COMMENT

Cable Internet Unbundling: Local Leadership in the Deployment High Speed Access

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I. INTRODUCTION

The evolution of law and technology has led to substantial activity in the field of communications law. The growth in popularity and use of the Internet has made it an area of economic, technological, and social interest. This has brought it to the attention and regulatory interest of the Federal Communications Commission (FCC).[1] The Internet, however, poses problems for the traditional regulatory paradigms that the FCC has come to rely upon.[2] This is true not only for the Internet itself, but also for the areas of intersection between the Internet and "traditional" media, such as telecommunications and cable. With the pending merger of TCI and AT&T and their promise of "one-stop" television, Internet, and telephone service, the cable Internet issues move to the forefront. The FCC and Congress responded by trying to induce increased competition in communications fields.[3] The desire of traditional Internet Service Providers (ISPs) to gain access to new high-speed technologies for Internet access led to requests for unbundling or open access to cable systems.[4] Such requirements would allow ISPs to lease elements of the cable company's infrastructure to compete with the cable company's own ISP.

Despite the focus of most of the attention and advocacy toward the

1. *See, e.g.*, *Fact Sheet* (visited Oct. 10, 1999) <http://www.fcc.gov/Bureaus/Common_Carrier/Factsheets/nominute.html> (discussing FCC's consideration of whether calls to ISPs are local or long-distance); *FCC Access Charge Reform Homepage* (last modified July 16, 1999) <http://www.fcc.gov/isp.html> (providing a home page for access charge reform and the implications for information service providers); Kevin Werbach, *Digital Tornado: The Internet and Telecommunications Policy* (visited Oct. 10, 1999) <http://www.fcc.gov/Bureaus/Wireless/OPP/working_papers/oppwp29.txt> (discussing office plans and policy analysis of the Internet, focusing on problems with current definitions, pricing structures, and bandwidth availability).

2. *See* Werbach, *supra* note 1.

3. *See* Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-communications, Inc. to AT&T Corp., *Memorandum Opinion and Order*, 14 F.C.C.R. 3160, paras. 77-81, 92-96, 15 Comm. Reg. (P & F) 29 (1999) [hereinafter FCC License Transfer].

4. *See id.* at para. 75; *FCC Likely to Punt on Web Unbundling*, MULTICHANNEL NEWS, Jan. 25, 1999, at 5.

federal level, local authorities took the first regulatory step toward open cable Internet access. Portland, Oregon, and surrounding Multnomah County were chosen for early access to the television-Internet-telephone service package to be offered by the merged AT&T and TCI.[5] To implement this marketing strategy, TCI needed local approval to transfer its existing cable franchises to AT&T. In an effort to meet community needs, however, the local authorities in Portland and Multnomah County conditioned such a transfer on the provision of open access to the "cable modem platform." Unable to reach a compromise with the local governmental bodies, AT&T and TCI filed suit in district court in an attempt to overturn the imposition of the open access requirement. In *AT&T Corp. v. City of Portland*,[6] the district court held that the actions of the local authorities were justified under existing law.[7] AT&T and TCI appealed this holding to the Ninth Circuit,[8] ensuring that the issue of unbundling of cable Internet access remains in the spotlight in the near future. More directly, however, the lawsuit attempts to settle the question of the legitimate role of local regulators regarding cable Internet access.

This Comment begins by looking at the technologies that exist for providing Internet access. This includes traditional "dial-up" access using a modem and local phone lines, as well as a variety of technologies to allow high-speed access. The facts surrounding the imposition by Portland and Multnomah of an open access requirement on AT&T and TCI will be considered next. Finally, the merits of open access will be considered, as well as the authority of local regulatory bodies to impose such a requirement.

II. TECHNOLOGY

Before addressing the specific justifications for unbundling or open access to the cable Internet platform, it is useful to have a basic understanding of the technologies for Internet access. This will begin with a brief consideration of the current narrowband modem over telephone line method. Next, technologies for high-speed access other than cable will be considered. Finally, the technology of cable Internet access, as well as the

5. For discussion of the facts of this case, see *infra* Part III.

6. *Opinion*, 16 Comm. Reg. (P & F) 138 (D. Or. June 3, 1999).

7. *See id.*

8. *See AT&T Seeks Expedited Appeal of Portland Cable Ruling* (visited Oct. 10, 1999) <http://www.att.com/press/item/0,1193,520,00.html>. The FCC filed an amicus brief with the Ninth Circuit in this appeal, arguing against the authority of local regulators to act in this manner. *See FCC Court Brief Underscores Consumer Benefits from National Internet Policy of Unregulation; Urges Narrow Judicial Resolution* (visited Oct. 10, 1999) <http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/1999/nrmc9060.html>.

two major cable ISPs, will be discussed.

A. Current "Dial-Up" Access

Currently, the most common method of Internet access among private individuals is the combination of a modem over the regular, twisted-pair telephone line used for telephone access. Users dial up an ISP, which provides the user with a connection to the Internet. Data can be sent and received from the Internet, given the capability of modems currently available, at speeds of up to fifty-six kilobytes per second (Kbps). Factors such as the capabilities of the site the user is visiting or the amount of traffic on the Internet at the moment, however, can make actual data speeds much slower than the theoretical maximum. To download a fifteen megabytes file at fifty-six kilobytes per second would take about thirty-eight minutes.[9] The current price for Internet access by this method is in the area of twenty dollars per month.

B. High-Speed Alternative Technologies

One technology that allows higher speed Internet access is the Integrated Services Digital Network (ISDN). The maximum potential speed of the most common type of ISDN connection is up to 512 Kbps.[10] To download a fifteen megabytes file at 512 Kbps would take about four minutes. It costs between one hundred dollars to four hundred dollars to have an ISDN line installed. The user must also provide an ISDN router to connect to the Internet. Finally, for the most common level of service, the cost is around sixty-seven dollars per month.[11]

The Digital Subscriber Line (DSL) also allows high-speed Internet access. Although there are many variations of this technology, the most common is the asymmetric DSL (ADSL). With a "splitter" version of ADSL, it is possible to use the line for both voice and data simultaneously. This would eliminate the need for a second phone line for Internet access. ADSL works over the regular lines used for phone service, but utilizes a special connection that provides much faster data transfer speeds. Users need to purchase a special type of modem that facilitates this connection, which will cost about $200. Additionally, the user's phone company must act as their ISP. The current cost for this service is about $40 per month for data speeds of 256 Kbps, up to $125 per month for one megabit per second

9. *See* Phil J. Shuey, *High-Speed Internet Connections: What You Need to Know*, 27 COLO. LAW. 9, 12 (1998).

10. *See id.* at 14.

11. *See id.*

or $875 per month for seven megabytes per second (Mbps).[12] To download a fifteen megabytes file at one megabytes per second would take about two minutes.

Yet another option for high-speed Internet access is a T1 high-speed leased telephone line, which provides point-to-point service (PTP). A T1 connection allows data transfer at up to 1.5 Mbps.[13] To download a fifteen megabytes file at 1.5 Mbps would take a little over one minute. The cost for this technology is commonly about $330 per month, plus forty-four dollars per mile from the user's computer to the ISP.[14]

Wireless Internet access is being developed as an alternative technology. One account suggests that Internet access through low-earth orbit satellites will be able to attain data speeds roughly two thousand times faster than traditional modems.[15] This would yield data speeds of about one hundred megabytes per second. At this transfer speed, a file of fifteen megabytes would download in less than one second. At the present time, however, this technology is primarily in the developmental stage.

C. Cable Technology

Cable or "broadband" Internet access also allows substantially greater data speeds than traditional phone networks. For true high-speed Internet access, new broadband cable must be installed to allow both reception and transmission of data. Theoretically, cable Internet access can allow data rates of up to ten megabytes per second.[16] Other estimates, however, put the likely data transmission range from two to five megabytes per second.[17] At five megabytes per second, it would take about twenty-four seconds to download a fifteen megabyte file. The monthly cost for this service is about forty dollars. A special cable modem is also required to allow access. Further, most currently installed cable connections only allow reception of data (i.e., for data to be transmitted to the subscriber's television) and thus must be replaced to allow full high-speed access.

An alternative cable approach would utilize existing cable to provide practical high-speed Internet access. Customers could use existing one-way

12. *See id.*

13. *See id.*

14. *See id.*

15. *See En Banc Hearing on Bandwidth Before the Federal Communications Commission* at 3-4 (visited Aug. 25, 1999) <http://www.fcc.gov/enbanc/070998/teledesi.pdf> (testimony of Steve Hooper, Co-Chief Executive Officer, Teledesic).

16. *See* Shuey, *supra* note 9, at 14.

17. *See En Banc Hearing on Bandwidth Before the Federal Communications Commission*, *supra* note 15 (written statement of Milo Medin, Senior Vice President, Engineering and Chief Technology Officer, @Home Network).

cable to receive data at high speeds. The transmission of data to the Internet by the subscriber would be accomplished through use of the telephone lines at slower speeds.[18]

The two main ISPs providing access over cable lines are @Home and Road Runner. @Home has affiliate agreements with leading cable companies, such as TCI, Comcast, Cox, InterMedia Partners, Marcus Cable, Rogers, Shaw, and Cablevision Systems Corp.[19] The combined cable networks of @Home's partners reach roughly forty percent of U.S. households. Time Warner and Cablevision use Road Runner. Reports indicate that Road Runner will combine its service with MediaOne's MediaOne Express, which will change its service name to Road Runner.[20]

III. *AT&T CORP. V. CITY OF PORTLAND*

Portland, Oregon, was chosen as a market to test a new marketing agreement from AT&T and TCI to provide a package of local and long-distance phone, cable TV, and Internet services on an upgraded cable network.[21] To do this, TCI was required to transfer the ownership of its cable franchise agreements to AT&T, which will run the company. The Mt. Hood Cable Regulatory Commission (MHCRC) decided that competing ISPs should be able to use the AT&T and TCI network to provide Internet service.[22] "Portland and Multnomah County, following the cable commission's recommendation," voted "to impose the open access condition as part of their approval of the franchise transfer."[23] AT&T claimed that America Online (AOL) and U.S. West, who requested unbundling at the federal level, pushed their agendas on the local authorities, leading to the unbundling requirement.[24] Oregon lawmakers, however, may have been more interested in "smooth[ing] the way for those local ISPs to offer Internet access that addresses specific community needs."[25]

18. *See* Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past* at 77 (visited Oct. 13, 1999) <http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp30.pdf>.

19. *See id.* at 79 n.373.

20. *See id.* at 78.

21. *See* Su-Jin Yim, *AT&T, TCI Sue Local Regulators, Portland, Multnomah County*, PORTLAND OREGONIAN, Jan. 20, 1999, at A1.

22. *See id.*

23. *Id.; see also* AT&T Corp. v. City of Portland, *Opinion*, 16 Comm. Reg. (P & F) 138, 139 (D. Or. June 3, 1999) (quoting identical provisions in Portland, Or., Ordinance 172955 (Dec. 17, 1998) and Mutlnomah County Bd. of Comm'rs, Or., Resolution 98-208 (Dec. 17, 1998)).

24. *See* Yim, *supra* note 21, at A21.

25. Price Colman, *Unbundling Duel in Denver*, BRDCST. & CABLE, Jan. 11, 1999, at 67.

The first lawsuit in the debate over open cable Internet access arose when AT&T and TCI filed suit in Oregon District Court in an attempt to overturn the unbundling requirement.[26] The issues involved in this dispute are "whether local authorities can preside over far-reaching industry issues and what equals fair competition in the fast-moving technology age."[27] In a broader sense, however, this dispute raises the question of whether unbundling or open access requirements should be placed on cable companies wishing to offer Internet access services. Portland City Commissioner, Erik Sten, explained that, from the city's perspective, "'we can't give away local power' . . . . 'We have enough cases in which local governments are really left in the lurch by federal policy. The fact that AT&T is suing us is not nearly reason enough to back down.'"[28]

The Oregon District Court resolved the case by granting the city of Portland and Multnomah County's motion to dismiss.[29] AT&T and TCI also moved for summary judgment, and the court found that there were no disputed issues of material fact. Thus, "these summary judgment motions . . . resolve the issues."[30] The court addressed numerous arguments based on the Constitution and federal law, however, the court ultimately concluded that these arguments did not prevail and granted summary judgment in favor of the defendants.[31] AT&T and TCI appealed this decision,[32] and the FCC has intervened as well.[33]

Several issues are raised both directly and indirectly by this litigation. Although the suit is not challenging the merits of unbundling itself and the district court did not expressly address it,[34] the issue is clearly at the heart of AT&T and TCI's motives for filing the suit. Second, and more directly relevant to the suit, there is the question of whether this was an appropriate means of implementing an open access requirement. Specifically, there is a question of whether the cable unbundling issue should be dealt with solely on the federal level, or whether this type of regulation can be implemented using the local authority over franchise agreements.

26. *See* AT&T Corp. v. City of Portland, *Opinion*, 16 Comm. Reg. (P & F) 138 (D. Or. June 3, 1999); Yim, *supra* note 21, at A1.

27. *Id.*; *See* AT&T Corp. v. City of Portland, *Opinion*, 16 Comm. Reg. (P & F) 138, 138-40.

28. Yim, *supra* note 21, at A1.

29. *See* AT&T Corp. v. City of Portland, *Opinion*, 16 Comm. Reg. (P & F) 138, 143.

30. AT&T Corp. v. City of Portland, *Opinion*, 16 Comm. Reg. (P & F) 138, 140.

31. *See id.* at 143.

32. *See AT&T Seeks Expedited Appeal of Portland Cable Ruling*, *supra* note 8.

33. *See FCC Court Brief Underscores Consumer Benefits from National Internet Policiy of Unregulation; Urges Narrow Judicial Resolution*, *supra* note 8.

34. *See* AT&T Corp. v. City of Portland, *Opinion*, 16 Comm. Reg. (P & F) 138.

IV. OPEN ACCESS

The general issues associated with unbundling of cable Internet access have received substantial attention at both the federal and local levels. A preliminary question is whether Internet access is a cable service or telecommunications service. Second, numerous arguments in support of access to broadband for competing ISPs are raised. Finally, potential regulatory remedies are proposed and evaluated under the First Amendment.

A. Cable Service vs. Telecommunications Service

A preliminary issue is whether AT&T and TCI should be treated as a telecommunications service provider and thus fall within the unbundling and other requirements already applied in the telecommunications context. Many ISPs and telecommunications providers argue that AT&T and TCI should be treated as a telecommunications service provider.[35] AT&T and TCI, as well as the National Cable Television Association (NCTA), argued that services such as those provided by @Home are "cable services."[36] AT&T and TCI argued that the legislative history of the Telecommunications Act of 1996[37] indicates that the addition of the words "or use" (as opposed to the more passive "interaction") to the definition of cable service was meant to include the type of interactive services provided by @Home.[38] The NCTA has acknowledged that such an interpretation would subject the services to cable franchise fees.[39] However, this would also "bring[] cable Internet-based services under the cable framework" and

35. *See, e.g.*, FCC License Transfer, *Memorandum Opinion and Order*, 14 F.C.C.R. 3160, para. 83, 15 Comm. Reg. (P & F) 29 (1999).

36. *See id.* at para. 82 (arguments of AT&T/TCI). *See also* Esbin, *supra* note 18, at 93 (argument of NCTA). For the statutory definition of "cable services", see 47 U.S.C. § 522(6) (Supp. II 1996).

37. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

38. *See* FCC License Transfer, *Memorandum Opinion and Order*, 14 F.C.C.R. 3160, para. 82, 15 Comm. Reg. (P & F) 29. Statements by Representative Dingell immediately prior to passage of the 1996 Act support this interpretation. Representative Dingell, discussing the effect of the revised definition of cable services would have on franchise revenues, stated:

> This conference agreement strengthens the ability of local government to collect fees for the use of public rights-of-way. For example, the definition of the term "cable service" has been expanded to include game channels and other interactive services. This will result in additional revenues flowing to the cities in the form of franchise fees.

141 CONG. REC. H1156 (1996) (statement of Rep. Dingell). "Other interactive services" may have been a reference to Internet access services. *See* Esbin, *supra* note 18, at 85.

39. *See* Esbin, *supra* note 18, at 93.

"provide the industry desired regulatory stability at the most fundamental level."[40] It would also exempt them from regulations placed upon information and/or enhanced services which would fall upon Internet services provided by telecommunications carriers over telecommunications facilities.[41] It has been argued that in the case of "Internet-based services, in which the cable operator supplies significant amounts of its own content and local programming and information along with open-ended Internet connectivity, inclusion under the definition of cable services is relatively easy because, such Internet-based services share many of the features of traditional cable programming services."[42] A strong argument can be made in support of the categorization of @Home-type cable Internet access as a cable service. Thus far, the FCC seems unpersuaded by arguments to the contrary. Such a holding will also work to bring this service under greater local regulatory control through franchise requirements. Thus, this Comment will proceed from the assumption that cable Internet access, at least of the type provided by @Home, is a cable service.

B. Access to Broadband Technology

Numerous arguments have been raised in support of open access to cable Internet technology. These arguments include support of competition and increased consumer choice of content. Several additional arguments from familiar cable regulations, including analogies to existing must-carry and leased access requirements, may justify open access as well. Several alternatives exist for dealing with the policy concerns that are raised. First Amendment concerns, however, may limit the alternatives that are available at this time.

1. Lack of Competition from the General ISP Market

Although there are currently narrowband "competitor" ISPs in most, if not all, markets in which cable Internet access will be made available, they may not in fact provide competition. Broadband service provides both substantially better transmission quality and data speeds than available from dial-up access. In addition to the desirability of these traits in their own right, they could also allow for the provision of new services. AT&T and TCI argued that, once the greater expense associated with broadband is accounted for, the cheaper narrowband alternative does provide effective competition.[43] Evidence was presented to the FCC, however, indicating

40. *Id.* at 4.
41. *See id.*
42. *Id.* at 87.
43. *See* FCC License Transfer, *Memorandum Opinion and Order*, 14 F.C.C.R. 3160,

that—accounting for both quality and price—narrowband Internet access is not a substitute for broadband service.[44] Thus, the general category of Internet access services may be too broad a category for purposes of measuring competition.

The FCC's regulatory decision—declining to act at the present time—relied upon the potential competition in the form of other high-speed access technologies. The FCC stated that "the record, while sparse, suggests that multiple methods of increasing bandwidth are or soon will be made available to a broad range of customers. On this basis, we see no reason to take action on this issue at this time."[45]

Although this ostensibly involves inaction on the part of the FCC, its faith in customer use of multiple technologies—one for cable television, another for Internet access—resembles a regulatory mistake of the past. Rather than rely on must-carry requirements, the FCC had previously hoped that cable and broadcasting coexistence would be ensured by the inclusion of an A/B switch that allowed individuals to switch between cable programming and broadcast programming received by their antenna. Prior to passing the 1992 Cable Act,[46] the House of Representatives found that "[a] recent survey of cable subscribers shows that consumers are not willing to use A/B switches . . . . Consumers appear to be unwilling to bear the expense of subscribing to cable and of maintaining an adequate antenna for off-the-air reception . . . ."[47] The Senate reported that among other problems with the A/B switches, "[ninety-eight] percent of cable homes do not have rooftop antennas connected to their television sets."[48] Indeed, "the FCC noted [that] the cable industry encouraged its subscribers to take down their antennas and eliminate their capacity to receive signal off-air."[49] The effects of these facts were, that:

> Once a home is connected to cable . . . that home becomes extremely dependent upon that cable for reception of local

para. 77, 15 Comm. Reg. (P & F) 29.

44. *See id.* at para. 78 (noting that this argument was raised by numerous parties and was supported by AOL with an economic model and expert testimony).

45. Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecomms. Act of 1996, *Report*, 14 F.C.C.R. 2398, para. 101, 14 Comm. Reg. (P & F) 1292 (1999) [hereinafter Deployment of Advanced Telecomms.]; *accord* FCC License Transfer, *Memorandum Opinion and Order*, 14 F.C.C.R. 3160, para. 62, 15 Comm. Reg. (P & F) 29.

46. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460.

47. H.R. REP. NO. 102-628, at 54 (1992).

48. S. REP. NO. 102-92, at 45 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1178.

49. *Id.*

> television stations. Even though these signals theoretically are available over-the-air, when a local television station is not carried on a cable system, cable subscribers effectively lose their ability to watch it. The cable becomes a gate over which the local system has control.[50]

Just as the FCC's faith in the A/B switch and consumer maintenance of a TV antenna proved misguided, faith in competing hardware solutions may be misguided as well. The same consumers who were unwilling to keep or obtain a TV antenna in the face of readily available cable television service are unlikely to undertake the effort necessary to have new technologies wired into their home for the purpose of Internet access, when comparable service is available through their existing cable connection. Further, continued use of existing twisted-pair telephone wiring may decline, given the availability of telephone service over the same cable used for television and Internet service. This could be particularly problematic for local ISPs who may not have the finances to implement new high-speed technologies themselves, but would have to wait to buy access from large ISPs. Thus, the absence of any competing Internet access technologies from any home with cable service is an outcome that is both likely and detrimental to the consumer.

2. Lack of Competition Within the Cable Market

It appears that prime justification for the regulatory action of the city of Portland and of Multnomah County stemmed from the conclusion that "@Home had no viable competitors in the local retail market for residential Internet access services."[51] Further, a number of arguments have been made to the FCC raising the concern that, without open access or unbundling, AT&T and TCI (and in the future, similarly situated cable companies) would have such a head start in broadband access that they would obtain monopoly, or near-monopoly status. Indeed, the FCC noted that "cable systems typically contract with only one cable modem service provider, and that provider actually manages data delivery over the cable facilities."[52] Therefore, "it does not appear that other cable modem service providers such as Road Runner, formed by Time Warner, are likely to be participants

50. *Id.* at 42, *reprinted in* 1992 U.S.C.C.A.N. 1175.

51. AT&T Corp. v. City of Portland, *Opinion*, 16 Comm. Reg. (P & F) 138, 139 (D. Or. June 3, 1999). The Mt. Hood Cable Regulatory Commission, which advises Portland and Multnomah County, found that the cable modem platform was "an 'essential facility' . . . meaning a facility that competitors cannot practically duplicate and that is otherwise unavailable." *Id.*

52. FCC License Transfer, *Memorandum Opinion and Order*, 14 F.C.C.R. 3160, para. 73, 15 Comm. Reg. (P & F) 29 (1999).

in markets served by @Home" so that "[c]ompetition, where it takes place, is for the contract to supply the customer's cable system."[53] Substantial development of broadband access by a given cable company will also result in no net competition in a given consumer's market.

Considering all these factors, cable companies, like AT&T and TCI, will have the ability to discriminate against competing ISPs and deny interconnection in order to seek monopoly profits. The rapid deployment of broadband technology, coupled with the attractive package that can be offered by AT&T and TCI, will give it substantial control over the price of access.[54] By offering high-speed Internet access as part of a package with services already utilized by customers, such as TCI cable television and AT&T telecommunications service, it is substantially less likely that a customer will look elsewhere for Internet access. In a filing with the FCC, the Mount Hood Cable Regulatory Commission (MHCRC) argued precisely this point. The MHCRC stated that the "proprietary platforms" offered by @Home and similar cable services may not "become available universally and in all markets and franchise areas unless local governments retain and utilize the regulatory tools available under existing franchise agreements and federally-recognized consumer protection authority."[55] This is a particular danger due to the "general availability of cable connections in urban areas, and the potentially superior technical 'fit' for many households to the robust cable platform as compared with the more limited DSL and other options available on the narrowband telephone platform."[56]

53. *Id.*

54. *See id.* at para. 81.

55. Mt. Hood Cable Regulatory Commission, *Ex Parte Comments of Mt. Hood Cable Regulatory Commission* (visited Sept. 12, 1999) <http://www.mhcrc.org/CurrentIssues/fccexpar.htm> [hereinafter *MHCRC Comments*]; *accord* FCC License Transfer, *Memorandum Opinion and Order*, 14 F.C.C.R. 3160, para. 75 & n.219, 15 Comm. Reg. (P & F) 29 (citing to *MHCRC Comments*).

56. *MHCRC Comments*, *supra* note 55. The Denver City Council reached largely the same conclusion in a resolution requisition action on cable Internet unbundling by the FCC. "[T]he City has determined that the public interest is served by assuring that a wide diversity of information sources are made available to the public from cable systems," and further, "that there is significant potential for reduction of competition in Internet and on-line [sic] services if the dominant cable operator does not provide nondiscriminatory access to its cable modem platform." *Resolution 9, Series of 1999, Urging the FCC to Take Swift Action Regarding Internet Service Providers Access to Cable Networks* (visited Aug. 24, 1999) <http://www.denvergov.org/content/template13660.asp>. Denver was faced with a situation similar to that of Portland, but chose not to require open access because "TCI and AT&T represent that local franchise authorities such as the [c]ity of Denver are preempted by federal law from regulating in the public interest with respect to open access to such cable modem platforms." *Id.* They further noted that AT&T/TCI "have brought litigation against other local franchise authorities that have attempted to regulate in the public interest." *Id.*

ISPs have noted that AT&T and TCI's provision of Internet access through @Home cuts consumer choice. Indeed, it seems unlikely that customers would pay an additional charge for the service of AOL, Mindspring, or local ISPs after already paying forty dollars per month or more for a similar service from @Home.[57] Thus, without equal access to the cable, it is unlikely that any ISP can compete in the arena of cable Internet access. Indeed, the FCC concedes that:

> A pessimistic observer might predict that the limitations of some broadband technologies will lead to a patchwork of local broadband monopolies, with most new entrants remaining fringe players. In the consumer market, in this view, DSL will be the only successful technology in one neighborhood, cable-based broadband in the next neighborhood, and satellites in rural areas. In addition, certain commenters [sic] argue that if economies of scale and scope in broadband for the consumer market are significant, the present headstart of the cable companies will give them an insuperable first mover advantage and leave them with the kind of dominance they still enjoy in their core market for multichannel video program distribution (MVPD). While this pessimistic view may include broadband reaching all Americans, it does not foresee competition for most residential consumers.[58]

Discrimination may also occur in terms of restrictions placed on competitive ISPs. The National Association of Broadcasters (NAB) warned the FCC that Internet video streaming might be restricted to @Home.[59] This conclusion is supported by TCI President and Chief Operating Officer Leo J. Hindery, Jr.'s acknowledgement that streaming video limitations had been placed on @Home.[60] The NAB interpreted this as a sign that TCI was willing to limit access to potentially competitive providers of content.[61] If such limitations are placed on competitors, it will likely drive consumers to the cable company's own ISP.

3. Microsoft Analogy

In the absence of unbundling, the current and potential offerings of cable Internet access bears many similarities to the tactics purportedly used

57. *See* Rochelle Garner, *Cable Access Critical for AOL*, MULTICHANNEL NEWS, Nov. 30, 1998, at 20.

58. Deployment of Advanced Telecomms., *Report*, 14 F.C.C.R. 2398, para. 47, 14 Comm. Reg. (P & F) 1292 (1999).

59. *See* Ted Hearn, *Rivals Demand Access to AT&T-TCI Networks*, MULTICHANNEL NEWS, Nov. 2, 1998, at 55.

60. *See id.* "Cable sources have said, however, that @Home's 10-minute cap on video streaming was primarily designed to conserve bandwidth, and not to protect cable-subscription revenue." *Id.*

61. *See id.*

by Microsoft to unfairly attempt to gain dominance in the market for Web browsers. In the complaint filed by the Antitrust Division of the Department of Justice, the government alleged that Microsoft "misused . . . its Windows operating system monopoly" by requiring PC Original Equipment Manufacturers "to adopt the uniform 'boot-up' sequence and 'desktop' screen specified by Microsoft" to ensure the prominent placement of Internet Explorer and prevent prominent placement of Internet browsers of any of Microsoft's competitors.[62] "[T]hese restrictions ensure that users of Windows continue to see the Microsoft-specified Windows desktop unless and until they take affirmative steps to change the screens presented."[63] This conduct was argued to have resulted in the exclusion of competitors "from the most important channels of distribution," and to have allowed Microsoft "to use the near-ubiquity of its Windows operating system monopoly to gain dominance in both the Internet browser market and other software markets."[64] Further, ISPs and providers of Internet content are alleged to have agreed not to sell to Internet Explorer's competitors in exchange for prominent desktop placement.[65] The clear implication of Microsoft's alleged conduct is that the superior positioning on the desktop, which Microsoft's market position allows it to control, gives it a clear edge because users are unlikely, or at least much less likely, to switch to a competitor when Internet Explorer is already available and prominently placed. Indeed, it is unlikely that the ISPs and content providers would have forgone other sources of revenue unless they felt that lost revenues would be outweighed by the benefits of prominent placement on the Windows desktop.

There are striking similarities between these aspects of Microsoft's alleged conduct and the position taken by cable companies with regard to cable Internet access. While no single cable company has a monopoly, "[a] cable system serving a local community, with rare exceptions, enjoys a monopoly."[66] In fact, as of Congress's consideration of the 1992 Cable Act, sixty percent of U.S. television households subscribed to cable.[67] The National Cable Television Association (NCTA) reports that as of 1998 that number had increased to about sixty-seven percent of U.S. television

62. Complaint at para. 24, United States v. Microsoft Corp., CIV.A.98-1232, 1998 WL 614485, (D.D.C. Sept. 14, 1998), *available at* <http://www.usdoj.gov/atr/cases/f1700/1763.htm>.

63. *Id.* at para. 97.

64. *Id.* at para. 27.

65. *See id.* at paras. 75-92.

66. S. REP. NO. 102-92, at 8 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1140-41.

67. *See* H.R. REP. NO. 102-628, at 30 (1992).

households.[68] By giving their own ISP prominent placement within the cable system, rather than on the equal footing that could come from unbundling or open access, cable companies can expect to experience the same benefit in two-thirds of American television households that Microsoft has experienced in its Windows market. Learning from the history of Microsoft, it is clear that once two-way cable is in place, cable companies will be able to leverage their subscriber base into likely subscribers to their ISP. Users who were unwilling to go through the effort of obtaining a competitor to Internet Explorer are expected to be similarly unwilling to subscribe to additional content or Internet access when the cable company's ISP is readily available. It is even less likely that Internet users in these homes will take the steps necessary to obtain high-speed Internet access through a competing technology.

4. Access to Local Content

The incentives of the cable industry, coupled with their superior positioning, will lead to decreased choice and access to local content. As the Senate noted when discussing the rate regulations in the Cable Act of 1992, "[w]hile there may be regulatory or structural approaches that might better suit the problems, because these involve changing cable's mode of operation, such approaches are impractical. The Committee is not writing on a blank slate."[69] In the case of the Cable Act, this rang true as a result of, in large part, the regulatory environment created by the government and the resulting market consequences. The extensive regulations of broadcasters, including spectrum assignments, statutory duty to serve the local community, and the compulsory copyright license, coupled with the (de)regulatory approach taken in the 1984 Cable Act,[70] led to a situation whereby cable companies were able to profit at the expense of broadcasters.[71] The incentives for cable companies to give unfavorable treatment to broadcasters increased as "competition for programming, viewers, and advertising dollars increas[ed]."[72]

The effects of the incentives before the cable industry are important to remember when thinking about the future of commercial provision of Internet access. The expectation for the future is that "'[n]ext-generation

68. *See Cable Industry Facts-at-a-Glance 1998* (visited Sept. 1, 1999) <http://www.ncta.com/yearend98_6.html> (based on Nielsen Media Research information).

69. S. REP. NO. 102-92, at 18, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1150-51.

70. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984).

71. *See* Esbin, *supra* note 18, at 66; *cf.* H.R. REP. NO. 102-628, at 50-57 (discussing the need for must-carry regulations).

72. H.R. REP. NO. 102-628, at 53.

Internet is next-generation NBC, where we finally see the true convergence of the computer and home entertainment,'" and "'[b]roadband, a la @Home, gets us to that point.'"[73] Many anticipate that the future of ISPs lie in capturing revenues from advertising and proprietary content and programming.[74] Indeed, the cable industry stated that primary services to be provided by ISPs such as @Home or Road Runner "will be closer in nature to traditional cable offerings, with significant operator-provided content and browsing capability, than the Internet-based services provided by the telephone carriers."[75] A good example is provided by Optimum Online, the high-speed ISP for Cablevision in Connecticut. Optimum Online breaks the Web into categories for subscribers, such as news, sports, community, etc.[76] It also includes "News 12 Interactive," an online counterpart to Cablevision's regional cable news service and other resources such as "SportsChannel," "Community Center" and "ExtraHelp Online."[77] In this environment, the market will again involve "competition for programming, viewers, and advertising dollars," this time among ISPs.[78] As these ISPs recognize, it is unlikely that subscribers will want to pay even a reasonable amount of money for content when they have already paid @Home for the same thing.

a. Must-Carry Justifications

Many of the same justifications that motivated the must-carry requirements in the 1992 Cable Act, mandating cable carriage of local broadcast programming, apply to ISPs as well.[79] The same technology issues that led to broadcasting disadvantages hinder competing ISPs relative to cable ISPs.[80] The same market incentives just discussed (competition for programming, viewers, and advertising dollars) led to the disadvantage of broadcasting relative to cable and are present with ISPs.

73. Garner, *supra* note 57, at 20 (quoting Alan Braverman, an analyst who covers AOL for Deutsche Bank Securities in New York).

74. *See id.*

75. Esbin, *supra* note 18, at 77.

76. *See id.* at 79.

77. *See id.* at 79-80.

78. H.R. REP. NO. 102-628, at 53 (1992).

79. Indeed, the similarities between the type of regulation embodied in an open access requirement for cable modem technology and the must-carry rules led AT&T/TCI to argue that the must-carry rules were intended by Congress to preempt local regulation of a similar nature. *See* AT&T Corp. v. City of Portland, *Opinion*, 16 Comm. Reg. (P & F) 138, 142 (D. Or. June 3, 1999). The court quickly dismissed this argument. Since the open access provisions only require access to the cable Internet technology, the requirements were not in tension with must-carry. *See id.*

80. *See supra* Part IV.B.1-2.

Further, the compulsory copyright license, a source of economic disadvantage sometimes used as part of the justification for must-carry requirements—which is not imposed upon ISPs—may in fact only be an illusory disadvantage to broadcasters.[81] Thus, in a world where the line between Internet access and broadcasting is blurred, ISPs may face the same technological and economic situation that faced broadcasters prior to the implementation of must-carry requirements in the 1992 Cable Act.[82]

81. Although the burden of the compulsory copyright license is sometimes discussed as part of the justification for must-carry requirements, it is not clear that Congress, through the compulsory copyright license, took anything away from broadcasters that they ever really had. Two Supreme Court cases established that there was no copyright liability for cable retransmission of broadcast programming. *See Fortnightly Corp. v. United Artist Television, Inc.*, 392 U.S. 390 (1968) (holding that cable retransmission of local broadcast signals was wholly outside the copyright laws); *Teleprompter Corp. v. Columbia Broadcast System, Inc.*, 415 U.S. 394 (1974) (holding that cable systems were not liable under copyright laws for retransmitting either distant or imported signals). It was not until 1976 that Congress amended the Copyright Act and established a licensing system for cable retransmission, arguably to further both the goals of broad public dissemination of broadcast programs and the protection of the rights of copyright holders. *See* Nicholas W. Allard, *The 1992 Cable Act: Just the Beginning*, 15 HASTINGS COMM. & ENT. L.J. 305, 336 (1993). "The thrust of the new licensing scheme, called compulsory licensing, was to guarantee cable operators the right to conduct their business free from the threat of liability as long as they complied with FCC regulations and paid their proper royalties." *Id.* Under pre-1976 copyright jurisprudence, broadcasters would have been entitled to nothing in return for cable retransmission of their programming. Due to the 1976 amendments, cable companies must pay licensing fees. Compulsory copyright licensing, thus, actually worked to give new benefits to broadcasters vis-à-vis cable.

82. Broadcasters' statutory duty to serve the local community could be seen as another distinction between the circumstances faced by broadcasters, for which must-carry requirements were justified, and the current situation of local ISPs. *Cf.* Turner Brdcst. Sys., Inc. v. FCC, 512 U.S. 622, 676-77 (1994) (O'Connor, J., concurring in part and dissenting in part) (arguing that a preference for local content motivated the must-carry requirements, despite the insistence of the majority that the requirements are content-neutral). Despite the absence of any statutory duty, local ISPs may serve the public interest of their local community in the same way as broadcasters. Indeed, one reason for Portland's rejection of TCI's franchise transfer absent open access was to "smooth the way for . . . local ISPs to offer Internet access that addresses specific community needs." Colman, *supra* note 25, at 67.

At the very least, anecdotal evidence indicates that local ISPs provide many of the same types of news, information, and services of interest to the local community they serve as do broadcasters. *See, e.g.*, *Pointonline.net* (visited Aug. 28, 1999) <http://www.pointonline.net> (ISP serving central Wisconsin); *MagicNet* (visited Aug. 28, 1999) <http://www.magiclink.com> (ISP serving Idaho); *InterNet Labs* (visited Aug. 28, 1999) <http://netlabs.net/oldhome.html> (ISP serving central New Jersey); *Lone Keep Internet* (visited Aug. 28, 1999) <http://www.lonekeep.com> (ISP serving Jersey Shore, New Jersey); *Cyberlink Internet Access* (visited Aug. 28, 1999) <http://www.clnk.com> (ISP serving Southeast Oklahoma); *North Country Internet Access* (visited Aug. 28, 1999) <http://www.ncia.net> (ISP serving New Hampshire and Northern New England); *Cyber City Maui* (visited Aug. 28, 1999) <http://www.ccmaui.com> (ISP serving Maui, Hawaii). These ISPs feature links to local news, weather, current community events, and other

b. Leased Access Justifications

While the must-carry policy justifications apply to a great extent in the context of cable Internet access for ISPs, the justifications for leased access requirements apply with even greater force. A requirement that channels be set aside for third-party commercial access separates editorial control over a limited number of cable channels from the ownership of the cable system itself. Such a requirement is fundamental to the goal of providing subscribers with the diversity of information sources intended by the First Amendment.[83] The offering of Internet access through @Home by AT&T and TCI provides insight into how this goal could be frustrated in the Internet context. TCI is one of the owners and original developers of @Home. Thus, the content they provide would be under the same editorial control as the rest of the programming offered by TCI. Indeed, because @Home and Road Runner are the cable ISPs of choice for such a large and geographically diverse audience, there will be an incentive to "dumb down" the content they provide to the least offensive level nationally to avoid the need to generate different content for particular local markets. Competing ISPs, if allowed access to the cable modem platform, would provide a different editorial voice. This voice would be expected to be more attuned to local interests and controversies, rather than attempting to sell to a national audience. Further, unlike must-carry, leased access provisions were not justified on the basis of statutory content requirements or the preservation of an established regulatory scheme. The public policy

information. Many of these ISPs also host web pages for subscribers and feature advertising from local businesses. Others also offer discussion forums focused on topics of relevance to the communities served. These sites are freely accessible through general Internet access. Thus, one need not be a subscriber to receive the content available on these sites. However, if ISPs follow an @Home-type model—providing content to subscribers as part of the service fee—then many of the services provided by these pages would be accessible only by subscribers. Further, if the local ISPs hosting these sites are unable to stay in business, the content, which is clearly locally focused, will be lost.

When coupled with the likely convergence of television and Internet content, it is clear that the need to preserve the content provided by local ISPs rivals the need to preserve the content statutorily required of broadcasters. Thus, any justifications used in support of existing must-carry requirements also apply to local ISPs. The explicit recognition that preference for local content motivated the regulation, however, seems likely to bring it under strict scrutiny for First Amendment purposes, which will likely result in the regulation being struck down.

83. *See* H.R. REP. NO. 98-934, at 30 (1984); 47 U.S.C. § 532(a) (1994) (stating that the purpose of the leased access provision is "to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems"). In addition, the Court advanced this purpose as one of its primary justifications for the must-carry requirements. *See* Turner Brdcst. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997).

justifications that make open access of cable to ISPs analogous to must-carry requirements apply with even greater force to leased access requirements.

The bare existence of a provision requiring access to the cable Internet technology for ISPs, however, is not enough. The franchise transfer agreements of both Portland and Multnomah County wisely required such access to be "nondiscriminatory."[84] Indeed, Congress noted that despite the inclusion of a leased access provision in the 1984 Cable Act, fewer commercial programming providers have availed themselves of the access than had been envisioned. "[T]he principal reason for this deficiency is that the Cable Act empowered cable operators to establish the price and conditions for use of leased access channels."[85] Consequently, in the 1992 Cable Act, the FCC was authorized to set terms and prices for such agreements.[86] Similarly, it is necessary for reasonable limits to be placed on an open access provision for cable Internet access.

C. Legal Challenges to Open Access Remedies

If the cable access issue is a problem, some remedy must be created as a solution. Several potential alternatives can be drawn from existing communications law. For example, must-carry requirements similar to those requiring cable carriage of broadcast programming could be used. Similarly, an approach like leased access could be used to open up the cable modem platform. However, any approach taken will likely face several constitutional challenges.

1. First Amendment Challenges

Access to the cable Internet technology for all ISPs is clearly in the public interest both in terms of procompetitive policy and encouragement of diverse sources of content, particularly content geared toward the local and community interests. Congress has recognized the legitimacy of these goals through such regulations as must-carry and leased access. Potential means of advancing these goals must then be found. One alternative would be a must-carry requirement mandating carriage of some number of ISPs similar to that for broadcasters. Must-carry provisions as currently embodied in the Communications Act have been upheld as constitutional

84. AT&T Corp. v. City of Portland, *Opinion*, 16 Comm. Reg. (P & F) 138, 139 (D. Or. June 3, 1999) (quoting identical provisions in Portland, Or., Ordinance 172955 (Dec. 17, 1998) and Mutlnomah County Bd. of Comm'rs, Or., Resolution 98-208 (Dec. 17, 1998)).

85. H.R. REP. NO. 102-628, at 39 (1992).

86. *See id.* at 40.

under the First Amendment in *Turner Broadcasting System, Inc. v. FCC*.[87] The analysis in *Turner* makes it questionable, however, whether any must-carry requirements regarding ISPs would be constitutional.

The first time the *Turner* case reached the Supreme Court, the district court's grant of summary judgment in favor of the FCC was reversed.[88] The Court applied the intermediate First Amendment standard established in *United States v. O'Brien*,[89] and determined that there were genuine issues of material fact regarding the actual jeopardy faced by broadcasters and the expected impact of the must-carry regulations.[90] On appeal after remand, the Court applied *O'Brien* to the expanded record.[91] This time, the Court upheld the must-carry regulations, noting that "[t]he expanded record now permits us to consider whether the must-carry provisions were designed to address a real harm, and whether those provisions will alleviate it in a material way."[92] At the present time, it is unclear whether there is enough evidence of current harm for a legislature to reference in order to overcome First Amendment challenges.

The MHCRC, in a filing with the FCC, correctly observed:

> [E]ither action is pursued now, or else an overly timid 'wait and see' attitude (whether federal or local), will require all involved levels of government to spend many years in the future trying to 'retrofit' open access onto a monopolistic and proprietary broadband Internet platform: the same platform the cable industry is now rushing to deploy.[93]

Thus, options other than must-carry should be considered to remedy the potential problem. The MHCRC felt that "the critical need to ensure that a maximum variety of choices concerning high-speed access to the Internet be available to users and citizens of any income level or social status" justified an open access requirement, which is similar to an unbundling or a leased access provision.[94] Variations on unbundling or leased access could

87. *See Turner Brdcst. Sys., Inc.*, 512 U.S. 622, 661 (1994); *Turner Brdcst. Sys., Inc.*, 520 U.S. 180, 189 (1997). Several previous attempts at must-carry regulations were unconstitutional. *See* Century Comm., Corp. v. FCC, 835 F.2d 292, 304 (D.C. Cir.), *clarified*, 837 F.2d 517 (D.C. Cir. 1987); *cert. denied*, 468 U.S. 1032 (1988) (holding that must-carry regulations failed First Amendment analysis for adequate justification); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1463 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

88. *See Turner Brdcst. Sys., Inc.*, 512 U.S. at 668.

89. 391 U.S. 367, 377 (1968).

90. *See Turner Brdcst. Sys., Inc.*, 512 U.S. at 667-68.

91. *See Turner Brdcst. Sys., Inc.*, 520 U.S. at 189.

92. *Id.* at 195.

93. *MHCRC Comments*, *supra* note 55.

94. *Id.* The precise language of the open access requirement was spelled out in the Portland and Multnomah County franchise transfer requirements: "Transferee [*i.e.*, AT&T]

also potentially be used to address the problem.[95]

Similar regulations have also faced First Amendment challenge. This type of "structural" regulation, aimed at encouraging diversity in information and to reduce the threat of bottlenecks, has often been upheld. In *Associated Press v. United States*,[96] the Court upheld the application of the Sherman Antitrust Act against newspaper combinations.[97] The Court stated that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[98] Such regulations have been upheld since then.[99] The district court in *AT&T Corp. v. City of Portland*[100] held that there was, in fact, no First Amendment violation.[101] The court argued that since no carriage of particular speech is required and no threat of the public mistaking the content of other ISPs for that of @Home exists, there is no free speech violation.[102] Further, the court concluded that even if the First Amendment right of AT&T and TCI were implicated, the open access approach of Portland and Multnomah County would pass *O'Brien*'s reasonableness test.[103]

shall provide, and cause the Franchisees to provide, non-discriminatory [sic] access to the Franchisees' cable modem platform for providers of Internet and on-line [sic] services, whether or not such providers are affiliated with Transferee or the Franchisees, unless otherwise required by applicable law." AT&T Corp. v. City of Portland, *Opinion*, 16 Comm. Reg. (P & F) 138, 139 (D. Or. June 3, 1999) (quoting provisions in Portland, Or., Ordinance 172955 (Dec. 17, 1998) and Mutlnomah County Bd. of Comm'rs, Or., Resolution 98-208 (Dec. 17, 1998)).

95. *See* FCC License Transfer, *Memorandum Opinion and Order*, 14 F.C.C.R. 3160, para. 86, 15 Comm. Reg. (P & F) 29 (1999).

96. 326 U.S. 1 (1945).

97. *See id.* at 23.

98. *Id.* at 20.

99. *See* CBS, Inc., v. FCC, 453 U.S. 367, 396-97 (1981) (upholding requirement that affords candidates for elective office "reasonable" access to broadcasting time); FCC v. National Citizens Comm. for Brdcst., 436 U.S. 775, 814-15 (1978) (upholding the FCC's newspaper-broadcast, cross-ownership rules); *see also* Turner Brdcst. Sys., Inc. v. FCC, 512 U.S. 622, 663 (1994) (concluding that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment").

100. *Opinion*, 16 Comm. Reg. (P & F) 138 (D. Or. June 3, 1999).

101. *See id.* at 142.

102. *See id.* This same argument was used by the Oregon district court to reject AT&T/TCI's argument that the open access terms conflicted with 47 U.S.C. § 544(f)(1). *See id.* This subsection states that local authorities may not "impose requirements regarding the provision or content of cable services." 47 U.S.C. § 544(f)(1) (1994**)**. Thus, the conclusion that the First Amendment rights of AT&T/TCI are not violated because carriage of specific content is not required also serves to invalidate the claim under section 544(f)(1).

103. *See* AT&T Corp. v. City of Portland, *Opinion*, 16 Comm. Reg. (P & F) 138.

2. Other Constitutional Challenges

The Oregon District Court also quickly disposed of several other claims raised by AT&T and TCI under the U.S. Constitution. The regulation did not unduly burden interstate commerce in violation of the Commerce Clause,[104] despite arguments by AT&T and TCI that the technological changes necessary to implement open access would impose extra expenses. Evidence was presented that competing ISPs would provide the needed hardware for connections. Further, local procedures exist for resolving specific franchise agreement disputes. Thus, AT&T and TCI would be afforded several levels of review regarding any specific issue associated with open access implementation.[105]

The provision also did not substantially impair private contracts in violation of the Contract Clause.[106] The court held that, contrary to AT&T and TCI's claims, the open access provisions "relate[] to AT&T's legal qualifications to assume control of TCI's cable franchises."[107] Thus, the provision is consistent with the franchise agreement and results in no impairment of the contractual rights of AT&T and TCI that would violate the Contracts Clause.[108]

3. Preemption

Federal preemption of a local law can occur through field preemption, express preemption, or conflict preemption.[109] In the case of field preemption, the federal government has occupied an entire subject area, and local authorities cannot supplement federal regulations.[110] Express preemption occurs when a federal law states in the statute itself Congress's intent to supplant state regulation.[111] Finally, conflict preemption occurs when it is impossible to follow both a federal and a state regulation,[112] or when joint compliance is possible but the goals underlying the regulations are inconsistent.[113] The ultimate issue under any theory of federal preemption is that of congressional intent.[114]

104. U.S. CONST. art. I, § 8, cl. 2.

105. *See* AT&T Corp. v. City of Portland, *Opinion*, 16 Comm. Reg. (P & F) 138, 142-43.

106. U.S. CONST. art. I, § 10.

107. AT&T Corp. v. City of Portland, *Opinion*, 16 Comm. Reg. (P & F) 138, 143.

108. *See id.*

109. *See* Cipollone v. Liggett Group, Inc. 505 U.S. 504, 516 (1992).

110. *See* Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

111. *See Cipollone*, 505 U.S. at 516.

112. *See* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).

113. *See* Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

114. *See Florida Lime & Avocado Growers, Inc.*, 373 U.S. at 132.

The district court in *AT&T Corp.* correctly found that the local ordinances were not preempted.[115] Field preemption does not exist because Congress specifically recognized the need for regulation other than on the federal level. For example, 47 U.S.C. § 533(d)(2) provides specifically for "state or franchising authority" regulation for purposes of promoting competition.[116] Similarly, section 706 calls for action by the states to encourage the rapid deployment of advanced telecommunications technologies.[117] These provisions will be discussed in greater detail in the discussion of the authority for Portland and Multnomah County to require open access.[118]

This same statutory language indicates that Congress did not expressly preempt local open access regulations. Cable Internet access is not specifically mentioned in the Communications Act, whereas in the consideration of field preemption and discussed in great detail in the next section, congressional recognition of a continued role for state and local authorities is embodied in the Act itself.

Finally, the actions of Portland and Multnomah County are consistent with the intent of Congress. Again, the examples of 47 U.S.C. § 533(d)(2) and section 706 of the Telecommunications Act of 1996 indicate congressional goals of protection of competition and of expediting access to technologies such as the Internet. To the extent that these were also the goals of Portland and Multnomah County, the open access provision was consistent with congressional intent.

4. Challenges to the Pricing Scheme

The open access or unbundling alternatives would require some payment to the owner of the broadband infrastructure. AT&T and TCI expressed concern that any such payment would be insufficient to compensate it not only for the marginal cost of providing the bandwidth, but also for investment in technology and risk bearing. This could, AT&T and TCI submit, "delay and diminish its deployment of broadband services to residential customers."[119] The NCTA has made the same argument, suggesting that "'exclusive bundling' by @Home is needed to reduce risk and provide adequate revenue streams to support investment in broadband

115. *See* AT&T Corp. v. City of Portland, *Opinion*, Comm. Reg. (P & F) 138, 142 (D. Or. June 3, 1999).

116. 47 U.S.C. § 533(d)(2) (1994).

117. Telecommunications Act of 1996, Pub. L. No. 104-104 sec. 706.

118. *See infra* Part V.

119. FCC License Transfer, *Memorandum Opinion and Order*, 14 F.C.C.R. 3160, para. 89, 15 Comm. Reg. (P & F) 29 (1999).

cable upgrades."[120] However, others have argued that providing access to other ISPs would produce additional revenue as existing subscribers of these ISPs switch to the faster broadband access, for which AT&T and TCI will receive compensation from the ISP.[121] While this may well be the case for larger ISPs, it is unclear how much additional revenue will be provided by smaller, local ISPs. Indeed, the incumbent local-exchange carriers challenged the mechanism used to determine pricing of elements that were unbundled as required by the Telecommunications Act of 1996. The opinions in that case, however, provide no guidance as to the appropriateness of that method.[122] Thus, the ultimate acceptability of any particular pricing method remains for future consideration.[123]

V. LOCAL REGULATIONS

It has been shown that the open access provisions required by Portland and Multnomah County were justified on policy grounds. Thus, what remains to be considered—and what is at the heart of the lawsuit—is the appropriateness of local, rather than federal, implementation of this policy.

Initially, the regulation and franchising of cable companies was solely a state matter. A series of Supreme Court and District of Columbia Circuit decisions, however, paved the way for substantial federal regulation of cable and the franchising process.[124] Beginning with the 1984 Cable Act, this authority was codified with the intent of establishing standards and procedures for the issuance and renewal of franchises.[125] Thus, to determine

120. *Id.* at para. 90.

121. *See id.* at para. 91.

122. *See* AT&T Corp. v. Iowa Util. Bd., 119 S. Ct. 721, 728 n.3 (1999) ("Incumbents argued below that [the pricing] method was unreasonable because it stranded their historic costs and underestimated the actual costs of providing interconnection and unbundled access. The Eighth Circuit did not reach this issue, and the merits of [this pricing method] are not before us.").

123. This includes not only constitutional validity, but acceptability in terms of the market impact of the pricing scheme.

124. *See* Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359, 365-66 (D.C. Cir. 1963) (upholding the FCC's denial of a microwave common carrier's license because the carrier's customer was a cable company that intended to import distant television to compete with local broadcast stations); United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968) (finding FCC jurisdiction over all cable matters "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting"); United States v. Midwest Video Corp., 406 U.S. 649, 667 (1972) (interpreting *Southwestern Cable* as establishing "authority to regulate CATV with a view not merely to protect but to promote the objectives for which the Commission had been assigned jurisdiction over broadcasting").

125. *See* 47 U.S.C. § 521(2), (5) (1994).

whether the local governments in Portland and Multnomah County had authority to impose the open access condition on the franchise transfer it is necessary to look to federal law.

First, it is important to note that the open access regulation does not regulate AT&T and TCI as a common carrier in violation of 47 U.S.C. § 541(c).[126] The district court recognized that because the requirements applied only to access by competing ISPs, the restrictions did not require AT&T and TCI "'to hold out facilities indifferently for public use and thus [did] not compel cable operators to function as common carriers.'"[127] Thus, the open access provisions are correctly seen as regulations of cable services.

Generally, cable services cannot be offered without a local franchise.[128] Consequently, as long as Internet access and content, such as that provided by @Home, is deemed a cable service, a franchise is required for its provision. The ability of franchising authorities to regulate franchisees is limited to the areas provided for by the Communications Act itself.[129] However, the Act provides several grants of regulatory authority to state and local bodies.

A. Authority to Implement Procompetitive Regulations

The most direct expression of authority, relied on in part by the MHCRC to justify local open access requirements, comes in 47 U.S.C. § 533(d), which addresses regulation of franchise ownership by franchising authorities. It states that, although franchising authorities may not deny ownership or control of a cable system because of a person's ownership or control of any other media interest:

> Nothing in this section shall be construed to prevent any State or franchising authority from prohibiting the ownership or control of a cable system in a jurisdiction by any person . . . (2) in circumstances in which the State or franchising authority determines that the acquisition of such a cable system may eliminate or reduce competition in the delivery of cable service in such jurisdiction.[130]

This section shows a clear "authoriz[ation of] local authorities to

126. This section states that cable systems "shall not be subject to regulation as a common carrier or utility by reason of providing any cable service." 47 U.S.C. § 541(c) (1994).

127. AT&T Corp. v. City of Portland, *Opinion*, 16 Comm. Reg. (P & F) 138, 141 (D. Or. June 3, 1999) (quoting *Midwest Video Corp.*, 440 U.S. at 707 n.16).

128. *See* 47 U.S.C. § 541(b)(1) (1994).

129. *See* 47 U.S.C. § 544(a) (1994) ("Any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this subchapter.").

130. 47 U.S.C. § 533(d) (1994).

impose pro-competitive [sic] conditions."[131] The potential anticompetitive impact of cable Internet access absent an unbundling or open access provision has been vigorously discussed before the FCC.[132] Even though the FCC did not find these arguments sufficiently persuasive to warrant action on its part, the Oregon District Court recognized that "[s]o long as the City and the County act within their jurisdiction, their findings [regarding competition] are entitled to deference."[133]

B. Authority Under Section 706

In addition, section 706 of the Telecommunications Act of 1996 validates this exercise of authority. Part of the concern that led the MHCRC to suggest the open access requirement was a concern that cable Internet access would be the only viable means of obtaining high-speed Internet access for substantial groups of people.[134] The MHCRC felt that the open access requirement would help maximize the number of people with high-speed access and avoid an "'information-rich' vs. 'information-poor' society."[135] Section 706 of the 1996 Telecommunications Act states, in pertinent part:

> The [FCC] and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[136]

The actions of Portland and Multnomah County to ensure widespread access to high-speed Internet capabilities and to ensure competition within this market are entirely consistent with the desire of this section.

The applicability of section 706 is not diminished by the fact that the Portland City Council and Multnomah County Board of Commissioners are not "state" commissions and were not exercising jurisdiction over "telecommunications services" in a literal sense. The inclusion of "State commission" within the policy directive clearly indicates the intent of

131. *MHCRC Comments*, *supra* note 55.

132. *See supra* Part IV.B.

133. AT&T Corp. v. City of Portland, *Opinion*, 16 Comm. Reg. (P & F) 138, 141 (D. Or. June 3, 1999).

134. *See MHCRC Comments*, *supra* note 55.

135. *Id.*

136. Telecommunications Act of 1996, Pub. L. No. 104-104 sec. 706.

Congress that the policy be implemented at both the federal and state levels. In the case of cable Internet access—a service that would be an advanced telecommunications service under the authority of a telecommunications commission were it not implemented through cable lines—the local commissions exercise the regulatory authority. The reasonable interpretation of section 706 is one that not only authorizes, but specifically calls for the type of action pursued by Portland and Multnomah County.

C. Authority to Regulate in Public Interest

Justifications for the must-carry requirements imposed for carriage of broadcasting signals seemed to apply with similar force to the content and services provided by competing ISPs. This similarity can be expected to increase as the line between the Internet and television continues to blur. The franchises issued by Portland and Multnomah County allow the imposition of "appropriate public interest conditions related to AT&T's legal, financial, and technical abilities."[137] The MHCRC argues that this further justifies the open access requirement.[138] However, the Telecommunications Act provides that, with certain exceptions, "any provision of any franchise granted by [a franchising] authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded."[139] Thus, the public interest condition within the franchise itself must be consistent with the Act if it is to be enforced.

From its very start, the Telecommunications Act evidences an intent that "franchise procedures . . . assure that cable systems are responsive to the needs and interests of the local community."[140] This statement alone should provide adequate evidence that the franchise agreement is consistent with the Act. The renewal procedure to be followed by franchising authorities further supports the open access requirement imposed by Portland and Multnomah County. When considering the proposal for franchise renewal of a cable operator, the franchising authority may consider whether "the operator's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests."[141] The "community needs and interests" would seem to reasonably include the benefits the community receives from the local news, information, community services, and other

137. *MHCRC Comments*, *supra* note 55.
138. *See id.*
139. 47 U.S.C. § 556(c) (1994).
140. 47 U.S.C. § 521(2) (1994) (statement of purposes).
141. 47 U.S.C. § 546(c)(1)(D) (1994).

content offered by competing ISPs, particularly local ISPs.

Each of these three justifications—procompetition, public interest, and section 706—independently justifies the open access provisions in the franchise transfer. When the arguments in support of regulatory power are considered together, they clearly provide adequate federal authority for local action.

VI. CONCLUSION

Despite the heated debate on the need for unbundling that has occurred at the federal level, local authorities have taken the lead in requiring open access to cable for competing ISPs. General anticompetitive concerns with cable Internet dominated by the cable company could be alleviated in large part by requiring open access to cable for ISPs. Such a requirement would also further the public interest in a manner similar to the must-carry and leased access requirements in the broadcasting context. Finally, federal law seems to permit local authorities to require open access for local ISPs. Such authority is based on the ability to further procompetitive goals, to provide high-speed Internet access in a timely manner, and to support the public interests and the interests of the community.