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**AT&T Corp. v. City of Portland: Classifying “Internet Over Cable” in the “Open Access” Fight**

I. INTRODUCTION

The Internet is one of the fastest growing communications technologies in history. In the past five years, the proportion of Internet users in the United States has increased from less than one percent of the population to nearly one-third of the population today, or fifty million people. Most people who have accessed the Internet during this time period have done so by using a local telephone line. Consequently, regulations governing the use of local telephone lines have had a substantial impact on how the Internet has developed. Title II of the Communications Act of 1934 requires local phone companies to provide telephone lines to all who request them on a nondiscriminatory basis. This open regulatory approach means that anyone can become an Internet service provider (ISP) by purchasing telephone lines from the local telephone company. As a result, multiple ISPs now compete to provide Internet access to consumers over a single telephone company’s network.

Demand for Internet access, however, is changing. The slower, narrow-bandwidth telephone connections of the past are beginning to give way to high-speed, broadband connections that have the ability to provide “[r]eal time high-fidelity music, telephone, videoconferencing, television and radio programs.” Several different

* For Bethany and Olivia, whose unfailing support made this possible, and for Jim Hanson, the finest teacher I have ever known.
1. This term comes from Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*, 7 COMMLAW CONSPECTUS 37, 88-89 (1999).
3. See id.
technologies are being used to meet this new demand including cable television networks, telephone lines called digital subscriber lines (DSL), fixed wireless systems, and direct satellite connections. As of late 1999, cable television networks have taken a strong lead in the broadband access market, providing broadband service to approximately one million homes.\(^8\) DSL is a distant second, providing service to approximately one hundred thousand homes.\(^9\) Fixed wireless lags far behind cable and DSL, and broadband via direct satellite will not be operational for at least a few more years.\(^10\)

In the past, these different transmission technologies—cable television, telephone, wireless, and satellite—have been regulated as distinct industries offering unique services. The application of these divergent regulatory structures to Internet access has created conflicting regulatory results. For example, local telephone companies are currently required to allow competing DSL providers to use their networks to offer broadband Internet access to consumers while cable companies, at least on a national basis, are not. As demand for these services grows, courts and regulators will face increasing pressure to reconcile divergent regulatory schemes for transmission technologies that offer the same or very similar high-speed data services.

The United States District Court for the District of Oregon, in \textit{AT&T Corp. v. City of Portland},\(^11\) was the first court to address how broadband Internet provided over cable television networks (Internet Over Cable) should be regulated. In this case, the court held that Internet Over Cable should be classified as a cable service and, consequently, that provisions of Title VI of the Communications Act govern its regulation. The court ultimately concluded that local franchising authorities (LFAs), who have the legal right to regulate certain aspects of cable service, can require a cable company to provide access to its facilities to other ISPs as a condition of granting a transfer of a cable television franchise from one company to another.


\(^9\) See id.


This Note argues that the district court in *AT&T Corp. v. City of Portland* erred when it classified Internet Over Cable as a cable service. It suggests that LFAs do not have the authority to force a cable operator to open its Internet facilities to other ISPs and recommends that Internet Over Cable be regulated as a non-cable communications service or as an advanced telecommunications capability and not as a cable service.

Part II of this Note provides a brief overview of the laws governing services provided over telephone lines and cable television networks. Part III discusses how *AT&T Corp. v. City of Portland* came before the court and what its ruling means for the broadband industry. Part IV suggests that the district court erred when it held that Internet Over Cable was a cable service and evaluates how this error influenced the outcome of the case. Part IV concludes that the district court should have held that Internet Over Cable is a non-cable communications service, and, consequently, that a local municipality does not have the authority to require a cable company to provide Open Access as a condition of franchise transfer approval. Part V proposes alternative regulatory mechanisms for broadband Internet access provided over a cable system. It suggests that broadband Internet service provided over cable television lines should be regulated either under the FCC’s Title I ancillary jurisdiction or as an Advanced Telecommunications Capability. Part VI concludes that courts should strike down attempts by local authorities to require cable companies to provide Open Access, and, instead, should look to alternative sources of law when classifying Internet Over Cable.

II. BACKGROUND

In 1934, Congress passed the Federal Communications Act (Communications Act) and established the Federal Communications Commission (FCC) for the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.12

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The Communications Act, as amended over time, has established distinct regulatory frameworks for telephone companies and cable television operators. Title II of the Communications Act addresses the regulation of telephone companies as common carriers. In part, it requires common carriers or telephone companies to provide service on a nondiscriminatory basis\textsuperscript{13} and for “just and reasonable” rates.\textsuperscript{14} In addition, after the breakup of AT&T in the 1980s, local telephone companies were required to allow other carriers, including long-distance and wireless carriers, to make use of their network.\textsuperscript{15}

Cable television regulation developed in an entirely different way. Because cable television did not become part of the national communications infrastructure until the 1950s, the 1934 Communications Act did not address its regulation. The FCC gradually asserted jurisdiction over cable systems in the 1960s despite a lack of express jurisdictional authorization in the Communications Act. The FCC claimed that it had the authority to regulate cable systems because this authority was necessary for it to carry out its mandate, under Title III of the Communications Act, to regulate broadcast television. The Supreme Court agreed.\textsuperscript{16}

Years later, Congress codified the FCC’s assertion of jurisdiction over cable systems by passing the Cable Communications Policy Act of 1984 (Cable Act). The Cable Act added Title VI to the Communications Act to provide a unique regulatory rubric for cable service provided over cable systems. It divided regulatory authority over the delivery of cable service between federal, state, and local governments\textsuperscript{17} and established that cable operators providing cable service would not be subject to the same common carriage requirements found in Title II.\textsuperscript{18} Cable companies, unlike phone companies, were not forced to provide network access to other carriers. However, the Cable Act did not alter the regulatory scheme that existed before with respect to non-cable communications services provided over a cable system.\textsuperscript{19} Indeed, the Cable Act contemplated that some serv-

\textsuperscript{14} Id. § 201(b) (Supp. II 1996).
\textsuperscript{15} See LEON T. KNAUER ET AL., TELECOMMUNICATIONS ACT HANDBOOK 25 (1996).
\textsuperscript{17} See 47 U.S.C. § 541 (1994).
\textsuperscript{18} See id. § 541(c).
ices provided over a cable system could be regulated as Title II common carrier services if they conformed to the service definitions outlined in Title II.20

The Communications Act was amended again in 1992 and in 1996.21 While the 1996 Telecommunications Act (1996 Act) made a number of ground-breaking changes to the Communications Act in an attempt to open local telephone markets to competition, it left the distinct regulatory schemes for telephone and cable service largely intact. As a result, broadband Internet service provided over local telephone networks is generally open, allowing consumers to choose between a number of ISPs. Broadband Internet service provided over a cable system, however, remains largely closed, with no comparable ISP choice. This disparity presents courts and regulators with a difficult question: how should divergent regulatory frameworks apply to a single service, broadband Internet service, that is being provided over both cable and telephone networks?

III. AT&T CORP. V. CITY OF PORTLAND: HOW IT AROSE AND WHAT IT PORTENDS

On June 24, 1998, AT&T announced its plans to acquire Tele-Communications Inc. (TCI), America’s second largest cable television company with access to one-third of the households in the United States.22 This acquisition would combine AT&T’s extensive long-distance telephone network with TCI’s local cable network within TCI’s service territory, allowing AT&T to provide a seamless package of telecommunications services, including high speed Internet service, over a unified national network. To complete its acquisition, AT&T needed approval from three sources: the Department of Justice, the FCC, and LFAs, which had the authority to approve or deny a franchise transfer from TCI to AT&T based on AT&T’s “financial, technical, or legal qualifications to provide cable service.”23

AT&T cleared the first hurdle on December 30, 1998, when the

20. See id. at 29 (stating that the Act would “preserve[ ] the regulatory and jurisdictional status quo with respect to non-cable communications services”).
Department of Justice approved AT&T’s acquisition of TCI upon the condition that the combined company divest its interest in Sprint PCS, a wireless phone service.\textsuperscript{24} Proceedings before the FCC and the LFAs were more precarious. A number of organizations, including local telephone companies and ISPs, opposed blanket approval of the acquisition. They argued that the FCC and the LFAs should not approve the acquisition unless AT&T agreed to provide competing ISPs with access to its Internet facilities (Open Access).\textsuperscript{25} On February 18, 1999, the FCC rejected their arguments and approved the acquisition.\textsuperscript{26} In its ruling, the FCC implicitly accepted AT&T’s argument that such a condition would “impose substantial investment costs and expenses on . . . [AT&T’s anticipated Internet service], which will only delay and diminish its deployment of broadband services to residential customers.”\textsuperscript{27}

AT&T was not as fortunate at the local level. The Open Access advocates first declared victory in Portland, Oregon. In the latter half of 1998, the Portland area LFA, the Mt. Hood Regulatory Commission, held public hearings to evaluate AT&T’s request.\textsuperscript{28} At the hearings, the ISPs not affiliated with AT&T’s proprietary ISP (Excite@Home)\textsuperscript{29} testified that “they would be driven out of business, eliminating several hundred jobs and costing the local economy $20 million.”\textsuperscript{30}

In response to the hearings, the Mt. Hood Commission found that Excite@Home had “no viable competitors” in the local market and recommended that Portland (the City) and Multnomah County (the County) “regulate AT&T's cable modem platform as an ‘essential facility’ to protect competition.”\textsuperscript{31} The City and County accepted the Commission’s recommendation and adopted Open Access provi-

\textsuperscript{24} See In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from TCI to AT&T, 14 F.C.C.R. 3160 (1999).
\textsuperscript{25} See id. ¶ 75.
\textsuperscript{26} See id. ¶ 96.
\textsuperscript{27} Id. ¶ 89.
\textsuperscript{28} See AT&T Corp. v. City of Portland, 43 F. Supp. 2d 1146, 1150 (D. Or. 1999).
\textsuperscript{29} The district court refers to AT&T’s ISP as @Home. @Home acquired Excite in 1999 and changed its name to Excite@Home. See id.
\textsuperscript{30} Id.
\textsuperscript{31} Id. The district court explained that “ ‘[e]ssential facility’ is a term of art in antitrust law, meaning a facility that competitors cannot practically duplicate and that is otherwise unavailable. A business that controls an essential facility may not exclude competitors without a ‘legitimate business reason for the refusal.’ ” Id. (citations omitted).
sions as a means of regulating AT&T’s essential Internet facility.

On December 29, 1998, AT&T refused to accept the mandatory access provision, and, shortly thereafter, filed an action against the City and County for declaratory relief in federal district court in Oregon.\footnote{32}{See id.} U.S. West, GTE, the Oregon Internet Service Provider Association, and OGC Telecommunications intervened as defendants. AT&T, the City, and the County filed motions for summary judgment. In its motion, AT&T argued that provisions of the 1934 Communications Act preempted an LFA’s authority to require Open Access as a condition to approving a franchise transfer,\footnote{33}{See infra Part IV.B.1.} and that an Open Access requirement violated the First Amendment, the Commerce Clause, and the Contract Clause of the U.S. Constitution. The City and County denied any constitutional violation and argued that a specific provision of the Communications Act, 47 U.S.C. § 533(d)(2), gave LFAs authority to impose an Open Access requirement.\footnote{34}{See infra Part IV.B.2.} The court granted the City and County’s motion for summary judgment, holding that 47 U.S.C. § 533(d)(2) gave LFAs the authority to condition a franchise transfer upon Open Access; that this authority was not preempted by other provisions of the Communications Act; and that the Open Access requirement did not violate the First Amendment, the Commerce Clause, or the Contract Clause.\footnote{35}{See AT&T Corp., 43 F. Supp. 2d at 1152-55.} AT&T appealed. The case is now before the Ninth Circuit Court of Appeals.

While the Ninth Circuit’s ruling will advance the discussion, it will not put the Open Access question to rest. Indeed, many jurisdictions are following Portland’s lead. As of January 2000, ten other jurisdictions have adopted comparable Open Access requirements including Broward County, Florida; St. Louis, Missouri; North Andover, Massachusetts; Quincy, Massachusetts; Cambridge, Massachusetts; Somerville, Massachusetts\footnote{36}{See Price Colman, \textit{The Access Revolution}, BROADCASTING & CABLE, Dec. 13, 1999, at 68.}; Henrico County, Virginia\footnote{37}{See Henrico County, Virginia Joins Open Access Fight (visited Jan. 25, 2000) <http://www.opennetcoalition.org/news/945269038.shtml>.}; Culver City, California\footnote{38}{See Culver City, California Joins Open Access Fight (visited Jan. 25, 2000) <http://www.opennetcoalition.org/news/945199353.shtml>.}; and Pitts-
burgh, Pennsylvania. In response, AT&T has filed law suits against Broward County, Florida; Henrico County, Virginia; and Madera County, California increasing the likelihood that other Courts of Appeal will be addressing the Open Access debate in the near future.

The changing corporate landscape is also influencing the debate. In May of 1999, AT&T announced an agreement to acquire MediaOne, another one of the nation’s largest cable television operators. This acquisition, while increasing AT&T’s already dominant position in the cable television market, opens the door for more jurisdictions to require open access as a condition of franchise transfer approval. Indeed, a number of the jurisdictions noted above have enacted their open access provisions in direct response to this announced acquisition.

Further, spurred by the FCC, AT&T has professed a commitment in principle to voluntary Open Access. In December, it announced an agreement to negotiate with MindSpring Enterprises—an ISP—to provide MindSpring with access to its cable networks at fair market prices once its exclusive agreements with Excite@Home expire beginning in 2002. This “deal to deal,” however, has been criticized by consumer groups and ISPs. Indeed, the OpenNet Coalition, an organization composed of 900 ISPs, has publicly questioned why AT&T will wait until 2002 to open its cable lines and has been vocal in pointing out shortcomings of a voluntary solution. Moreover, AT&T’s decision in January 2000 to sue Henrico County in response to its Open Access requirement suggests that AT&T will continue to defend its right to be the exclusive provider of Internet services over its cable lines.

42. See Seth Schiesel & Geraldine Fabrikan, MCI is Said to Weigh Bid for MediaOne, N.Y. TIMES, May 4, 1999, at C1.
43. See Charles Haddad, FCC Chairman: Let Cable Evolve Freely, ATLANTA J. CONST., Dec. 17, 1999, at 1D.
In addition, in early January 2000, one of the leading Open Access movement supporters, AOL, announced a merger agreement with Time-Warner, another one of the nation’s largest cable television operators. The merger agreement has caused many to question whether AOL, as a cable operator, will continue to support the call for Open Access or will shift its position to something akin to AT&T’s call for voluntary access. New developments in the Open Access fight arise almost weekly. For the foreseeable future, however, courts and regulators will continue to grapple with whether an LFA may require a cable company to open its facilities to competing ISPs and, if not, whether federal or state regulators should impose similar Open Access requirements.

IV. ANALYSIS

An LFA’s authority to impose an Open Access requirement on a cable operator stems from Title VI of the Communications Act. Title VI generally applies only to “cable services” provided over a cable system and not to non-cable communications services provided over the same. Thus, a critical threshold question is whether Internet Over Cable is a cable service or a non-cable communications service. The Cable Communications Policy Act of 1984 (Cable Act) defined cable service as the “one-way transmission to subscribers of (I) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection of such video programming”—a definition that almost certainly does not include Internet Over Cable. The 1996 Act amended this definition to allow subscriber interaction necessary for selection or use of programming. A question of considerable significance to the future of broadband Internet access is whether this amendment expanded the original definition of cable service to include Internet Over Cable. Unfortunately, the district court in AT&T Corp. v. City of Portland, without saying why, assumed that Internet Over Cable is a cable

46. See AOL Seen Unlikely to Remain Advocate of Open Access Rules, COMM. DAILY, Jan. 12, 2000, available in LEXIS, News>By individual publication>C>Communications Daily.
48. See infra notes 68-70 and accompanying text.
49. See 47 U.S.C. § 522(6)(B) (Supp. II 1996); see also infra note 72 and accompanying text.
service. Part IV.A evaluates whether Internet Over Cable can be classified as a cable service and concludes that it cannot. Part IV.B analyzes the effect of this conclusion on the district court’s ruling.

A. Is Internet Over Cable a Cable Service?

1. The Cable Act’s definition of cable service

The authors of the Cable Act recognized a cable system’s potential to provide services—other than traditional cable television—that could compete with interactive data services which, at the time, were provided almost exclusively by telephone companies. For instance, the Cable Act’s legislative history contemplates the use of cable systems to provide “‘two-way’ services, such as the transmission of voice and data traffic, and transactional services such as at-home shopping and banking.”\(^{50}\) Recognizing the diverse uses of cable systems, the Cable Act sought to carve out a unique set of rules for traditional cable television services without disturbing existing regulations established to govern two-way services provided by common carriers. The legislative history to the Cable Act explains that the Act’s definition of cable service was meant to

exempt video programming from common carrier regulation in accordance with the traditional conception that the one-way delivery of television programs, movies, sporting events and the like is not a common carrier activity. Other programming services that make non-video information generally available to all subscribers are included as cable services because they are sufficiently like video programming to warrant a similar regulatory exemption.\(^{51}\)

The Cable Act divided regulatory authority over cable systems between federal, state, and local regulators, but left non-cable service provided over cable systems subject to the state and federal control that existed prior to the Cable Act’s adoption.\(^{52}\)

Consistent with the intent expressed in the Cable Act’s legislative history, the Act defined “cable service” as “(A) the one-way transmission to subscribers of (i) video programming, or (ii) other pro-

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51. Id. at 41 (emphasis added).
gramming service, and (B) subscriber interaction, if any, which is re-
quired for the selection of such video programming or other pro-
gramming service.\footnote{53} The Cable Act defines “video programming” as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.”\footnote{54} It defines “other programming service” as “information that a cable op-
erator makes available to all subscribers generally.”\footnote{55}

Based on this definition and its legislative history, there are three characteristics of traditional cable service: (1) a cable service must be predominantly one-way; (2) it must be generally available to all; and (3) the content of a cable service must be within the control of the cable operator or service provider. The Cable Act explicitly defines cable service as “one-way transmission . . . of video . . . or . . . other programming.”\footnote{56} The only upstream or interactive communication with programming allowed under the Cable Act’s definition is that which is necessary for the “selection” of programming.\footnote{57}

Similarly, to be like traditional cable service, programming pro-
vided as a cable service must be made available to all those who sub-
scribe to the service. This wide, non-discriminatory availability is im-
plied by the requirement that video programming be “comparable to programming provided by . . . a television broadcast station”\footnote{58} and by the requirement that “other programming” be made “available to all subscribers generally.”\footnote{59}

Finally, the Cable Act contemplated that a cable operator would exert some control over the content of the programming. The legis-
lative history to the act explains as follows:

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 \textit{delineated by the cable operator or the programming service provider}. Such options or categories must themselves be \textit{created by the cable operator or programming service provider} and made generally available to all sub-

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54. \textit{Id.} § 522(19) (current version at § 522(20)).
55. \textit{Id.} § 522(13) (current version at § 522(14)).
57. \textit{Id.}
58. \textit{Id.} § 522(19) (current version at § 522(20)).
59. \textit{Id.} § 522(13) (current version at § 522(14)).
scriber to engage in the offpremises [sic] creation and retrieval of a category of information would not fall under the definition of cable service.60

This is consistent with the Cable Act’s stated purpose of confining Title VI regulations to services that conform to the “traditional . . . one-way delivery of television.”61 The text of the cable service definition also supports this conclusion. Video programming is programming that is comparable to traditional broadcast television,62 and other programming is programming that is made available by the cable operator.63

The legislative history to the Cable Act is rife with specific examples of cable and non-cable services. It explains that cable services include “the transmission or downloading of computer software” if the software is generally available to all subscribers.64 Pay-per-view or similar services that allow a subscriber to select “information from among a specific number of options or categories delineated by the cable operator” are also cable services.65 Moreover, information services that allow a subscriber to retrieve information by choosing from a limited number of “preselected keywords” also constitute cable services.66 Other examples of cable services include “voter preference polls in the context of a video program video rating services, . . . stock market information, and on-line airline guides and catalog services that do not allow customer purchases.”67

Services that are not cable services under the Cable Act include “voice communication between cable subscribers”; the “transmission of private data”; “at-home shopping and banking that allow transactions between subscribers and cable operators or third parties”; “offpremises data processing,” including the ability to retrieve “data tailored to the specific request of the subscriber”; and “electronic mail.”68

61. Id. at 41.
63. See id. § 522(13) (current version at § 522(14)).
65. Id. at 43.
66. Id.
67. Id. at 44.
68. Id. at 42-44.
Under the Cable Act’s definition of cable service, Internet Over Cable is not cable service. For example, electronic mail, one of the most popular uses of the Internet, fails to meet all three of the Cable Act’s cable service definition requirements. First, electronic mail involves a degree of interaction not contemplated by the Cable Act. The Cable Act limits a subscriber’s interaction with information to the selection of programming. Electronic mail involves sending information not just selecting programming. Second, electronic mail involves the transmission of discrete information from one user to another. Transmitting private information is contrary to the requirement that cable service information must be generally available to all. Indeed, the Cable Act’s legislative history indicates that a cable service cannot include the “transmission of private data.” Finally, electronic mail involves the transmission of information that is in no way controlled by the cable operator. Those who send and receive electronic mail control its content not the cable operator. Electronic commerce transactions and chat session participation cannot be part of a cable service for the same reasons: the information transmitted in both activities is not generally available to all, the subscriber interaction for both goes beyond program selection, and the cable operator exerts no control over the content of the transmissions.

One might argue that viewing a web page or downloading an audio or video file can be classified as part of a cable service under the Cable Act definition. It is true that selecting and downloading a web page or an audio or video file, in most instances, comports with the Act’s requirement that information transmitted be generally available to all. It is also true that the interaction involved in these Internet activities is limited to selection of content. Yet, while the first two cable service requirements appear to be satisfied, these Internet activities cannot be classified as cable services under the Cable Act because they involve the transmission of content that is in no way controlled by the cable operator. As a rule, Internet content can be developed by anyone and stored on a server almost anywhere. Moreover, even if these Internet activities did satisfy the content control requirement, it would be advisable to classify them as non-
cable services because the Internet cannot realistically be divided into cable and non-cable services for regulatory purposes. In sum, the Cable Act authors did not contemplate extending Title VI regulation beyond traditional cable television service, and Internet services are sufficiently unlike traditional cable service to fall outside of the Title VI ambit.

2. Did the 1996 Act expand the cable service definition to include Internet Over Cable?

   a. The 1996 amendment to the cable service definition. The 1996 Telecommunications Act (1996 Act) amended the definition of cable service to include “subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.”72 By adding the words “or use” to the definition of cable service, the 1996 Act expands the degree of allowable interaction. However, the limits of this expansion are unclear.

   The 1996 Act’s Conference Agreement with respect to cable services attempts to clarify the meaning of the amendment.73 It states that “[t]he conference agreement adopts the House provisions with modifications. It adopts the House provision amending the definition of cable service.”74 The legislative history to the House amendment indicates that the words “or use” were added to the definition of cable service to “reflect[] the evolution of video programming toward interactive services.”75 The conference agreement adds: “[t]he conferees intend the amendment to reflect the evolution of cable to include interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services.”76

   Although the use of the phrase “interactive services” in the leg-

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73. See H.R. CONF. REP. No. 104-458, at 169 (1996). In the conference agreement addressing definitions, the “House recede[d] to the Senate with respect to the definition[] of . . . ‘cable service.’” Id. at 116. The conference agreement that addressed the definition of cable service, however, “adopt[ed] the House provisions with modifications.” Id. at 169. Since the Senate bill left the definition of cable service unchanged and the House bill changes made it into the text of the final 1996 Act, it is safe to assume that the House definition prevailed in conference.
74. Id. at 169 (emphasis added).
75. Id. at 167.
76. Id. at 169.
islative history to the House amendment could be read to include Internet services, the better argument is that it refers to interactive television services in development at the time that the 1996 Act was passed.\textsuperscript{77} Since the term “interactive services” when used in the context of cable television referred to a type of service that was selected and controlled by the cable operator\textsuperscript{78} and was distinct from Internet services,\textsuperscript{79} the term interactive services should be interpreted to exclude Internet services.

The House and Senate Conference Agreement modified the legislative history to the House amendment by adding examples of different \textit{kinds} of interactive services. The examples included “game channels and information services made available to subscribers by the cable operator, as well as enhanced services.”\textsuperscript{80}

The term “game channels” was a reference to video game services like the Sega Channel, which offers access to interactive multi-user video games.\textsuperscript{81} These services are selected and provided by the cable operator for a flat monthly fee, much like premium cable chan-


\textsuperscript{78} See Gibbons, supra note 77; McCarthy, supra note 77; Richard Tedesco, \textit{FSN Launching Omnio Navigator, BROADCASTING & CABLE’S TELEMEDIA WK.}, May 6, 1996, at 46 (Time Warner Cable’s Full Service Network “features links within each content category that bring the user into menus of related areas of content, most of them centered on merchandising within that category. Clicking on a link while watching a movie would offer the user a menu of options that could include a particular studio’s merchandising products.”).

\textsuperscript{79} See Fred Dawson, \textit{UBI Prep’s ‘Unique’ IV Service; UBI Consortium; Interactive TV, MULTICHANNEL NEWS}, Jan. 1, 1996, at 27 (reporting that the cable consortium intended to provide interactive television as well as “other types of cable services, including Internet and online services.”); Gibbons, supra note 77 (suggesting that cable operators are shunning interactive television for Internet services); McCarthy, supra note 77 (suggesting that “cable operators are moving away from [interactive video]” towards data services including “Web-created content.”); Cathy Taylor, \textit{GTE Calls in IVT Ad Dollars: Telco Begins Major Push for Sponsors in Interactive Test Markets, MEDIA WK.}, Apr. 29, 1996, at 12 (indicating that cable operators are “shift[ing] their interest from [interactive television] to the World Wide Web”); \textit{cf. Source Media’s Interactive Channel (SM) Announces Internet Connectivity for Subscribers, PR NEWSWIRE}, Apr. 29, 1996 (This article reported that subscribers to a cable interactive channel would “soon be able to send and receive Internet E-mail over their television sets as well as access programming from popular World Wide Web sites.” The access to the Internet contemplated by this service was considered to be a “breakthrough” and was limited to web content that was selected and controlled by the cable operator.).


\textsuperscript{81} See Michael Saul, \textit{Game’s Never Over: Sega Channel to Offer 24-hour Video Amusements on TCI, DALLAS MORNING NEWS}, Nov. 17, 1995, at 1D.
nels such as HBO and Showtime. The term “information service” is defined in the 1996 Act as

the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

This definition is nearly identical to the definition of “information service” found in the Modification of Final Judgment (MFJ) entered in the antitrust settlement that led to the break-up of AT&T. Indeed, the FCC recently held that, by adopting the term “information service” in the 1996 Act, Congress intended to “build upon frameworks established prior to the passage of the 1996 Act,” including the framework established in the MFJ and in the Second Computer Inquiry (Computer II). The MFJ included mutually exclusive categories of services—telecommunications services and information services. These services are analogous to the basic and enhanced service categories laid out in Computer II.

Telecommunications or basic services include “transmission . . .

84. See United States v. AT&T Co., 552 F. Supp. 131, 229 (D.D.C. 1982), aff’d sub nom. Maryland v. United States, 460 U.S. 1001 (1983). The MFJ definition reads as follows: “Information service” means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications, except that such service does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.
86. See id.
87. See id.; see also Second Computer Inquiry, 77 F.C.C. 2d 384, 417-32 (1980) (final decision); but see Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, 11 F.C.C.R. 21905, ¶¶ 99-103 (1997) (action) explaining that the overlap between information and enhanced services is not entirely complete because “‘enhanced services’ under Commission precedent are limited to services ‘offered over common carrier transmission facilities used in interstate communications,’ whereas ‘information services’ may be provided, more broadly, ‘via telecommunications.’” (citation omitted)).
of information of the user’s choosing, without change in the form or
content of the information as sent and received.\footnote{88} Basic service, like
traditional voice or facsimile transmission over telephone lines, is a
“pure transmission capability over a communications path that is
virtually transparent in terms of its interaction with customer sup-
plied information.”\footnote{89} In basic or telecommunications service, “once
information is given to the communication facility, its progress to-
wards the destination is subject to only those delays caused by con-
gestion within the network or transmission priorities given by the
originator.”\footnote{90}

On the other hand, information or enhanced services offer the
subscriber the "capability for . . . storing, transforming, [or] pro-
cessing . . . information."\footnote{91} Information or enhanced services include
any offering over the telecommunications network which is more
than a basic transmission service. In an enhanced service, for exam-
ple, computer processing applications are used to act on the con-
tent, code, protocol, and other aspects of the subscriber’s informa-
tion. In these services additional, different, or restructured
information may be provided the subscriber through various pro-
cessing applications performed on the transmitted information, or
other actions can be taken by either the vendor or the subscriber
based on the content of the information transmitted through edit-
ing, formatting, etc. Moreover, in an enhanced service the content
of the information need not be changed and may simply involve
subscriber interaction with stored information. Many enhanced
services feature voice or data storage and retrieval applications such
as in a “mail box” service.\footnote{92}

The authors of the 1996 Act created some confusion by import-
ing language traditionally applied to telephone carriers under Title II
of the Communications Act—information services—into the defini-
tion of cable services, an area exempted from Title II that tradition-
ally applies to cable operators through Title VI. For example, informa-
tion or enhanced service, according to the FCC, is more than

\footnote{88} 47 U.S.C. \S 153(43) (Supp. II 1996); see also 13 F.C.C.R. 11501, ¶ 13 (1998) (ind-
icating that the 1996 Act definition incorporates past understanding of this concept from
MFJ and Computer II).
\footnote{89} 77 F.C.C. 2d. ¶ 96.
\footnote{90} Id. ¶ 95.
\footnote{91} 47 U.S.C. \S 153(20) (Supp. II 1996); see also supra note 83 and accompanying text.
\footnote{92} 77 F.C.C. 2d ¶ 97 (emphasis added).
basic service\textsuperscript{93} or, in other words, more than “pure transmission capability”\textsuperscript{94} between a subscriber and a destination. This Title II-based concept, at the time the 1996 Act was adopted, had no Title VI corollary, since, in the vast majority of cable systems, subscribers had little or no upstream transmission capability.\textsuperscript{95} Even still, the broad outlines of the basic/enhanced or telecommunications/information service dichotomies accurately reflect the aim of those who authored the 1996 Act’s changes. At its core, information service, in the MFJ and Computer II, meant something more than traditional telephone service or comparable services. Similarly, in a Title VI, cable television context, information service means something more than traditional, broadcast-style cable television. It means a previously unrecognized level of interaction with video or other information provided by the cable operator. Use of the term information service in a cable context, while it may create some confusion, makes sense.

b. The 1996 amendment did not expand the definition of cable service to include Internet Over Cable. The critical question is whether the addition of “or use” to the definition of cable service and that definition’s legislative history expands the Cable Act’s definition of cable service to include Internet Over Cable. The answer to this question depends largely upon how the 1996 Act altered the three factors that made cable service distinctive: (1) whether the service is predominantly one-way, (2) whether the service is generally available to all, and (3) whether the content of the service is within the control of the cable operator or service provider.\textsuperscript{96}

(1) One-way service. The 1996 Act abandoned the requirement that a cable service be predominantly one-way. While the Cable Act limited subscriber interaction with a cable service to that which was necessary for the “selection” of programming, the 1996 Act allows the subscriber to “use” the programming. “Use” means to “put

\textsuperscript{93} See id.

\textsuperscript{94} Id. ¶ 96.

\textsuperscript{95} Those cable subscribers that did have upstream transmission capability generally only had the ability to communicate to the head-end owned by the cable operator. For example, a subscriber might be able to send a signal to the cable operator to order a pay-per-view movie. This kind of transmission is not a basic or telecommunications service because it involves interaction directly with the cable operator such as “acquiring, storing, . . . [or] retrieving . . . information.” 47 U.S.C. § 153(20) (Supp. II 1996).

\textsuperscript{96} See supra notes 56-68 and accompanying text.
into action or service.\textsuperscript{97} It is more active or interactive than the word “select.” Moreover, the legislative history’s use of video game channels as an example of use suggests that a high degree of interaction is an acceptable part of a cable service. Consequently, this change in the definition of cable service suggests that at least some Internet services may be part of a cable service.\textsuperscript{98}

(2) Available to all. However, the 1996 Act did not abandon the requirement that programming provided as part of a cable service be generally available to all. Under the 1996 Act, the definition of video programming was not changed. Video programming is programming “comparable to programming provided by[] a television broadcast station.”\textsuperscript{99} This requirement implies that video programming, like broadcast television, must be available to all. Similarly, the 1996 Act did not change the Cable Act’s definition of “other programming services.” Other programming services is still defined as “information that a cable operator makes available to all subscribers generally.”\textsuperscript{100}

The 1996 Act’s conference agreement with respect to the definition of cable service may conflict somewhat with the text of the cable service definition. The terms “information services” and “enhanced services,” for example, are broad enough to include information that is not generally made available to all. For instance, the FCC, while declining to comment on the “classification” of Internet Over Cable,\textsuperscript{101} has held that Internet access services provided over copper

\textsuperscript{97} Webster’s Third New International Dictionary 2523 (1971).

\textsuperscript{98} Since other Internet services are not cable services, this leads to the unworkable conclusion that the Internet ought to be divided in two—cable and non-cable services—for regulatory purposes. I propose that this dilemma should be resolved by reading the 1996 Act’s failure to alter the content control requirements of the original cable service definition, see infra part IV.A.2.b.3, as a prohibition on the inclusion of Internet services not selected or controlled by the cable operator in the modern cable service definition. This proposal resolves a possible conflict between the cable service definition text and its legislative history in favor of the text. Another approach is to view the dilemma noted above as an “absurd result”, see infra note 103, and to rely on an expansive reading of the term “information services” in the 1996 Act’s legislative history to include Internet Over Cable in the cable service definition. The first approach is superior because it avoids an unnecessarily aggressive use of the “absurd results” doctrine by relying on the unchanged content control requirements of the original cable service definition and because it recognizes that Congress and state legislatures are best suited to these kinds of dramatic changes in policy. See infra note 105.


\textsuperscript{100} Id. § 522(14).

telephone wires are information services because Internet services—
including homepage creation, web page retrieval, Usenet newsgroup
access, and e-mail—“involve[] information processing.”102 While it is
possible that some Internet services—retrieving web pages or Usenet
newsgroup information—are available to all, many Internet services
are not. Electronic mail, for example, involves the transmission of
information that is available only to the receiver and the sender. In
addition, chat session information in many cases is available only to a
limited number of chat participants.

If the legislative history’s use of the term “information services”
includes Internet service provided over a cable system, the only rea-
sonable conclusion is that Internet Over Cable service should be
governed by two different regulatory regimes: one that governs
Internet services available to all and an entirely separate one for dis-
crete Internet services like e-mail. Since it would be impossible to
determine what kind of Internet activity—public or private—a sub-
scriber is engaged in, and therefore, what kind of regulation to apply
to the participants, this interpretation of the cable service definition
is unworkable.103 Consequently, the cable service definition’s “gen-
eral availability” text should be read to override an interpretation of
the legislative history that would allow the provision of discrete
Internet services.104 This interpretation would prevent a cable op-

102. Id. ¶¶ 73-80.

103. Internet Over Cable could be considered generally available to all if Internet access,
as a service, were available to all. However, this interpretation is contrary to the text of the ca-
ble service definition. The other programming service definition requires that the infor-
mation provided by the cable operator be “available to all subscribers generally,” not the service. 47

104. See In re Abbott Laboratories, 51 F.3d 524, 528 (5th Cir. 1995), cert. granted sub
nom. Free v. Abbott Laboratories, 120 S.Ct. 525 (1999) (stating that legislative history should
not be consulted unless a statute is unclear or ambiguous); see also Stromberg Metal Workers,
Inc. v. Press Mechanical, Inc., 77 F.3d 928, 931 (7th Cir. 1996) (holding that “[w]hen text
and legislative history disagree, the text controls”). But see 2A NORMAN J. SINGER, STATUTES
AND STATUTORY CONSTRUCTION § 46.07, at 126 (1991) (stating that “if the literal import of
the text of an act is inconsistent with the legislative meaning or intent, or such interpretation
leads to absurd results, the words of the statute will be modified to agree with the intention of
the legislature.” (citations omitted)). One might argue that the drafters of the 1996 Act, by
using the term “information services,” intended to include Internet Over Cable as part of the
definition of cable services. The drafter’s refusal to change the content control provisions of
the Cable Act, see infra notes 105-106 and accompanying text; the use of the term “interactive
services” in the legislative history, see infra notes 107-110 and accompanying text; and the
1996 Act’s stated goal of protecting the Internet from overregulation, see infra notes 112-114
and accompanying text; all suggest that this was not their aim. One might also argue that a
literal reading of the general availability text in the cable service definition would lead to an
erator from providing any Internet service as part of a cable service.

(3) Control of content. A careful analysis of the third category—a cable operator’s control over the content of the cable service—helps to resolve the discrete/non-discrete dilemma described in the general availability discussion. Unchanged portions of the cable service definition text and the legislative history’s emphasis on interactive services suggest that Congress intended to exclude nearly all Internet services from cable service. By adding “or use” to the cable service definition, the authors of the 1996 Act did not alter the Cable Act’s requirement, implicit in the text and explicit in the legislative history, that a cable operator exercise a substantial degree of control over the selection of programming content. The words “or use” are added to subsection B of the cable service definition, the subsection that addresses subscriber interaction—not programming content. Since the Cable Act’s requirement that a cable operator have a substantial degree of control over programming is an explicit and implicit part of the programming content provisions and not part of subscriber interaction provisions, the cable service definition should still be read to require a significant amount of cable operator control over content selection. Because cable operators have essentially no control over selection of Internet content, Internet Over Cable should not be considered part of a cable service.

The legislative history also suggests that Congress did not intend to include Internet Over Cable as part of a cable service. The authors of the 1996 Act intended the cable service amendment to “reflect the evolution of cable to include interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services.” The focus of this portion of the conference agreement is on interactive services. Game

“absurd result”—the application of one regulatory regime to Internet Over Cable that is generally available to all, and another regulatory scheme to Internet Over Cable that is not generally available to all. Once again, the drafters’ failure to alter the Cable Act’s requirement that cable service be controlled by the cable operator, the use of the term “interactive services,” and the 1996 Act’s express anti-regulation policy suggest that the drafters had no such intent.

105. See supra text accompanying notes 60-63.

106. See 1A Singer, supra note 104, § 22.30, at 275 n.14 (stating that “an amendatory act is not to be construed to change the original act or section further than expressly declared or necessarily implied” and referring to Brainard v. Blue, 369 P.2d 13 (Ca. 1962), which held that “parts of an amended statute not affected by the amendment will be given the same construction that they received before the amendment”).

channels, information services, and enhanced services are listed as examples of interactive services and not as additional types of services. When the 1996 Act was adopted, the term “interactive services” in the context of cable television meant a limited number of services selected and controlled by the cable operator—not an unlimited number of services provided over the Internet. 108 Industry publications commonly made the distinction between cable television interactive services—such as video games, sports, entertainment, interactive shopping, or news services—and Internet services. 109 Thus, Internet Over Cable should not be considered part of a cable service because the terms “information services” and “enhanced services” are limited by the scope of “interactive services” as understood at the time of the 1996 Act in the context of cable television.

Further, the terms “information service” or “enhanced service” in the conference agreement are qualified by the words “made available to subscribers by the cable operator.” 110 This language confirms the view that the authors of the 1996 amendment to the cable service definition contemplated that a cable operator would continue to have the ability to select and control cable programming. In sum, the quandary posed by the 1996 Act's general availability requirement, in addition to the Act’s assumption that a cable operator would retain the ability to select content, suggest that Internet Over Cable should not be considered part of a cable service.

Of course, some cable Internet services today exercise control over Internet content provided to subscribers by storing commonly used web sites on servers that are part of a proprietary network available only to cable subscribers. Excite@Home’s high speed Internet service is a popular example of this kind of service. These quasi-Internet services allow consumers to access multiple sources of information without the slowdown associated with normal Internet traffic. Naturally, these services also include access to the Internet. As long as the content of these quasi-Internet services is selected by the cable operator or programming provider, and as long as the information provided is “generally available to all,” these services should be considered cable services. Traditional access to the Internet, how-

108. See supra notes 77-79 and accompanying text.
109. See supra notes 77-79 and accompanying text.
110. H.R. CONF. REP. No. 104-458, at 169 (1996). The words “as well” suggest that the qualification applies equally to information services and enhanced services. The fact that enhanced service is an analog of information service further supports this conclusion. See id.
ever, as well as to services that provide access to private information, such as e-mail, are not cable services for the reasons discussed above.

c. Policy implications. Additional considerations suggest that Internet Over Cable should not be part of a cable service. Minor textual changes in a statute should be construed narrowly. The 1996 Act changed the cable service definition by adding only two words to the text. Such a small change to the text suggests that Congress intended to retain a substantial portion of the statute’s original meaning. In this case, the Cable Act intended to develop a regulatory niche for services that are comparable to traditional broadcast television. While the addition of the words “or use” alters this rubric by allowing more interaction than that traditionally allowed by broadcast-like services, it should not be read to depart entirely from the broadcast model outlined in the Cable Act definition of cable service. Indeed, given the minor change and the uncertain legislative history, courts should presume that Congress intended to preserve previous requirements established by the definition, including the general availability and content control requirements. This careful approach to statutory interpretation makes it more difficult for the drafters of legislation or legislative history to hijack legislation for their own purposes.

Furthermore, excluding Internet Over Cable from the definition of cable services is consistent with the broad, pro-competitive purpose of the 1996 Act. Section 230 of the 1996 Act states that “[i]t is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.” If Internet access is part of a cable service, Internet Over Cable will be regulated as any other cable service with a mix of federal, state, and local regulations. Hundreds of municipalities will

111. See supra note 106.

112. See 2A Singer, supra note 104, § 46.07, at 126 (“It has also been said that although it is generally unnecessary to look beyond the language of a statute to arrive at the legislative purpose and intent, where different interpretations are urged, a court must look to reasons for the enactment of the statute and the purposes to be gained by it and construe the statute in the manner which is consistent with such purpose.” (citations omitted)). It should be noted that relying on the purpose of a statute is urged only when there are divergent interpretations of the statute itself, not conflicting views about the meaning of an act’s legislative history. This case involves the latter. Nevertheless, the 1996 Act’s deregulatory purpose supports the conclusion that Internet Over Cable is not a cable service.

have the power to impose their will on cable operator’s providing Internet service. On the other hand, if Internet Over Cable is not a cable service, it will be subject only to a mix of federal and state regulations with the strong possibility that those federal regulations will preempt state control.114 Classifying Internet Over Cable as a non-cable service will prevent local interests from burdening the development of the nation’s broadband Internet infrastructure by distributing regulatory authority between the FCC and the states.

B. Does the Communications Act Preempt an LFA’s Attempt to Regulate Internet Over Cable?

AT&T and the City’s preemption arguments rely largely upon provisions of Title VI, a provision that generally applies only to cable services. If Internet Over Cable is not a cable service, the preemption arguments are, for the most part, moot. However, the discussion below remains helpful both because it explains why the specific Code provisions referenced in the case do not apply to Internet Over Cable and because the argument that Internet Over Cable is a cable service remains a tenable position under current precedent.115

AT&T has argued that certain provisions of Title VI of the Communications Act preempt an LFA’s right to require Open Access as a condition to the transfer of a franchise. Specifically, AT&T argued that three provisions of the Communications Act preempt the City’s authority to require Open Access: 47 U.S.C. § 541(c), which prohibits common carrier regulation of cable services; 47 U.S.C. § 544(f)(1), which prevents any authority from regulating the content of cable services; and 47 U.S.C. § 544(e), which prohibits state and local authorities from imposing technical requirements on cable systems.116 The City responded by suggesting that the provisions relied upon by AT&T are inapposite and that 47 U.S.C. § 533(d)(2), which preserves a state or local authority’s power to prevent transfer in cable system ownership if that transfer will reduce cable service competition within that community, expressly allows a franchise authority to impose Open Access conditions on a franchise transfer.117

114. See infra notes 171-174, 187-189 and accompanying text.
115. See supra note 98.
117. See id.
Both AT&T and the City relied upon provisions of Title VI to support their position. Since Title VI generally applies to cable services and not to non-cable communications services,\(^{118}\) both positions are suspect. Moreover, because both parties looked to Title VI to support their arguments, it is easy to see why the court assumed that Internet Over Cable is a cable service without even discussing the intricacies of the issue.

1. AT&T’s arguments

a. 47 U.S.C. § 541(c). AT&T argued that § 541(c) preempted the city’s authority to require Open Access. Section 541(c) precludes common carrier regulation of cable systems. It states that “[a]ny cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.”\(^{119}\) The City’s Open Access requirement, according to AT&T, would effectively regulate AT&T as a common carrier even though the requirement was based on the antitrust essential facilities doctrine.\(^{120}\)

The City replied by arguing that the Open Access requirement under the essential facilities doctrine, while comparable to common carrier regulation, is not the same as common carrier regulation.\(^{121}\) In support of this position, U.S. West and GTE argued, as intervenors, that other provisions of Title VI impose common carrier obligations similar to those imposed by Title II without subjecting cable operators to Title II’s entire regulatory scheme.\(^{122}\) This view is supported by the Cable Act’s legislative history, which suggests that “[a] cable system would not, for instance, be subject to rate of return regulation, or to the traditional common carrier requirement of

\(^{118}\) The legislative history to Title VI states that “[t]he Committee intends that state and Federal authority over non-cable communications services under the status quo shall be unaffected by the provisions of Title VI.” H.R. Rep. No. 98-934, at 60 (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4697.

\(^{119}\) 47 U.S.C. § 541(c) (1994).

\(^{120}\) See Appellant’s Opening Brief at 31-42, AT&T Corp. v. City of Portland, 43 F. Supp. 2d 1146 (D. Or. 1999) (No. CV 99-65-P.A.) (on file with Ninth Circuit Court of Appeals clerk) [hereinafter Appellant’s Brief].

\(^{121}\) See Appellee’s Brief at 35, Portland (No. CV 99-65-P.A.) (on file with Ninth Circuit Court of Appeals clerk) [hereinafter Appellee’s Brief].

servicing all customers indifferently upon request (except as otherwise provide [sic] in Title VI), to the extent that the cable system is providing cable services.\textsuperscript{123} 

The district court held that § 541(c) did not preempt local authority because Open Access under the essential facilities doctrine is not the same as common carrier Open Access provisions under Title II.\textsuperscript{124} In support of its position, the court relied on FCC v. Midwest Video Corp.,\textsuperscript{125} which, in a footnote, recognized that the Court had forbidden regulations requiring a cable system to grant access to any member of the public, but allowed regulations requiring cable operators to transmit local broadcast station signals on their systems.\textsuperscript{126}

However, if the court had considered the question of whether Internet Over Cable is a cable service, it could have resolved the issue on different grounds. Section 541(c) only prohibits common carrier regulation of cable systems “by reason of [their] providing any cable service.”\textsuperscript{127} If Internet Over Cable is not a cable service, § 541(c) does not preempt the City’s franchise authority.

b. 47 U.S.C. § 544(f)(1). AT&T also argued that § 544(f)(1) preempts the City’s ability to require Open Access. Section 544(f)(1) states that “[a]ny Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this subchapter.”\textsuperscript{128} AT&T reasoned that the City’s Open Access requirement is contrary to § 544(f)(1) because the requirement was triggered by the provision of a particular cable service—high speed Internet service.\textsuperscript{129}

The City, relying on United Video, Inc. v. FCC,\textsuperscript{130} argued that its Open Access requirement is acceptable because it is a “content-neutral” facilities requirement not a “content-based” regulation “re-


\textsuperscript{124} See AT&T Corp. v. City of Portland, 43 F. Supp. 2d 1146, 1152-53 (D. Or. 1999).

\textsuperscript{125} 440 U.S. 689 (1979).

\textsuperscript{126} See id. at 707 n.6. AT&T has challenged this ruling, arguing that common carrier regulations include regulations of a specific subset of the public. See Appellant’s Brief at 37, Portland (No. CV 99-65-P.A.) (on file with Ninth Circuit Court of Appeals clerk).

\textsuperscript{127} 47 U.S.C. § 541(c) (1994) (emphasis added).

\textsuperscript{128} Id. § 544(f)(1).

\textsuperscript{129} See Appellant’s Brief at 37, Portland (No. CV 99-65-P.A.) (on file with Ninth Circuit Court of Appeals clerk).

\textsuperscript{130} 890 F.2d 1173, 1189 (D.C. Cir. 1989).
quir[ing] that particular programs or types of programs be provided."\textsuperscript{131} The trial court agreed with the City and found that the Open Access requirement was content-neutral.

However, if Internet Over Cable is not a cable service, then the court’s decision is flawed. Section 544(f)(1) applies to the “content of cable services.”\textsuperscript{132} Since it only applies to cable services, it does not preempt the City’s regulatory authority.

c. 47 U.S.C. § 544(e). AT&T further argued that § 544(e) preempts the City’s local franchise authority. Section 544(e) states that “[n]o State or franchising authority may prohibit, condition, or restrict a cable system’s use of any type of subscriber equipment or any transmission technology.”\textsuperscript{133} AT&T argued that the Open Access requirement violated § 544(e) because it would require AT&T to modify its existing broadband Internet platform.\textsuperscript{134}

The City responded by referring to AT&T’s position as a “strange reading of the law”\textsuperscript{135} because it would . . . eliminate the provisions of the Cable Act—including the other provisions of 47 U.S.C. §544[sic]—that specifically permit localities to establish and enforce facilities and equipment requirements, as well as the provisions of 47 U.S.C. §546 [sic], which ensure a community can require a cable system that meets the community’s cable-related needs and interests.\textsuperscript{136}

The FCC supports the City’s position. It has held that a franchising authority’s “responsibilities in determining local cable-related needs and interests” are not diminished by provisions in the 1996 Act restricting a local authority’s ability to regulate transmission technology.\textsuperscript{137} So, while local authorities cannot “dictate” that certain transmission technologies be used, they can enforce other requirements that may have an effect on a cable operator’s selection of

\textsuperscript{131} Id.; see also Appellee’s Brief at 42, Portland (No. CV 99-65-P.A.) (on file with Ninth Circuit Court of Appeals clerk).


\textsuperscript{133} Id. § 544(e).

\textsuperscript{134} See Appellant’s Brief at 30, Portland (No. CV 99-65-P.A.) (on file with Ninth Circuit Court of Appeals clerk).

\textsuperscript{135} Appellee’s Brief at 31, Portland (No. CV 99-65-P.A.) (on file with Ninth Circuit Court of Appeals clerk).

\textsuperscript{136} Id. at 32.

a particular transmission technology. The district court agreed, finding that the City’s Open Access requirement “does not tell AT&T how to implement [O]pen [A]ccess, nor does it require that AT&T use any particular transmission technology.”

Assuming that Internet Over Cable is not a cable service, it is not clear that § 544(e) would preempt the City’s authority. The Cable Act’s legislative history states that the addition of Title VI to the Communications Act was not intended to alter existing regulatory authority over non-cable services. Because § 544(e) is part of Title VI, it could be interpreted to apply only to cable services and, therefore, would not preempt the City’s authority to require Open Access.

However, § 544(e)’s use of the term “cable system” suggests that § 544(e) may preempt the City’s regulatory authority because a cable system can provide more than just cable service. The Cable Act’s legislative history assumes that a cable system may carry more than just a cable service. It states:

> [t]he term ‘cable system’ is not limited to a facility that provides only cable service which includes video programming. Quite the contrary, many cable systems provide a wide variety of cable services and other communications services as well. A facility would be a cable system if it were designed to include the provision of cable services (including video programming) along with communications services other than cable service.

This broad view of the term cable system suggests that § 544(e) may preempt the City’s franchising authority if AT&T’s view of § 544(e) is correct. The court’s holding, however, appears to be the better position, because it is consistent with other provisions of Title VI that give LFAs the authority to regulate in ways that affect transmission technology and because the FCC has taken a narrow view of § 544(e).

47 U.S.C. § 541(b)(3)(D). Finally, AT&T has raised a new argument in its appeal to the Ninth Circuit. It has argued that § 541(b)(3)(D) preempts the City’s authority to impose Open Access

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138. See id.
139. AT&T Corp. v. City of Portland, 43 F. Supp. 2d 1146, 1153 (D. Or. 1999).
140. See supra notes 19-20 and accompanying text.
requirements.\textsuperscript{142} Section 541(b)(3)(D) states:

Except as otherwise permitted by sections 531 and 532 of this title, a franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise.\textsuperscript{143}

AT&T contends that the City’s Open Access requirement would force it to provide telecommunications facilities to competing ISPs. The term “telecommunications facilities” is not defined in the 1996 Act. However, according to the 1996 Act, “telecommunications” is “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”\textsuperscript{144} In contrast, “information service” gives a subscriber something more than “pure transmission capability,”\textsuperscript{145} including the ability to “acquir[e], stor[e], transform[], process[], retriev[e], utiliz[e], or mak[e] available information via telecommunications.”\textsuperscript{146} AT&T reasons that § 541(b)(3)(D) preempts the City’s franchising authority to require Open Access because Open Access would compel AT&T to provide facilities that would allow ISPs to transmit information “of [their own] choosing, without change . . .”\textsuperscript{147} as a condition to the transfer of TCI’s franchise to AT&T—a patent violation of § 541(b)(3)(D).

The City has argued that whether a service is a telecommunications service must be analyzed from the perspective of the subscriber, not the perspective of a third-party ISP.\textsuperscript{148} Because the service received by the subscriber is, according to all parties in the case, a cable service, it cannot be a telecommunications service and § 541(b)(3)(D) cannot apply.

The intervenors in this case have argued that § 541(b)(3)(D) was intended to prevent LFAs from regulating telephone or telecommunications service provided by cable operators over the coaxial cable in


\textsuperscript{144} Id. § 153(43).


\textsuperscript{146} 47 U.S.C. § 153(20).

\textsuperscript{147} Id. § 153(43).

cable television systems. There is substantial support for this view in the 1996 Act’s legislative history. The legislative history states: “The Committee intends that this section precludes a local government from imposing a franchise obligation on provision of telecommunications services, but this section does not . . . limit the right of local governments . . . with respect to franchise obligations applying to cable service.” It further states that “[i]t is the Committee’s intention that when an entity, whether a cable operator or some other entity, enters the telephone exchange service business, such entity should be subject to appropriate regulations of Federal or State regulators.”

The intervenors have suggested that AT&T’s view of § 541(b)(3)(D) does not comport with the 1996 Act’s stated purpose of, in this case, drawing a clear line between Title II telecommunications services and Title VI cable services even where Title II-type services are provided over cable television facilities.

Because this argument was not raised before the district court, the district court did not address it. Moreover, because AT&T has asserted the argument for the first time on appeal, there is a good chance that the Ninth Circuit will not consider it in its ruling. However, the argument deserves careful review because it will likely be raised in other courts or before the FCC. While AT&T’s view of § 541(b)(3)(D) is consistent with the text, its legislative history indicates that it was intended to prevent LFAs from regulating local exchange telephone service provided over coaxial cable by cable operators. This reinforces the City’s position that telecommunications facilities should be determined from the perspective of the individual subscriber and supports the intervenors’ view that § 541(b)(3)(D) was not intended to effect an LFA’s ability to regulate cable service or, for that matter, non-cable services provided over a cable system that are also not telecommunications services.

While AT&T’s argument is technically supported by the text, it would employ the statute in a way never contemplated by Congress. Consequently, § 541(b)(3)(D) should not be interpreted to preempt


151. Id.

152. See Sofamor Danek Group, Inc. v. Brown, 124 F.3d 1179, 1186 n.4 (9th Cir. 1997) (holding that, as a general rule, an argument must be raised first at the trial level in order to be considered on appeal).
the City’s authority to require Open Access as a condition of a franchise transfer.

2. The City’s arguments

In addition to arguing that the four provisions referred to by AT&T do not preempt its authority to require Open Access, the City has argued that § 533(d) specifically grants it that authority. Section 533(d) states:

Any State or franchising authority may not prohibit the ownership or control of a cable system by any person because of such person’s ownership or control of any other media of mass communications or other media interests. 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 . . . 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.153

The City contends that it may require Open Access as a franchise transfer condition because the transfer from TCI to AT&T would, as the City and County found, reduce competition in the delivery of Internet service.154

AT&T has argued that § 533(d)(2) only applies to a transfer that would affect competition in the delivery of cable service, or services provided by more than one cable operator, not competition in the delivery of Internet service or service provided by a cable operator and an Internet access provider.155 Because the City’s Open Access condition applies to the kind of competition described in the latter category, and because AT&T’s acquisition of TCI will not affect competition in the delivery of Internet Over Cable, § 533(d)(2) does not give the City the authority to require Open Access as a condition of the franchise transfer.

The district court agreed with the City. It held that

[1]ocal franchising authorities have the power to determine whether

a change of ownership or control would “eliminate or reduce competition.” It is not my role to second-guess the findings supporting the decision to impose [O]pen [A]ccess. So long as the City and County act within their jurisdiction, their findings are entitled to deference.\footnote{156. AT&T Corp. v. City of Portland, 43 F. Supp. 2d 1146, 1152 (D. Or. 1999).}

Assuming that Internet Over Cable is a type of cable service, the district court’s ruling is questionable. AT&T’s reasoning is compelling. Since TCI would have provided its exclusive Internet service without its acquisition by AT&T, the franchise transfer will have no effect on competition in the delivery of Internet Over Cable. Deference to the City and County is only justified if they are acting within their jurisdiction. In this case, they were not.

Moreover, the district court’s ruling on \( \S \) 533(d)(2) is even more questionable when one considers that the court failed to address the interpretive problems associated with Internet Over Cable as a cable service. If Internet Over Cable is not a cable service, \( \S \) 533(d)(2) does not give the City the authority to condition the franchise transfer on Open Access because \( \S \) 533(d)(2) applies only to competition in the delivery of cable service.

3. An alternative ruling

The district court should have held that the Mt. Hood Commission exceeded its authority when it made Open Access a condition of AT&T’s franchise transfer. An LFA’s authority stems from Title VI of the Communications Act. Section 621 of Title VI, or 47 U.S.C. \( \S \) 541, clarifies the scope of an LFA’s authority. Section 541(d)(2) states that “[n]othing in this subchapter shall be construed to affect the authority of any State to regulate any cable operator to the extent that such operator provides any communication service other than cable service, whether offered on a common carrier or private contract basis.”\footnote{157. 47 U.S.C. \( \S \) 541(d)(2).} Furthermore, Title VI’s legislative history states that Title VI “preserves the regulatory and jurisdictional status quo with respect to non-cable communications services.”\footnote{158. H.R. REP. NO. 98-934, at 29 (1984), \textit{reprinted in} 1984 U.S.C.C.A.N. 4655, 4666.} Since Title VI maintains existing state and federal regulatory authority over non-cable services, LFAs do not have the authority to impose regulations on non-cable services.

\footnotesize{156. AT&T Corp. v. City of Portland, 43 F. Supp. 2d 1146, 1152 (D. Or. 1999).} 
\footnotesize{157. 47 U.S.C. \( \S \) 541(d)(2).} 
V. ALTERNATIVE MECHANISMS FOR REGULATING INTERNET OVER CABLE

Title VI of the Communications Act is not a proper framework for regulating Internet Over Cable because Internet Over Cable is not a cable service. Because Internet Over Cable involves more than “pure transmission capability,” Title II is not an appropriate regulatory scheme either. If Title VI of the Communications Act is not an appropriate regulatory framework for Internet Over Cable and Title II is not, what is? Two provisions of the Communications Act give the FCC some authority to regulate Internet Over Cable: Title I and the provisions of the 1996 Act that address advanced telecommunications capability (ATC).

A. The FCC’s Title I Ancillary Jurisdiction

Title I of the Communications Act states that the Act “appl[ies] to all interstate and foreign communications by wire or radio.” The legislative history to the Communications Act indicates that the FCC has “regulatory power over all forms of electrical communication.” The Supreme Court has held that Congress conferred broad powers upon the FCC so that it may respond appropriately to a “new and dynamic” industry. Accordingly, the Court has held that the FCC may exercise its regulatory authority over wire communications not explicitly mentioned in other portions of the Communications Act, as long as that authority is “reasonably ancillary to the effective performance of the Commission’s various responsibilities” explicitly outlined in the Communications Act.

Whether the FCC can regulate Internet Over Cable under its


160. See supra notes 91-92, 101-102 and accompanying text. The FCC’s recent Universal Service Order supports this view. In it, the FCC, without deciding whether Internet Over Cable is an enhanced service, determined that other Internet access services are enhanced services, not basic services, and are subject to the FCC’s Title I ancillary jurisdiction, not to its Title II jurisdiction. See Federal-State Joint Board on Universal Service, 13 F.C.C.R. 11501, ¶ 69 n.140 (1998) (report to Congress).


163. Southwestern Cable, 392 U.S. at 173 (quoting National Broadcasting Co. v. United States, 319 U.S. 190, 219 (1943)).

164. Id. at 178.
Title I ancillary jurisdiction depends upon whether its regulation of those services is reasonably ancillary to its explicit responsibilities outlined in other portions of the Act. In United States v. Southwestern Cable Co., the Supreme Court held that the FCC’s regulation of cable television systems prior to the passage of Title VI was reasonably ancillary to the FCC’s express authority over broadcast television because the “importation of distant [television] signals [by cable television operators] into the service areas of local [broadcast] stations” would seriously impair the service offered by broadcast stations.

Under this ruling, the FCC’s ability to regulate Internet Over Cable may not be reasonably ancillary to its Title VI jurisdiction because Internet Over Cable is not presently a threat to the provision of cable services. On the other hand, regulation of Internet Over Cable may be reasonably ancillary to Title II of the Communications Act because services similar to basic service—such as long distance phone service over the Internet—might affect or impair the FCC’s regulation of common carriers. In addition, the FCC is already regulating enhanced services, including non-cable Internet access services under its Title I ancillary jurisdiction. If non-cable Internet services are ancillary to Title II, Internet Over Cable should be similarly ancillary to Title VI or to Title II. This is especially true when one considers that the stated purpose of the 1996 Act was to “preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”

In addition to questions regarding ancillary jurisdiction, courts must also consider whether FCC preemption would preclude all state regulation of the Internet. The D.C. Circuit, in affirming Computer II, suggested that state regulations should give way to the FCC when they conflict with the FCC’s ability to accomplish its goals.

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165. Barbara Esbin has recognized Title I as a potential source of authority for regulating Internet Over Cable. See Esbin, supra note 1, at 99, 117 n.777.
167. Id. at 175.
168. See Esbin, supra note 1, at 99, 117 n.777.
169. How far the FCC’s ancillary jurisdiction extends is not clear. For example, could the FCC, under the guise of Title I, require cable operators to provide Open Access to competing ISPs as part of a national Internet policy? The answer to this question is not readily apparent.
171. See Computer and Communications Indus. Ass’n v. F.C.C., 693 F.2d 198, 214
In its opinion, the court held that “when state regulation of intrastate equipment or facilities would interfere with achievement of a federal regulatory goal, the [FCC’s] jurisdiction is paramount, and conflicting state regulations must necessarily yield to the federal regulatory scheme.”

In *California v. FCC*, the Ninth Circuit expressed a contrasting point of view by invalidating the FCC’s preemption of state regulation of enhanced services because the scope of the preemption was overly broad in relation to the FCC’s legitimate purpose. As one commentator noted, “[t]his suggests that a mere determination by the FCC that something should go unregulated does not necessarily preempt state law.” However, the Ninth Circuit’s decision was based on a specific section of the Communications Act, § 2(b)(1), which denied the FCC the ability to regulate intrastate enhanced services, an area that it was attempting to preempt to further its legitimate statutory purpose. Consequently, if any part of Internet Over Cable service is an intrastate service, the FCC must carefully craft any preemption of state regulation as part of its un-regulation policy in order to avoid the unnecessary preemption of local authority. The uniquely interstate and even global character of the Internet, though, suggests that restrictions on FCC Title I ancillary preemption will be less of a problem than the restrictions on preemption under Title II that the Ninth Circuit addressed in *California v. FCC*.

**B. Internet Over Cable as an Advanced Telecommunications Capability**

Classifying Internet Over Cable as an “advanced telecommunications capability” (ATC) under § 706 of the 1996 Act is another viable means of regulating Internet cable services. Section 706 gave the FCC and state commissions the authority to regulate advanced telecommunications services. The 1996 Act states:

(D.C. Cir. 1982).

172.  *Id.* (footnotes omitted).

173.  *See* 905 F.2d 1217, 1243-45 (9th Cir. 1990); *see also* HENRY H. PERRITT, JR., LAW AND THE INFORMATION SUPERHIGHWAY § 7.5, at 312 (1996).


175.  *See* 47 U.S.C. § 152(b)(1) (1994); *see also* California, 905 F.2d at 1238.

176.  905 F.2d 1217 (9th Cir. 1990).
In General.—The Commission 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.

Inquiry.—The Commission shall, within 30 months after the date of enactment of this Act [Feb. 8, 1996], and regularly thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission’s determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.177

Section 706 further states that, “[t]he term ‘advanced telecommunications capability’ is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.”178

The FCC adopted a report in response to § 706(b) on February 2, 1999. The report defined “‘broadband’ as having the capability of supporting, in both the provider-to-consumer (downstream) and the consumer-to-provider (upstream) direction, a speed (in technical terms, ‘bandwidth’) in excess of 200 kilobits per second (kbps) in the last mile.”179 The Commission adopted this definition because

178. Id. § 157(c)(1).
179. In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate
200 kbps is sufficient to provide undelayed access to web pages and full-motion video. While the report declined to decide whether Internet Over Cable is an ATC, Internet service over a cable system conforms to this definition. It provides two-way speeds of well over 200 kbps for the transmission of “high-quality voice, data, graphics, and video” over a cable system, a technological platform that is consistent with the 1996 Act’s requirement that ATC be provided over “any technology.”

In addition, while the FCC refused to resolve the uncertain status of Internet Over Cable, it referred to cable modem service as the “most popular offering of broadband to residential consumers,” suggesting that, while cable over Internet’s regulatory classification is uncertain, it is the leading provider of ATC-like services. Moreover, the FCC noted in the report that cable television companies, at the time the report was issued, had “at least 350,000 residential customers.” Incumbent local exchange carriers (I-LECs) were the only other provider of ATC services with a significant number of subscribers. The FCC estimated that I-LECs had approximately 25,000 residential customers at the time the report was issued.

Because it is difficult to imagine a reasonable definition of ATC that does not include Internet Over Cable, the FCC may not have the discretion it believes it has to find that Internet Over Cable is not an ATC. In addition, the FCC’s authority to regulate ATC can only be invoked if the Commission determines that ATC is not “being deployed to all Americans in a reasonable and timely fashion.” Consequently, the FCC’s regulatory authority is limited.

Additionally, this express provision of the 1996 Act may eclipse the FCC’s Title I ancillary jurisdiction. However, the FCC probably has enough discretion with respect to a ruling on timely deployment that it will have the flexibility it needs to regulate Internet Over Ca-

\[\text{\textsuperscript{180}}\] See id. ¶ 20.
\[\text{\textsuperscript{181}}\] See Esbin, supra note 1, at 116-17.
\[\text{\textsuperscript{182}}\] 47 U.S.C. § 157(b).
\[\text{\textsuperscript{183}}\] 14 F.C.C.R. 2398, ¶ 54.
\[\text{\textsuperscript{184}}\] Id.
\[\text{\textsuperscript{185}}\] See id. ¶ 58.
\[\text{\textsuperscript{186}}\] 47 U.S.C. § 157(b).
ble as it sees fit. This does not mean that its authority is without limits, especially if its timely deployment ruling appears to be a jurisdictional pretext.

Finally, § 706(a) gives “[s]tate commission[s] with regulatory jurisdiction” concurrent authority to “encourage the deployment” of ATC.187 It is conceivable that a state, absent an FCC determination that timely deployment is not occurring, could seek to encourage ATC deployment to “all Americans” by requiring local cable operators to give ISPs access to their cable facilities in order to “promote competition in the local telecommunications market.”188 It is not clear that the FCC’s decision not to regulate would preempt a state’s authority to regulate.189

VI. CONCLUSION

Analysts have suggested that there will be over forty million broadband subscribers in the next several years.190 Indeed, the broadband services market is expected to become a $150 billion annual market.191 Given the early lead cable television operators have taken in this new market, it is important that courts bring clarity to Internet Over Cable’s legal status. The district court in AT&T Corp. v. City of Portland accepted the premise that Internet Over Cable is a cable service without addressing the intricacies of the definition of cable service. The Ninth Circuit in this case, and other courts that will be addressing this question in the near future, should conclude that the cable service definition as amended in 1996 cannot be read to include Internet Over Cable. Any uncertainty in the cable service definition legislative history can and should be resolved by the textual requirement that cable services must be made available to all subscribers generally—a qualification that excludes many, if not all, Internet services. Moreover, the legislative history to the 1996 amendment, while unclear, suggests that Congress wanted to allow cable operators to provide interactive services that are available to all and selected and controlled by the cable operator, criteria that Inter-

187. Id. § 157(a).
188. Id.
189. See supra notes 171-174 and accompanying text.
191. See id.
net Over Cable does not meet.

Courts that address this particular question in the future should find that Internet Over Cable is not a Title VI cable service and, consequently, that LFAs do not have the authority to require cable operators to provide Open Access to their Internet facilities. At the same time, they should recognize the authority of the FCC and state governments to regulate Internet Over Cable. The FCC may assert its Title I ancillary jurisdiction to regulate Internet Over Cable, and both the FCC and state regulatory bodies may also regulate Internet Over Cable as an advanced telecommunications capability. Moreover, absent express FCC preemption of the Open Access question, it is conceivable that state regulatory bodies could require cable operators to provide Open Access to other ISPs.

The Open Access debate will likely have a dramatic effect on how consumers access the Internet in the future. Broadband Internet access is, in many respects, the future of the Internet, and cable television is a leading provider of broadband access. As more and more LFAs impose Open Access restrictions, courts will be faced with the task of classifying Internet Over Cable. Courts can go a long way toward providing regulatory clarity in the turbulent broadband market by holding that Internet Over Cable is not a cable service.

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