriers. The cases make clear both that common carriers need not serve the whole public, and that private carriers may serve a significant clientele, apart from the carrier himself. Since given private and common carriers may therefore be indistinguishable in terms of the clientele actually served, it is difficult to envision a sensible line between them which does not turn on the manner and terms by which they approach and deal with their customers. The common law requirement of holding oneself out to serve the public indiscriminately draws such a logical and sensible line between the two types of carriers.⁹⁷

Although NCTA agrees that *NARUC I* controls, it would state the test this way:

Under the *NARUC I* test, there are two prongs in determining whether an entity is a private or common carrier: first, whether there is a legal compulsion to serve the public indifferently; and second, whether there are reasons implicit in the entity's operations to expect that it should hold itself out to the public indifferently.⁹⁸

EarthLink agrees that this was one formulation of the common carrier test stated by the *NARUC I* court. That version of the test, however, was enunciated by the *NARUC I* court in the context of an SMRS service that had yet to be initiated.⁹⁹ As such, the test as stated by NCTA is a special application of the more general common carrier test enunciated by the court. The more general test quoted above is the proper test to use in the current instance, because we are dealing not with a service that will be initiated in the future, but rather with a service that is reaching millions of people every day.

⁹⁷ *Id.* at 641-642 (emphasis added).

⁹⁸ *NCTA Comments* at 14 (footnote omitted).

⁹⁹ *NARUC I*, 525 F.2d at 634 (“The Orders under review deal with the allocation of frequency spectrum . . . and with the development of regulations pertaining to the future use of that spectrum.”) (emphasis added).

In this regard, those cable operators that are already certificated as local exchange carriers meet any articulation of the *NARUC I* test. For those carriers, the analysis of whether or not they are common carriers should end there. Because the arguments offered by the cable operators cannot go unanswered, however, we provide below an analysis of why all cable operators that provide information services to the public over their own facilities are common carriers, even if they were not already a common carriers by virtue of their LEC status.

d. Cable Operators Are Offering Internet Access, And Thus Cable Modem Services, Indiscriminately To The Public.

As discussed above in the context of the Commission's *Computer II* and *Frame Relay* orders and its *Universal Service Report to Congress*, and in the context of the cable industry's failed "contamination theory" arguments, under the law today an information service provider that uses its own facilities to provide information services also provides a separate, underlying transmission service over which the information service travels.

Put differently, every information service travels over a transmission service. Because that is the case, each offering of an information service to the public for a fee also necessarily includes the offering for a fee¹⁰⁰ of a transmission service – in this case cable modem service – to the same

¹⁰⁰ As the Commission has explained, a single fee paid for an information service is allocated between the two distinct functions that make up that service – the transmission function and the data processing function:

As we have stated basic services form one component of the charges for enhanced services – the remaining components of which are available from the competitive resources and capabilities of the data processing industry.

Computer II, 77 F.C.C. 2d at 435.

customers that buy the information service. Accordingly, for the purpose of determining who is offering cable modem services, and to whom, the simplest way to determine whether a cable operator is offering cable modem service to the public is to examine that cable operator's provision of Internet access to the public. Internet access is a useful proxy for tracking the offering of cable modem service because it is the Internet access service that cable operators describe in their promotional offerings. The use of a proxy is necessary because the cable operators do not mention the transmission service that they in fact provide separately to their affiliated ISP, in a deliberate attempt to avoid common carrier status.

Under *NARUC I* then, the question that must be answered is in itself a simple one: Are cable operators providing Internet access to the public for a fee on an indiscriminate basis? If the answer to that question is "yes," then those cable operators are also necessarily providing cable modem services (the underlying transmission service) to the public for a fee for the reasons stated immediately above. If a cable operator is providing cable modem service – a form of "telecommunications" – indiscriminately to the public for a fee, then that cable operator is offering a common carrier service, and the cable operator is therefore subject to the *Computer II* requirement that it provide its transmission services to competing ISPs on the same terms that it provides those transmission services to itself.

It would appear to be a simple matter to determine whether cable operators are offering Internet access and its related transmission service to the public. However, no major cable operator to EarthLink's knowledge addresses its relationship with its subscribers in the comments filed to date in this