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# POLES, HOLES AND CABLE OPEN ACCESS: WHERE THE GLOBAL INFORMATION SUPERHIGHWAY MEETS THE LOCAL RIGHT-OF-WAY

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specializing in cable communications law and policy. The views expressed herein are solely those of the authors and do not represent the views of the Federal Communications Commission (hereinafter "FCC," "Commission," or "agency"), the federal government, or the views of any other person or organization.

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## I. INTRODUCTION

Digital technologies combined with optical networks make it possible to provide multiple communications services—*i.e.*, voice, video and data—over a single network or platform. This "convergence" holds great promise for the delivery of cost-effective, innovative new services. At the same time, it presents daunting challenges to those charged with administering a regulatory framework premised upon distinct networks, services and service providers. These integrated digital capabilities rarely fit nicely into existing regulatory categories.

Vexing "category problems"<sup>1</sup> arise as providers already franchised to use public rights-of-way for specified services begin to deploy additional communications services over existing or upgraded plant. Some of these issues arise because facilities-based cable operators and telecommunications carriers use the public rights-of-way in a similar manner, but are regulated under vastly different regulatory schemes. Existing regulatory regimes were designed to govern technologically distinct networks and services that were relatively easy to recognize—wireline telephone, cable television,

broadcast television, wireless telecommunications and satellite television services. Correspondingly, the various "titles" of the Communications Act of 1934<sup>2</sup> establish regulatory requirements that are, for the most part, technology, service and network-specific. Technological advances, which enable the provision of familiar services over new platforms, new services over old platforms and multiple media services over any platform, are confounding our ability to intelligently apply these discrete definitional categories. In our digital age, it is often said that "bits are bits," but government officials must continue to attempt to tell them apart in order to carry out their statutory obligations. The exercise must be performed regardless of whether the ultimate goal is to regulate or refrain from regulating a particular communications service.<sup>3</sup>

A vigorous public policy debate has emerged regarding how our regulatory regimes may be rationalized to encourage innovation and market entry while protecting communications users, the integrity of public rights-of-way and the public interest generally. This debate has been occurring at every level of government and has focused on the inter-

<sup>1</sup> See FCC, OPP WORKING PAPER NO. 29, DIGITAL TORNADO: THE INTERNET AND TELECOMMUNICATIONS POLICY (authored by Kevin Werbach), at 26–47 (1997), available at [http://www.fcc.gov/Bureaus/OPP/working\\_papers/oppwp29.pdf](http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp29.pdf) (noting difficulties in categorizing Internet services for regulatory purposes and observing that existing regulations "could produce strange results if applied blindly"); *Id.* at 43; Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*, FCC, OPP WORKING PAPER NO. 30 (1998), republished in 7 COMMLAW CONSPECTUS 37 (1999) [hereinafter Esbin] (noting that the Internet poses significant challenges for government policymakers and regulators).

<sup>2</sup> Communications Act of 1934, Pub. L. No. 73-416, ch. 652, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. §§ 151–614) [hereinafter *Communications Act or Act*].

<sup>3</sup> See *In re* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), *Final Decision*, 77 F.C.C.2d 384 (1980). The FCC's seminal *Computer Inquiry* proceedings were aimed as much at regulating that which must be regulated on a common carrier basis under Title II as they were in distinguishing those services which utilized common carrier communications but which did not need to be regulated on a common carrier basis because they were subject to vibrant competition.

twined issues of public rights-of-way management, regulatory classification and the limits of government regulatory authority over new technologies and services.

Almost immediately following passage of the landmark Telecommunications Act of 1996 (the "1996 Act"),<sup>4</sup> provisions aimed at removing legal and regulatory barriers to entry into telecommunications markets at the state and local levels<sup>5</sup> became the subject of petitions for preemption before the Federal Communications Commission (the "FCC" or the "Commission").<sup>6</sup> These cases involved the scope of local franchising of telecommunications carriers, the scope of permissible rights-of-way management authority, the permissible level of telecommunications franchise fees and a host of related issues, including the fundamental question of what it means to "use" public the rights-of-way in a manner that would trigger local rights-of-way management authority. A substantial body of administrative and judicial case law has developed, and, as this article will demonstrate, it establishes a very modest role for local governments in the realm of substantive telecommunications services and advanced services regulation.

<sup>4</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified in scattered sections of 47 U.S.C.) [hereinafter *1996 Act*].

<sup>5</sup> See *1996 Act*, sec. 101(a), 110 Stat. 70-71, codified at 47 U.S.C. § 253 (2000).

<sup>6</sup> See, e.g., *In re Classic Telephone, Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief*, *Memorandum Opinion and Order*, 11 FCC Rcd. 13,082, 13,083, para. 1 (1996) [hereinafter *Classic Telephone*], *enforcement denied*, 12 FCC Rcd. 15,619, 15,638, para. 35, (1997); *In re Classic Telephone, Inc., Order on Reconsideration*, 14 FCC Rcd. 19,974, 19,975, para. 3 (1999), *affg In re Classic Telephone, Inc., Order*, 14 FCC Rcd. 960 (1999), *vacated as moot*, *In re Classic Telephone, Inc., Order*, 15 FCC Rcd. 25,101 (2000), *motion to dismiss granted sub nom. City of Bogue v. FCC*, Nos. 96-1432 and 99-1521, 2001 U.S. App. LEXIS 7562 (D.C. Cir. Mar. 15, 2001). *In re TCI Cablevision of Oakland County, Inc. Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e), and 253*, *Memorandum Opinion and Order*, 12 FCC Rcd. 21,396 (1997) [hereinafter *Troy Order*], *petition for reconsideration denied*, 13 FCC Rcd. 16,400, 16,426, para. 83 (1998) [hereinafter *Troy Reconsideration Order*].

<sup>7</sup> Even the terminology of the open access movement is a matter of dispute. This article will refer to the Internet services provided by cable operators such as AT&T Broadband as "cable Internet services" and, where appropriate, will refer to the facilities used to deliver such services as the "cable Internet platform." Others use similar terminology. For example, the FCC has chosen the terms "cable modem service" and "cable modem platform" to refer to these services and facilities. See, e.g., *In re Inquiry Concerning High-Speed Ac-*

cess to the Internet Over Cable and Other Facilities, *Notice of Inquiry*, 15 FCC Rcd. 19,287, para. 1 n.1 (2000) [hereinafter *Open Access NOI*].

By far the most visible and controversial convergence issue has been the question of mandatory "open access" for unaffiliated Internet service providers ("ISPs") to the advanced Internet services and platform provided by cable system operators.<sup>7</sup> The push for open access has been driven by a coalition of online service providers, ISPs, local and long distance telephone companies, and consumer advocates seeking government-mandated open access to the Internet service provided over franchised cable systems.<sup>8</sup>

Initially, efforts to secure open access to cable were focused on the proceedings before the FCC. Yet, since early 1999, the FCC, under the leadership of former Chairman William E. Kennard, repeatedly declined to impose mandatory "open access" requirements on cable. The FCC formulated and implemented this "hands off" policy indirectly in the context of merger review proceedings, in its periodic proceedings to determine the status of broadband deployment pursuant to section 706 of the 1996 Act<sup>9</sup> and in the course of other administrative proceedings.<sup>10</sup> Prior to late 2000, no formal proceeding before the FCC dealt exclusively or even directly with the question of the appropriate regulatory status of cable-deliv-

cess to the Internet Over Cable and Other Facilities, *Notice of Inquiry*, 15 FCC Rcd. 19,287, para. 1 n.1 (2000) [hereinafter *Open Access NOI*].

<sup>8</sup> See, e.g., openNET Coalition, at <http://www.opennetcoalition.org> (last visited June 2, 2001).

<sup>9</sup> See *1996 Act*, § 706, 110 Stat. 153, codified at 47 U.S.C. § 157 note (2000). Section 706 of the 1996 Act was codified as a note to section 7 of the Communications Act of 1934. Section 706(a) directs the FCC and each state commission with regulatory jurisdiction over telecommunications services to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by using, among other things, various "measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." *Id.* Section 706(b) directs the FCC to regularly initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans. *Id.* If the FCC determines that deployment is not reasonable and timely, section 706(b) mandates that 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." *Id.* Under section 706(c)(1) "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." *Id.*

<sup>10</sup> See, e.g., *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Telecommunications, Inc., Transferor To AT&T Corp.*,

ered Internet services.<sup>11</sup> In the wake of their initial defeats at the FCC, open access proponents launched a three-pronged attack on cable operators that focused primarily on cable local franchising authorities ("LFAs"), federal and state legislators,<sup>12</sup> and later the Federal Trade Commission ("FTC") in the context of the FTC's review of the merger of America Online ("AOL") and Time Warner.<sup>13</sup> At the same time, proponents lost no opportunity to continue to press the FCC to change its cable access policy from one of "vigilant restraint,"<sup>14</sup> to active regulatory intervention.

The effort to force open access upon cable operators at the local level led to a series of conflicting court rulings on the appropriate regulatory classification for cable Internet services, as well as the extent of local power with respect to these services.<sup>15</sup> It also caused the FCC to file two *amicus curiae* briefs with federal appellate courts reflecting the FCC's views on the twin issues of regulatory categorization and local authority.<sup>16</sup> These lawsuits proved awkward for the FCC because it had yet to directly address the regulatory classifi-

cation and related open access issues in the context of an industry-wide administrative proceeding. The resulting lack of interpretive and policy guidance on the central question of regulatory classification left the courts free to interpret the statutory definitions and regulatory directives on their own.

In June 2000, a defining moment in the push for open access arrived when the United States Court of Appeals for the Ninth Circuit held that the City of Portland's open access ordinance was preempted under a provision of the Communications Act that prohibits local franchising authorities from regulating or interfering with telecommunications services provided by cable operators.<sup>17</sup> Although the Ninth Circuit determined that cable Internet service is not a Title VI cable service,<sup>18</sup> it preempted the city's ordinance on the theory that the cable operator's transport of Internet services over cable television facilities is a "telecommunications service," as defined in the Act.<sup>19</sup> Immediately thereafter, the FCC announced that it would initiate an inquiry into the

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Transferee, *Memorandum Opinion and Order*, 14 FCC Rcd. 3160 (1999) [hereinafter *AT&T/TCI Transfer Order*]; *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor To AT&T Corp., Transferee, Memorandum Opinion and Order*, 15 FCC Rcd. 9816 (2000) [hereinafter *AT&T/MediaOne Merger Order*]; *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Report*, 14 FCC Rcd. 2398 (1999); *In re Internet Ventures, Inc., Internet On-Ramp, Inc., Petition for Declaratory Ruling that Internet Service Providers are Entitled to Leased Access to Cable Facilities Under Section 612 of the Communications Act, Memorandum Opinion and Order*, 15 FCC Rcd. 3247 (2000) [hereinafter *IVI Leased Access Order*].

<sup>11</sup> See Esbin, *supra* note 1, at 113-18.

<sup>12</sup> Nearly a dozen bills were proposed at the federal level between 1999 and 2000. See, e.g., Internet Freedom and Broadband Deployment Act of 1999, H.R. 2420, 106th Cong. (1999); Consumer and Community Choice in Access Act of 1999, H.R. 2637, 106th Cong. (1999); Internet Growth and Development Act of 1999, H.R. 1685, 106th Cong. (1999); Broadband Internet Regulatory Relief Act of 1999, S. 877, 106th Cong. (1999). None of these bills were enacted, although the Tauzin-Dingell bill, H.R. 2420, which de-regulates the broadband data offerings of the Bell Operating Companies, was re-introduced in 2001 as H.R. 1542. See H.R. 2420, 106th Cong. (1999); Internet Freedom and Broadband Deployment Act of 2001, H.R. 1542, 107th Cong. (2001). Open access legislation of one form or another was also introduced, but never enacted, in at least seventeen states. *Open Access Legislation*, COMM. DAILY, Mar. 23, 2000, at 5.

<sup>13</sup> See America Online, Inc. and Time Warner Inc., *Consent Order, Decision and Order, Order to Hold Separate*, 2000

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F.T.C. LEXIS 170, \*19 (2000).

<sup>14</sup> See *Staff Report to William E. Kennard, Chairman, Federal Communications Commission on Industry Monitoring Sessions Convened by Cable Services Bureau*, BROADBAND TODAY, available at <http://www.fcc.gov/bureaus/cable/reports/broadbandtoday.pdf> (Oct. 1999); Barbara S. Esbin, *Hands Off Policy Works on Open Access*, MULTICHANNEL NEWS, July 26, 1999, at 69.

<sup>15</sup> Compare *AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146, 1150, 1156 (D. Or. 1999) [hereinafter *Portland I*] (affirming a Portland city ordinance that mandated non-discriminatory access for Internet service providers not affiliated with cable franchisees), *rev'd*, 216 F.3d 871 (9th Cir. 2000) [hereinafter *Portland II*], with *MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712, 714 (E.D. Va. 2000) [hereinafter *Henrico County I*] (holding that a local ordinance mandating open access for any Internet service provider to cable facilities is pre-empted by state and federal laws), *aff'd*, 257 F.3d 356 (4th Cir. 2001) [hereinafter *Henrico County II*]. See also *Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685 (S.D. Fla. 2000); *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000) [hereinafter *Gulf Power II*], *mandate stayed, cert. granted*, 121 S. Ct. 879 (2001).

<sup>16</sup> See *Amicus Curiae Brief of the FCC*, at 3, 8, *Portland II*, 216 F.3d 871 (No. 99-35609); see also *Amicus Curiae Brief of the FCC, Henrico County I*, 257 F.3d 356 (Nos. 00-1680, 00-1709, 00-1719).

<sup>17</sup> *Portland II*, 216 F.3d at 878. Section 621(b)(3)(B) of the Act bars any local requirement "that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator." 47 U.S.C. § 541(b)(3)(B) (2000).

<sup>18</sup> *Portland II*, 216 F.3d at 877.

<sup>19</sup> *Id.* at 878. See 47 U.S.C. § 153(46) (2000). "The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes

issues raised by the court's action.<sup>20</sup>

On September 28, 2000, the FCC initiated its Inquiry to determine on a national basis the legal and regulatory framework to govern the provision of high-speed Internet service over cable.<sup>21</sup> While the formal pleading cycle in the Inquiry closed on January 10, 2001, additional action remains within the discretion of the agency.<sup>22</sup> If the FCC determines that further action is warranted, this could come in the form of a report, a declaratory ruling, the initiation of a notice of proposed rulemaking, or, depending upon the regulatory category selected, initiation of a proceeding to forbear from regulation under section 10 of the Act.<sup>23</sup>

Meanwhile, the various federal court decisions, particularly the Ninth Circuit's decision in *Portland II*, have also engendered speculation that, if Internet over cable is treated as a telecommunications service rather than a cable service, local governments may regulate it under their telecommunications franchising authority.<sup>24</sup> Indeed, as discussed below, the Fourth Circuit's *Henrico II* decision that cable operators offering Internet services maintain "telecommunications facilities"<sup>25</sup> may be misinterpreted as being consistent with the need for additional telecommunications facilities authorizations at the local level. Yet, the scope and extent of such local telecommunications franchising authority is considerably narrower than local cable franchising authority. As this article demonstrates, under relevant FCC and judicial precedent, that authority does not extend to such substantive service regulation as mandatory open access.

Thus today, government at every level finds itself involved with these fundamental issues of reg-

ulatory categorization and the limits of its regulatory authority. At each level, government and judicial bodies have begun to arrive at different and often conflicting conclusions regarding the meaning of the 1996 Act's definitions as well as the scope of its operative market-opening provisions.<sup>26</sup> This fragmentation suggests the need for government decision makers to determine which policy goal or goals are preeminent and establish a coherent policy course for achieving them.

A growing body of federal law and policy regarding limits on local government's exercise of rights-of-way management authority with respect to cable and telecommunications carriers provides excellent guidance to both the local official and practitioner in this area. Section 253 rights-of-way management decisions have largely followed and expanded upon FCC interpretative and policy decisions, which chart a narrow and limited course for substantive local regulation of telecommunications and advanced services. As demonstrated herein, the consensus view appears to be that the overriding federal policy to encourage the rapid deployment of private sector investment in advanced telecommunications and information networks requires that local government authority over such providers should be narrowly construed and sparingly applied. In contrast, the growing cable open access jurisprudence has suffered from the lack of "controlling legal authority" from the expert administrative agency on this matter. This vacuum has led to a plethora of confused and confusing judicial rulings on the regulatory classification of the cable Internet service and platform.

This article argues that, regardless of which reg-

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of users as to be effectively available directly to the public, regardless of the facilities used." *Id.*

<sup>20</sup> Press Release, Federal Communications Commission, FCC Chairman to Launch Proceeding on "Cable Access"—Kennard Says Time is Right to Establish Record on Marketplace Developments, available at [http://www.fcc.gov/Bureaus/Cable/News\\_Releases/2000/nrc0017.html](http://www.fcc.gov/Bureaus/Cable/News_Releases/2000/nrc0017.html) (June 30, 2000); *FCC Proceeding to Decide Key Cable Open Access Issue*, WARREN'S CABLE REG. MONITOR, July 10, 2000, at 1; *FCC To Launch Proceedings on Classification Of Cable Modem Services, Internet Telephony*, TELECOMM. REP., July 3, 2000, at 5.

<sup>21</sup> See *Open Access NOI*, 15 FCC Rcd. 19,287.

<sup>22</sup> The 2001 change in administration from Democratic to Republican is widely believed to portend a less regulatory approach to the communications industries. However, it remains to be seen how this will affect resolution of the issues raised in the *Open Access NOI*. See, e.g., *The New Communications Boss*, WASH. POST, Feb. 12, 2001, at A20; Carolyn Hirschman, *New Sheriff in Town*, TELEPHONY MAG., Jan. 29, 2001, at

14.

<sup>23</sup> See 47 U.S.C. § 160(a) (2000) (authorizing the FCC to forbear from applying any regulation or any provision of the Act "to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services" upon a finding that the statutory test for forbearance has been met).

<sup>24</sup> *Court Ruling May Trigger Fresh Disputes Over Cities' Rights*, COMM. DAILY, July 5, 2000, at 2.

<sup>25</sup> *Henrico County II*, 257 F.3d at 363–64.

<sup>26</sup> See *AT&T v. Iowa Util. Bd.*, 525 U.S. 366, 397 (1999) [hereinafter *Iowa Utilities*].

It would be a gross understatement to say that the [1996 Act] is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction. That is most unfortunate for a piece of legislation that profoundly affects a crucial segment of the economy worth tens of billions of dollars.

*Id.*

ulatory classification ultimately is attached to Internet over cable, the scope of regulatory authority, particularly local franchising authority, over these services is and should be limited as a matter of federal law and policy. Part II reviews the history and policies underlying local franchising authority over cable and telecommunications providers. Part III analyzes FCC and judicial approaches to rights-of-way management under section 253 of the Communications Act and argues that overly broad, discriminatory and redundant rights-of-way authorizations should be avoided. Part IV discusses federal policy regarding regulation of the Internet and reviews the federal judicial decisions regarding local authority to impose "open access" conditions on franchised cable television operators and the regulatory status of cable Internet service. Part V examines relevant issues raised by the FCC's *Open Access NOI*. Finally, Part VI concludes that even if individual municipalities did hold authority over the provision of cable Internet services, they should exercise their discretion to refrain from extensive regulation. Extensive local regulation would: (1) discourage investment in advanced communications facilities and thereby delay deployment of advanced services; (2) unnecessarily increase transaction costs for communications providers and thereby increase consumer prices; and (3) result in an unstable and unpredictable regulatory environment, which will serve as a barrier to competitive market entry. Ironically, continued municipal support for increased regulation of Internet services provided by cable systems will, if successful, likely retard the expansion of services provided over these systems, which expansion in the authors' experience has long been a local government goal.

These same policy concerns should also guide the federal regulatory approach to this matter.

The statutory definitions are both the beginning and the end of regulatory decision making, but they can never be sensibly applied in a policy vacuum. If, as the authors believe, the FCC's preeminent policy goal is facilities-based competition across all service categories, then the Title VI classification for Internet over cable should provide an expedient means to that end.

## II. LOCAL CABLE AND TELECOMMUNICATIONS FRANCHISING

To franchise a communications service at the local level, as well to determine the service-specific limitations on such franchising authority, local governments must make an initial determination regarding the service being provided.

Local authority over communications providers is linked inextricably to the provider's use of the public rights-of-way to lay conduit, install utility boxes and hang wire on certain utility poles.<sup>27</sup> Although cable and telecommunications systems use the public rights-of-way in a similar manner, these systems differ technologically, and the regulatory and franchising requirements that apply to each were designed with these differences in mind.

Further differentiation in regulatory treatment stems from the historically different nature of the services provided. Principally, cable operators, like newspaper publishers, are considered First Amendment "speakers" and, with limited exceptions, exercise absolute editorial discretion with respect to the content carried on their systems.<sup>28</sup> Telecommunications carriers, in contrast, must carry the content or information of the user's choosing, without alteration in the form or content of the information as sent or received.<sup>29</sup> Arguably, this is the essence of common carriage.

<sup>27</sup> See, e.g., H.R. REP. NO. 98-934, at 59 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4696 [hereinafter *1984 House Report*]; S. REP. NO. 9867, at 6-7 (1983) (explaining that the premise for local regulation of cable was its use of local streets and rights-of-way).

<sup>28</sup> See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) [hereinafter *Turner I*]; *Leathers v. Medlock*, 499 U.S. 439, 494-95 (1991); *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986); *Century Communications Corp. v. FCC*, 835 F.2d 292, 297 (D.C. Cir. 1987); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1437 (D.C. Cir. 1985), *cert. denied sub nom. Nat'l Ass'n of Broad. v. Quincy Cable TV, Inc.*, 476 U.S. 1169 (1986); *Broward County*, 124 F. Supp. 2d at 686.

<sup>29</sup> "The term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43) (2000). The term "telecommunications service" means "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46) (2000). The term "telecommunications carrier" means "any provider of telecommunications services . . . A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services." 47 U.S.C. § 153(44) (2000).

### A. Telecommunications Service and Its Regulation

Telephone systems were established to provide transmission of voice or other subscriber communications without change in form or content of the information transmitted.<sup>30</sup> They serve as pure “conduits” for the transmission of information of the user’s choosing. Telecommunications regulation was designed to comport with this basic “carrier” function.

In most states, the state government, acting through a public service commission, establishes the market entry qualifications for telecommunications carriers and issues certificates to carriers that meet minimum financial, legal and technical requirements. Substantive regulation of—or regulatory forbearance with regard to—the rates, terms and conditions of service and rules regarding carrier-to-carrier interconnection are established at the state and federal level. Title II of the Communications Act requires interstate common carrier wire communications services to be offered under tariff to all who request them on rates, terms and conditions that are just, reasonable and not unreasonably discriminatory.<sup>31</sup> Section 2(b) of the Communications Act preserves state authority over intrastate common carrier wire communications services.<sup>32</sup>

Thus, in terms of substantive requirements, the interstate services of local exchange carriers (“LECs”) are regulated as common carrier services under Title II of the Communications Act and corresponding state statutes governing their intrastate telephone exchange and access services.

In some areas, local authorities are authorized to manage LEC use of the public rights-of-way using a relatively streamlined system for issuing construction permits and overseeing the deployment of facilities. While exceptions may exist, local governments rarely hold expressly granted substantive regulatory authority over telecommunications services or service providers.<sup>33</sup>

### B. Cable Service and its Regulation

#### 1. Traditional Cable Television Service

Unlike telephony, cable services have historically been subject to a dual federal-local regulatory regime. Both Congress and the FCC have repeatedly recognized that local cable franchising authority historically derived from municipal police power over usage of the public rights-of-way for facilities placement.<sup>34</sup> In 1984, Congress added Title VI to the Communications Act to “establish a national policy concerning cable communications” and to “minimize unnecessary regulation that would impose an undue economic burden on cable systems.”<sup>35</sup> Title VI both preserves and limits the authority that a franchising authority may exercise through the cable franchise process. The legislative history of the 1984 Cable Act states that it was intended to establish a national policy “clarifying” the then-current system of local, state and federal regulation of cable television by continuing reliance on the local franchising process as the primary means of cable regulation, “while defining and limiting the authority that a franchising authority may exercise through the

<sup>30</sup> 47 U.S.C. § 153(43) (2000).

<sup>31</sup> “Wire communication” or “communication by wire” is defined in the Act to mean:

the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

47 U.S.C. § 153(52) (2000). Regulation of common carriers’ services and charges, including prohibitions on unreasonable discrimination and preferences is contained in sections 201 and 202. 47 U.S.C. §§ 201, 202 (2000). Tariff requirements for common carriers are contained in section 203. 47 U.S.C. § 203 (2000). With the 1996 Act’s addition of a new section 10 in the Communications Act, Congress authorized the FCC to eliminate the tariff filing requirement upon the appropriate public interest showing. 47 U.S.C. § 160 (2000).

<sup>32</sup> 47 U.S.C. § 152(b) (2000).

<sup>33</sup> See *Classic Telephone*, 11 FCC Rcd. at 13,107, para. 49 (state commission was authorized to grant state-wide Certificate of Public Convenience and Necessity to intrastate telecommunications carriers; localities were authorized by state law to grant local telecommunications franchises).

<sup>34</sup> 1984 House Report at 59, reprinted in 1984 U.S.C.A.N. at 4696; S. REP. NO. 98-67, at 6–7 (explaining that the premise for local regulation of cable was its use of local streets and rights-of-way); *In re Amendment of Part 76 of the Commission’s Rules and Regulations Relative to an Inquiry on the Need for Additional Rules in the Area of Duplicative and Excessive Over-Regulation of Cable Television*, Report and Order, 54 F.C.C.2d 855, 861–63, paras. 21–25 (1975) (describing “reasonable regulation regarding use of the streets and rights-of-way” as within state jurisdiction); *Troy Reconsideration Order*, 13 FCC Rcd. at 16,413, paras. 40, 41 n.70.

<sup>35</sup> Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2780 (1984) [hereinafter *1984 Cable Act*] (codified at 47 U.S.C. § 521(1), (6) (2000)).

franchise process.”<sup>36</sup> At both the federal and local level, cable service is treated as an integrated content and conduit service. The First Amendment rights of cable operators are protected by a series of Title VI provisions, and even those mandatory carriage obligations that exist, may not be expanded beyond the limits specifically enacted by Congress.<sup>37</sup>

In the 1984 Cable Act, Congress reaffirmed cable operators’ exemption from common carrier regulations in section 621(c),<sup>38</sup> and specifically prohibited “requirements regarding the provision or content of cable services” in section 624(f)(1).<sup>39</sup> Thus, Title VI preserves local franchising authority primarily over cable’s use of the public rights-of-way and related aspects of cable service, particularly consumer protection and customer service. Localities may, for example, determine whether a new operator “has the financial, technical or legal qualifications to provide cable service,”<sup>40</sup> collect franchise fees for the cable system’s use of the public rights-of-way,<sup>41</sup> establish “construction schedules and other construction-related requirements,”<sup>42</sup> and where otherwise consistent with the Act, establish requirements for facilities and equipment, but not “for video programming or other information services.”<sup>43</sup> Provisions of Title VI enforced solely by the FCC include program access requirements, leased access requirements and must carry/re-

transmission consent.<sup>44</sup>

## 2. Cable Telephony and Cable Internet Services

Among other things, the 1996 Act repealed the cable-telecommunications cross-ownership prohibition and opened local telephone markets to competition.<sup>45</sup> Congress fully expected cable operators to be among the most significant facilities-based competitors to enter local markets and took pains to delineate the appropriate scope of local franchising authority over cable telephony. Section 621(b)(3)(A) of the Communications Act<sup>46</sup> now prohibits local attempts to impose Title VI franchises over cable operators engaged in the provision of telecommunications services or to impose any Title VI obligations on the cable operator’s provision of such services. Section 621(b)(3)(B)<sup>47</sup> bars LFAs from imposing any requirement under Title VI “that has the purpose or effect of prohibiting, limiting, restricting or conditioning the provision of a telecommunications service by a cable operator.” In addition, local attempts to “prohibit, condition, or restrict a cable system’s use of any type of subscriber equipment or any transmission technology,” were barred under amended section 624(e),<sup>48</sup> as were attempts to impose any condition with the “purpose or effect” of requiring or restricting a cable system’s “provision of telecommunications services

<sup>36</sup> 1984 House Report at 4 (1984), reprinted in 1984 U.S.C.C.A.N. at 4656.

<sup>37</sup> See *Henrico County I*, 97 F. Supp. 2d at 715 (noting statutory limits regarding access requirements and citing 47 U.S.C. § 531 (2000) (cable channels for public, educational and government use), 47 U.S.C. § 532 (2000) (cable channels for commercial use), 47 U.S.C. § 534 (2000) (carriage of local commercial television signals), 47 U.S.C. § 535 (2000) (carriage of noncommercial educational television), and 47 U.S.C. § 532(b)(2) (2000) (“Any Federal agency, State, or franchising authority may not require any cable system to designate channel capacity for commercial use by unaffiliated persons in excess of the capacity specified [herein.]”).

<sup>38</sup> 47 U.S.C. § 541(c) (2000).

<sup>39</sup> 47 U.S.C. § 544(f)(1) (2000).

<sup>40</sup> 47 U.S.C. § 541(a)(4)(C) (2000).

<sup>41</sup> 47 U.S.C. § 542(a) (2000).

<sup>42</sup> 47 U.S.C. § 552(a)(2) (2000).

<sup>43</sup> 47 U.S.C. § 544(a) & (b) (2000). See *In re Entertainment Connections, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd. 14,277, 14306–07, para. 62 (1998) [hereinafter *ECI*], *aff’d sub nom.* City of Chicago v. FCC, 199 F.3d 424, 429–30 (7th Cir. 1999), *cert. denied sub nom.* Nat’l Ass’n of Telecomm. Officers and Advisors v. FCC, 531 U.S. 825 (2000) (quoting *In re Amendment of Part 76 of the Commission’s Rules and Regulations Relative to an Inquiry on the Need for Additional Rules in the Area of Duplicative and Ex-*

*cessive Over-Regulation of Cable Television, Report and Order*, 54 F.C.C.2d 855, 861, para. 21 (1975))

The ultimate dividing line [between federal and local regulation], as we see it, rests on the distinction between reasonable regulations regarding use of the streets and rights-of-way and the regulation of the operational aspects of cable communications. The former is clearly within the jurisdiction of the states and their political subdivisions. The latter, to the degree exercised, is within the jurisdiction of this Commission.

*Id.*

<sup>44</sup> 47 U.S.C. § 532 (2000) (leased access); 47 U.S.C. § 534 (2000) (commercial broadcast must carry); 47 U.S.C. § 535 (2000) (non-commercial broadcast must carry); 47 U.S.C. § 548 (2000) (program access).

<sup>45</sup> 1996 Act, § 302(a), 110 Stat. 118, codified at 47 U.S.C. § 571 (2000). Although the 1996 Act repealed the former cross-ownership provision, both telephone companies and cable television operators remain restricted from entering joint ventures and from acquiring more than a 10% financial interest or any management interest in the other within the same service area; exceptions exist, however, for rural areas and small systems. See 47 U.S.C. § 572 (2000).

<sup>46</sup> 47 U.S.C. § 541(b)(3)(A) (2000).

<sup>47</sup> 47 U.S.C. § 541(b)(3)(B) (2000).

<sup>48</sup> 47 U.S.C. § 544(e) (2000).



or facilities" in connection with the grant, renewal or transfer of a cable franchise under section 621(b)(3)(D).<sup>49</sup>

Congress also declared that it 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."<sup>50</sup> Section 230 of the Communications Act now defines the "Internet" as "the international computer network of both Federal and non-Federal interoperable packet switched data networks."<sup>51</sup> It defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."<sup>52</sup>

At the same time, Congress amended the definition of cable services covered under Title VI. The 1996 Act added the words "or use" to the definition of cable services, so that it now includes the "one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and subscriber interaction, if any, which is required for the selection *or use* of such video programming or other programming service."<sup>53</sup> "Other programming service" includes any "information that a cable operator makes available to all subscribers generally."<sup>54</sup> Addition of this "interac-

tive" feature to cable was accompanied by legislative history indicating that Congress intended "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."<sup>55</sup>

The meaning of this amendment has been much debated,<sup>56</sup> and is integral to the FCC's *Open Access NOI* as well as several conflicting decisions in the federal courts.<sup>57</sup> Nevertheless, inasmuch as Congress explicitly intended to include "enhanced" and "information services" as a component of "cable service" when provided by cable operators,<sup>58</sup> and given the FCC's general determination that the provision of Internet access is an "enhanced" or "information service,"<sup>59</sup> the conclusion that Congress intended Internet services provided by cable television operators to be governed by Title VI of the Act (Cable Communications) rather than by Title II (Common Carriers) appears inescapable.

Since its enactment, Title VI has defined "cable service" as including not only "video programming," but also "other programming service," which was and is defined broadly as "information that a cable operator makes available to subscribers generally."<sup>60</sup> The 1996 Act expanded the definition of "cable services" to include "interactive services" like Internet service over cable.<sup>61</sup> The effect of the 1996 amendment is to prevent a cable

<sup>49</sup> 47 U.S.C. § 541(b)(3)(D) (2000). Congress left no doubt that it intended to preempt inconsistent local regulations by providing that "any provision of any law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded." 47 U.S.C. § 556(c) (2000).

<sup>50</sup> 47 U.S.C. § 230(b)(2) (2000).

<sup>51</sup> 47 U.S.C. § 230(e)(1) (2000).

<sup>52</sup> 47 U.S.C. § 230(e)(2) (2000).

<sup>53</sup> 47 U.S.C. § 522(6) (2000) (emphasis added).

<sup>54</sup> 47 U.S.C. § 522(14) (2000).

<sup>55</sup> S. REP. NO. 104-230, at 169 (1996); H.R. CONF. REP. NO. 104-458, at 169 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 182 [hereinafter *1996 Conf. Report*].

<sup>56</sup> Compare Esbin, *supra* note 1 (amendment may reasonably be interpreted to include cable Internet services as cable service under the Act), with Earl W. Comstock and John W. Butler, *Access Denied: The FCC's Failure to Implement Open Access to Cable as Required by the Communications Act*, 8 COMM'LAW CONSP'CTUS 5 (2000) [hereinafter Comstock & Butler] (cable Internet service is a telecommunications service), and Christopher E. Duffy, *Note: The Statutory Classification of Cable-Delivered Internet Service*, 100 COLUM. L. REV. 1251 (2000) [hereinafter Duffy] (cable Internet service is an information

service).

<sup>57</sup> See generally *Open Access NOI*, 15 FCC Rcd. 19,287. Compare *Portland II*, 216 F.3d at 877 (cable modem service includes both a "telecommunications service" and an "information service"), with *Gulf Power II*, 208 F.3d at 1275-78 (Internet service is neither a cable nor a telecommunications service), and *Henrico County I*, 97 F. Supp. 2d at 714 (cable modem service is a cable service).

<sup>58</sup> The term "information service" means 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.

47 U.S.C. § 153(20) (2000).

<sup>59</sup> See, e.g., *In re Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd. 11,501, 11,533, 11,536-40, paras. 66, 73-82 (1998) [hereinafter *Universal Service Report to Congress*].

<sup>60</sup> 47 U.S.C. § 522(14) (2000).

<sup>61</sup> *1996 Conf. Report*, *supra* note 55, at 169.

operator offering Internet over cable from being subject, *inter alia*, to traditional common carrier obligations.<sup>62</sup> The fact that service can also fit easily within the statutory definition of "information services" is consistent with the amendment. The categories of both cable and information services are consistent with one another and are each "mutually exclusive" of a telecommunications service classification.<sup>63</sup>

Thus, Title VI may be read to broadly encompass both traditional multichannel video programming distribution ("MVPD") and such "other programming" and interactive information services that cable operators provide under its regulatory scheme.<sup>64</sup> This reading of the statute is fully consistent with the statutory goals of advanced infrastructure deployment articulated in section 706 of the 1996 Act.<sup>65</sup> It would achieve regulatory stability for cable operators, local franchising authorities and federal regulators by retaining the familiar local franchising control over cable's use of the public rights-of-way for its facilities. At the same time, the classification leaves the critical programming and spectrum management decisions involved in the provision of Internet over cable outside the scope of either federal or local regulation and firmly within the editorial discretion of the cable operator. Under the Title VI regime, cable operators would be free to continue their substantial investments in network upgrades and advanced infrastructure deployment without unnecessary additional regulatory interference.

<sup>62</sup> See 47 U.S.C. § 541(c) (2000).

<sup>63</sup> See Esbin, *supra* note 1, at 94–98; For an extended discussion of this topic see also *Universal Service Report to Congress*, 13 FCC Rcd. at 11,516–26, paras. 33–48 ("information services" are a separate and mutually exclusive category from "telecommunications services").

<sup>64</sup> 47 U.S.C. § 522(6)(A) (2000); *1996 Conf. Report, supra* note 55, at 169.

<sup>65</sup> *1996 Act*, § 706, 110 Stat. 153 (codified at 47 U.S.C. § 157 note (2000)).

<sup>66</sup> 47 U.S.C. § 153(46) (2000). See *supra* note 29.

<sup>67</sup> An equally pressing question is the scope of local franchising authority over facilities-based providers of solely information services. Most state statutes and constitutional provisions authorizing local franchising speak in terms of utility services generally or cable and telecommunications networks and services specifically. It is highly unlikely that localities are authorized to franchise information service providers under existing law, and attempts to subject ISPs to the types of local franchising requirements that apply to cable operators would likely be met with stiff resistance from the Internet service community. See, Duffy, *supra* note 56, at

Nonetheless, even assuming *arguendo* that the FCC and the courts were to adopt the approach of the Ninth Circuit in *Portland II* and find that the transmission of Internet service by a cable operator is the provision of "telecommunications service" as that term is defined by section 3(a)(51) of the Act,<sup>66</sup> this would not mean local franchising authorities could freely impose either additional franchising requirements or open access mandates on cable operators.<sup>67</sup> As discussed below, existing FCC and judicial precedent establish a far more limited role for local governments with respect to telecommunications services.

### III. FEDERAL TELECOMMUNICATIONS POLICY AND LOCAL RIGHTS-OF-WAY MANAGEMENT AUTHORITY

#### A. Statutory Authority—Telecommunications Services

The Telecommunications Act of 1996 added section 253 to the Communications Act as a key ingredient in opening local telephone markets to competition. In essence, subsection 253(a) eliminates state and local barriers to the provision of telecommunications services, while subsections (b) and (c) preserve state and local authority to protect the public welfare and consumers, preserve universal service and manage local rights-of-way in a non-discriminatory and competitively neutral manner. Subsection 253(d), in turn, requires the FCC to preempt state and local require-

1277–79 (classifying Internet over cable as an "information service" would conform with free market goals of federal communications law by removing authority from local franchising authorities). A separate examination of whether existing state delegations to localities are sufficient to cover an information service network that does not also function as a cable system or telecommunications service network is beyond the scope of this article. Arguably, however, any communications system that utilizes the public rights-of-way for its facilities and equipment could be subject to some form of local authorization and permitting process to the extent permitted by state law. See, e.g., *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 52 F. Supp. 2d 763, 772–73 (N.D. Tex. 1999) [hereinafter *Dallas III*], *vacated and remanded*, 243 F.3d 928 (5th Cir. 2001) (vacating and remanding with instructions to dismiss based upon enactment of subsequent state statute that repealed the Dallas telecommunications ordinance at issue and preempted any future similar city ordinances); *City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999) (overturning the FCC's decision that Open Video System ("OVS") operators could not be required to obtain local franchises).

ments that are found to violate sections 253(a) and (b).<sup>68</sup> Litigation of cases under section 253 began immediately following its enactment and, five years later, has produced a lengthy series of highly fact-sensitive decisions by the FCC and the courts. While general themes can be discerned, local authorities and practitioners are well advised to tread carefully as to specific requirements when crafting local telecommunications ordinances.

## B. FCC's Approach to Rights-of-Way Management Under Section 253

### 1. *Classic Telephone*

In the FCC's first significant section 253 proceeding, *Classic Telephone, Inc.*, filed a request for preemption alleging that two Kansas municipalities had blocked its entry into local markets in violation of section 253(a).<sup>69</sup> Kansas authorizes both its public utility commission and its cities to grant telecommunications authorizations and franchises.<sup>70</sup> *Classic* had received its state authorization, but each city denied *Classic* a franchise on the ground that it already had granted a telecommunications license to another carrier.<sup>71</sup>

The FCC found that section 253(a) proscribes state and local legal requirements that prohibit all but one entity from providing telecommunications services.<sup>72</sup> It also rejected the cities' claims that their decisions fell within the scope of permitted actions under section 253(b). To be protected by that provision, the cities' actions must be both "competitively neutral" and "necessary" to achieve the stated public interest goals.<sup>73</sup> The FCC concluded that the cities' absolute bar on entry failed to meet either requirement.<sup>74</sup>

The FCC also addressed the cities' claim that

their actions were valid exercises of their authority to manage the public rights-of-way under section 253(c). Drawing on the section's legislative history, the FCC found that permissible management functions include: (i) regulating the time and location of excavation to preserve effective traffic flow, prevent hazardous road conditions and minimize notice impacts; (ii) requiring a company to place its facilities underground rather than overhead, where consistent with the requirements imposed on other utility companies; (iii) requiring a company to pay fees to recover an appropriate share of the increased street repair and paving costs resulting from repeated excavation; (iv) enforcing local zoning regulations; and (v) requiring a company to provide indemnification against claims of injury resulting from the company's excavation.<sup>75</sup> Because the cities' conclusory statements regarding their denials of *Classic*'s franchise applications were "inadequate to establish that the Cities' actions reflect an exercise of public rights-of-way management authority or the imposition of compensation requirements for the use of such rights-of-way," the FCC concluded that the cities' actions did not "trigger section 253(c)."<sup>76</sup>

### 2. *Huntington Park*

In *Huntington Park*,<sup>77</sup> the FCC interpreted the section 253(a) proscription against requirements that "prohibit or have the effect of prohibiting the ability of any entity to provide" telecommunications services. The California Payphone Association had challenged an ordinance prohibiting outdoor payphones on private property in the City of Huntington Park's central business dis-

<sup>68</sup> 47 U.S.C. § 253(a)-(d) (2000).

<sup>69</sup> *Classic Telephone*, 11 FCC Rcd. at 13,082, para. 1.

<sup>70</sup> *Id.* at 13,084, para. 4.

<sup>71</sup> *Id.* at 13,085, para. 6.

<sup>72</sup> *Id.* at 13,095, para. 25.

<sup>73</sup> *Id.* at 13,101-02, paras. 36-38.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 13,103, para. 39.

<sup>76</sup> *Id.* at 13,104, para. 42. Following its order preempting the cities' decisions that denied *Classic*'s local telephone franchise applications in *Classic Telephone*, the Commission denied *Classic*'s request for action to enforce the order, 12 FCC Rcd. 15,619, and subsequently granted *Classic*'s request to dismiss the proceeding as moot when *Classic* asserted that it no longer planned to provide telephone service in the cities. 14 FCC Rcd. 19,974, *aff'g* 14 FCC Rcd. 960. The Commis-

sion later vacated its order preempting the cities' denial of *Classic*'s franchise applications and its order denying *Classic*'s request for enforcement in an effort to prevent unintended legal consequences for the parties. *Classic Telephone, Inc., Order*, 15 FCC Rcd. 25,101 (2000). Although the Commission's *Classic Telephone* decision is no longer binding precedent in FCC proceedings, its reasoning was subsequently adopted and endorsed by the FCC in other decisions as well as by several federal courts, as described in detail below.

<sup>77</sup> *In re California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934, Memorandum Opinion and Order*, 12 FCC Rcd. 14,191 (1997) [hereinafter *Huntington Park*].

strict. The ordinance did not flatly prohibit payphone service within the city, but rather restricted the locations where payphones could be placed.<sup>78</sup> The FCC stated that, to determine whether an ordinance has “the effect of prohibiting” the ability of service providers to offer payphone services, the FCC would consider whether the ordinance “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”<sup>79</sup> This broad reading of the statutory language significantly limits the range of permissible local regulation.

### 3. *TCI Cablevision of Oakland County*

In the *Troy* case,<sup>80</sup> TCI alleged that the City of Troy, Michigan, had precluded it from upgrading its cable system by attempting to condition approval of cable construction permits on TCI's agreement to subject itself to the city's telecommunications franchise ordinance.<sup>81</sup> TCI asserted that it was not offering and did not intend to offer telecommunications services within the city.<sup>82</sup>

The FCC concluded that the city's requirement that TCI agree to obtain a telecommunications franchise as a condition of receiving cable system construction permits violated section 621(b)(3)(B) of the Communications Act.<sup>83</sup> The FCC observed that “administration of the public rights-of-way should not be used to undermine the efforts of either cable or telecommunications providers to either upgrade or build new facilities to provide a broad array of new communications services.”<sup>84</sup> It therefore encouraged all levels of government to join in streamlining and hastening administrative processes in order to accelerate the completion of cable upgrades, rather than to impede those efforts by erecting new roadblocks.<sup>85</sup>

The FCC also decided that, under the circumstances, it need not have reached TCI's claim that the Troy telecommunications ordinance violated section 253.<sup>86</sup> Nonetheless, the FCC followed its

*Classic Telephone* precedent and reiterated that the appropriate scope of local rights-of-way management authority is limited to activities that directly involve physical usage of the public rights-of-way.

We recognize that section 253(c) preserves the authority of state and local governments to manage public rights-of-way. Local governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way . . . [T]he types of activities that fall within the sphere of appropriate rights-of-way management . . . include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.<sup>87</sup>

The FCC also addressed TCI's allegations that the City had applied its telecommunications ordinance in a discriminatory manner. The FCC characterized as an “especially troubling issue” allegations regarding the discriminatory application of telecommunications regulation, whether at the state or local level.<sup>88</sup>

One clear message from section 253 is that when a local government chooses to exercise its authority to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, it must do so on a competitively neutral and nondiscriminatory basis. Local requirements imposed only on the operations of new entrants and not on existing operations of incumbents are quite likely to be neither competitively neutral nor nondiscriminatory.<sup>89</sup>

Thus, the FCC declared that localities may not single out new entrants to telecommunications markets for special and more burdensome treatment, nor may they unreasonably and/or inexplicably delay processing new entrants' construction and system upgrade permits.<sup>90</sup>

In the concluding paragraphs of the *Troy Order*, the FCC outlined its vision of the appropriate roles of local, state and federal authorities in carrying out the mandates of the 1996 Act. The FCC began by observing that:

Section 253 is a critical component of Congress' pro-

<sup>78</sup> See *Huntington Park*, 12 FCC Rcd. at 14,192-93, para. 5.

<sup>79</sup> *Id.* at 14,206, para. 31.

<sup>80</sup> *Troy Order*, 12 FCC Rcd. 21,396, recon. denied, *Troy Reconsideration Order*, 13 FCC Rcd. 16,400.

<sup>81</sup> *Troy Order*, 12 FCC Rcd. at 21,398, para. 5.

<sup>82</sup> *Id.* at 21,399, para. 7.

<sup>83</sup> *Id.* at 21,399, para. 6. Section 621(b)(3)(B) prohibits local franchising authorities from imposing requirements under Title VI that have the effect of restricting or condition-

ing cable operators' provision of telecommunications services. 47 U.S.C. § 541(b)(3)(B) (2000).

<sup>84</sup> *Troy Order*, 12 FCC Rcd. at 21,429, para. 78.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 21,399, 21,439, paras. 7, 99.

<sup>87</sup> *Id.* at 21,441, para. 103.

<sup>88</sup> *Id.* at 21,442, para. 107.

<sup>89</sup> *Id.* at 21,433, para. 108 (footnote omitted).

<sup>90</sup> *Id.* at 21,441-42, para. 105.

competitive deregulatory national policy framework that it put into place by enacting the 1996 Act. As we have noted, 'Congress intended primarily for competitive markets to determine which entrants shall provide telecommunications services demanded by consumers, and by preempting under section 253 sought to ensure that State and local governments implement the 1996 Act in a manner consistent with these goals.'<sup>91</sup>

The FCC cautioned local governments about creating an unnecessary "third tier" of regulation that extends far beyond the statutorily protected interest of managing the public rights-of-way.

Our concern is that some localities appear to be reaching beyond traditional rights-of-way matters and seeking to impose a redundant 'third tier' of telecommunications regulation which aspires to govern the relationships among telecommunications providers, or the rates, terms and conditions under which telecommunication service is offered to the public.<sup>92</sup>

The Troy Telecommunications Ordinance contained provisions that, among other things, required franchisees to interconnect with other telecommunications systems in the city for the purpose of facilitating universal service, provided for regulation of the fees charged for interconnection and mandated "most favored nation" treatment for the city.<sup>93</sup>

Such Ordinance provisions will be difficult to justify under section 253(c) on the grounds that they are within the scope of permissible local rights-of-way management authority or other traditional municipal concerns such as police, fire, building code enforcement or other public safety concerns. In addition, several of these provisions seem redundant of comprehensive federal and state regulatory programs governing intercarrier interconnection and universal service obligations and support.<sup>94</sup>

Citing the likelihood of such local requirements impeding competition and imposing unnecessary delays on new entrants, the FCC vowed close scrutiny of challenged local ordinances in the future.<sup>95</sup>

Finally, the FCC cautioned that while each local government may believe that it is simply protecting the interests of its constituents, the "telecommunications interests of constituents . . . are not only local[—][t]hey are statewide, national and international as well,"<sup>96</sup> a fact that Congress un-

derstood when enacting section 253. According to the FCC, the section 253(b) reservation of state authority "over issues such as universal service, safety and consumer protection appears to reflect Congress' view that an array of local telecommunications regulations that vary from community to community is likely to discourage or delay the development of telecommunications competition."<sup>97</sup>

As a result, where relations among telecommunications providers would be affected, or where the rates, terms, and conditions under which telecommunications service is offered to the public are dictated by an local ordinance, is of considerable concern to this Commission. This concern is *exacerbated by the potential for multiple, inconsistent obligations imposed on a community-by-community basis. Such a patchwork quilt of differing local regulations may well discourage regional or national strategies by telecommunications providers, and thus adversely affect the economics of their competitive strategies.*<sup>98</sup>

The prescription? The FCC appealed to state governments to delegate their section 253(b) powers to local authorities sparingly, and therefore avoid "an intricate intrastate patchwork of telecommunications regulation at the local level that will frustrate the prospects for full and effective competition."<sup>99</sup> Similarly, the FCC implored local governments that have "historically refrained from engaging in substantive telecommunications regulation" to refrain from viewing "new entrants as being more susceptible to regulation than incumbents."<sup>100</sup> Such restraint, according to the FCC, would "go a long way in hastening the arrival of local telephone competition of many varieties, and in particular, of facilities-based local competition."<sup>101</sup>

#### 4. Public Utility Commission of Texas

In the *Texas* proceeding, the FCC preempted portions of a Texas statute that imposed onerous build-out requirements on competitive LECs.<sup>102</sup> Rejecting the state of Texas's claim that the statutory provisions were "saved" by section 253(b), the FCC held that a state or local requirement must

<sup>91</sup> *Id.* at 21,440, para. 102 (footnotes omitted) (quoting *Classic Telephone*, 11 FCC Rcd. at 13,096, para. 25).

<sup>92</sup> *Id.* at 21,441, para. 105.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 21,441–42, para. 105.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 21,442, para. 106.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* (emphasis added).

<sup>99</sup> *Id.* at 21,433, para. 109.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *In re Public Utility Commission of Texas, Petition for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995, Memorandum Opinion and Order*, 13 FCC Rcd. 3460, 3466, 3496–506, paras. 13, 73–95 (1997) [hereinafter *Texas*].

be “competitively neutral,” “consistent with section 254,” and “necessary” that is, indispensable for the achievement of the goals set forth in section 253(b) in order to enjoy its safe harbor.<sup>103</sup> The FCC observed that, although it had earlier interpreted the term “necessary” in the context of sections 251(c)(6) and 251(d)(2)(A) as not indispensable, but rather to mean “something more than just . . . ‘used’ . . . ‘useful’ . . . or ‘a prerequisite for competition.’”<sup>104</sup> Lax interpretation of the phrase “necessary” in the context of section 253(b) would permit a state or local government to choose the most restrictive means available, and thereby thwart the pro-competitive intent of the 1996 Act.<sup>105</sup> Instead, the FCC chose a stringent interpretation of “necessary” in the context of a section 253 challenge. This choice confirms that, to qualify for the section 253(b) safe harbor, a state or local requirement must bear a rational relationship to the policy goal it purports to further and must stand as a prerequisite to achieving that goal.

#### 5. *Petition of the State of Minnesota*

In a more recent section 253 proceeding, the state of Minnesota asked the FCC to find that its agreement with a developer granting the developer exclusive physical access to certain state rights-of-way was consistent with section 253.<sup>106</sup> Al-

though it declined both to issue the requested ruling or to preempt the agreement, the FCC found that the agreement could adversely affect the provision of telecommunications services in Minnesota by facilities-based providers and therefore would violate section 253(a).<sup>107</sup> The FCC further found that the agreement was not saved by section 253(b) because it was neither “competitively neutral” nor “necessary” to protect the public safety and welfare, as Minnesota had claimed.<sup>108</sup> In addition, the FCC concluded that the state was not entitled to the protection of section 253(c). Even assuming that the agreement constituted protected rights-of-way management (a point on which the FCC expressed considerable doubt), Minnesota had not shown that its management was competitively neutral and/or nondiscriminatory.<sup>109</sup> Of particular concern to the FCC was the possibility that the agreement would substantially raise the cost of providing service for new entrants by restricting them to an entry strategy based upon resale of the developer’s capacity, rather than reliance upon their own facilities.<sup>110</sup>

#### 6. *City Signal Petitions*

On December 22, 2000, the FCC released three public notices seeking comment on petitions for declaratory ruling filed by City Signal Communications, Inc.<sup>111</sup> City Signal, a competitive LEC cer-

<sup>103</sup> *Id.* at 3480, para. 41.

<sup>104</sup> *Id.* at 3501-02, para. 85 (footnotes omitted) (citing *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd. 15,499, 15,641-42, 15,794, paras. 282, 579 [hereinafter *Local Competition Order*] (subsequent history omitted); *In re New England Public Communications Council, Petition for Preemption Pursuant to Section 253, Memorandum Opinion and Order*, 11 FCC Rcd. 19,713, 19,723-24, para. 24 (1996), *recon. denied*, 12 FCC Rcd. 5215 (1997) [hereinafter *New England Payphone*]. “[T]he term ‘necessary’ as used in . . . section 253(b) means something more than just ‘used,’ ‘useful,’ or ‘a prerequisite for competition.’” 12 FCC Rcd. at 5218, para. 7.

<sup>105</sup> In both the *Texas* and *New England Payphone* decisions, the Commission explicitly distinguished its less stringent interpretation of the term “necessary” as meaning “used or useful” in the context of § 251’s obligation that incumbent LECs provide for physical collocation of equipment “necessary” for interconnection or access to unbundled network elements. The Commission’s less rigorous interpretation of the § 251 “necessary” limitation was struck down as “unduly broad” by the United States Court of Appeals for the District of Columbia Circuit in *GTE Service Corp. v. FCC*, 205 F.3d 416, 423 (D.C. Cir. 2000). On remand from the D.C. Circuit, the FCC concluded that equipment “necessary” for interconnection or access to unbundled network elements under section

251(c)(6) was equipment absent which requesting carriers would be precluded “as a practical, economic, or operational matter” from obtaining “‘equal in quality’ interconnection or ‘nondiscriminatory access’ to unbundled network elements.” *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability, Fourth Report and Order*, 2001 FCC LEXIS 4303 (2001), para. 2.

<sup>106</sup> *In re Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way, Memorandum Opinion and Order*, 14 FCC Rcd. 21,697, 21,699 (1999).

<sup>107</sup> *Id.* at 21,700, paras. 3-4.

<sup>108</sup> *Id.* at 21,724, para. 50.

<sup>109</sup> *Id.* at 21,729, para. 61.

<sup>110</sup> *Id.* at 21,717, para. 38.

<sup>111</sup> See Comments Sought on City Signal Communications, Inc. Petition for Declaratory Ruling Concerning Use of Public Rights of Way for Access to Poles in Cleveland Heights, Ohio Pursuant to Section 253, *Public Notice*, 2000 FCC LEXIS 6802 (Dec. 22, 2000); Comments Sought on City Signal Communications, Inc. Petition for Declaratory Ruling Concerning Use of Public Rights of Way for Access to Poles in Wickliffe, Ohio Pursuant to Section 253, *Public Notice*, 2000 FCC LEXIS 6803 (Dec. 22, 2000); Comments Sought on City Signal Communications, Inc. Petition for Declaratory Ruling Concerning Use of Public Rights of Way for Access to Poles

tified by the Public Utilities Commission of Ohio, sought FCC preemption of the effective denial by three municipal governments of City Signal's applications to use public rights-of-way for the placement of aerial fiber-optic cables on existing utility poles for telecommunications purposes and asked for an FCC order requiring that such permits be granted.<sup>112</sup> According to City Signal's three identical petitions,<sup>113</sup> the cities of Cleveland Heights, Wickliffe, and Pepper Pike, Ohio, ignored City Signal's construction applications for the placement of aerial facilities, despite relevant state law requiring action on such applications within thirty days,<sup>114</sup> and stated that right-of-way authorizations would not be granted unless City Signal agreed to place its fiber underground, despite the fact that other telecommunications providers maintained aerial facilities throughout the cities.<sup>115</sup> City Signal claimed the municipalities' tactics constituted a denial of its applications and amounted to a prohibition on its provision of interstate or intrastate telecommunications service<sup>116</sup> in violation of section 253 of the Act and the FCC's "mandate to introduce competition into the local telecommunications markets," as expressed in the FCC's *Troy Order*.<sup>117</sup> Comments filed by a variety of competitive entrants and franchising authorities covered a broad spectrum of section 253 issues, including fundamental questions regarding the FCC's jurisdiction to grant relief for alleged violations of section 253(c), whether municipal delay in processing applications constitutes an unlawful barrier to entry, and whether construction requirements im-

posed only upon new entrants and not on incumbents constitute a competitively neutral, nondiscriminatory exercise of rights-of-way management authority.<sup>118</sup> With the exception of City Signal's *Wickliff* petition,<sup>119</sup> these matters remain pending before the FCC.

### 7. *Competitive Networks Notice of Inquiry*

In July 1999, the FCC issued a Notice of Inquiry regarding, among other things, access to public rights-of-way and the imposition of franchise fees,<sup>120</sup> in which it reiterated that "local governments and, to a lesser extent, state governments . . . are responsible for . . . ensuring that the rights-of-way are used in a manner that benefits the public and . . . [that] neither threatens public safety, unnecessarily inconveniences the public, nor imposes uncompensated costs."<sup>121</sup> The FCC also observed that while incumbent LECs have long been granted authority to use public rights-of-way for the placement of wireline communications facilities, competing providers of both wireline and wireless communications services seeking such permission for the first time present special challenges for state and local governments.<sup>122</sup>

One challenge for State and local governments in the era of competitive telecommunications service is to administer the public rights-of-way in a manner that serves these ends and at the same time does not unfairly favor incumbent carriers or obstruct other providers' ability to compete effectively in the provision of service.<sup>123</sup>

The FCC asserted that:

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sors, CS Docket Nos. 00-253, 00-254, 00-255 (filed Feb. 14, 2001).

<sup>119</sup> See *City Signal v. Wickliff*, 2001 FCC LEXIS 3401.

<sup>120</sup> *In re* Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services; Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes and Assessments; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98*, 14 FCC Rcd. 12,673, 12,675, 12,712-17, paras. 1, 70-80 (1999) [hereinafter *Competitive Networks Inquiry*].

<sup>121</sup> *Competitive Networks Inquiry*, 14 FCC Rcd. at 12,712, para. 72.

<sup>122</sup> *Id.* at 12,712, paras. 70-72.

<sup>123</sup> *Id.* at 12,712, para. 72.

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in Pepper Pike, Ohio Pursuant to Section 253, *Public Notice*, 2000 FCC LEXIS 6804 (Dec. 22, 2000). City Signal withdrew its petition with regard to the City of Wickliff after the city granted City Signal access to the public rights-of-way. See *City Signal Communications, Inc. v. City of Wickliff*, DA 01-1499, 2001 FCC LEXIS 3401 (June 26, 2001).

<sup>112</sup> *Id.*

<sup>113</sup> *In re* City Signal Communications, Inc. v. City of Cleveland Heights, *Petition for Declaratory Ruling*, CS Docket No. 00-253 (filed Oct. 18, 2000); *In re* City Signal Communications, Inc. v. City of Wickliffe, *Petition for Declaratory Ruling*, CS Docket No. 00-254 (filed Nov. 27, 2000); *In re* City Signal Communications, Inc. v. City of Pepper Pike, *Petition for Declaratory Ruling*, CS Docket No. 00-255, (filed Nov. 29, 2000) [collectively hereinafter *City Signal Petitions*].

<sup>114</sup> *City Signal Petitions* at 2, para. 8.

<sup>115</sup> *Id.* at 2, paras. 5-6.

<sup>116</sup> *Id.* at 3, para. 12.

<sup>117</sup> *Id.* at 4, para. 17.

<sup>118</sup> Compare Reply Comments of the Association for Local Telecommunications Services CS Docket Nos. 00-253, 00-254, 00-255 (filed Feb. 14, 2001), with Reply Comments of the National Association of Telecommunications Officers and Advi-

Full and fair competition in the provision of local telecommunications service requires that competing providers have comparable access to the means of transporting signals . . . [which] may involve the ability to utilize public rights-of-way in a manner, on a scale, and under terms and conditions similar to those applicable to the incumbent LECs' use of public rights-of-way.<sup>124</sup>

The FCC noted that, while many carriers and communities are able to work out their differences, a significant number of "carriers and their [trade] associations have alleged that many state and local governments continue to engage in rights-of-way management and compensation practices that the carriers believe are unreasonable, anticompetitive, and contrary to federal law."<sup>125</sup> This 1999 proceeding remains pending before the FCC.

Regardless of its ultimate disposition, the *Competitive Networks Inquiry* provides insight into the FCC's view of preemption jurisprudence. In establishing the issues to be addressed, the FCC first reviewed the statutory requirement as well as its own section 253 precedents<sup>126</sup> and emphasized its abiding concern about requirements unrelated to rights-of-way usage that local governments have imposed on carriers using public rights-of-way.<sup>127</sup> The FCC also cited with apparent approval several federal district court cases in which the courts took a limited, rather than expansive, view of local telecommunications franchising authority and relied upon the FCC's *Classic Telephone* and *Troy Orders* in doing so.<sup>128</sup> These cases, and several others, are discussed in the following section.

### C. Judicial Decisions Under Section 253

The majority of federal courts have followed

the FCC's section 253 policies in resolving disputes concerning the scope and applicability of that provision. These decisions<sup>129</sup> firmly establish that local governments may not condition a telecommunications franchise on anything other than the carrier's agreement to comply with those regulations and fees minimally necessary to manage and recover the costs of administering usage of the public rights-of-way for the provision of telecommunications services.

The federal courts' statutory analysis in these decisions is straightforward: section 253(a) broadly prohibits any state or local action that "prohibits or has the effect of prohibiting" the provision of telecommunications services.<sup>130</sup> Sections 253(b) and 253(c) create two narrow exceptions to this broad federal preemption of state and local regulation of telecommunications. Section 253(b) reserves to *states* the authority to regulate universal service, protect consumers, ensure quality, and protect the public safety and welfare "on a competitively neutral basis and consistent with section 254 [universal service]."<sup>131</sup> Section 253(c) preserves the authority of *state and local governments* to manage and seek compensation for use of the public rights-of-way.<sup>132</sup> Absent a specific state delegation of broader telecommunications regulatory authority to local governments, therefore, section 253(c) defines the full scope of local authority over telecommunications providers.<sup>133</sup> Section 253(c) limits this authority to "manag[ing] the public rights-of-way" and "requir[ing] fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of

<sup>124</sup> *Id.* at 12,712, para. 71.

<sup>125</sup> *Id.* at 12,716, para. 79.

<sup>126</sup> *Id.* at 12,713-16, paras. 73-80.

<sup>127</sup> *Id.* at 12,714-15, para. 76.

<sup>128</sup> *Id.* at 12,714-17, paras. 75-80.

<sup>129</sup> See, e.g., *City of Auburn v. Qwest Corp.*, 247 F.3d 966 (9th Cir. 2001) *amended by, reh'g denied*, 2001 U.S. App. LEXIS 15519; *N.J. Payphone Ass'n, Inc. v. Town of West New York*, 130 F. Supp. 2d 631 (D.N.J. 2001); *Dallas III*, 52 F. Supp. 2d at 769-75; *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 52 F. Supp. 2d 756, 760-63 (N.D. Tex. 1998) [hereinafter *Dallas II*]; *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 590-94 (N.D. Tex. 1998) [hereinafter *Dallas I*]; *Bell Atlantic-Md., Inc. v. Prince George's County*, 49 F. Supp. 2d 805 (D. Md. 1999), *vacated and remanded*, 212 F.3d 863 (4th Cir. 2000) *on remand*, 2001 U.S. Dist. LEXIS 10645 (D.Md. July 23, 2001) (preempting county ordinance under state law and permanently enjoining enforcement); *AT&T Communications of the South-*

*west, Inc. v. City of Austin*, 975 F. Supp. 928, 939-43 (W.D. Tex. 1997), *vacated and remanded*, 235 F.3d 241 (5th Cir. 2000) (vacating and remanding with instructions to dismiss based upon enactment of subsequent state statute that repealed the Austin telecommunications ordinance at issue and preempted any future similar city ordinances).

<sup>130</sup> 47 U.S.C. § 253(a). In section 253(a), the phrase "effect of prohibiting" extends to even relatively minor state or local regulatory requirements that could, in the aggregate, prohibit new telecommunications providers from entering the market. See, e.g., *Texas*, *supra* note 102, 13 FCC Rcd. at 3480, para. 41 ("We further conclude that this mandate requires us to preempt not only express restrictions on entry, but also restrictions that indirectly produce that result.").

<sup>131</sup> 47 U.S.C. § 253(b).

<sup>132</sup> 47 U.S.C. § 253(c).

<sup>133</sup> Such delegations are not the norm, and many states, including Florida, Delaware, Mississippi, Texas, Wyoming and Michigan, have affirmatively limited the authority of lo-



public rights-of-way.”<sup>134</sup> Of course, because sections 253(b) and 253(c) shelter certain state and local regulations otherwise prohibited by section 253(a), courts must always first determine whether the challenged state or local action “prohibits or has the effect of prohibiting” the provision of a telecommunications service before considering whether the action nonetheless is saved by either section 253(b) or 253(c). As demonstrated below, courts have narrowly construed the scope of authority reserved to state and local governments under sections 253(b) and 253(c) and have taken a fairly expansive view of whether local requirements prohibit or have the effect of prohibiting the provision of telecommunications service.<sup>135</sup>

### 1. *The Scope of Public Rights-of-Way Management Authority is Narrow*

In the *Dallas I* decision, the United States District Court for the Northern District of Texas found that AT&T had demonstrated the rigorous showing required to preliminarily enjoin the enforcement of a local telecommunications franchise application and fee regime.<sup>136</sup> The *Dallas I* court found that section 253 means what it says. Section 253 “limits the scope of . . . [local] authority to regulate telecommunications to two narrow areas [under sections 253(b) and 253(c)]: the ‘management’ of city rights-of-way, and the requirement of fees for use of rights-of-way.”<sup>137</sup> By limiting local jurisdictions to rules minimally necessary to manage the public rights-of-way, the court held that section 253 prohibited the city from: granting or denying a franchise based solely on its own discretion; requiring a comprehensive

franchise application that considers a company’s technical and organizational qualifications; imposing conditions unrelated to the use of the right-of-way, such as the submission of financial information, the maintenance of detailed records or the provision of free services to the city; and imposing fees on gross revenue that are unrelated to the carrier’s actual physical use of the rights-of-way.<sup>138</sup>

Lower federal courts in Florida, Maryland, Pennsylvania, New York and California have reached similar conclusions. In *BellSouth Telecommunications, Inc. v. Coral Springs*,<sup>139</sup> the United States District Court for the Southern District of Florida held that both the 1996 Act and Florida law prohibit local municipalities from conditioning telecommunications franchises on more than the service provider’s agreement to comply with the municipality’s reasonable regulation of its rights-of-way and the fees for use of those rights-of-way.<sup>140</sup> On appeal, the Eleventh Circuit affirmed in part, reversed in part and remanded for further proceedings based upon a subsequent change in Florida law. As grounds for the remand, the appellate court cited the district court’s failure to first address whether the cities’ ordinances violated section 253(a) before considering whether they constituted permissible rights-of-way management under section 253(c).<sup>141</sup>

In *Bell Atlantic-Maryland, Inc. v. Prince George’s County, Maryland*, the United States District Court for the District of Maryland preempted under federal law the county’s telecommunications ordinance, which established a comprehensive “franchise” scheme regulating telecommunications companies seeking to do business in the county.<sup>142</sup> While the court held that telecommu-

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cal governments to impose substantive telecommunications regulations. See FLA. STAT. ANN. § 364.01(2) (West 1999) (granting PSC exclusive jurisdiction over regulating telecommunications companies and preempting all local, special or municipal acts that conflict with PSC authority); DEL. CODE ANN. tit. 26, § 201 (1998) (granting public service commission exclusive supervision and regulation of all public utilities); MISS. CODE ANN. § 77-3-5 (1999) (granting public service commission exclusive jurisdiction over public utilities); TEX. UTIL. CODE ANN. § 52.002 (Vernon 1997) (granting public service commission exclusive jurisdiction over public utilities); WYO. STAT. ANN. § 37-2-112 (Michie 1999) (granting public service commission exclusive jurisdiction over public utilities); MICH. COMP. LAWS § 484.2201 (2000).

<sup>134</sup> 47 U.S.C. § 253(c).

<sup>135</sup> Apparently, only certain *incumbent* local phone companies have encountered significant difficulties in demon-

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strating that state and local regulations have prohibited or had the effect of prohibiting their provision of telecommunications service. See *BellSouth Telecomm. Inc. v. City of Mobile*, 2001 U.S. Dist. LEXIS 4244 (S.D. Ala. Mar. 30, 2001); *BellSouth Telecomm., Inc. v. City of Orangeburg*, 522 S.E.2d 804 (S.C. 1999).

<sup>136</sup> *Dallas I*, 8 F. Supp. 2d at 592.

<sup>137</sup> *Id.* at 591.

<sup>138</sup> *Id.*

<sup>139</sup> 42 F. Supp. 2d 1304 (S.D. Fla. 1999), *aff’d in part, rev’d in part and remanded sub nom.* *BellSouth Telecomm., Inc. v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. 2001).

<sup>140</sup> *Coral Springs*, 42 F. Supp. 2d at 1307–08.

<sup>141</sup> *Palm Beach*, 252 F.3d at 1191–92. The Eleventh Circuit also invalidated substantial portions of the cities’ ordinances as inconsistent with state law. *Id.* at 1179–85.

<sup>142</sup> *Prince George’s County*, 49 F. Supp. 2d at 808–11,

nications companies interested in using the county's public rights-of-way could be required to obtain a local franchise, it also found that section 253 limited "the terms of any such franchise . . . to the types of activities described by the FCC in *TCI Cablevision* [the *Troy Order*] and *Classic Telephone*."<sup>143</sup> By regulating providers of telecommunications services in "the most comprehensive and utterly discretionary fashion,"<sup>144</sup> the county ordinance at issue in *Prince George's County* went "well beyond the bounds of legitimate local governmental regulation discussed in *TCI Cablevision* and *Classic Telephone*."<sup>145</sup>

The United States Court of Appeals for the Fourth Circuit overturned the *Prince George's County* decision for failure to consider state law claims before addressing preemption under federal statutes and the U.S. Constitution.<sup>146</sup> In addition to its federal preemption claims, Bell Atlantic alleged that, in passing the ordinance, the "County had breached a 1904 County franchise agreement and an 1884 state franchise with Bell Atlantic, violated Articles 2 and 24 of the Maryland Declaration of Rights, and violated public utilities companies §§ 2-113, *et seq.* of the Maryland Code."<sup>147</sup> The case was remanded to the district court for consideration of the state law claims so the court could determine if it could be resolved without reaching the constitutional issue of federal preemption.<sup>148</sup> On remand, the district court preempted the county's ordinance under the state law and permanently enjoined its enforcement while respectfully disagreeing with the Fourth Circuit that federal law initially required consideration of state law claims in the circumstances presented.<sup>149</sup> Thus, neither the Fourth Circuit nor the district court on remand disturbed the district court's original interpretation of section 253.

The reasoning behind the district court's *Prince George's County* decision already has been en-

dorsed by other federal district and circuit courts, including, among others, the United States Court of Appeals for the Ninth Circuit in *City of Auburn v. Qwest Corp.*<sup>150</sup> On April 24, 2001, the Ninth Circuit held that section 253 preempted local telecommunications ordinances requiring wired and wireless telecommunications providers to obtain local franchises and pay franchise fees.<sup>151</sup> The Ninth Circuit joined the majority of federal courts by ruling that "Congress has narrowly circumscribed the role of state and local governments in . . . the regulation of telecommunications."<sup>152</sup> Citing the FCC's *Classic Telephone* and *Troy Orders*, the Ninth Circuit held that, under federal law, local rights-of-way management was limited to "control over the right-of-way itself, not control over companies with facilities in the right-of-way."<sup>153</sup>

In *Auburn*, local telecommunications ordinances enacted by the cities of Auburn, Des Moines, Olympia and Tacoma, among others, included several features that the Ninth Circuit found would have the effect of prohibiting entry in violation of section 253(a). These violations included: (1) lengthy and detailed application forms, including maps, corporate policies, documentations of licenses, and any other information requested by the local government; (2) application fees ranging from an undetermined amount to \$5,000; (3) the consideration of "discretionary factors that have nothing to do with the management or use of the right-of-way";<sup>154</sup> (4) regulations concerning the transferability of ownership and the reporting of stock sales; (5) the imposition of "non-tax fees charged under the franchise agreements [that] are not based on the costs of maintaining the right of way, as required under the Telecom Act";<sup>155</sup> and (6) the cities' reservation of "discretion to grant, deny, or revoke the franchises . . . even allowing the Cities to remove the company's facilities."<sup>156</sup> The Ninth Circuit held that each of these requirements would have

813-17; see also *Coral Springs*, 42 F. Supp. 2d at 1309-11 (preempting under federal and state law significant portions of a broad local telecommunications ordinance).

<sup>143</sup> *Prince George's County*, 49 F. Supp. 2d at 816 (footnote omitted).

<sup>144</sup> *Id.* at 817 (internal quotations omitted).

<sup>145</sup> *Id.*

<sup>146</sup> *Bell Atlantic-Md., Inc.*, 212 F.3d 865-66.

<sup>147</sup> *Id.* at 864-65.

<sup>148</sup> *Id.* at 865-66.

<sup>149</sup> *Bell Atlantic-Md., Inc. v. Prince George's County*, 2001 U.S. Dist. LEXIS 10645, n.19 (D. Md. July 23, 2001).

<sup>150</sup> 247 F.3d 966, amended by, *reh'g denied*, 2001 U.S. App. LEXIS 15519.

<sup>151</sup> *Id.* Following release of the decision, the city of Portland, Oregon, announced that it would abandon efforts to impose franchise fees on the provision of cable modem services. COMM. DAILY, May 15, 2001 at 8.

<sup>152</sup> *Auburn*, 247 F.3d at 980 (internal quotation omitted) (quoting *Dallas I*, 8 F. Supp. 2d at 591).

<sup>153</sup> *Id.* at 982.

<sup>154</sup> *Id.* at 983.

<sup>155</sup> *Id.* (footnote omitted).

<sup>156</sup> *Id.*

the effect of prohibiting Qwest and other companies from providing telecommunications services, and that "[t]aken together, they create a substantial and unlawful barrier to entry into and participation in the . . . telecommunications markets."<sup>157</sup>

The Ninth Circuit also concluded that the cities' ordinances fell outside of the safe harbor provisions of section 253(c).<sup>158</sup> The court applied the guidelines noted in the FCC's *Classic Telephone* and *Troy Orders* and the legislative history of the 1996 Act to conclude that "the ordinances regulated the telecommunications companies themselves, not merely the rights-of-way."<sup>159</sup> Therefore, the court held that the local ordinances failed to manage the public rights-of-way or require fair and reasonable compensation for the use of those rights-of-way, as section 253(c) would permit. The court focused on four features of the ordinances that violated section 253(c). First, the ordinances required an extensive application process that was not directly related to management of the public rights-of-way.<sup>160</sup> Second, the ordinances imposed reporting requirements or other controls concerning matters not directly related to management of the public rights-of-way.<sup>161</sup> Third, the ordinances required, either through the application process or by other means, that the franchise agreements contain conditions unrelated to management of the public rights-of-way, including, for example, requiring that the franchisees offer "most favored community" status to the cities in connection with telecommunications rates and terms.<sup>162</sup> Fourth and finally, like most other courts, the Ninth Circuit found especially problematic the cities' "unfettered discretion to insist on unspecified franchise terms and to grant, deny, or revoke a franchise based on unnamed

factors[.]" which the court held was "too vague and too broad to comply with § 253(c)."<sup>163</sup>

In *PECO Energy Co. v. Township of Haverford*,<sup>164</sup> the United States District Court for the Eastern District of Pennsylvania framed the issue as one of "balancing the authority of a local government to regulate within its borders against the right of a telecommunications provider to install its fiber optic cables in a community without undue interference from the community's officials."<sup>165</sup> PECO Energy sought to attach fiber optic cables to Township-owned utility poles that the utility managed for the primary purpose of providing a communications link to various Delaware County school districts, but which also had the capacity to serve other customers.<sup>166</sup> The Township ordered PECO Energy to "cease and desist" its construction activities until it had obtained the requisite permits under the Township's telecommunications franchise ordinance.<sup>167</sup> PECO Energy sought a declaration from the federal district court that the ordinance was invalid and unenforceable under federal and state law.<sup>168</sup>

Given the overriding federal policy "to decrease regulation and increase competition in the telecommunications industry[.]" the court ruled in PECO Energy's favor on its section 253 challenges.<sup>169</sup> The *PECO* court found that the ordinance was not entitled to the "safe harbor" protection of section 253(c) because the ordinance was not limited in several respects to matters involving the simple regulation of the public rights-of-way.<sup>170</sup> Specifically, the failure of the ordinance to limit the Township Manager's discretion in granting or denying a franchise placed the ordinance outside the ambit of the section 253(c) safe harbor. "[N]othing in the ordinance . . . limit[ed]

<sup>157</sup> *Id.* The Ninth Circuit noted that other federal courts also had found nearly identical franchise requirements to be prohibited under section 253. *Id.* (citing *Prince George's County*, 49 F. Supp. 2d at 816; *Dallas III*, 52 F. Supp. 2d at 770; *Coral Springs*, 42 F. Supp. 2d at 1304).

<sup>158</sup> *Auburn*, 247 F.3d at 982.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 983.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 984 (citing *TCG New York v. City of White Plains*, 125 F. Supp. 2d 81, 92 (S.D.N.Y. 2000); *Coral Springs*, 42 F. Supp. 2d at 1306; *Prince George's County*, 49 F. Supp. 2d at 816; *Dallas III*, 52 F. Supp. 2d at 592-93).

<sup>164</sup> Civ. No. 99-4766, 1999 U.S. Dist. LEXIS 19409 (E.D. Pa. Dec. 20, 1999).

<sup>165</sup> *Id.* at \*1.

<sup>166</sup> *Id.* at \*2.

<sup>167</sup> *Id.* at \*3.

<sup>168</sup> *Id.* at \*4-5.

<sup>169</sup> *Id.* at \*17 (citing *Reno v. ACLU*, 521 U.S. 844 (1997) (stating the primary purpose of the 1996 Act was "to reduce regulation and encourage the rapid deployment of new telecommunications technologies") (internal quotations omitted); *Paging, Inc. v. Bd. of Zoning Appeals*, 957 F. Supp. 805, 807 (W.D. Va. 1997) (noting that "Congress passed the [1996 Act] in order to provide a procompetitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services for all Americans by opening all telecommunications markets to competition.") (internal quotation omitted).

<sup>170</sup> *PECO*, 1999 U.S. Dist. LEXIS 19409, at \*19-20.

the discretion of the Township Manager to matters involving the physical use and occupation of the public rights-of-way . . . [or] whether the Township . . . look[ed] only at matters involving the public rights-of-way or other factors impermissible under the [1996 Act].”<sup>171</sup> The court further found the ordinance violated section 253(a) because it lacked “any guarantee that applications under this Kafkaesque regime, once submitted, will be processed expeditiously,” and because the ordinance vested sole discretion in the Township Manager to “completely prohibit provision of telecommunications services.”<sup>172</sup> Finally, the court found a violation of section 253(c) because “[a]ny fee . . . must be directly related to the company’s use of the right-of-way” and because the ordinance failed to “state the amount of the fees, how they are to be calculated, or how they relate to use of the public rights-of-way.”<sup>173</sup> The court therefore found that the ordinance’s imposition of “fees of uncertain amounts” itself might serve as a significant barrier to entry.<sup>174</sup>

The *PECO* court also rejected Haverford’s request that ambiguities in the ordinance be read in a manner that would not violate the Telecommunications Act of 1996 because such a reading “flies in the face of the [1996 Act], which preserves very specific authority to local governments.”<sup>175</sup> Once the court found that the ordinance was not entitled to safe harbor protection, it analyzed whether the ordinance prohibited or had the effect of prohibiting *PECO* Energy’s ability to provide telecommunications services under section 253(a).<sup>176</sup> The *PECO* court followed the *Prince George’s County* ruling that a similar ordinance had the effect of prohibiting the provision of telecommunications services, because “any process for entry [into the market] that imposes burdensome requirements on telecommunications companies and vests significant discretion in local governmental decision makers to grant or deny permission to use the

public rights-of-way [violates 253(a)].”<sup>177</sup>

In *TCG New York, Inc. v. City of White Plains*, the United States District Court for the Southern District of New York overturned portions of a city ordinance “setting forth the process by which new telecommunications carriers could obtain approval to place equipment in the City’s rights-of-way.”<sup>178</sup> The city’s ordinance required prospective carriers to submit a formal application including, among other things, information regarding the carrier, its affiliates, the equipment to be placed in the rights-of-way, the carrier’s construction plans, its legal, financial, technical, and other qualifications, and the financing for the proposed construction.<sup>179</sup> Following completion of the application, new carriers were required to obtain a “franchise,” the terms of which, such as compensation to the city, insurance, performance bonds, the city’s right to inspect the premises, indemnification requirements, non-assignment clauses and other provisions, were to be negotiated with the city.<sup>180</sup> After the new carrier and the city negotiated the franchise agreement, the application would be referred to the Common Council, which was empowered to reject the application or adopt it by separate ordinance.<sup>181</sup> The ordinance authorized the Common Council to consider, among other things, the carrier’s ability to satisfy construction requirements, the adequacy of the terms of the franchise agreement, the adequacy of the compensation to be paid the city, the legal, financial, technical and other qualifications of the carrier, and any other factors the Council deemed appropriate and in the city’s public interest.<sup>182</sup> In contrast, the incumbent LEC, Bell Atlantic, was not required to obtain a franchise or pay a franchise fee, and was not subject to the same general construction permitting requirements or requirements for insurance, deposits and permitting fees.<sup>183</sup>

Although TCG formally applied for franchises

<sup>171</sup> *Id.* at \*20–21.

<sup>172</sup> *Id.* at \*26.

<sup>173</sup> *Id.* at \*22.

<sup>174</sup> *Id.* at \*26.

<sup>175</sup> *Id.* at \*24.

<sup>176</sup> *Id.* at \*25. This approach to section 253 analysis conflicts with the Eleventh Circuit’s recent determination that challenged ordinances must first be tested against the section 253(a) prohibitions before considering whether their provisions fall within the section 253(b) or 253(c) “safe harbors.” See *Palm Beach*, 252 F.3d at 1191–92.

<sup>177</sup> *PECO*, 1999 U.S. Dist. LEXIS 19409 at \*26 (quoting

*Prince George’s County*, 49 F. Supp. 2d at 814) (internal quotations omitted) (alteration in original).

<sup>178</sup> *TCG New York, Inc. v. City of White Plains*, 125 F. Supp. 2d 81, 84 (S.D.N.Y. 2000) (citing White Plains Municipal Code, Telecommunications Franchising and Licensing, Articles 1–3).

<sup>179</sup> *Id.* at 84.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 90.

<sup>183</sup> *Id.* at 85.

beginning in 1992, as of June 18, 1999, the date TCG filed suit, it had been unable to finalize any agreement with the city.<sup>184</sup> Following initiation of the suit, the city proposed a new franchise agreement, which, among other things, required TCG to pay an annual franchise fee equal to five percent of gross revenues, required a guarantee of payment from TCG's corporate parent, required TCG to construct additional conduit without charge at the city's request, allowed the city to examine TCG's records, imposed a "most favored vendee" status on the city's behalf, and required TCG to remove its facilities from public property upon termination of the agreement.<sup>185</sup> TCG's section 253 claims objected to the requirements the city attempted to impose on grounds that: (1) the ordinance and proposed franchise effectively prohibited TCG "from providing telecommunications services, and regulate beyond the City's public rights-of-way" in violation of section 253(a), (b), and (c) of the Communications Act; and (2) the exemption of Bell Atlantic from terms of the ordinance and from the requirement of a franchise was both non-competitive and discriminatory in violation of section 253(c).<sup>186</sup>

After analyzing the history and structure of section 253 and related judicial and administrative decisions, the *White Plains* court held that "the requirements imposed on TCG by the City and the Ordinance, when viewed as a whole and in context, have the effect of prohibiting the ability of TCG to provide telecommunications services" in violation of section 253(a).<sup>187</sup> The court observed that the city's process of obtaining a franchise became a lengthy and complex negotiation spanning more than seven years and that even if an agreement had been reached between TCG and the city, the ordinance gave the Common Council the right to reject the application based upon unspecified "public interest" factors, which, once identified, would restart the entire complex pro-

cess.<sup>188</sup> "Accordingly, while the City's requirements admittedly do not impose an explicit prohibition on TCG, the regulations coupled with the City's long delay in moving forward with the approval process have effectively prohibited TCG from providing telecommunications services in White Plains . . . [a]s a result, § 253(a) has been violated."<sup>189</sup>

In determining whether the city's regulations were saved by the safe harbor provisions of section 253(c), the *White Plains* court addressed three questions: (1) whether the regulations managed the public rights-of-way; (2) whether the required fees for use of the public rights-of-way were fair and reasonable; and (3) whether the city's exemption of Bell Atlantic from the regulations was competitively neutral and non-discriminatory.<sup>190</sup> The court cited the FCC's *Classic Telephone* and *Troy Orders* in support of its conclusion that "any attempt to regulate beyond the circumscribed scope of activities related to public rights-of-way is beyond the scope of § 253(c)."<sup>191</sup> The court consequently invalidated those portions of the city's ordinance that: (a) required TCG to furnish a description of the telecommunications services to be provided;<sup>192</sup> (b) required TCG to provide information concerning "proposed financing for the operation and construction of the services . . . as well as a description of the applicant's legal, financial, technical and other appropriate qualifications to hold the franchise;"<sup>193</sup> (c) permitted the city to include franchise provisions "[it] determines are necessary or appropriate 'in furtherance of the public interest;'"<sup>194</sup> (d) required TCG to maintain records other than those necessary for the city to enforce its rights-of-way regulations and to ensure that it has received accurate fee information;<sup>195</sup> (e) required TCG to offer its services to the city at rates and terms no less favorable than those offered to any other governmental or non-profit agency;<sup>196</sup> (f) required TCG to waive its le-

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 86.

<sup>187</sup> *Id.* at 88.

<sup>188</sup> *Id.* at 89.

<sup>189</sup> *Id.* (citing *RT Communications, Inc. v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000)).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 90.

<sup>192</sup> *Id.* at 92.

<sup>193</sup> *Id.* at 91.

<sup>194</sup> *Id.* at 89. The court found such provisions to be pre-

empted because they gave the city "near total discretion to approve or reject an application." *Id.* at 92. For similar reasons, the court invalidated those provisions allowing the Council to deny an application based upon "the adequacy of the . . . franchise agreement . . . to protect the public interest . . . as well as any other public interest factors or considerations . . . that are deemed pertinent by the City for safeguarding the interest of the City and the public." *Id.* at 93 (internal quotations and citations omitted).

<sup>195</sup> *Id.* at 92.

<sup>196</sup> *Id.* at 93.

gal right to challenge the terms or conditions of the franchise agreement;<sup>197</sup> (g) required the city's approval of network construction on private property;<sup>198</sup> and (h) allowed the city broad rights to inspect and oversee TCG's business.<sup>199</sup>

As the cases discussed above demonstrate, a sensible and narrow approach to the question of what it means to "manage" the "use" of public rights-of-way under section 253 has emerged in the federal courts. This approach, which confines local authority to activities of the carrier that are directly related to its physical occupation and use of the rights-of-way for communications facilities, is derived from, and is wholly consistent with, the FCC's policy guidance contained in the *Classic Telephone* and *Troy Orders*, which the courts have cited with approval.

## 2. *Fees Should Recover Incremental and Related Administrative Costs Related to Rights-of-Way Usage*

Section 253(c) authorizes municipalities to recover "fair and reasonable compensation" from telecommunications providers for their use of public rights-of-way.<sup>200</sup> Several courts, including the United States Court of Appeals for Ninth Circuit, have embraced the view that section 253(c) permits recovery of only the incremental costs of using public rights-of-way, and does not authorize recovery unrelated to the actual physical burden imposed.<sup>201</sup> Other courts, including the Sixth Circuit, have taken the more expansive "rent" recovery view.<sup>202</sup>

For example, in the initial *Prince George's County* decision, the district court found that, under section 253(c), the "crucial point . . . is that any franchise fees that local governments impose on telecommunications companies must be directly related to the companies' use of the local rights-of-way, otherwise the fees constitute an unlawful economic barrier to entry under section 253(a)."<sup>203</sup> For the same reason, the court contin-

ued, "local governments may not set their franchise fees above a level that is reasonably calculated to compensate them for the costs of administering their franchise programs and of maintaining and improving their public rights-of-way. Franchise fees thus may not serve as general revenue-raising measures."<sup>204</sup> These limitations on local governmental authority to impose franchise fees on telecommunications companies are, in the court's view, "necessary to promote the full purposes and objectives of Congress" in adopting the 1996 Act and to prevent local governments from "effectively thwart[ing] the [1996 Act's] pro-competition mandate and mak[ing] a nullity out of section 253(a)."<sup>205</sup>

Prince George's County erred by basing its telecommunications franchise fee on the estimated "value" for the "privilege" of using public rights-of-way to provide local phone service. Instead, the court emphasized, the "proper benchmark is the cost to the County of maintaining and improving the public rights-of-way" that the telephone company actually uses.<sup>206</sup> Furthermore, the court held that, to be "fair and reasonable," these costs "must be apportioned [to the carrier] based on its degree of use, not its overall level of profitability."<sup>207</sup> Because the court found nothing in the record to indicate that the county had based its "right-of-way charge" upon any of these factors, the court held that the county's franchise fee violated section 253.

The *Dallas I* court had also concluded that section 253 prevents municipalities from "impos[ing] fees on a telecommunications provider except as compensation for use of the City's rights-of-way."<sup>208</sup> In *Dallas I*, the city of Dallas had passed an ordinance that required telecommunications providers to pay four percent of the gross revenue that resulted from activities conducted in the city. The city defined "gross revenue" broadly as twenty-five potential sources of revenue, including long-distance services and resale of unbun-

<sup>197</sup> *Id.* at 94–95.

<sup>198</sup> *Id.* at 94.

<sup>199</sup> *Id.* at 94. "The City's limited authority does not give it the power to micromanage TCG's business through audits and submission of detailed financial records, unless they are directly related to the rights-of-way or a proper fee." *Id.*

<sup>200</sup> 47 U.S.C. § 253(c).

<sup>201</sup> In *Auburn*, the Ninth Circuit noted that "[s]ome non-tax fees charged under the franchise agreements are not based on the costs of maintaining the right of way, as re-

quired under the Telecom Act." 247 F.3d at 981 (footnote omitted).

<sup>202</sup> See *TCG Detroit v. City of Dearborn*, 16 F. Supp. 2d 785 (E.D. Mich. 1998), *aff'd*, 206 F.3d 618 (6th Cir. 2000).

<sup>203</sup> *Prince George's County*, 49 F. Supp. 2d at 817.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 818.

<sup>207</sup> *Id.*

<sup>208</sup> *Dallas I*, 8 F. Supp. 2d at 593.

dled network elements ("UNEs").<sup>209</sup> AT&T, which was offering services in Dallas as a nonfacilities-based carrier, objected to the fee and sought a preliminary injunction in federal court. The court found that AT&T had already paid for its use of rights-of-way through the incumbent LEC, from which it leased UNEs.<sup>210</sup> Although the court did not speculate on what a reasonable fee for use of the public rights-of-way would be, it concluded, "any fee that is not based on AT&T's use of City rights-of-way violates § 253(a) of the [1996 Act] as an economic barrier to entry."<sup>211</sup>

Similarly, in the *PECO* decision, the district court found that the Haverford ordinance violated section 253(c) requirements regarding reasonable compensation, in part because revenue-based fees "cannot, by definition, be based on pure compensation for use of the rights-of-way."<sup>212</sup> The Haverford ordinance was flawed because it imposed at least four different fees of unspecified amounts on telecommunications providers, without any attempt to relate the fees to use of the public rights-of-way. Moreover, because other Haverford ordinances imposed fees for the use of "streets and sidewalks" and "poles and wires," it appeared that Haverford was already being compensated for use of the public rights-of-way. The court ruled that under the 1996 Act, "any fees charged must be related to use of the rights-of-way"; the Haverford ordinance, however, did "not, on its face, comply with this mandate."<sup>213</sup> By vesting complete and limitless discretion in the Township Manager to deny a franchise and by imposing "fees of uncertain amounts, a fact which, by itself, may serve as a significant barrier to entry," the *PECO* court found the barriers to entry posed by the Haverford ordinance even greater than those posed by the Prince George's County ordinance.<sup>214</sup>

Conversely, in the *Dearborn* case, the lower court upheld the imposition of a local telecommunications franchise requirement on TCG, a telecommunications provider licensed by the Michigan Public Service Commission to provide basic local

telecommunications service in certain areas.<sup>215</sup> The telecommunications ordinance required telecommunications providers who wished to utilize the city's rights-of-way to enter into a franchise agreement with the city. The proposed agreement in question required TCG to pay four percent (4%) of its gross revenues to the city of Dearborn as a franchise fee, in addition to "a \$50,000 one time payment (in lieu of providing the city with four fiber optic strands) and up to \$2500 of the costs incurred by [the city] in connection with granting the franchise."<sup>216</sup> Following passage of the 1996 Act, TCG rejected the agreement and filed a suit seeking preemption of the local ordinance under section 253(a) and (c).<sup>217</sup> TCG alleged specifically that the city was discriminating against it by not requiring the incumbent local exchange carrier, Ameritech, at least initially, to enter into a franchise agreement.<sup>218</sup>

The district court rejected TCG's contention that the percentage-of-revenue franchise fee was not "fair and reasonable" compensation for use of the rights-of-way.<sup>219</sup> The *Dearborn* court stated, "whether compensation is 'fair and reasonable' is not amenable to a strict test[,] but rather must be 'determined by examining the totality of the facts and circumstances.'"<sup>220</sup> The court endorsed the view, first established in 1893, that the city could appropriately charge a "rental" fee to private parties occupying the public rights-of-way.<sup>221</sup> Given TCG's planned use of public property for its twenty-seven mile network, the court found the compensation sought by Dearborn neither unfair nor unreasonable. Another relevant factor, according to the *Dearborn* court is "what other telecommunications providers would be willing to pay."<sup>222</sup> In the court's view, the fact that three other telecommunications providers were willing to pay substantially similar amounts also supported a finding that the compensation was fair and reasonable.<sup>223</sup>

The *Dearborn* court also noted that TCG and the city had been in negotiations over these fees several years before passage of the 1996 Act and had

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *PECO*, 1999 U.S. Dist. LEXIS 19409, at \*24.

<sup>213</sup> *Id.* at \*23.

<sup>214</sup> *Id.* at \*25-26.

<sup>215</sup> *Dearborn*, 16 F. Supp. 2d 785.

<sup>216</sup> *Id.* at 787.

<sup>217</sup> *Id.* at 788.

<sup>218</sup> *Id.* at 787.

<sup>219</sup> *Id.* at 790.

<sup>220</sup> *Id.* at 789.

<sup>221</sup> *Id.* at 789-90 (citing *City of St. Louis v. W. Union Tel. Co.*, 148 U.S. 92, 99 (1893)).

<sup>222</sup> *Id.* at 790.

<sup>223</sup> *Id.*

nearly concluded the agreement in its present form when section 253 was enacted.<sup>224</sup> The court found TCG's claim that the fees were neither fair nor reasonable to be "belied by its apparent previous willingness to negotiate, and enter into, the agreement at issue. In fact, such evidence indicates quite the opposite, that the proposed agreement was reasonable, fair and consistent."<sup>225</sup> Finally, the court was not convinced by TCG's argument that the fees were so excessive that they would likely render doing business unprofitable, again largely in light of TCG's pre-1996 Act willingness to pay the regulated compensation. The *Dearborn* decision was upheld on appeal, where the Sixth Circuit affirmed the district court's analysis of "fair and reasonable compensation" under section 253(c).<sup>226</sup>

In *White Plains*, the federal District Court for the Southern District of New York adopted the *Dearborn* court's analysis in upholding the city of White Plains's imposition, *inter alia*, of an annual franchise fee equal to five percent of the gross revenue TCG or its affiliates derived in connection with the operation of proposed telecommunications facilities within the city limits.<sup>227</sup> Although the court acknowledged judicial decisions holding that to be "'fair and reasonable,' fees must be directly tied to the carrier's use of and/or the municipality's costs of maintaining the public rights-of-way[.]"<sup>228</sup> the *White Plains* court relied upon another case from the Southern District of New York, which concluded that "this reading of the word 'compensation' may 'too severely limit the term' because such a reading would treat § 253(c) as if it permitted recoupment of 'costs' rather than gaining of 'compensation.'"<sup>229</sup>

In determining that the city's "rent" for use of its rights-of-way was "fair and reasonable," the *White Plains* court applied the factors identified in the *Dearborn* case.<sup>230</sup> The court found: (1) TCG's contemplated use of the public rights-of-way to be extensive; (2) a number of other carriers had agreed to the same fee provisions (indeed, TCG

itself had entered into other agreements in New York in which it agreed to pay franchise fees based upon gross revenues); (3) negotiations between TCG and the city had been fairly constant since 1992; and (4) there was no basis to conclude that payment of the fees would likely render doing business with the city unprofitable.<sup>231</sup>

The South Carolina Supreme Court adopted similar reasoning in connection with BellSouth's claim that the City of Orangeburg's revenue-based franchise fee was neither fair nor reasonable under section 253(c). The *Orangeburg* court acknowledged a split of authority in the federal courts regarding "whether municipal franchise fees must be limited under § 253(c) to the municipality's cost of maintaining the public rights-of-way used by the telecommunications utility."<sup>232</sup> The court found that a franchise fee equal to a percentage of revenue generated is "not inherently unfair or unreasonable as a measure of the franchise's value as a business asset to the franchisee."<sup>233</sup> Absent evidence that the particular amount was unfair, the court declined to find that the revenue-based fees violated the 1996 Act.<sup>234</sup>

While the courts have split on whether franchise fees should be designed to recover "costs" versus "rents," the better view, taking the pro-competitive policy goals of the 1996 Act into account, is that section 253's limitation on local authority to managing the physical use of public rights-of-way carries with it the concomitant limitation of only collecting fees that are related to the actual costs incurred in doing so. As several courts have observed, such a limitation on local authority regarding compensation for use of the public rights-of-way is necessary to achieve the facilities-based competition envisioned by Congress, when it adopted the 1996 Act.<sup>235</sup> A similar conclusion has been reached by states such as Colorado and Florida, which have imposed parallel restrictions on the collection of rights-of-way fees by municipal authorities.<sup>236</sup>

<sup>224</sup> *Id.* at 790-91.

<sup>225</sup> *Id.* at 791.

<sup>226</sup> *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624-25 (6th Cir. 2000).

<sup>227</sup> *White Plains*, 125 F. Supp. 2d at 96-98.

<sup>228</sup> *Id.* at 95.

<sup>229</sup> *Id.* at 96 (citing *Omnipoint Communications, Inc. v. Port Auth. of N.Y. and N.J.*, No. 99 Civ. 0060 (BJS), 1999 WL 494120, at \*6 (S.D.N.Y. July 13, 1999)).

<sup>230</sup> *Id.* at 96-98.

<sup>231</sup> *Id.* at 96-97.

<sup>232</sup> *Id.* at 808 (comparing the *Dearborn* and *Prince George's County* decisions).

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> See, e.g., *Prince George's County*, 49 F. Supp. 2d at 817; *Dallas I*, 8 F. Supp. 2d at 593; *PECO*, 1999 U.S. Dist. LEXIS 19409, at \*23-24.

<sup>236</sup> See, e.g., COLO. REV. STAT. § 38-5.5-107 (2001) (limiting "[a]ll fees and charges levied by a political subdivision" to



### 3. *Discriminatory Treatment of New Entrants vs. the Incumbent Should be Avoided*

A highly contentious area of section 253 jurisprudence concerns discriminatory treatment of new entrants, particularly with respect to the imposition of asymmetrical franchise fee obligations. Although the FCC generally cautioned localities regarding discriminatory treatment of new entrants in its *Troy Order*,<sup>237</sup> it has not directly ruled upon the question of whether the asymmetrical imposition of franchise fees on new entrants would violate federal law. In the *Dearborn* case, the city's demand that the incumbent, Ameritech, enter into a franchise agreement came long after it sought to require a telecommunications franchise from competitive entrant TCG.<sup>238</sup> Ameritech refused to obtain such a franchise on the grounds that it had been granted a statewide franchise to operate due to its incorporation under an act of the state legislature in 1883.<sup>239</sup> The federal district court refused to address TCG's claim of discrimination, insofar as it pertained to the failure of the city to apply its franchise requirement to Ameritech, because the city had initiated that process. However, it ruled that local governments must be able to distinguish between different telecommunications providers, taking into consideration the different burdens individual carriers place on the rights-of-way in assessing fees.<sup>240</sup> Thus, the obligations imposed on incumbents and new entrants need not be identical. According to the court, "it is enough that the City imposes (or plans to impose) comparable burdens" to avoid violating section 253(c).<sup>241</sup>

On appeal, the Sixth Circuit concluded that the "fact that Ameritech prevailed before the district court in its contention that state law prohibits the City from subjecting it to the franchise fee charged others does not mean that the City is thereby discriminating in Ameritech's favor."<sup>242</sup>

Although the Sixth Circuit acknowledged that the asymmetrical imposition of local franchising fees on new entrants might strengthen Ameritech's competitive position, and thereby enable it to undercut its competition, TCG had not alleged that this had occurred.<sup>243</sup> According to the Sixth Circuit, "[s]ince the district court found the fee to be fair and reasonable, and its imposition to be neither discriminatory in intent nor, in and of itself, anti-competitive in effect, the court also correctly rejected TCG's argument that the fee constituted an impermissible barrier to entry in violation of § 253(a)."<sup>244</sup>

Although an arguably permissible legal interpretation of section 253(c) when examined in a vacuum, the *Dearborn* outcome is squarely at odds with congressional intent to promote the rapid development of facilities-based telecommunications competition. A city's plan to impose comparable burdens on the incumbent at some undetermined future time does not result in competitively neutral and non-discriminatory treatment of new entrants who must labor under those burdens in the present. Moreover, these burdens fall particularly hard on a new entrant attempting to build infrastructure because, without the municipality's permission, that entity cannot install its facilities and begin to compete. For an incumbent that already is providing service, a city's request that it obtain a local telecommunications franchise "after-the-fact" will have little practical or competitive impact. The incumbent has the time to contest such a request at its leisure. For the new entrant, time-to-market can make the difference between successful competitive entry and no entry at all.

Nevertheless, as noted above, some courts have adopted the *Dearborn* reasoning to find that franchising requirements and fee payments imposed on new entrants but not on incumbents sat-

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"the costs directly incurred by the political subdivision in providing services relating to the granting or administration of permits," restricting local authority to require in-kind services from telecommunications companies and expressly requiring that any local taxes, fees or charges "be competitively neutral among telecommunications providers"); FLA. STAT. ANN. § 337.401 (West 1999) (limiting the authority of municipalities to levy taxes or fees on telecommunications companies). Adoption of such a federal policy under section 253(c), of course, would not deprive local franchising authorities of any lawful taxing authority they have been delegated by the states to impose taxes on *all* service providers, regardless of their

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use of the public rights-of-way.

<sup>237</sup> *Troy Order*, 12 FCC Rcd. at 21,433, para. 108 (local requirements imposed only on new entrants will likely violate 47 U.S.C § 253).

<sup>238</sup> *Dearborn*, 16 F. Supp. 2d at 787, 791.

<sup>239</sup> *Id.* at 791, 793.

<sup>240</sup> *Id.* at 792-93.

<sup>241</sup> *Id.* at 792.

<sup>242</sup> *Dearborn*, 206 F.3d at 625.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

isfy the competitive neutrality and non-discrimination prongs of section 253(c).<sup>245</sup> The *White Plains* court, for example, relied upon *Dearborn*, other federal cases, and the legislative history of the 1996 Act for the proposition that “[t]he City need not treat [the incumbent LEC] and [the new entrant] identically in order to satisfy § 253(c).”<sup>246</sup> The court rejected TCG’s contentions that exemption of the incumbent LECs from city franchising and franchise fee requirements was anti-competitive and discriminatory. Instead, the court reasoned, “[a]s long as the City makes distinctions based on valid considerations, it cannot be said to have discriminated against [the entrant] in favor of [the incumbent carrier].”<sup>247</sup> The court characterized as “powerful” the city’s reasons for treating the incumbent (Bell Atlantic) differently, including the fact that Bell Atlantic had been paying a fee in exchange for use of the city’s rights-of-way in the form of free municipal use of conduit and through the provision of free additional conduit for the city’s use in building its own communications network.<sup>248</sup> In addition, the court was persuaded that Bell Atlantic’s obligation to offer universal service at affordable rates to the city’s residents, when compared to TCG’s ability to limit its service to the most profitable areas, constituted a valid consideration supporting the city’s differential treatment of the incumbent and the new entrant.<sup>249</sup>

With regard to the non-fee related franchise requirements that the *White Plains* court had not preempted for example, submission of construction plans, performance bonds, indemnification for property damage and regulations designed to minimize street disruptions—the court found TCG had not presented sufficient evidence that Bell Atlantic had engaged in activities impacting the rights-of-way since enactment of the city’s ordinance. According to the court, therefore, “it cannot be said that exempting Bell Atlantic from those particular regulations has had a discrimina-

tory or non-competitive effect.”<sup>250</sup> The court specifically declined to reach the question of whether Bell Atlantic would be subject to the city’s ordinance, including the franchising requirement, if in the future Bell Atlantic decided to “build more conduit or construct other telecommunications facilities in the City’s rights-of-way.”<sup>251</sup> And, the court observed that because the:

fees that the City wishes to impose . . . are not based upon the construction of new facilities, but rather on the existence of revenue and the provision of services from networks running in the City’s right-of-way . . . the imposition of a disparate fee could, indeed, have a discriminatory or non-competitive effect.<sup>252</sup>

Nevertheless, because the city offered evidence of what it considered to be Bell Atlantic’s in-kind compensation to the city, namely, the provision of “an extensive underground conduit network” among other things, and because TCG “offer[ed] no proof that the fee ‘charged’ to Bell Atlantic, as opposed to that which would be imposed on TCG, would have a non-competitive or discriminatory effect[.]” the court found the city’s evidence “sufficient to sustain [its] burden that the fees charged to TCG and the fees paid by Bell Atlantic [were] competitively neutral and nondiscriminatory.”<sup>253</sup>

These conclusions are troubling for several reasons. First, even maintenance of existing telecommunications structures in the rights-of-way by the incumbent should be considered a use of the rights-of-way within the franchising authority and responsibility of the locality. Existing roadways can be damaged by maintenance activities, and the imposition of such costs on the locality is arguably the reason why some level of telecommunications franchise fees is warranted. Therefore, the court’s assumption that Bell Atlantic’s activities would not impact the rights-of-way is dubious. Moreover, given the heavy recent investment by incumbent LECs, including Bell Atlantic, to upgrade their plants for the provision of Digital Subscriber Lines (“DSL”),<sup>254</sup> which necessarily entails

<sup>245</sup> *White Plains*, 125 F. Supp. 2d at 98 (finding, among other things, that the incumbent’s obligation to offer universal service justified differences in franchising and fee payment requirements).

<sup>246</sup> *Id.* (citing *Cablevision of Boston, Inc. v. Pub. Improvement Comm’n of the City of Boston*, 184 F.3d 88, 103 (1st Cir. 1999)); *Dearborn*, 16 F. Supp. 2d at 792; *Dallas I*, 8 F. Supp. 2d at 598; 141 CONG. REC. H8427 (daily ed. Aug. 4, 1995) (noting that Congress considered and ultimately rejected a “parity” provision prohibiting local governments from imposing fees that distinguished among different prov-

iders).

<sup>247</sup> *White Plains*, 125 F. Supp. 2d at 98 (quoting *Cablevision*, 184 F.3d at 103) (alteration in original).

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 98–99.

<sup>250</sup> *Id.* at 99 (footnote omitted).

<sup>251</sup> *Id.* at 99 n.16.

<sup>252</sup> *Id.* at 99.

<sup>253</sup> *Id.*

<sup>254</sup> See, e.g., Mike Farrell, *Bell South Bags Wireless Cable, DTH Plans*, MULTICHANNEL NEWS, Jan. 1, 2001, at 1; Doug

the installation of fiber-optic cables, remote terminals and similar equipment in the public rights-of-way, such an assumption is unjustifiable. In addition, the universal service obligations relied upon by the court<sup>255</sup> have nothing to do with compensating local governments for direct costs imposed by carriers' uses of the public rights-of-way and should not even figure into the equation regarding the discriminatory application of franchise fee requirements.

Second, the court's discrimination argument rests upon the untested assumption that the balance of benefits to the city and burdens on the incumbent LEC represent compensation for use of the rights-of-way such that the incumbent may be exempted from payment of franchise fees without running afoul of the nondiscrimination language of section 253(c). In contrast, the FCC specifically addressed discriminatory application of local telecommunications franchise and fee requirements on new entrants in the *Troy Order* and cautioned that such situations were very likely to be considered discriminatory and in violation of the Act.<sup>256</sup>

#### 4. Courts Will Uphold Narrowly Tailored Requirements Regarding Uses of the Public Rights-of-Way

In contrast to the many cases in which the courts have invalidated local ordinances that unduly burdened the provision of telecommunications services, the United States District Court for the Southern District of Alabama upheld the City of Mobile's enforcement of a narrowly tailored and balanced right-of-way management ordinance. In *BellSouth Telecommunications, Inc. v. City of Mobile*,<sup>257</sup> the district court reviewed a local ordinance requiring:

any party who seeks to perform excavation or construction work on public streets or rights-of-way . . . [to] first obtain a permit from the City Engineer. In order to obtain such a permit, the party must submit a permit application, pay a permit fee, and file detailed plans with the City Engineer before beginning the project.<sup>258</sup>

Prior to enactment of the ordinance, BellSouth could perform repair, construction or maintenance activities in the City's rights-of-way without obtaining advance authorization.<sup>259</sup> Significantly, the City's permit fees were designed "to enable the City to recover its costs of administration and enforcement and not for the purpose of raising revenue."<sup>260</sup> The court held that:

[n]othing in the Mobile Ordinance exceeds the reservation of authority contained in section 253(c). . . . The compensation imposed by the Ordinance is reasonable and is directly related to the actual use of the City's rights-of-way. . . . These fees are publicly disclosed and are administered in a competitively neutral and nondiscriminatory basis. . . . Accordingly, the court finds that Mobile's Rights of Way Construction and Administration Ordinance 57-022 is not preempted by the [1996 Telecommunications Act].<sup>261</sup>

Moreover, in light of BellSouth's failure to identify any instance in which the city's ordinance had the effect of prohibiting the company from providing a telecommunications service, the court found that "BellSouth cannot plausibly make a claim that the Ordinance" violates section 253(a).<sup>262</sup>

The *Mobile* case is important because it confirms that where local authorities resist the temptation to overreach their authority and enrich the city coffers at the expense of telecommunications providers (and indirectly, their customers), the courts will uphold narrowly tailored regulations to manage the public rights-of-way in an competitively neutral and nondiscriminatory manner.

The South Carolina Supreme Court addressed similar issues in a preemption case filed by BellSouth Telecommunications against the city of Orangeburg, and found for the city by upholding the application of a local telecommunications fee ordinance.<sup>263</sup> The Orangeburg court distinguished several federal district courts (including *Dallas* and *Prince George's County*) that interpreted section 253(c) to strictly limit a local government's power to managing the public rights-of-way. The court observed that South Carolina had delegated to municipalities "the power to enact

Olenick, *DSL to Surpass Cable in 2004: In-Stat*, TWICE, Dec. 18, 2000, at 1.

<sup>255</sup> See *White Plains*, 125 F. Supp. 2d at 98.

<sup>256</sup> *Troy Order*, 12 FCC Rcd. at 21,443, para. 108 ("Local requirements imposed only on the operations of new entrants and not on existing operations of incumbents are quite likely to be neither competitively neutral nor nondiscriminatory.").

<sup>257</sup> *BellSouth v. Mobile*, 2001 U.S. Dist. LEXIS 4244.

<sup>258</sup> *Id.*, slip op. at 3.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*, slip op. at 4 (quoting Mobile Ordinance 57-022 section 1.2.7).

<sup>261</sup> *Id.*, slip op. at 19 (citations omitted).

<sup>262</sup> *Id.*, slip op. at 47-48.

<sup>263</sup> *BellSouth v. Orangeburg*, 522 S.E.2d 804 (S.C. 1999).

ordinances 'necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it.'"<sup>264</sup> The court concluded that this delegation includes the ability to ensure that the grant of franchise privileges operates to the public's benefit, and that the Orangeburg ordinance "merely requires BellSouth, as its franchisee, to make reasonable effort to provide the service that is the subject of its franchise."<sup>265</sup>

##### 5. *Redundant Rights-of-Way Authorizations Should be Avoided*

The majority view in the case law discussed above supports the conclusion that local authority to impose telecommunications franchises is limited in scope to regulation of the provider's physical occupation of the rights-of-way for the installation and maintenance of telecommunications facilities. Accordingly, a franchised cable operator should not be required to obtain additional local authorization to provide telecommunications service because the locality's legitimate interests in managing the use of the public rights-of-way have already been fully protected under its cable franchising authority. This policy result may be achieved by following the reasoning set forth in the *Auburn*, *Austin*, *Dallas*, *Coral Springs*, *Prince George's County*, *White Plains*, and *PECO* cases.<sup>266</sup>

<sup>264</sup> *Id.* at 807 (quoting S.C. CODE ANN. § 5-7-30 (Supp. 2000)).

<sup>265</sup> *Id.*

<sup>266</sup> The Fifth Circuit vacated and remanded with instructions to dismiss the *Austin* and *Dallas* district court decisions based upon a subsequently enacted Texas state statute, which repealed the Dallas and Austin city ordinances and which preempted any future similar city ordinances. See *AT&T Communications of the Southwest, Inc. v. City of Austin*, 235 F.3d 241 (5th Cir. 2000); *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 243 F.3d 928 (5th Cir. 2001). The plaintiffs in the *Austin* and *Dallas* cases therefore prevailed in both judicial and state legislative forums. Although the cases have lost their authority as binding precedent due to the Fifth Circuit's actions, their persuasive authority is, if anything, heightened by the Texas legislature's codification of their reasoning and results. Similarly, the Eleventh Circuit affirmed in part, reversed in part, and remanded for further proceedings the district court's *Coral Springs* decision, 42 F. Supp. 2d 1304. The Eleventh Circuit based its decision upon a subsequent change in Florida law and the district court's consideration of whether the city's ordinance constituted permissible rights-of-way management under section 253(c) without the court's first addressing whether the ordinance

- a. *To Be Subject to Local Franchising, an Entity's "Use" of the Public Rights-of-Way Must Involve A Permanent Physical Impact*

Federal court decisions have made abundantly clear that no "use" of the rights-of-way occurs unless signals physically impact the public rights-of-way. According to these decisions, the mere passage of additional electrons through a previously authorized wire that lies in a public right-of-way does not "use" the right-of-way and therefore does not vest the local authority with jurisdiction over a service provider that is simply using the existing wire.<sup>267</sup> Similarly, the mere passage of light waves and particles through the air does not affect the public rights-of-way and therefore does not imbue municipalities with regulatory authority over the services of wireless telecommunications providers.<sup>268</sup>

In *Dallas III*, for example, the court granted summary judgment against a municipality that had sought to claim "rights-of-way" jurisdiction over a non-facilities-based competitive LEC and a wireless provider because neither provider ever physically intruded into the public rights-of-way.<sup>269</sup> For the non-facilities-based competitive LEC, the court held that leasing network elements from an entity that used the public rights-of-way did not mean that the lessee also "used" the rights-of-way. The court found, "[a]lthough a

prohibited or had the effect of prohibiting a telecommunications service in violation of section 253(a); the Eleventh Circuit also invalidated substantial portions of the city's ordinance as inconsistent with state law. See *Palm Beach*, 252 F.3d 1169.

<sup>267</sup> *Austin*, 975 F. Supp. at 943 (describing the city's "unsupported assertion that a non-facilities-based provider is 'using' the City's public rights-of-way" as "wholly unpersuasive"); *Dallas I*, 8 F. Supp. 2d at 593.

Many of Dallas's franchise requirements—such as the submission of a wide range of financial information on the company, the maintenance of detailed records subject to the City's approval, the provision of ubiquitous services, and the dedication of ducts and fiber optic strands to the City's exclusive use— . . . are totally unrelated to use of the city's rights-of-way, and are thus beyond the scope of the City's authority.

*Id.*; *Dallas III*, 52 F. Supp. 2d at 772 (holding that a non-facilities-based competitive LEC does not "use" the public right-of-way).

<sup>268</sup> *Dallas II*, 52 F. Supp. 2d at 762; *Dallas III*, 52 F. Supp. 2d at 773.

<sup>269</sup> *Dallas III*, 52 F. Supp. 2d at 763.

CLEC's purchase of access to a UNE from an [ILEC] gives the CLEC exclusive control over the functionality [of] the UNE, the ILEC still retains ownership of the UNE and will continue to repair, maintain, and operate it even when the CLEC purchases exclusive access."<sup>270</sup> The *Dallas III* court also rejected the city's argument that a wireless telecommunications provider's transmissions across and through the city somehow resulted in a "use" of the public rights-of-way. The court held that under section 253(c), the term "use" means a "physical occupation" of the rights-of-way, and that because the wireless carrier's telecommunications facilities did not do so, it therefore could not be said to be "using" the rights-of-way.<sup>271</sup>

Definitions of "use" that extend beyond physical intrusions into property strain the term beyond all recognition.<sup>272</sup> Indeed, as the *Austin* court held, definitions of "use" that do not involve actual physical intrusions simply represent "meta-physical interpretation[s] of the term . . . that def[y] logic and common sense."<sup>273</sup> To retain any meaning, the phrase "use of the public rights-of-way" must be limited to actual physical intrusions into property, not to every beam and particle of light that happens to pass over or through a public right-of-way.<sup>274</sup>

b. *Cable Franchising Adequately Regulates the Cable Operator's Use of Public Rights-of-Way; Additional Franchising Is Unnecessary and Counterproductive*

Cable operators seeking to use, upgrade or install additional facilities in the rights-of-way to provide advanced services present a unique set of issues for local governments. In the case of franchised cable operators, the physical "use" and occupation of the public rights-of-way is regulated by local franchising authorities consistent with the

limitations contained in Title VI of the Communications Act.<sup>275</sup> Title VI authorizes local governments to require that, among other things, cable operators upgrade their plant to provide more reliable and more advanced cable services.<sup>276</sup> These same upgrades, of course, also enable the cable operator to begin deploying additional services such as telecommunications and information services over its cable infrastructure.

Providing additional communications services over upgraded cable systems, however, does not place any additional burden on the public rights-of-way. An incumbent cable operator should therefore not be obligated to obtain additional authority from local governments before it may provide telecommunications services over its cable system. The reasons supporting this position are simple: (1) local governments already regulate the cable operator's use of public rights-of-way through the cable franchise; and (2) apart from overseeing the physical use of the rights-of-way, federal law restricts local government ability to regulate the provision of services classified as "telecommunications services" under the Act.

Indeed, amendments to section 621(b)(3) contained in the 1996 Act prohibit a local government from invoking Title VI to impose any franchising or regulatory requirements on a cable operator's provision of telecommunications service.<sup>277</sup> The residual, non-Title VI authority that local governments retain with respect to the regulation of telecommunications services is *restricted* to managing the rights-of-way.<sup>278</sup> "Managing" public rights-of-way does not mean imposing requirements and obligations unrelated to use of public rights-of-way.<sup>279</sup> Nor does it mean regulating the types of service that are provided over such rights-of-way. Rather, the term means overseeing "the physical manner in which [public] rights-of-way are encumbered by the construction, mainte-

<sup>270</sup> *Id.* at 772.

<sup>271</sup> *Id.* at 773.

<sup>272</sup> See BLACK'S LAW DICTIONARY 1541 (7th ed. 1999) (defining "use" as "the enjoyment of property which consists of its employment, occupation, exercise or practice"); 2 NEW SHORTER OXFORD ENGLISH DICTIONARY 459 (Lesley Brown ed., 1993) (defining "use" as "the holding of land or other property by one person for the profit or benefit of another").

<sup>273</sup> *Austin*, 975 F. Supp. at 943.

<sup>274</sup> See *ECI*, 13 FCC Rcd. at 14,306, para. 62 (holding that ECI's SMATV system did not constitute a cable system because ECI purchased capacity from Ameritech's supertrunking system and ECI therefore did not "use" the public right-of-way in a manner that triggers the need for an additional

cable franchise); *In re Definition of a Cable Television System*, 5 FCC Rcd. 7638, 7642, para. 28 (1990) ("[I]t is well established that radio transmissions, including line of sight transmissions, such as the point-to-multipoint transmission . . . do not use public rights-of-way").

<sup>275</sup> 47 U.S.C. §§ 521-573 (2000).

<sup>276</sup> 47 U.S.C. § 546(b)(2) (2000) (local governments may require that cable franchise renewal proposals include "proposals for an upgrade of the cable system"); 47 U.S.C. § 544(b)(1) (2000) (franchising authorities "may establish requirements for facilities and equipment").

<sup>277</sup> 47 U.S.C. § 541(b)(3)(A)-(B) (2000).

<sup>278</sup> See 47 U.S.C. § 253(c) (2000).

<sup>279</sup> See *Auburn*, 247 F.3d at 978.

nance and continuing use of facilities that provide telecommunications services."<sup>280</sup>

A policy aimed at removing barriers to facilities-based competition, therefore, would ensure that, where the provision of telecommunications service will not place a new or additional burden on the public rights-of-way, local authorities are prohibited from requiring a franchised cable operator to secure a separate telecommunications franchise.<sup>281</sup> If a cable operator offers competitive telecommunications services over its upgraded cable facilities—either directly or through a state certificated affiliate—the public rights-of-way are no more affected than they are when the operator offers advanced cable services over the same plant.<sup>282</sup> The mere passage of additional light waves and electrons through the cable operator's network does not newly implicate the locality's interest in managing the public rights-of-way to preserve public safety and order. Because that management interest already is fully addressed by the cable operator's Title VI franchise, no other interests remain to be addressed through a separate local telecommunications service franchise.<sup>283</sup>

For similar reasons, local authorities should refrain from restraining or precluding cable operators from making their facilities available to third parties for the provision of telecommunications or other communications services. The use of the cable operator's physical plant by affiliated or unaffiliated entities to provide telecommunications service does not constitute a "use" of the public rights-of-way that triggers an additional franchise

obligation on the part of the cable operator.<sup>284</sup> Therefore, local governments may not use the franchising and related permitting processes to prevent cable operators from making capacity available to other providers of telecommunications services without the "approval" of the franchising authority.

This limitation on local regulatory authority should apply with equal force to any additional communications service provided over the franchised cable operator's facilities, including high-speed Internet access and related data-communications services. The local interest in managing the cable operator's use of the public rights-of-way should be satisfied through a single exercise of state-delegated local franchising authority, and the collection of a single franchise fee. Neither local governments nor the public interest requires any further local authorization before the provider can offer such advanced services to the public. This is particularly true for services that the FCC has already classified as "enhanced" and/or "information" services, such as data retrieval and processing and Internet access services.<sup>285</sup> The local government's authority to manage the rights-of-way is not affected by the provision of such additional services, and Internet and interactive computer services are, by Congressional directive, to remain "unfettered" by regulation.<sup>286</sup>

Moreover, the exercise of expansive local regulatory authority over such additional communications services in varying degrees and jurisdictions

<sup>280</sup> See *Troy Order*, *supra* note 80, 12 FCC Rcd. at 21,441, para. 103.

<sup>281</sup> See *Dallas II*, 52 F. Supp. 2d at 761–62 (authority for franchising is limited to physical occupation of the public rights-of-way).

<sup>282</sup> See *Prince George's County*, 49 F. Supp. 2d at 819–20 (carriers using facilities owned, installed, and maintained by others); *Dallas III*, 52 F. Supp. 2d at 772 (lease of facilities); *Dallas II*, 52 F. Supp. 2d at 761–62 (wireless service provider); *Austin*, 975 F. Supp. at 942–43 (carrier that provided service only by means of resale and use of unbundled network elements).

<sup>283</sup> In principle, this result should extend to any entity that is authorized to be in the public rights-of-way pursuant to a local telecommunications franchise. For example, the provision of additional services, such as Internet access, over franchised telecommunications plant should not trigger the need to obtain an additional local rights-of-way authorization. In contrast, a cable franchise would be required under the existing terms of Title VI to the extent a telecommunications carrier chose to provide cable services, 47 U.S.C. § 541, and could be required by localities to the extent the carrier

provides "open video services." 47 U.S.C. §§ 571, 573. See *Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999). Although the rights-of-way authorization itself would be redundant, local cable franchising authority under Title VI is far broader than the local telecommunications franchising authority permitted under section 253, and extends to, among other things, cable franchise transfer approval, enforcement of technical and customer service standards, as well as the statutory right to collect a franchise fee of up to five percent of gross revenues derived from the provision of cable services. 47 U.S.C. § 542(a) & (b).

<sup>284</sup> See, e.g., *ECI*, 13 FCC Rcd. at 14,306–07, para. 62 (cable franchise not required where service provider is using facilities already authorized to be in the rights-of-way); *Dallas III*, 52 F. Supp. 2d at 772–73.

<sup>285</sup> See 47 U.S.C. § 230(b)(2) (2000) ("It 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.").

<sup>286</sup> *Id.*; see also 47 U.S.C. § 253(c) (2000).

would undermine goals local governments have traditionally championed.<sup>287</sup> Increased and inconsistent regulation would likely retard or eliminate the expansion of services offered over cable television systems, discourage investment in advanced communications facilities, increase transaction costs for communications providers (and, therefore, consumer prices), and result in an unstable and unpredictable regulatory environment. Slowing cable entry into new service markets will likely have a ripple effect as other providers experience decreased competitive pressure to develop innovative services. Inasmuch as local franchising authorities have traditionally sought expanded services, infrastructure investment and competition, along with reduced prices for consumers, expanding regulation would actually undercut these local government interests. Similar policy considerations should also inform the federal regulatory approach to cable Internet services.

The following section examines how the push for open access drove the question of mandated access for unaffiliated ISPs from the federal to the local franchising level, and then back again. Court challenges growing out of local franchising authority efforts to force multiple-ISP access to cable facilities have left a legacy of confusion and uncertainty regarding the appropriate classification of cable Internet service and the scope regulatory jurisdiction over it. This situation, in turn, has led back to action at the federal level with the FCC's initiation of an inquiry into cable open access.<sup>288</sup> The final section of this article suggests some

guideposts for a rational policy solution to the convergence issues that threaten to leave a legacy of regulatory roadblocks to the further development of the national and international information superhighway known as the "Internet."

#### IV. LOCAL ROADBLOCKS ON THE GLOBAL INFORMATION SUPERHIGHWAY

The Internet is the widely recognized global communications "network of networks."<sup>289</sup> With respect to cable open access, the central legal question before the courts has been the scope of local authority under the Communications Act to impose access requirements on cable-delivered Internet services. The handful of local open access requirements that have been enacted would effectively require cable operators to interconnect their cable Internet platforms with third-party ISPs, to permit such ISPs to collocate equipment for direct connections in the cable head-end, or to resell broadband transport from the head-end to the subscriber's premises.<sup>290</sup> That is, they sought to regulate at the local level of government the "on-ramp" to an interoperable, global communications superhighway.<sup>291</sup>

Resolution of the legality of local open access efforts entails a determination of whether the Communications Act or the U.S. Constitution preempts locally imposed third-party ISP access requirements. A conclusion that Internet over cable is not a Title VI cable service does not necessarily end the matter if, as was true of the *Portland*

<sup>287</sup> See *In re Comcast Cable Communications, Inc.*, Final Resolution of Cable Programming Service Rate Complaints, Order, 11 FCC Rcd. 4029 (1995); *In re Social Contract for Continental Cablevision, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd. 299 (1995); *In re Social Contract for Time Warner*, Memorandum Opinion and Order, 11 FCC Rcd. 2788 (1995).

<sup>288</sup> *Open Access NOI*, 15 FCC Rcd. 19,287.

<sup>289</sup> See, e.g., 47 U.S.C. § 230(e)(1) (2000) ("The term 'Internet' means the international computer network of both Federal and non-Federal interoperable packet switched data networks.").

<sup>290</sup> See, e.g., *Broward County*, 124 F. Supp. 2d 685; *MediaOne of Massachusetts, Inc. v. Board of Selectmen of the Town of North Andover*, Docket No. CTV 99-2, 99-3, 99-4, 99-5, — Mass. Reg. — (Mass. Dep't of Telecomm. and Energy, Cable Television Div. May 1, 2000) (available at <http://www.state.ma.us/dpu/catv/Appeals/sumdecfnl.pdf>).

<sup>291</sup> Reacting to the district court's decision in *Portland I*, former FCC Chairman Kennard described the prospect of 30,000 local franchising authorities arriving at differing formulations of cable open access regulation as one of "chaos," and warned of deleterious effects on the services available to

consumers and on the ability of cable operators to raise capital for system upgrades. William E. Kennard, The Road Not Taken: Building a Broadband Future for America, Remarks before the National Cable Television Association, Chicago, Illinois, available at <http://www.fcc.gov/Speeches/Kennard/> (June 15, 1999) ("[T]he Information Superhighway will not work if there are 30,000 different technical standards or 30,000 different regulatory structures for broadband. The market would be rocked with uncertainty; investment would be stymied. Consumers would be hurt."). Current FCC Chairman Powell echoed these concerns as a Commissioner in his contemporaneous speech to the Chicago chapter of the Federal Communications Bar Association. Michael K. Powell, Remarks before the Federal Communications Bar Association, Chicago chapter, Chicago, Illinois, available at <http://www.fcc.gov/Speeches/Powell/> (June 15, 1999) ("[Government] intervention could stifle the development of alternative paths to the home that are currently under development and which are attracting investment. Ironically pronouncing cable an essential asset and declaring regulation of that asset may risk condemning customers to regulated monopoly control of access.").

If decision, a determination also is made that the service is a "telecommunications service" or an "information service," or some combination of the two. If it is a "telecommunications service"—even assuming a delegation of authority from the state to local governments that would permit their franchising of local telecommunications providers' use of the public rights-of-way—the scope of local franchising authority to mandate open access (interconnection/furnishing of service) for ISPs would be tested under section 253. Under the analysis suggested in the preceding discussion, locally imposed mandatory open access would not likely withstand preemption.

On the other hand, if the determination is made that Internet over cable is an "information service," the likelihood of an express state delegation of regulatory or franchising authority to local governments over information services is practically non-existent.<sup>292</sup> Preemption of local requirements might not be available under section 253, as its protections are limited to an entity's provision of "any" telecommunications service, but preemption would become a near certainty under the section 230 mandate that Internet services remain free from regulation by any level of government. Again, as demonstrated in Part III above, a cable operator's provision of additional wire communications services over an already franchised plant should not give rise to an additional franchise obligation because the local govern-

ment's interest in managing the operator's underlying use of the public rights-of-way is already protected through the cable franchise. Nor should it give rise to new common carrier obligations for cable operators in light of competition in the provision of broadband "last mile" networks.<sup>293</sup>

#### A. The Push for Open Access

The push for mandatory open access came against a regulatory backdrop that permits cable operators to structure their Internet offerings free of the types of resale and access obligations imposed on incumbent local exchange carrier services, so long as everyone agrees that they are some form of cable service.<sup>294</sup> Under the Title VI "umbrella," cable operators are permitted to establish exclusive arrangements with affiliated ISPs for use of their broadband distribution systems.<sup>295</sup> The historic disparities in regulatory treatment between cable television and telephone companies have led the latter to call for the imposition of common carrier regulatory requirements for cable's Internet services under the banner of "regulatory parity."<sup>296</sup>

From the outset, the lobbying campaign for open access aimed at "socializing" the concept of creating a common carrier-like obligation for cable operators with respect to their budding high-speed interactive Internet services. Stripped of its rhetoric,<sup>297</sup> mandated open access likely

<sup>292</sup> See discussion *supra* note 67; Duffy, *supra* note 56, at 100 COLUM. L. REV. 1277-79.

<sup>293</sup> See *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Second Report, 15 FCC Rcd. 20,913, 20,917-19, 20,983-91, paras. 8, 185-202 (2000) [hereinafter 2000 Section 706 Report]; *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Report, 14 FCC Rcd. 2398, 2402, 2422-32, paras. 6, 45-62 (1999) [hereinafter 1999 Section 706 Report]; Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630 (D.C. Cir. 1976), cert. denied, 425 U.S. 992 (1976) [hereinafter NARUC I]; Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 533 F.2d 601 (D.C. Cir. 1976) [hereinafter NARUC II]; *In re Cable and Wireless, PLC Application for a License to Land and Operate in the United States a Private Submarine Fiber Optic Cable Extending Between the United States and the United Kingdom*, Cable Landing License, 12 FCC Rcd. 8516, 8530, para. 39 (1997).

<sup>294</sup> See 47 U.S.C. § 541(c) (2000) ("Any cable system shall

not be subject to regulation as a common carrier or utility by reason of providing any cable service.").

<sup>295</sup> Open Access NOI, 15 FCC Rcd. at 19,299, para. 29 ("[C]able operators currently are not legally prohibited from having an exclusive relationship with one particular ISP.") (footnote omitted).

<sup>296</sup> See, e.g., FCC's AOL-TW Deal Approval Stokes Open Access, COMM. DAILY, Jan. 16, 2001 at 2-3. John Raposa, Verizon's vice president and associate general counsel, "whose company backs that effort," indicated an intent to lobby the new Administration and Congress to enact a proposed Title 7 regulatory plan that would impose similar high-speed data rules on phone companies, cable operators and other broadband players, claiming that the "crazy patchwork quilt of regulation" governing cable and telephone companies "threatened the future of the Internet." *Id.* at 2-3.

<sup>297</sup> The day following the release of the FCC's First Section 706 Report to Congress, the unsuccessful proponents of regulating cable Internet services, including AOL, MCI WorldCom, US WEST and other telecommunications carriers and ISPs, announced formation of the "openNET Coalition," with the stated goal "to promot[e] the rights of all consumers to obtain affordable, high-speed access to the Internet from the provider of their choice." See openNET Coalition, at <http://www.opennetcoalition.org/who> (last visited



would require, at a minimum, that cable operators offer wholesale access and interconnection to ISPs and other carriers, who in turn would sell the high-speed Internet connection and ultimately other services over the broadband cable platform.<sup>298</sup> Under current law, however, if the service is a Title VI cable service, it may not be subjected to such common carrier regulation or subjected to local requirements regarding, for example, technical standards.<sup>299</sup> From the legal perspective of cable franchising and open access, therefore, categorization of the service determines the jurisdiction and scope of possible regulation.

At the federal level, open access proponents initially failed to secure regulatory intervention by the FCC. Indeed, within the various contexts of the AT&T/TCI merger,<sup>300</sup> the AT&T/MediaOne merger,<sup>301</sup> the Internet Ventures, Inc. Petition for Leased Access<sup>302</sup> and the Section 706 Broadband Inquiry proceedings,<sup>303</sup> the FCC resisted strident claims that mandated open access was necessary to preserve the open nature of the Internet. Instead, the FCC affirmatively chose a policy of waiting and watching (the so-called "hands off" pol-

icy) to see how the nascent broadband markets developed. The FCC feared that initiating a formal action would result in market uncertainty and a decrease in investment.<sup>304</sup> In other words, the FCC concluded that regulatory action would not advance its policy goals, the most important of which appeared to be the facilities-based deployment of advanced communications infrastructure and services.<sup>305</sup> Ironically, had the FCC chosen to implement its "hands off" policy through formal regulatory action, rather than through oblique pronouncements, it might have avoided the series of conflicting judicial open access decisions that eventually threatened the agency's ability to set broadband policy on a national basis.

With few exceptions, localities considering the imposition of open access conditions have done so through their cable franchise transfer review authority.<sup>306</sup> One notable exception was Broward County, Florida, whose open access ordinance—prior to its invalidation by the United States District Court for the Southern District of Florida on First Amendment grounds<sup>307</sup>—applied to all cable operators under the county's general cable

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June 2, 2001). The naming of the movement, "open access" and its coalition "openNET" was nothing short of brilliant. It immediately put cable on the defensive—if cable is arguing against open access, it must be arguing for "closed access." The terms of the engagement were set early, and they were set by cable's competitors.

<sup>298</sup> See *Open Access NOI*, 15 FCC Rcd. at 19,299–300, para. 30.

<sup>299</sup> 47 U.S.C. § 541(c) (2000) ("Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service."); 47 U.S.C. § 544(e) (2000) ("No State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology.").

<sup>300</sup> *AT&T/TCI Transfer Order*, 14 FCC Rcd. at 3206–07, paras. 95–96 (concluding that the merger of AT&T and TCI would pose no additional competitive threats to the last-mile broadband market and that open access mandates were not necessary in light of the fact AT&T did not block access to any site on the Internet through its Internet platform and nothing about the merger was adversely affecting consumers' choice of ISP or their manner of Internet access).

<sup>301</sup> *AT&T/MediaOne Merger Order*, 15 FCC Rcd. at 9867–70, paras. 117–20 (finding that in addition to significant growth in competition from alternative broadband access providers, AT&T voluntarily committed to various principles of "openness" that would enable customer options, including: choice of ISPs, connection speeds, direct access to all content available on the World Wide Web without added charges and the ability to customize a subscriber's "start page").

<sup>302</sup> *IVI Leased Access Order*, 15 FCC Rcd. at 3253, para. 12 (rejecting request by ISP for "leased access" carriage on cable

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system on the ground that ISP's Internet access service did not constitute "video programming" as that term is defined in Title VI).

<sup>303</sup> *1999 Section 706 Report*, 14 FCC Rcd. at 2423, 2449, paras. 48, 101. "We believe it is premature to conclude that there will not be competition in the consumer market for broadband. The preconditions for monopoly appear absent." *Id.* at 2423, para. 48. "[T]he record, while sparse, suggests that multiple methods of increasing bandwidth are or soon will be made available to a broad range of customers. On this basis, we see no reason to [impose cable open access] at this time." *Id.* at 2449, para. 101. See also *2000 Section 706 Report*, 15 FCC Rcd. at 20,917–19, para. 8 (finding that deployment of last-mile facilities to support advanced services is expanding rapidly throughout the country, and rather than mandating open access, the FCC recommended considering "whether to allow access by multiple Internet service providers to cable companies' infrastructure for the delivery of advanced services" under its statutory mandate to take action to accelerate deployment of advanced telecommunications capability to all Americans).

<sup>304</sup> See, e.g., FCC, OPP WORKING PAPER NO. 31, THE FCC AND THE UNREGULATION OF THE INTERNET (authored by Jason Oxman), at 21 (1999), available at [http://www.fcc.gov/Bureaus/OPP/working\\_papers/oppwp31.pdf](http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp31.pdf).

<sup>305</sup> See Barbara Esbin, *Hands Off Policy Works on Open Access*, MULTICHANNEL NEWS, July 26, 1999, at 69, available at <http://www.tvinsite.com/multichannelnews>.

<sup>306</sup> 47 U.S.C. §§ 533(d), 537 (2000). See *Portland I*, 43 F. Supp. 2d 1146; *Portland II*, 216 F.3d 871; *Henrico County I*, 97 F. Supp. 2d 712; *Henrico County II*, 257 F.3d 356 (4th Cir. 2001).

<sup>307</sup> *Broward County*, 124 F. Supp. 2d 685.

franchising authority.<sup>308</sup>

On June 4, 1999, open access proponents received their first significant, if short-lived, legal victory when U.S. District Court Judge Owen Panner upheld Portland, Oregon's, open access franchise transfer condition.<sup>309</sup> In general, Judge Panner accepted the parties' claims that Internet over cable was a Title VI cable service, but rejected AT&T's challenge to municipal authority to impose open access as a franchise condition.<sup>310</sup> The court held that Title VI permits the local franchising authority to review the impact on local cable competition of a franchise transfer, and to order open access to preserve that competition.<sup>311</sup> The court also accepted the city's arguments that cable is an "essential facility," and that cable operators may be required to open their plant to competing ISPs to preserve "cable competition" in the locality.<sup>312</sup>

The 106th Congress also played a role in the open access debate from spring through summer 1999. More than a dozen bills were introduced in the House and Senate, either imposing open access on cable, or relieving the Bell Companies of their interLATA data restrictions, or both.<sup>313</sup>

<sup>308</sup> These ordinances and the legal challenges to their validity are discussed below.

<sup>309</sup> *Portland I*, 43 F. Supp. 2d at 1149.

<sup>310</sup> *Id.* at 1151, 1155.

<sup>311</sup> *Id.* at 1152.

<sup>312</sup> In cable television franchise transfer proceedings, LFAs are permitted to consider the technical, legal and financial qualifications of the proposed franchisee, as well as the impact of a proposed franchise transfer (or transfer of control) on cable competition in the locality. See 47 U.S.C. §§ 533(d), 537 (2000); 47 C.F.R. § 76.502 (2000); *In re Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions, Memorandum Opinion and Order on Reconsideration of the First Report and Order*, 10 FCC Rcd. 4654, 4676-77, para. 52 (1995). The court's specific rulings on AT&T's claims of statutory and constitutional preemption are discussed below.

<sup>313</sup> See, e.g., Internet Freedom and Broadband Deployment Act of 1999, H.R. 2420, 106th Cong. (1999); Consumer and Community Choice of Access Act of 1999, H.R. 2637, 106th Cong. (1999); Internet Growth and Development Act of 1999, H.R. 1685, 106th Cong. (1999); Broadband Internet Regulatory Relief Act of 1999, S. 877, 106th Cong. (1999).

<sup>314</sup> The sole broadband access bill that garnered significant support during the 106th Congress was H.R. 2420 (224 sponsors). Representatives Tauzin and Dingell reintroduced the legislation in the 107th Congress as H.R. 1542. See Internet Freedom and Broadband Deployment Act of 2001, H.R. 1542, 107th Cong. (2001). The main thrust of H.R. 1542 is to de-regulate the broadband data offerings of the Bell Operating Companies, particularly relieving them of the

None of the bills passed either the House or the Senate, however, and their future prospects in the 107th Congress remain uncertain.<sup>314</sup> More recently, movement in the marketplace, the withdrawal of AOL's public support for government intervention, as well as entrenched opposition in the U.S. Senate to re-opening the Telecommunications Act of 1996 all point in the direction of continued heat and light from Capitol Hill rather than the likelihood of new regulatory or deregulatory mandates.

By early 2000, state level attempts to impose open access on cable through legislation had failed in nearly 17 states.<sup>315</sup> Nevertheless, at least two open access proponents, GTE and Bell Atlantic, now "Verizon," vowed to continue to push for cable open access, and have delivered on this promise.<sup>316</sup> For example, in addition to lobbying, Verizon sued cable operator Cox Communications, Inc., in federal district court in California.<sup>317</sup> Verizon's lawsuit seeks both interconnection and unbundled broadband transport services from Cox based on the Ninth Circuit's decision in *Portland II*.<sup>318</sup>

Cable open access emerged as a central issue in

interLATA restrictions contained in sections 271 and 272 of the Act and certain unbundling obligations imposed by the FCC pursuant to section 251 of the Act. See Ted Hearn, *Data Dereg Rises With Sponsor*, MULTICHANNEL NEWS, Jan. 22, 2001, at 1.

<sup>315</sup> *Regulatory Interest in Open Access on Wane*, COMM. DAILY, Mar. 23, 2000, at 5.; See also, e.g., *Minnesota PUC Closes Docket to Probe 'Open-Access' Issue*, TELECOMMS. REPS., Feb. 28, 2000, at 29; *3 More States Abandon Open Access Legislation*, WARREN'S CABLE REG. MONITOR, Feb. 21, 2000, at 2.

<sup>316</sup> *FCC Asked to Allow Cities to Regulate Cable Internet Service*, WARREN'S CABLE REG. MONITOR, Dec. 4, 2000, at 3; *Cable-Modem Inquiry Yields No Consensus on 'Open Access'*, TELECOMMS. REPS., Dec. 4, 2000, at 26-27; *Cable TV Operators List Legal, Technical Hurdles To 'Open Access'*; *ILECs Want 'Regulatory Parity'*, TELECOMMS. REPS., Dec. 11, 2000, at 26-29; COMM. DAILY, May 25, 2000, at 10 (reporting GTE's intention to file a motion for expedited appeal of the *Henrico County I* decision).

<sup>317</sup> *GTE.NET v. Cox Communications, Inc.*, No. 00-CV-2289-J (CGA) (S.D. Calif. filed Nov. 29, 2000) (hereinafter *GTE.NET v. Cox*).

<sup>318</sup> *Id.* In a similar vein, Qwest Communications International, Inc. has threatened both regulatory and judicial action against AT&T's cable television operations in Qwest's fourteen state service area in an attempt to force AT&T to provide "access to the underlying network that provides transport to the end user's home." Steve Caulk, *Qwest Ends Talks with AT&T, Seeks Forced Access to Cable*, DEN. ROCKY MTN. NEWS, available at <http://www.rockymountainnews.com> (Feb. 23, 2001) (quoting Steve Davis, Qwest senior vice president for policy and law).

the Federal Trade Commission's investigation of the merger of AOL and Time Warner, which concluded on December 14, 2000, when AOL Time Warner agreed to enter into a Consent Order requiring that the merged entity make a choice of ISPs available to its subscribers.<sup>319</sup> The FCC's order approving the merging parties' license transfer applications largely echoed, rather than expanded upon, the FTC's open access mandate for AOL Time Warner.<sup>320</sup> Whether the FCC will impose similar requirements on the rest of the cable industry will be determined in the course of its *Open Access Inquiry*.

By late 2000, most of the largest cable MSOs had committed to open their networks to third-party ISPs.<sup>321</sup> In the wake of these developments, the policy debate over open access has largely been resolved in favor of some form of access for third party ISPs and online service providers, with remaining disputes seemingly confined to the means of achieving this goal.<sup>322</sup> Cable operators prefer market-based negotiations, whereas proponents of open access continue to press for government mandates.<sup>323</sup>

Nonetheless, open access proponents waged a fierce campaign to obtain government intervention, particularly at the local franchising level. As a result of their efforts, several court actions concerning the extent of local authority to order open access, and remnants of open access activity before local franchising authorities, a handful of state legislative committees and public utility commissions, the FCC, and the U.S. Congress re-

mained through mid-2001. These legal efforts, predictably, took on a life of their own and moved on a parallel (and far more leisurely) schedule, which was separate and apart from both the policy debate and marketplace developments.

## B. Judicial Decisions Regarding Local Authority to Impose Cable Open Access and the Regulatory Classification Question

Several federal district and circuit courts have ruled upon challenges to local open access ordinances. The Ninth Circuit Court of Appeals overturned Portland, Oregon's municipal "open access" franchise transfer condition in June 2000.<sup>324</sup> In a similar case regarding Henrico County, Virginia, the Fourth Circuit Court of Appeals affirmed the district court's invalidation of an open access franchise transfer condition on federal preemption grounds, while avoiding a determination of the regulatory classification for cable Internet services.<sup>325</sup> In Florida, the federal district court for the Southern District of Florida invalidated a Broward County open access ordinance on First Amendment grounds.<sup>326</sup> In addition, the Eleventh Circuit ruled that cable Internet services are neither cable services nor telecommunications services in the context of a dispute regarding the FCC's pole attachment rules, and the United States Supreme Court granted a petition for certiorari of that decision.<sup>327</sup> Resolution of the open access cases and related proceedings may affect the ultimate outcome of the campaign for govern-

<sup>319</sup> America Online, Inc. and Time Warner Inc., *Consent Order, Decision and Order, Order to Hold Separate*, 2000 F.T.C. LEXIS 170 (2000) (requiring, *inter alia*, AOL Time Warner to allow at least one independent ISP to provide cable modem service in a market before it offers broadband service through affiliated ISP; AOL Time Warner must then reach access agreements with at least two additional independent ISPs within 90 days of AOL Time Warner providing broadband service through its affiliated ISP).

<sup>320</sup> *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee, Memorandum Opinion and Order*, 23 Communications Reg. (P & F) 157, FCC 01-12-2001 FCC Lexis 432 (Jan. 22, 2001).

<sup>321</sup> See, e.g., *Implementing Cable Open Access*, CABLE DATACOM NEWS, Jan. 1, 2001, at 5-6; Comments of the National Cable Television Association, GEN Docket No. 00-185, at 48-50 (filed Dec. 1, 2000) (describing plans of AT&T, AOL and Time Warner to permit multiple ISPs to access cable Internet platform); see also Comments of AT&T, GEN Docket No. 00-185, at 61-66; Comments of Charter Communications, Inc., GEN Docket No. 00-185, at 7-9; Comments of

Comcast Corporation, GEN Docket No. 00-185, at 37-38; Comments of Cox Communications, Inc., GEN Docket No. 00-185, at 25-26.

<sup>322</sup> *AT&T-Mindspring Agreement on Cable Modems Solidifies Resolve of All Sides in Access Debate*, TELECOMMS. REPS., Dec. 13, 1999, at 7 (quoting Robert Pepper, Chief, FCC Office of Plans and Policy, saying: "Everybody agrees with the goal of open networks . . . The question is whether it should be achieved with government regulations or whether the market is going to work it out.").

<sup>323</sup> Compare Comments of Cox Communications, Inc. and Comments of Comcast Corporation, with Comments of Consumers Union, Consumer Federation of America, Center for Media Education and Media Access Project, GEN Docket No. 00-185 (filed Dec. 1, 2000) and Comments of WorldCom, Inc., GEN Docket No. 00-185 (filed Dec. 1, 2000).

<sup>324</sup> *Portland II*, 216 F.3d 871.

<sup>325</sup> *Henrico County I*, 97 F. Supp. 2d 712), *aff'd*, 257 F.3d 356.

<sup>326</sup> *Broward County*, 124 F. Supp. 2d 685.

<sup>327</sup> *Gulf Power II*, 208 F.3d at 1277, *cert. granted*, 121 S.Ct. 879. The Court scheduled oral argument for Oct. 2, 2001.

ment-mandated ISP access that once again is pending before the FCC. Although many of the lower court decisions have been reversed or otherwise superceded on appeal, their persuasive or unpersuasive value remains of interest, particularly in light of the lack of final resolution as to the regulatory status of Internet over cable and the legality of mandated cable open access. If the FCC may be faulted for its reticence in answering the regulatory classification question, several of the federal courts may certainly be faulted in their over-eagerness to jump into that breach and, more importantly, to craft federal broadband policy as a matter of first impression from the appellate bench.

1. *Portland, Oregon—Two Views of Consistency of Local Access Mandates With Title VI*

a. *Portland I—Local Open Access Ordinance Not Preempted Under Title VI Protections for Cable Services*

As noted above, on June 4, 1999, federal District Court Judge Owen Panner ruled that the city of Portland had the legal authority to impose an open access condition on AT&T's provision of the @Home cable Internet service.<sup>328</sup> The court cited section 613 of the Act, which reserves to local authorities the right to reject, and therefore condition, cable franchise transfers that threatened "cable competition."<sup>329</sup> Portland's view that open access was needed because AT&T's plant was an "essential facility" which, unless opened to competing ISPs, would stifle local cable competition, was upheld as a valid basis for the franchise transfer condition.<sup>330</sup>

Because the parties did not contest the issue, Judge Panner accepted without question that cable Internet service could be treated as a Title VI cable service. However, the court rejected each

of AT&T's preemption arguments.<sup>331</sup> The court first observed that "Congress may either explicitly state its intent to preempt state law in the language of a statute or Congress may imply its intent to preempt through the structure and purpose of a statute."<sup>332</sup> Despite the explicit language of section 636(c),<sup>333</sup> however, the court determined that "Congress intended to interfere as little as possible with existing local government authority to regulate cable franchises."<sup>334</sup> The judge found that the Cable Act lacks any clear intent to preempt existing local government authority to regulate cable franchisees.<sup>335</sup> Such preemption must be "unmistakably clear in the statute's wording,"<sup>336</sup> and the court did not find a clear intent to preempt in any of the provisions cited by AT&T.<sup>337</sup> Arguably, the provision cited also supports precisely the opposite conclusion.

The principal issue decided in Portland's favor was the broad determination that Title VI recognizes the power of local authorities to preserve competition for cable services, particularly with respect to changes of ownership and control pursuant to section 613.<sup>338</sup> The judge ruled that the power to deny a transfer includes the lesser power to condition.<sup>339</sup> Judge Panner observed that courts have recognized a city's power to promote competition in the local economy, citing a nineteenth century decision regarding a colonial franchise to construct and operate a bridge over the Charles River in Boston.<sup>340</sup>

Judge Panner rejected AT&T's argument that the city's open access requirement was preempted under section 621(c) due to its treatment of the cable operator as a common carrier. Instead, the district court found that requiring a business to allow its competitors access to an "essential facility"—an antitrust doctrine—does not constitute common carrier regulation.<sup>341</sup>

AT&T's constitutional challenges were summa-

<sup>328</sup> *Portland I*, 43 F. Supp. 2d 1146.

<sup>329</sup> *Id.* at 1152.

<sup>330</sup> *Id.* at 1153.

<sup>331</sup> *Id.* at 1153–54.

<sup>332</sup> *Id.* at 1151 (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

<sup>333</sup> 47 U.S.C. § 556(c) 2000 ("Except as provided in section 637, any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded.").

<sup>334</sup> *Portland I*, 43 F. Supp. 2d at 1151–52 (citing *Dallas v.*

*FCC*, 165 F.3d at 347).

<sup>335</sup> *Id.*

<sup>336</sup> *Id.* at 1152 (internal quotes omitted) (citation omitted).

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> *Id.* (citing *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 547–48 (1837) (holding that the grant of an exclusive franchise to build and operate a bridge does not preclude a local government from constructing another bridge nearby)).

<sup>341</sup> *Id.* at 1153.

rily dismissed. The open access requirement was not found to violate the Contract Clause of U.S. Constitution<sup>342</sup> because local authorities have the power to “prevent an antitrust violation” under their authority to review the “legal qualifications” of the person seeking to hold a franchisee.<sup>343</sup> AT&T’s claim that “forced access” violated its First Amendment rights was rejected with virtually no analysis in light of the court’s view that the requirement was a content-neutral economic regulation that satisfied the Supreme Court’s *O’Brien* test.<sup>344</sup>

Tellingly, Judge Panner stated that in reaching his conclusions, he did not need to consider whether the open access requirement “is good policy.”<sup>345</sup> In flatly rejecting AT&T’s preemption claims and instead finding that the “open access requirement was within the authority of the City and County to protect competition,”<sup>346</sup> Judge Panner effectively authorized a local level of communications antitrust enforcement by the Mt. Hood Cable Regulatory Commission, in addition to that performed by the United States Department of Justice, the Federal Trade Commission and the FCC. The court cited no state law delegation of such sweeping antitrust powers to local governments. Judge Panner’s ruling stretched very far to place regulation of cable Internet services within the scope of the local franchising authority’s cable regulatory jurisdiction.

AT&T appealed the case to the United States Court of Appeals for the Ninth Circuit, and the FCC entered the appeal with an influential *amicus curiae* brief that challenged the parties’ Title VI ar-

guments as being based “on a faulty premise.”<sup>347</sup> The FCC suggested that Internet over cable *might* be classified as a cable service, a telecommunications service, an information service or as an “advanced telecommunications capability” under section 706, but stated that it had not yet decided that issue.<sup>348</sup> The court was asked to rule narrowly, keeping in mind that only the FCC, and not local governments, had regulatory authority over all providers of broadband services, including wireless and satellite carriers.<sup>349</sup>

b. Portland II—Local Open Access Mandate held Inconsistent with Title VI Protections for Telecommunications Services Provided by Cable Operators

Somewhat ironically, although the Ninth Circuit found that the city of Portland was preempted under Title VI from conditioning cable franchise transfers on the transferee’s provision of open access, it did not reach this conclusion under any of the cable service theories AT&T had advocated. Rather, the court determined that the ordinance was inconsistent with section 621(b)(3),<sup>350</sup> which limits the exercise of local cable franchising authority over telecommunications services provided by cable operators. This outcome rests upon the Ninth Circuit’s finding that the provision of Internet service over cable facilities comprises both a “telecommunications service” and an “information service” under the Communications Act.<sup>351</sup>

Like the district court, the Ninth Circuit dis-

<sup>342</sup> U.S. CONST. art. I, § 10, cl.1.

<sup>343</sup> *Portland I*, 43 F. Supp. 2d at 1155. The district court also rejected AT&T’s arguments that the open access condition was barred by the company’s franchise agreement because the “franchise agreements do not limit the factors that the City and County may consider in deciding whether to approve a change in control.” *Id.*

<sup>344</sup> *Id.* at 1154 (citing *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

<sup>345</sup> *Portland I*, 43 F. Supp. 2d at 1151.

<sup>346</sup> *Id.* at 1152.

<sup>347</sup> Amicus Curiae Brief of the FCC, *Portland II*, 216 F.3d 871 (9th Cir. 2000) (No. 99-35609).

<sup>348</sup> The FCC’s brief also attempted to answer the “category” problem by dividing communications service networks into two: “broadcast” or “one-to-many” networks, and “switched” or “one-to-one” networks. Lumping “cable” into the broadcast category, the brief describes the broadcast network as one in which the distributor chooses the content and sends it to all customers. In contrast, telecommunications and information services would fall into the switched cate-

gory, because they allow customers to choose the content and send it to the recipient of choice. Under this view, the brief suggested that cable Internet may be more appropriately characterized as information or telecommunications rather than cable service. The brief stated that the FCC had not yet conclusively resolved the regulatory classification issue, and effectively urged the Court to decide the case “narrowly” and avoiding ruling on the clarification issue. *Id.* at 19, 26, 29.

<sup>349</sup> *Id.* at 29.

<sup>350</sup> 47 U.S.C. § 542(b)(3).

<sup>351</sup> *Portland II*, 216 F.3d at 877–79. Arguably, this portion of the *Portland II* is non-binding dicta. The challenged ordinance was enacted under the city’s cable franchising authority and required open access only insofar as Internet over cable was treated as a Title VI cable service. *Id.* at 873. Once the court determined that it was not a cable service, the question before the court regarding the validity of the open access requirement in the city’s cable franchise transfer ordinance was settled. The remaining portions of the decision may therefore be considered dicta. See *Export Group v. Reef*

claimed that it was ruling on whether "open access" is the correct national *policy* for cable, rather, it was making its ruling on how *existing law* treats what the court described as "cable broadband Internet access."<sup>352</sup> The court continued by observing that cable was one of many providers of broadband Internet access, including wireline telecommunications carriers, fixed wireless and satellite providers, and that the fight over open access was fundamentally "a struggle for control over access to cable broadband technology."<sup>353</sup> It noted that the FCC had declined requests to impose open access conditions on AT&T in the context of its acquisition of TCI. According to the court, the FCC had declined, both in its regulatory capacity and in its capacity as *amicus curiae*, to address the regulatory classification of the cable Internet service.<sup>354</sup> Therefore, the court was not bound to give deference to the administrative agency's statutory construction,<sup>355</sup> and it felt free to arrive at its own conclusions under what it called the "plain language" of the statute.<sup>356</sup>

The Ninth Circuit found that the statutory definition of cable services simply did not fit what AT&T's @Home cable Internet service provides the consumer. According to the Ninth Circuit, cable services under the statute are "one-way," in contrast to Internet access service, which is two-way and highly interactive.<sup>357</sup> The court gave short shrift to the argument that the addition of the phrase "or use" to the pre-existing statutory definition of cable services was sufficient to change the "essence of cable service," which is the "one-way transmission of programming to subscribers generally."<sup>358</sup> Moreover, the court found it inconceivable that Congress intended to apply the "carefully tailored scheme of cable television

regulation to cable broadband Internet access" because that would lead to "absurd results."<sup>359</sup>

Instead, the Court ruled that the @Home cable Internet service is comprised of both a "telecommunications service" and an "information service" component, and that AT&T's provision of the @Home transmission element constitutes the provision of a "telecommunications service."<sup>360</sup> The court correctly noted that the FCC treats ISPs as providing "information services" under the Act.<sup>361</sup> Information services are defined by the Act as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications."<sup>362</sup> As the definition suggests, ISPs generally lease telecommunications service or lines to transport data to their customers; as to the "public," they are not providing telecommunications services, but rather are providing "information services." The court correctly recognized that information services, like the FCC's earlier category of "enhanced services," have never been subject to regulation under the Act.<sup>363</sup> Yet, directly contrary to FCC precedent holding that the elements of an Internet access service may not be "teased" apart and given separate regulatory treatment,<sup>364</sup> the court divided the @Home offering into two elements: a "pipeline" that is cable broadband (as opposed to telephone lines), and what it described as "the Internet service transmitted through that pipeline," and awarded a different legal status to each element.<sup>365</sup>

The Ninth Circuit appears to have been heavily influenced by the way traditional dial-up service is provided by means of a separate telecommunications service (provided by a LEC) and an informa-

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Indus., Inc., 54 F.3d 1466, 1472 (9th Cir. 1995) (concluding that the court's statements not necessary to the decision have no binding or precedential effect).

<sup>352</sup> *Portland II*, 216 F.3d at 876-77.

<sup>353</sup> *Id.* at 873.

<sup>354</sup> *Id.* at 876.

<sup>355</sup> *Id.* (referring to *Chevron USA v. Natural Res. Def. Council*, 467 U.S. 837 (1984)).

<sup>356</sup> *Id.*

<sup>357</sup> *Id.* at 876-77.

<sup>358</sup> *Id.* at 876.

<sup>359</sup> *Id.* at 877.

<sup>360</sup> *Id.* at 877-78.

<sup>361</sup> *Id.* at 877.

<sup>362</sup> 47 U.S.C. § 153(20) (2000).

<sup>363</sup> *Portland II*, 216 F.3d at 878 (citing *Howard v. America Online, Inc.*, 208 F.3d 741, 752-53 (9th Cir. 2000)); 47 C.F.R.

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§ 64.702(a) (2000).

<sup>364</sup> See *Universal Service, Report to Congress*, 13 FCC Rcd. at 11,516-26 (1998); *IVI Leased Access Order*, 15 FCC Rcd. at 3253-54, para. 13.

Internet access service generally consists of numerous distinct and related elements, such as access to personal, educational, informational, and commercial web sites; the ability to send and receive electronic mail; access to streamed video content; Internet video messaging and conferencing; and a host of other services both realized and forthcoming. . . . In contrast, the leased access provisions of the Communications Act require cable operators to reserve channel capacity for one statutorily prescribed purpose—video programming.

*Id.* (footnote omitted) (citing 47 U.S.C. § 522(20)).

<sup>365</sup> *Portland II*, 216 F.3d at 878.

tion service (provided by an ISP). The court found, "unlike [all] other ISPs, @Home controls all of the transmission facilities between its subscribers and the Internet."<sup>366</sup> The court stated that "[t]o the extent @Home is a conventional ISP, its activities are one of an information service. However, to the extent that @Home provides its subscribers Internet transmission over *its* cable broadband facility, *it* is providing a telecommunications service as defined in the Communications Act."<sup>367</sup> The very next sentence switches focus from @Home itself to AT&T, and concludes, "[u]nder this taxonomy, the Communications Act bars Portland from conditioning the franchise transfer upon AT&T's provision of the @Home transmission element that constitutes telecommunications."<sup>368</sup> The court's understanding of what the "it" is in the case of the @Home offering, and "who" is offering "what" is both confused and confusing.

The Ninth Circuit held that Title VI prohibits local franchising authorities from "regulating cable broadband Internet access, because the transmission of Internet service to subscribers over cable broadband facilities is a telecommunications service under the Communications Act."<sup>369</sup> Specifically, the court found that section 621(b)(3) "expresses both an awareness that cable operators could provide telecommunications services, and an intention that those telecommunications services be regulated as such, rather than as cable services."<sup>370</sup> Accordingly, under the terms of section 621(b)(3), a cable operator "need not obtain a franchise to offer cable broadband."<sup>371</sup> Therefore, a city may not impose any requirement that has the "purpose or effect of prohibiting, limiting, restricting or conditioning" the provision of cable broadband, nor may it order the operator to discontinue providing cable broadband or require the operator to provide cable broadband as a franchise transfer condition.

The court ruled that under several provisions of section 621(b)(3), the city, in its capacity as a cable franchising authority, was prohibited from regulating the cable operator's provision of @Home; therefore, the open access condition "is void."<sup>372</sup>

In an effort to bolster its novel analysis, the Ninth Circuit noted that even "[b]eyond the domain of cable-specific regulation, the definition of cable broadband as a telecommunications service coheres with the overall structure of the Communications Act as amended by the Telecommunications Act of 1996, and the FCC's existing regulatory regime."<sup>373</sup> In support, the court cited the definition of "advanced telecommunications capability" under section 706, which the court found to describe cable broadband.<sup>374</sup> Under section 706, advanced telecommunications capability consists of the "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology."<sup>375</sup> Here again, the court departed from FCC precedent that had expressly refrained from ruling that cable Internet service falls within the category of "advanced telecommunications capability" as defined in section 706.<sup>376</sup>

Finally, the Ninth Circuit observed that the FCC thus far has refrained from subjecting cable broadband to any regulation, including common carrier telecommunications regulation, and that the FCC has broad authority to forbear from enforcing telecommunications provisions if it determines that such action is unnecessary to prevent discrimination and protect consumers and consistent with the public interest.<sup>377</sup> The court made a point of stating that "Congress has reposed the details of telecommunications policy in the FCC, and we will not impinge on its authority over these matters."<sup>378</sup> Coming fast upon its re-classification of cable Internet service based solely on ar-

<sup>366</sup> *Id.*

<sup>367</sup> *Id.* (emphasis added).

<sup>368</sup> *Id.* At this point in the analysis, the Ninth Circuit appears to have missed the crucial distinction under the Act between "telecommunications service," which is provided on a common carrier basis, and "telecommunications" which may be provided on either a common or private carrier basis. Compare 47 U.S.C. § 153(46) (2000), with 47 U.S.C. § 153(43) (2000). In other words, the transmission of telecommunications is not always synonymous with the provision of telecommunications service.

<sup>369</sup> *Portland II*, 216 F.3d at 880.

<sup>370</sup> *Id.* at 878.

<sup>371</sup> *Id.* at 878-79.

<sup>372</sup> *Id.* at 879.

<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

<sup>375</sup> 1996 Act, § 706(c)(1), 110 Stat. 56, 153 (codified at 47 U.S.C. § 157 note).

<sup>376</sup> 1999 Section 706 Report, 14 FCC Rcd. 2398, at para. 24.

<sup>377</sup> *Portland II*, 216 F.3d at 879.

<sup>378</sup> *Id.* at 879-80. The *Portland II* decision was not appealed and is final.

guments raised for the first time in appellate briefs, this statement appears somewhat disingenuous. The Ninth Circuit may have left the “details” of telecommunications policy with the FCC, but its breaking new ground to classify cable Internet as a telecommunications service itself carried profound consequences. This is amply demonstrated by Verizon’s post-*Portland II* lawsuit seeking interconnection and unbundled service from cable operator Cox pursuant to Title II.<sup>379</sup> As previously noted, largely in response to the Ninth Circuit’s decision, the FCC has initiated a proceeding to examine the regulatory implications of cable Internet services.<sup>380</sup>

## 2. *Broward County, Florida—Local Open Access Mandate Violates Cable Operators’ First Amendment Rights*

On July 13, 1999, the Board of County Commissioners for Broward County, Florida, approved a broad cable open access ordinance, Ordinance No. 1999-41, unrelated to a particular franchise transfer, that would require all franchisees to open their cable modem platforms to independent ISPs. Despite repeated recommendations from county staff that it not be enacted, the Board’s approval came following an offer from GTE, which drafted and lobbied for the ordinance, to indemnify the county for any attorney’s fees incurred in defending challenges to the lawfulness of the ordinance.<sup>381</sup>

The ordinance compels franchised cable operators to provide ISPs access to “Broadband Internet Access Transport Services” that are “unbundled from the provision of content,” on “rates, terms, and conditions that are at least as favorable as those on which it provides such access to itself, to its affiliate, or to any other person.”<sup>382</sup> Should the cable franchisee become subject “to more extensive or different nondiscriminatory equal access requirements” that are imposed or agreed upon with “any other jurisdiction,” any ISP may, at its option, compel the franchisee to comply with that

obligation in lieu of the Broward County ordinance.<sup>383</sup>

Cable operators in Broward County immediately challenged the ordinance in the United States District Court for the Southern District of Florida. Two separate lawsuits were filed, the first by Comcast and Advanced Cable, and the second by AT&T/TCI and MediaOne. Each generally alleged preemption and related claims similar to those alleged by AT&T in the *Portland* litigation.<sup>384</sup>

Although the district court initially denied the cable operators’ summary judgment motions,<sup>385</sup> following submission of an extensive record, District Judge Donald Middlebrooks subsequently granted the motions and held that the Broward County ordinance “unconstitutionally abridges freedom of speech and the press.”<sup>386</sup> In contrast to the open access preemption cases, Judge Middlebrooks actively assessed the policy implications of the efforts to regulate the Internet’s on-ramps at the local level by reference to both statutory and regulatory sources as well as documented competitive conditions. Without delving into the regulatory classification issue directly, the court invalidated the local ordinance on the ground that it imposed a “significant constraint and economic burden directly on a cable operator’s means and methodology of expression.”<sup>387</sup> The court further found that this constraint was not adequately justified by local officials as likely to combat any demonstrable, as opposed to entirely speculative, set of harms.<sup>388</sup>

The court likened the cable operators’ choice of offering an Internet service through a selected ISP, such as Excite@Home, to the cable operators’ editorial choice of the types of video and other programming content offered through their traditional cable service.

Each selection offers distinctive programming and format. According to the Plaintiffs, their choices were made from an array of opportunities and reflected a choice based upon content. Their choice required them to forgo other programming because of physical limitations of their systems. They plan to market their

<sup>379</sup> *GTE.NET v. Cox*, *supra* note 317, No. 00-CV-2289-J (S.D. Calif. filed Nov. 29, 2000).

<sup>380</sup> *Open Access NOI*, 15 FCC Rcd. 19,287.

<sup>381</sup> *Broward County*, 124 F. Supp. 2d at 686–87 & n.1.

<sup>382</sup> *Broward County*, Fla., Ordinance 1999-41 § 1.02 (July 13, 1999).

<sup>383</sup> *Id.* at § 1.04.

<sup>384</sup> See Linda Haugsted, *Fla. Access Setback Follows Two*

*Wins*, MULTICHANNEL NEWS, available at <http://www.tvinsite.com/multichannelnews> (Feb. 21, 2000) [hereinafter Haugsted].

<sup>385</sup> *Comcast Cablevision of Broward County v. Broward County*, 104 F. Supp. 2d 1365 (S.D. Fla. 2000).

<sup>386</sup> *Broward County*, 124 F. Supp. 2d at 686.

<sup>387</sup> *Id.* at 692.

<sup>388</sup> *Id.* at 697–98.



Internet provider as an integral part of their overall programming. Under their business plan, advertising is sold to create income for their Internet service in addition to payments from their subscribers.<sup>389</sup>

The court rejected Broward County's argument that although cable operators' content may be entitled to First Amendment protection, "the transmission mechanism employed by the cable operator enjoys no First Amendment protection and may be separated out for regulation."<sup>390</sup> In contrast to the type of rationale accepted by Judge Panner in *Portland I*, Judge Middlebrooks rejected the county's defense that its ordinance regulated "only trade practices and not speech," because it was not aimed at the cable operators' own content, but at its "unique facility – the transmission conduit," that the county believed should be shared among competitors.<sup>391</sup> Rather, the court observed, if, to a substantial extent, "the medium is the message," how "can government regulate the technology of expression without also changing its meaning?"<sup>392</sup> Because the cable Internet service is provided by an intertwining of content and technology, the court found that the type of analytical separability engaged in by the county "difficult and perhaps unwise."<sup>393</sup> Judge Middlebrooks analogized cable Internet service providers to publishers of information, citing a number of Supreme Court cases applying the First Amendment to means of distribution and concluded, "[i]n arguing that the conduit or transmission capability of speech can be separated from its content, the County ignores the relationship between the two."<sup>394</sup> As these cases establish, the freedom of press articulated in the constitution is not limited to the traditional print media "but also to delivery of information by means of fiber optics, microprocessors and cable. 'The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.'"<sup>395</sup>

The district court observed that while the Broward ordinance imposed significant constraints and economic burdens on the cable operators' means

of expression, it had no application to wireless, satellite, telephone transmission or other providers of Internet service. The ordinance, therefore, "invidiously impacts a cable operator's ability to participate in the information market . . . [because it] both deprives the cable operator of editorial discretion over its programming and harms its ability to market and finance its service, thereby curtailing the flow of information to the public."<sup>396</sup> Because the Broward County ordinance would only become applicable after a cable operator decided to offer an "Internet information channel," the court found the ordinance and the arguments supporting it:

very similar to the Florida law which led to the Supreme Court's decision in *Miami Herald Pub. Co. v. Tornillo* . . . [and found it] ironic that a technology, which is permitting citizens greater ease of access to channels of communication than has existed at any time throughout history, is being subjected to the same arguments rejected by the Supreme Court in *Tornillo*.<sup>397</sup>

Significantly, the court declined to limit its review to intermediate scrutiny, which the Supreme Court had adopted in *Turner Broadcasting System, Inc. v. FCC*<sup>398</sup> to review the FCC's must-carry regulations. The court found that the reasons given by the Supreme Court for applying intermediate rather than strict scrutiny to the must carry rules did not apply to the case before it once the court made its central finding that cable operators exercise no bottleneck control over Internet access or content.

Cable operators control no bottleneck monopoly over access to the Internet. Today, most customers reach the Internet by telephone. Those who obtain access through cable can use the Internet to reach any Internet information provider. After inquiry, the FCC has concluded that it does not foresee monopoly, or even duopoly in broadband Internet services. . . . The "bottleneck" theory offers no justification for less than heightened scrutiny of the Broward County Ordinance.<sup>399</sup>

The court held that strict scrutiny should be applied to the Broward County ordinance.<sup>400</sup> Intermediate scrutiny, used by the Supreme Court in

<sup>389</sup> *Id.* at 691.

<sup>390</sup> *Id.*

<sup>391</sup> *Id.*

<sup>392</sup> *Id.* at 692.

<sup>393</sup> *Id.*

<sup>394</sup> *Id.*; see *Ex Parte Jackson*, 96 U.S. 727, 733 (1877); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 768 (1988); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938)).

<sup>395</sup> *Broward County*, 124 F. Supp. 2d at 692 (quoting

*Lovell*, 303 U.S. at 452).

<sup>396</sup> *Id.* at 693.

<sup>397</sup> *Id.* at 694 (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 254, 258 (1974)).

<sup>398</sup> *Turner I*, 512 U.S. 622.

<sup>399</sup> *Broward County*, 124 F. Supp. 2d at 696 (citation omitted) (citing *Advanced Services Report*, 14 FCC Rcd. 2398 (1999)).

<sup>400</sup> *Id.* at 697.

*Turner I*, was held to be inapplicable because: (1) unlike the must-carry rules, which applied to all cable operators, the Broward County ordinance applied only to those few providing Internet service;<sup>401</sup> (2) unlike the must-carry rules, differential treatment was unjustified by some special characteristic of the medium such as bottleneck control, which cable operators certainly did not possess over Internet access;<sup>402</sup> and (3) unlike the must-carry rules, which posed no risk of diminishing the free flow of ideas, or of confusing the ideas or messages of the broadcasters with those of the cable operator, the Broward County ordinance would require the adoption of technology to accommodate, in contravention of existing contracts, the demands of thousands of Internet service providers, whose sometimes offensive speech could be mistaken for that of the cable operator. In sum, in the district court's view, the Broward County ordinance, unlike the must-carry rules, threatened to diminish the free flow of information and ideas.<sup>403</sup>

The court also found that the ordinance would fail intermediate scrutiny if that standard were to be applied.<sup>404</sup> The court reasoned that the open access ordinance passed none of the *O'Brien* criteria, relying heavily upon the FCC's own analyses of the competitiveness of the broadband marketplace and the pace of deployment of advanced telecommunications capability. The court rejected the county's asserted justification that open access was necessary to ensure competition and diversity in cable Internet offerings by providing ISPs access to the "essential facility" operated by cable operators as flatly inconsistent with the FCC's findings in both its *Broadband Today Report*

and its *Advanced Services Reports*.<sup>405</sup> In contrast, the court noted that the county had not conducted its own inquiry into the competitiveness of the broadband Internet access market, but had merely asserted that the markets were dysfunctional. In addition, the county had failed to demonstrate that the open access ordinance furthered a substantial government interest. Therefore, the court concluded, even applying content-neutral intermediate scrutiny, the ordinance violated the First Amendment.<sup>406</sup>

### 3. *Henrico County, Virginia—Local Open Access Mandate Is Inconsistent With Title VI Protections for Cable Services and Operators*

In December 1999, several communities imposed open access in connection with the AT&T/MediaOne acquisition, including Henrico County, Virginia, Culver City, Madera County and West Hollywood, California.<sup>407</sup> AT&T and MediaOne filed suit against Henrico County in U.S. District Court in Richmond, Virginia, and against Madera County in U.S. District Court, Eastern District of California, Fresno Division.<sup>408</sup>

#### a. *Henrico County I: Title VI Preempts Local Open Access Ordinance As Inconsistent With Federal Cable Service Regulation*

On May 10, 2000, the United States District Court for the Eastern District of Virginia, Richmond Division, granted AT&T's motion for summary judgment in connection with the company's challenge to the Henrico County open access ordinance.<sup>409</sup> In a strongly worded opinion, Senior

<sup>401</sup> The district court observed, "[t]his ordinance is targeted only at the Plaintiffs, and it is likely to result in the elimination of broadband cable Internet service in unincorporated Broward County. The ordinance was adopted at the behest of a telephone company seeking to eliminate or hamper a competitor." *Id.* at 696.

<sup>402</sup> *Id.*

<sup>403</sup> *Id.* at 697. Subsequently, the county and the cable operators reached an agreement whereby the county would withdraw its appeal of this ruling and repeal the open access ordinance. See Haugsted, *supra* note 384.

<sup>404</sup> *Broward County*, 124 F. Supp. 2d at 697. Under the now familiar test articulated in *United States v. O'Brien*, 391 U.S. 367 (1988), a content-neutral regulation will withstand constitutional scrutiny if: (1) it furthers an important or substantial governmental interest; (2) if the governmental interest is unrelated to the suppression of free expression; and (3) if the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that

interest. *Id.* at 377.

<sup>405</sup> *Broward County*, 124 F. Supp. 2d at 697-98.

<sup>406</sup> *Id.* at 698.

<sup>407</sup> See *The Open Access Saga: A Blow by Blow Account*, MULTICHANNEL NEWS, May 8, 2000.

<sup>408</sup> See *Henrico County I*, 97 F. Supp. 2d 712, *aff'd*, *Henrico County II*, 257 F.3d 356; *MediaOne Group, Inc. v. Madera County, Calif.*, Civ. F.99-6787 (OWW DLB) (E.D. Calif. filed Dec. 21, 1999). The Madera County suit remains pending. Its outcome, however, will be governed by the Ninth Circuit's ruling in the *Portland* litigation that the transmission of Internet over cable is not a Title VI cable service. Because the Madera County complaint was based upon an open access condition imposed by Madera County on the transfer of MediaOne's franchise to AT&T, the district court will be bound by the Ninth Circuit's *Portland* decision and the Madera County transfer condition will be invalidated.

<sup>409</sup> *Henrico County I*, 97 F. Supp. 2d 712.

Judge Richard L. Williams permanently enjoined enforcement of the county's ordinance.<sup>410</sup> The district court found the "Road Runner" Internet service offered by MediaOne to be properly classified as a cable service, and that Title VI as well as Virginia law prohibited local franchising authorities from imposing an open access obligation.

The district court began its preemption analysis by citing three key Communications Act policy directives. The first, contained in the Cable Act, declares that the purpose of Title VI is the establishment of a "national policy concerning cable communications" that would, among other things, "minimize unnecessary regulation that would impose an undue economic burden on cable systems."<sup>411</sup> The second, added by the 1996 Act, declares that "it 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."<sup>412</sup> Finally, the court cited section 636 regarding the preemptive effect of the Communications Act: "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority which is inconsistent with this Act shall be deemed to be preempted and superseded."<sup>413</sup> Consistent with these broad policy directives, the district court cogently held the county's ordinance to be preempted by four separate provisions of Title VI.

First, section 621(b)(3)(D) prohibits a franchising authority from requiring "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."<sup>414</sup> The Henrico ordinance violated this provision by requiring MediaOne to "provide telecommunications facilities," as a condition of franchise transfer approval.<sup>415</sup>

The court found the requirement that MediaOne provide "its cable modem platform" to any requesting ISP "unbundled from the provision of content" (provided by the ISP) would force MediaOne to operate its cable modem platform "to provide transmission between the points selected by requesting ISPs and their customers, without change in content" and thereby would require the provision of a telecommunications facility in violation of the statute.<sup>416</sup>

Second, the ordinance violated section 624(e), which proscribes state or local franchising authority actions that "may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology."<sup>417</sup> Despite the lack of record evidence regarding the precise technology necessary to provide third-party ISP access, the court found the ordinance preempted by section 624(e) because it required MediaOne "to use some kind of multiple access technology and equipment . . . if MediaOne [ ] itself decides to offer Road Runner[,]"<sup>418</sup> thereby bringing the ordinance in conflict with section 624(e).

Third, the open access ordinance violated section 621(c), which provides that "[a]ny cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service."<sup>419</sup> The court found that the MediaOne Internet service, which triggers application of the open access ordinance, is a "cable service" under section 602(6), and is therefore subject to section 621(c).<sup>420</sup> Cable service is defined under Title VI as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming

<sup>410</sup> The *Henrico County I* decision resolved plaintiff's summary judgment motion on federal statutory preemption and Virginia state law claims. The complaint, however, also included First Amendment and Commerce Clause claims. *Id.* at 713.

<sup>411</sup> *Id.* at 714 (quoting 47 U.S.C. §§ 521(1), (6)).

<sup>412</sup> *Id.* (quoting 47 U.S.C. § 230(b)(2)).

<sup>413</sup> *Id.* (quoting 47 U.S.C. § 556(c)).

<sup>414</sup> 47 U.S.C. § 541(b)(3)(D) (2000).

<sup>415</sup> *Henrico County I*, 97 F. Supp. 2d at 714. The Fourth Circuit affirmed primarily on this basis. *Henrico County II*, 257 F.3d at 364, 365 ("Because the open access condition violates § 541(b)(3)(D) of the Communications Act, our analysis may stop at that.").

<sup>416</sup> *Henrico County I*, 97 F. Supp. 2d at 714. The Communications Act contains no specific definition of "telecommunications facility." The district court's reasoning that the ordinance would force MediaOne to operate its cable modem platform to provision transmission from the points selected by requesting ISPs and their customers, without change in content, could also have supported a conclusion that the ordinance ran afoul of the prohibition against the imposition of telecommunications service requirements contained in section 621(b)(3)(D). 47 U.S.C. § 541(b)(3)(D) (2000).

<sup>417</sup> 47 U.S.C. § 544(e) (2000).

<sup>418</sup> *Henrico County I*, 97 F. Supp. 2d at 715.

<sup>419</sup> *Id.* (quoting 47 U.S.C. § 541(c)).

<sup>420</sup> *Id.* at 715.

or other programming service.”<sup>421</sup> The district court reasoned that because the cable operator’s Internet service “contains news, commentary, games, and other proprietary content with which subscribers interact as well as Internet access,” it falls under the statutory definition of “cable service.”<sup>422</sup>

In addition, the district court found that “[w]hile Congress adopted certain narrowly defined requirements that set aside particular numbers of cable system channels for particular kinds of programming, Congress prohibited regulatory bodies from adopting access requirements for any additional types of video programming.”<sup>423</sup> Similarly, Congress enacted section 621(c) to prevent the imposition of additional access requirements and “recognized that the provision would prohibit imposition of ‘the traditional common carrier requirement of servicing all customers indifferently upon request.’”<sup>424</sup> According to the district court, Congress had determined, “the demand of consumers for diverse sources of programming would be best met if ‘a cable company’s owners, not government officials, . . . decide what sorts of programming the company would provide.’”<sup>425</sup>

Open access would violate these precepts by requiring the cable operator to provide indiscriminate access to its facilities by reason of its offering a cable service, namely, cable modem service. The ordinance would therefore render the cable operator “unable to make [an] individualized decision[ regarding] whether to share capacity on its respective cable systems with any one or more ISP[s] and on what terms[,]” as well as depriving the cable operator of editorial control over the content those other ISPs would offer.<sup>426</sup> Accordingly, the district court found the open access ordinance to be “forbidden common carrier regulation” under section 621(c).<sup>427</sup>

Finally, the open access ordinance was found to

violate the section 624(f)(1) ban on any regulatory requirement regarding the provision or content of cable services, except as expressly provided in Title VI.<sup>428</sup> The district court observed that this section prohibits any additional governmental interference with the programming and related decisions of cable operators.<sup>429</sup> Because Henrico County’s open access requirement was “triggered” by the cable operator’s provision of its own Internet service, and would require the operator to transmit the “content” of other ISPs, the court held that “the Ordinance’s imposition of requirements regarding *both* the ‘provision’ and the ‘content’ of cable services” violated section 624(f)(1).<sup>430</sup>

The district court also agreed with the cable operator that the open access ordinance was *ultra vires* and therefore invalid under Virginia law.<sup>431</sup> Virginia law limits the powers of local government to those expressly “granted by statute, and any other power necessarily implied in or incident to the power specifically granted or essential for achieving the purpose of the power delegated” (Dillon’s Rule).<sup>432</sup> Because the Code of Virginia granted local government specific and limited powers with regard to cable television systems, and this authorization did not include the power to require open access, the court held the open access ordinance invalid under state law.<sup>433</sup>

b. *Henrico County II: Title VI Preempts Local Regulation of Cable Operators’ Provision of “Telecommunications Facilities”*

Henrico County and Verizon appealed the *Henrico County I* decision to the United States Court of Appeals for the Fourth Circuit. As it did in the *Portland* litigation, the FCC intervened in the appeal and filed an *amicus curiae* brief.<sup>434</sup> The FCC argued that the Fourth Circuit should uphold the

<sup>421</sup> 47 U.S.C. § 522(6) (2000).

<sup>422</sup> *Henrico County I*, 97 F. Supp. 2d at 715.

<sup>423</sup> *Id.* (footnotes omitted) (citing 47 U.S.C. § 531 (cable channels for public, educational and government use); 47 U.S.C. § 532 (cable channels for leased commercial use); 47 U.S.C. § 534 (carriage of local commercial television signals); 47 U.S.C. § 535 (carriage of noncommercial educational television); 47 U.S.C. § 532(b)(2) (“Any Federal agency, State, or franchising authority may not require any cable system to designate channel capacity for commercial use by unaffiliated persons in excess of the capacity specified [herein].”)).

<sup>424</sup> *Id.* at 715 (quoting H.R. REP. NO. 98-934, at 60 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4697).

<sup>425</sup> *Id.* (quoting *United Video, Inc. v. FCC*, 890 F.2d

1173, 1189 (D.C. Cir. 1989)).

<sup>426</sup> *Id.* at 716.

<sup>427</sup> *Id.*

<sup>428</sup> *Id.* See 47 U.S.C. § 544(f)(1) (2000).

<sup>429</sup> *Henrico County I*, 97 F. Supp. 2d at 716. (citing *Time Warner v. City of New York*, 943 F. Supp. 1357, 1367, 1399 (S.D.N.Y. 1996), *aff’d sub nom.* *Time Warner Cable v. Bloomberg*, 118 F.3d 917 (2d Cir. 1997)).

<sup>430</sup> *Id.* at 716.

<sup>431</sup> *Id.* at 716–17.

<sup>432</sup> *Id.*

<sup>433</sup> *Id.* at 717.

<sup>434</sup> *Amicus Curiae Brief of the FCC, Henrico County II*, 257 F.3d 356.

district court decision based upon the section 621(b)(3)(D) prohibition on local franchising authority requirements regarding a cable operator's provision of telecommunications "services or facilities," and urged the court to avoid reaching the underlying regulatory classification of cable Internet service itself.<sup>435</sup> The FCC indicated its view that the regulation or non-regulation of cable Internet would hinge upon that classification, and that it desired to make such an important decision under its regulatory jurisdiction.<sup>436</sup>

In a decision filed July 11, 2001, the Fourth Circuit essentially complied with the FCC's request and held that Henrico County's open access condition violated section 621(b)(3)(D)<sup>437</sup> of the Communications Act.<sup>438</sup> As noted above, section 621(b)(3)(D) prohibits franchising authorities from requiring "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."<sup>439</sup> In his concurring opinion, Circuit Judge Widener indicated his agreement with the result reached by the majority, but differed as to the analysis of whether state law provided an independent ground for disposition of the matter.<sup>440</sup>

The Fourth Circuit divided its review of the issues into the constitutional question of whether the Communications Act preempts any power the county may have under state law to impose cable open access and the state law question of whether the county has the authority under Virginia law to enact such a requirement. The court stated that to avoid unnecessary decisions on constitutional grounds, it must first consider whether state law provides an independent ground for disposition of the case.<sup>441</sup> The Fourth Circuit concluded that

there was no independent state law ground for disposing of the case "[b]ecause the open access provision is not prohibited by either the Virginia cable statute or by other laws of the Commonwealth."<sup>442</sup>

This reading of Virginia law is directly contrary to the district court's analysis that, in a Dillon's rule state such as Virginia,<sup>443</sup> such statutory authorizations are to be construed narrowly, and in doubtful cases, construed against the local governing body.<sup>444</sup> The district court, finding no express or necessarily implied authorization for local open access ordinances, had little trouble concluding that such ordinances were *ultra vires*. While the *Henrico II* court is correct that nothing in the Virginia code provisions expressly *prohibits* the local imposition of mandatory open access, it is equally true that nothing in the code expressly *permits* such regulation.<sup>445</sup> The majority also determined that the Virginia cable statute did not provide an independent ground for disposition because it contained a provision that prohibits any cable regulation or ordinance that is "inconsistent . . . with federal law,"<sup>446</sup> and the question of whether the county's open access provision was consistent with federal law under that statute was identical to the question presented directly under the Communications Act.<sup>447</sup> In his concurring opinion, Judge Widener noted that in view of this provision, the Court should have rested its decision solely on the fact that the local ordinance is contrary to state law, in deference to the state's obvious attempt to avoid routine constitutional preemption of its statutes.<sup>448</sup> Thus, despite its protestation to the contrary, the court appears to have reached out to decide, rather than avoid, the constitutional question.

Turning to the preemption issue directly, the

<sup>435</sup> *Id.* at 13–15, 18–22.

<sup>436</sup> *Id.* at 21–22.

<sup>437</sup> 47 U.S.C. § 541(b)(3)(D) (2000).

<sup>438</sup> *Henrico County II*, 257 F.3d 356. Shortly after the Fourth Circuit's decision, the Henrico County Board of Supervisors announced that the county would not appeal it. Linda Haugsted, *Henrico Will Not Appeal Decision*, MULTICHANNEL NEWS, July 26, 2001.

<sup>439</sup> 47 U.S.C. § 541(b)(3)(D) (2000).

<sup>440</sup> *Henrico County II*, 257 F.3d 356–66.

<sup>441</sup> *Id.* at 361.

<sup>442</sup> *Id.* at 362.

<sup>443</sup> "Dillon's Rule" provides that local governments hold only those powers granted by statute, which includes any other power "necessarily implied in or incident to the power specifically granted or essential for achieving the purpose of

the power delegated." See *Henrico County I*, 97 F. Supp. 2d at 717.

<sup>444</sup> *Id.* (citing Board of Supervisors of Fairfax County v. Horne, 215 S.E.2d 453, 456 (Va. 1975); City of Richmond v. Confre Club of Richmond, 387 S.E.2d 471, 473 (Va. 1990).

<sup>445</sup> In a Dillon's Rule state, the lack of an affirmative delegation of authority should end the matter. Inasmuch as local authority to impose open access is not necessarily implied in, incident to, or essential for achieving the purposes of the Virginia cable statute, Dillon's Rule would appear to invalidate the Henrico County open access ordinance.

<sup>446</sup> VA. CODE ANN. § 15.2-2108(E) (Michie 1997 & Supp. 2001).

<sup>447</sup> *Henrico County II*, 257 F.3d at 362.

<sup>448</sup> *Id.* at 366 (Widener, C.J., concurring).

Fourth Circuit engaged in an analysis of the cable Internet service highly reminiscent of the Ninth Circuit. The court found:

MediaOne's Road Runner service combines the use of a cable modem platform with access to the Internet. Road Runner's cable modem platform, separated from its Internet service component, is a telecommunications facility because it is a pipeline for telecommunications, that is, for 'the transmission . . . of information of the user's choosing, without change in the form or content.' The open access provision therefore requires MediaOne to provide 'telecommunications . . . facilities . . . as a condition of . . . a transfer of a franchise' in violation of § 541(b)(3)(D).<sup>449</sup>

Here, the court followed the lead of the Ninth Circuit in *Portland II* by separating, for the purposes of analysis, the physical infrastructure from the "Internet service component." Yet, in contrast to the Ninth Circuit, the Fourth Circuit deferred to the FCC and its stated desire to answer the service classification question in its regulatory capacity. Thus, the Fourth Circuit declined to reach any of the other bases adopted by the district court for invalidating the County's open access requirement, including the district court's holding that MediaOne's Road Runner Internet service constituted cable service within the meaning of the Communications Act. The Fourth Circuit expressly declined to reach a determination regarding the proper regulatory classification of Internet access service provided over cable systems; *i.e.*, whether cable Internet service should be deemed to be "cable," "telecommunications" or "information" service under the Communications Act.<sup>450</sup> Instead, the Court accepted, "for the time being," the FCC's invitation to allow the agency to make such a determination in the first instance. The court reasoned that "[b]ecause the open access condition violates § 541(b)(3)(D) . . . our analysis of federal law may stop at that."<sup>451</sup>

With regard to the analysis of section 621(b)(3)(D), the Fourth Circuit's decision appears to differ in a subtle but significant way from that of the district court. The district court held that Henrico County's franchise transfer requirement—namely, that the operator provide non-discriminatory access to multiple ISPs upon request—would essentially convert the cable system

into a telecommunications facility and thereby violate the statute.<sup>452</sup> In contrast, the Fourth Circuit's analysis quoted above may be interpreted to find that the "cable modem platform," *standing alone*, is a telecommunications facility.<sup>453</sup> The court's lack of precision in this piece of analysis further darkens the already murky jurisprudential waters surrounding the provision of Internet over cable.

The Fourth Circuit's reliance on the "telecommunications facility" theory does not, in itself, imply any conclusion about whether cable modem service is a cable service, a telecommunications service or an information service. To reach the conclusion that cable modem service uses a "telecommunications facility," the court considered the transmission element of the cable modem service separately from the content provided to cable modem customers. It determined that "telecommunications facilities" are "the physical installations or infrastructure necessary for transmission" of telecommunications.<sup>454</sup> In that context, the Fourth Circuit concluded that the cable modem platform is a "telecommunications facility" and, therefore, is subject to the limitations of section 621(b)(3)(D).

The decision does not conclude that cable modem services are "telecommunications services," subject to common carrier obligations, but also does not require that these services be treated as either cable services or information services. Nevertheless, the court's statement that the cable modem platform is a telecommunications *facility* could easily be misinterpreted as a finding that the cable modem service is a telecommunications *service*. Although the statutory provisions draw a careful distinction between "telecommunications" and "telecommunications service," and establish that non-telecommunications services can be provided via telecommunications, these distinctions easily are obscured or misunderstood. Moreover, although the court apparently separated the transmission component of cable modem service purely for analytic purposes, rather than deciding that such transmission actu-

<sup>449</sup> *Id.* at 363. (citations omitted).

<sup>450</sup> *Id.* at 365. ("[W]e do not have to reach the question of whether MediaOne's bundled Road Runner service is a cable service, a telecommunications service, or an information service. For the time being, therefore, we are content to leave these issues to the expertise of the FCC.")

<sup>451</sup> *Id.* at 364.

<sup>452</sup> *Henrico County I*, 97 F. Supp. 2d at 714.

<sup>453</sup> *Henrico County II*, 257 F.3d at 363.

<sup>454</sup> *Id.* ("Telecommunications" is the "transmission . . . of information of the user's choosing, without change in the form or content.") (citing 47 U.S.C. § 153(43)).

ally constitutes a separable service,<sup>455</sup> the language of the Fourth Circuit opinion is ambiguous enough to be misunderstood as a determination that the “cable modem platform” is a telecommunications offering independent of cable Internet services such as RoadRunner and @Home. Therefore, while purporting to affirm the district court’s section 621(b)(3)(D) analysis, the court’s confusing references to a “telecommunications facility,” may provide open access proponents with another basis to argue that the provision of cable modem service is a telecommunications service subject to common carrier obligations.<sup>456</sup>

By declining to rule directly on the regulatory classification issue, the *Henrico County II* decision avoided a direct “split in the circuits” between the Fourth and Ninth Circuits regarding the appropriate service classification of Internet over cable and thus decreased the likelihood of direct review by the United States Supreme Court.<sup>457</sup> Although the *Portland*, *Broward County* and *Henrico County* cases differ in their reasoning and approach to the question of the appropriate regulatory classification of Internet services provided over cable systems, in every case, local open access ordinances have been invalidated as contrary to preeminent federal law.

#### 4. *Eleventh Circuit Pole Attachment Order—Internet Services are Neither Telecommunications Nor Cable Services, But Rather Are Information Services*

Yet another federal court of appeals decision, that of the Eleventh Circuit in a pole attachment case,<sup>458</sup> also may have direct bearing on the legal picture surrounding open access in general, and particularly on the authority of localities within the circuit to impose open access as a cable franchising requirement. In *Gulf Power v. FCC*, a group of major electric utilities challenged an FCC order determining, *inter alia*, that the lower “cable only” pole attachment rate pursuant to section 224(d)(3) of the Communications Act would apply to pole attachments used for both cable and Internet services.<sup>459</sup> The FCC had rejected use of the higher “telecommunications” rate for facilities carrying blended cable and Internet services, as well as the utilities’ claim that they could charge an unregulated market rate for such attachments.<sup>460</sup> The FCC concluded that it possessed a broad statutory mandate under section 224(b)(1) to set rates, terms and conditions for “any attachments by a cable television system,” regardless of the particular services provided over such attach-

<sup>455</sup> Such an approach would be similar to that of the Ninth Circuit, which found that cable modem service “consists of two elements: a ‘pipeline’ . . . and the Internet service transmitted through that pipeline. . . . However, to the extent that @Home provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.” *Portland II*, 216 F.3d at 878.

<sup>456</sup> Open access proponents wasted no time in exploiting the ambiguity of the Fourth Circuit’s decision. In commenting on the decision, Thomas J. Tauke, Verizon’s senior vice president-public policy and external affairs, stated the *Henrico County II* decision was important because it “once again suggested that the cable modem is telecommunications equipment. It didn’t say specifically telecommunications services . . . but that was the implication.” Brian Hammond & Lynn Stanton, *Cable TV System Operators Move Forward With Access Deals in Wake of Court Victories*, TELECOMMS. REPS., July 23, 2001, at 8.

<sup>457</sup> The Supreme Court’s January 22, 2001, grant of certiorari petitions in the Eleventh Circuit pole attachment case, discussed *infra*, also has the potential of settling the regulatory classification issue, despite the fact that appellants have specifically asked the Court to rule more narrowly and affirm the FCC’s approach. Meanwhile, in the absence of a definitive ruling from the FCC or the federal courts, local and state jurisdictions continued their attempts to sort through the regulatory classification issues presented by so-called “media

convergence.” For example, the Massachusetts Department of Telecommunications and Energy accepted the cable service classification and ruled that local cable franchising jurisdictions exceeded their authority by enacting open access ordinances in connection with their review of the AT&T/MediaOne cable franchise transfers. *MediaOne of Massachusetts, Inc. v. Board of Selectmen of the Town of North Andover*, Docket No. CTV 99-2, 99-3, 99-4, 99-5 (Mass. Dep’t of Telecomm. and Energy, Cable Television Div. May 1, 2000) (available at <http://www.state.ma.us/dpu/catv/Appeals/sumdecfnl.pdf>). In a radically different approach to the issue of cable open access in the context of a state-level franchise renewal proceeding, the Vermont Public Service Board tentatively concluded that Internet services offered by a cable provider constituted “telecommunications service” under Vermont law. Petitions for renewal of Certificates of Public Good; Motion of Vermont Department of Public Service, Docket Nos. 6101, 6223, *Opinion and Order* (Vt. Pub. Serv. Bd. Apr. 28, 2000), available at <http://www.state.vt.us/psb/orders/document/61016223finalorder.pdf>.

<sup>458</sup> *Gulf Power II*, 208 F.3d 1263, cert. granted, 121 S. Ct. 879.

<sup>459</sup> See *In re Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission’s Rules and Policies Governing Pole Attachments, Report and Order*, 13 FCC Rcd. 6777, 6793–96, paras. 30–35 (1998) [hereinafter *1998 Pole Order*].

<sup>460</sup> *Id.*

ments.<sup>461</sup>

The Eleventh Circuit overturned the FCC order, in part, and concluded that Internet services could not be considered either Title VI cable services under the amended definition of cable services or telecommunications services under relevant FCC precedent.<sup>462</sup> According to the majority, therefore, the FCC was without jurisdiction over pole attachments for facilities used in providing cable Internet services.<sup>463</sup> Over a vigorous dissent, the majority dismissed the FCC's argument that its broad jurisdiction over "any attachments" permitted it to assess the lower "cable only" rate for Internet over cable.<sup>464</sup> The court read the statute as requiring regulated rates for attachments used to provide either cable or telecommunications services, and nothing more.<sup>465</sup> The court also rejected the argument that addition of the statutory language "or use" to the preexisting definition of cable services could cover Internet services.<sup>466</sup> The court noted the FCC's previous finding that "Internet service providers themselves provide information services."<sup>467</sup> The Eleventh Circuit therefore concluded "the FCC lacks statutory authority to regulate the Internet under the 1996 Act based on the theory that Internet service is a cable service."<sup>468</sup> Finally, the court noted the FCC's finding that "the Internet is not a telecommunications service" under the 1996 Act.<sup>469</sup> Accordingly, the Eleventh Circuit concluded, "there is no statutory basis for the FCC to regulate the Internet as a telecommunications service under the 1996 Act."<sup>470</sup>

The Eleventh Circuit's *Gulf Power II* decision exemplifies how courts can be led astray by a combination of silence from the expert agency charged with interpreting federal law and an analysis that reads the relevant statute in a vacuum divorced from its underlying policies. The court's first error was a factual one; namely, the inaccurate observation that the FCC had interpreted the 1996 Act "to require that utility companies give Internet providers access to their poles because the

Internet was a cable service."<sup>471</sup> This factual error may have led to the court's dubious conclusion that "the FCC lacks statutory authority to regulate the Internet under the 1996 Act based on the theory that Internet service is a cable service."<sup>472</sup> The FCC never has adopted such a theory. In fact, the FCC has studiously avoided determining the regulatory category for "Internet service" and certainly has never stated that "the Internet was a cable service," as the court asserted. Indeed, in the *1998 Pole Order* cited by the court as support for this assertion, the FCC specifically determined that it "need not decide . . . the precise category into which Internet services fit. Such a decision is not necessary in order to determine the pole attachment rate applicable to cable television systems using pole attachments to provide traditional cable services and Internet services."<sup>473</sup>

Although the FCC avoided making a determination regarding the classification of cable Internet service, it also avoided the Eleventh Circuit's error of analyzing the text of the statute without considering its purpose. The FCC's analysis in the *1998 Pole Order* integrated the congressional purpose underlying the Pole Attachment Act:

The purpose of the amendments to Section 224 made by the 1996 Act was similar to the purpose behind Section 224 when it was first enacted in 1978, i.e., to remedy the inequitable position between pole owners and those seeking pole attachments. The nature of this relationship is not altered when the cable operator seeks to provide additional service. Thus, it would make little sense to conclude that a cable operator should lose its rights under Section 224 by commingling Internet and traditional cable services. Indeed, to accept contentions that cable operators expanding their services to include Internet access no longer are entitled to the benefits of Section 224 would penalize cable entities that choose to expand their services in a way that will contribute 'to promot[ing] competition in every sector of the communications industry,' as Congress intended in the 1996 Act.<sup>474</sup>

In contrast, the Eleventh Circuit based its analysis on what it called "the unambiguous language

<sup>461</sup> *Id.* at 6795-96, para. 34.

<sup>462</sup> *Gulf Power II*, 208 F.3d at 1276-77.

<sup>463</sup> *Id.* at 1276.

<sup>464</sup> *Id.* at 1273, 1275-76.

<sup>465</sup> *Id.* at 1276.

<sup>466</sup> *Id.* at 1276-77.

<sup>467</sup> *Id.* at 1277 (quoting *Universal Service Report to Congress*, 13 FCC Rcd. at 11,501, 11,532-33, para. 66).

<sup>468</sup> *Id.*

<sup>469</sup> *Id.* (citing *1998 Pole Order*, 13 FCC Rcd. at 6795, para.

33; *In re Federal-State Joint Board on Universal Service, Recommended Decision*, 12 FCC Rcd. 87, 123, para. 69 (1996)).

<sup>470</sup> *Id.*

<sup>471</sup> *Id.* at 1269 (citing *1998 Pole Order*, 13 FCC Rcd. at 6795-96).

<sup>472</sup> *Id.* at 1277.

<sup>473</sup> *1998 Pole Order*, 13 FCC Rcd. at 6795, para. 34.

<sup>474</sup> *Id.* at 6794, para. 31 (quoting *1996 Act* preamble) (footnotes citing legislative histories of the Pole Attachment Act and the 1996 Act omitted).



of the 1996 Act<sup>475</sup> without considering the Act's purpose.

The 1996 Act calls for the Commission to establish two rates for pole attachments. One, described in section 224(d) applies to 'any pole attachment by a cable television system solely to provide cable service.' . . . The second rate applies to 'charges for pole attachments used by telecommunications carriers to provide telecommunications services.' For the FCC to be able to regulate the rent for an attachment that provides Internet service then, Internet service must qualify as either a cable service or a telecommunications service.<sup>476</sup>

In addition to ignoring the congressional policies underlying section 224, the Eleventh Circuit's analysis fails to give effect to Congress's mandate that the FCC "shall regulate the rates, terms, and conditions for pole attachments,"<sup>477</sup> which Congress defined as "any attachment by a cable television system or provider of telecommunications services."<sup>478</sup> As Judge Carnes observed in dissent, "the adjective 'any' is not ambiguous; it has a well-established meaning. . . . that is, 'one or some indiscriminately of whatever kind.' . . . Applying that definition to sections 224(a)(4) and (b)(1), the FCC has the authority to regulate *all* attachments . . . [including] those attachments used to provide . . . Internet services."<sup>479</sup> The directive in subsection 224(d)(3) to apply certain rates to "any pole attachment used by a cable television system solely to provide cable service,"<sup>480</sup> therefore does not preclude the FCC from regulating other pole attachments as the Eleventh Circuit concluded.<sup>481</sup> In contrast to the Eleventh Circuit's focus on the nature of the services provided<sup>482</sup> rather than the nature of the attaching entity and the nature of the existing pole use specified in section 224(a), the FCC observed that:

[t]he definition of 'pole attachment' does not turn on what type of service the attachment is used to provide.

Rather, a 'pole attachment' is defined to include any attachment by a 'cable television system.' Thus, the rates, terms and conditions for all pole attachments by a cable television system are subject to the Pole Attachment Act.<sup>483</sup>

Having made the questionable finding that the nature of the service provided—rather than the service provider—determined whether a pole attachment was subject to the statute, the Eleventh Circuit majority also rejected the argument that Congress's addition of the words "or use" to the statutory definition of cable services under section 602(6)<sup>484</sup> was intended to encompass Internet services when those services were provided over cable television system facilities.<sup>485</sup> Although the court acknowledged the FCC's determination that "Internet service providers themselves provide information services[,] "<sup>486</sup> it selectively quoted from the legislative history of the 1996 Act to support the conclusion "that Congress expanded the definition to include services that cable television companies offer to their customers to allow them to interact with traditional video programming services."<sup>487</sup> As noted earlier, the 1996 Conference Report actually stated that:

[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*. This amendment is not intended . . . to cause dial-up access to information services over telephone lines to be classified as a cable service.<sup>488</sup>

Based upon congressional intent as expressed in the legislative history of the 1996 Act, if Internet service is an information service, as the court appeared to acknowledge, its conclusion that Congress *did not* intend such services to constitute cable service when provided by a cable operator over a cable television system is erroneous.

<sup>475</sup> *Gulf Power II*, 208 F.3d at 1276.

<sup>476</sup> *Id.* (footnote and citations omitted) (quoting 47 U.S.C. §§ 224(d)(3), 224(e)(1)).

<sup>477</sup> 47 U.S.C. § 224(b)(1) (2000).

<sup>478</sup> 47 U.S.C. § 224(a)(4) (2000) (emphasis added).

<sup>479</sup> *Gulf Power II*, 208 F.3d at 1280 (Carnes, J., concurring in part and dissenting in part) (internal quotations and citations omitted) (emphasis in original).

<sup>480</sup> 47 U.S.C. § 224(d)(3) (2000).

<sup>481</sup> To the extent that section 224(d)(3) could reasonably be interpreted as narrowing the scope of sections 224(b)(1) and 224(a)(4), the statute is susceptible to two different meanings and is ambiguous by definition. Pursuant to the now familiar *Chevron* analysis, therefore, the Eleventh Circuit should have deferred to the FCC's interpretation of the statute. "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *Iowa Util. Bd.*, 525 U.S. at 397 (citing *Chev-*

*ron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984)).

<sup>482</sup> *Gulf Power II*, 208 F.3d at 1274 (stating that the statute "by negative implication does not give the FCC authority over attachments to poles for *wireless* communications." (footnote omitted) (emphasis in original)); "The 1996 Act allows the Commission to regulate the rates for cable *service* and telecommunications *service*; Internet *service* in neither." *Id.* at 1276 (emphasis added).

<sup>483</sup> *1998 Pole Order*, 13 FCC Rcd. at 6793–94, para. 30.

<sup>484</sup> 47 U.S.C. § 522(6) (2000).

<sup>485</sup> *Gulf Power II*, 208 F.3d at 1276–77.

<sup>486</sup> *Id.* at 1277 (quoting *Universal Service Report to Congress*, 13 FCC Rcd. at 11,532–33, para. 66).

<sup>487</sup> *Id.* (footnote omitted).

<sup>488</sup> *1996 Conf. Report* at 169, reprinted in 1996 U.S.C.C.A.N. at 182.

If upheld on appeal, the practical effect of the Eleventh Circuit's decision would be the removal from federal regulation of any pole attachment used to provide Internet services in addition to traditional cable television or telecommunications services. If applied in the context of open access, the court's conclusion that Internet service is not a cable service also would prohibit local franchising authorities within the states comprising the Eleventh Circuit from requiring open access as a cable franchise condition. On May 26, 2000, the FCC and others petitioned the Eleventh Circuit for rehearing, arguing that the ruling "attributes to Congress an inexplicable intent to *penalize* cable companies for providing high-speed Internet access."<sup>489</sup> The FCC asserted, *inter alia*, that the court need not have reached out to address a "controversial issue with enormous implications beyond this case: whether a cable company's provision of Internet access is properly characterized as a 'cable service,' a telecommunications service," or an 'information service.'"<sup>490</sup> Although it is "central to the 'open access' debate," the FCC stated that it has taken no position on that issue to date.<sup>491</sup> The Eleventh Circuit denied rehearing,<sup>492</sup> but stayed the issuance of its mandate pending resolution of petitions for certiorari to the Supreme Court. On January 22, 2001, the United States Supreme Court granted the petitions for certiorari filed by the FCC and the National Cable and Telecommunications Association ("NCTA").<sup>493</sup> This action raises the prospect of the Supreme Court supplying "controlling legal authority" on the question of the appropriate regulatory classification of Internet over cable, despite the requests of the appellants that the pole attachment rate issue be decided in accordance with the FCC's original decision.

<sup>489</sup> Petition by Respondents for Panel Rehearing and Suggestion for Rehearing *En Banc* at 2, *Gulf Power II*, 208 F.3d at 1263 (No. 98-6222) (emphasis in original).

<sup>490</sup> The FCC argued that the panel erroneously concluded that a cable attachment receives statutory protection only if it is used to provide services falling within one of the two "rate boxes" described in sections 224(d) and 224(e) of the Act. According to the FCC, the Pole Attachment Act covers all attachments of cable television systems, regardless of the services provided over those attachments, and grants the FCC discretion to extend the lower "cable only" pole rate to cable attachments used for mixed cable and Internet services. *Id.* at 7-11 & n.1.

<sup>491</sup> *Id.* (citing *In re* Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Tele-

## 5. Summary

One practical consequence of the FCC's "hands off" approach to cable open access has been the resulting lack of "controlling legal authority" on the question of the appropriate regulatory classification for the cable Internet service. The FCC, of course, cannot expect to benefit from the important doctrine of *Chevron* deference without first providing the courts a statutory interpretation to which they may comfortably defer.<sup>494</sup> The FCC repeatedly declined to address the classification question, citing the lack of need to answer the question in the context of particular proceedings before it.<sup>495</sup> Courts that have been asked to address this question either directly or indirectly have found the cable Internet issue to be somewhat of an "attractive nuisance." The Ninth Circuit used silence from the expert administrative agency as a springboard to reach its conclusions about the nature of the service and how it ought to be regulated. As discussed above, the determination that AT&T's @Home service was not a cable service within the meaning of the Communications Act was sufficient to resolve the controversy before the court; therefore, its conclusions regarding other regulatory classifications of cable Internet service were wholly unnecessary to the decision and may be considered dicta.<sup>496</sup> Nonetheless, the court's ruling on the regulatory classification question has had far reaching consequences specifically for cable operators and local governments within the Ninth Circuit, and for national regulatory policy generally. The Eleventh Circuit simply proceeded to make its own determination on the question, in the context of nationwide rules establishing the rates for cable and telecommunications pole attachments. If the Elev-

communications Act of 1996, *Third Report and Order in CC Docket No. 98-147*, *Fourth Report and Order in CC Docket No. 96-98*, 14 FCC Rcd. 20,912, 20,941-42, para. 59 (1999)).

<sup>492</sup> *Gulf Power Co. v. FCC*, 226 F.3d 1220 (11th Cir. 2000).

<sup>493</sup> *Gulf Power II*, 121 S. Ct. 879.

<sup>494</sup> See *Chevron*, 467 U.S. at 842-43 (both courts and administrative agencies "must give effect to the unambiguously expressed intent of Congress"; however, where a statute is silent or ambiguous, courts will defer to an agency's reasonable construction of the statute).

<sup>495</sup> See, e.g., *AT&T/MediaOne Merger Order*, 15 FCC Rcd. at 9872, para. 126; *AT&T/TCI Transfer Order*, 14 FCC Rcd. at 3191, para. 60.

<sup>496</sup> See *supra* note 351; *Reef Indus. Inc.*, 54 F.3d at 1472.

enth Circuit's ruling is left standing, cable operators deploying advanced Internet services will face unregulated rates for their pole attachments, and the FCC's regulatory authority will be diminished. The Fourth Circuit recognized the absence of guidance to date from the expert agency as a reason *not* to decide the service classification issue, but even here appears to have reached out to decide more than it needed to resolve the dispute. Similarly, the issue continues to be examined by several state utility commissions with varying results. Moreover, the consequences of statutory service classification are not confined to the area of substantive service regulation alone. Significant franchise fee and tax consequences may flow from categorization of plant as either "telecommunications" or "cable."<sup>497</sup> Resolution of difficult regulatory policy questions such as the appropriate regulatory status of cable Internet services should be left to the agency created by Congress to make such decisions as a matter of its primary jurisdiction. But in order to expect deference from the courts in such matters, the FCC must carefully protect its jurisdiction in the first instance by fully explaining the bases for its policy choices and, where necessary, supplying timely, authoritative interpretative guidance for the statute it is charged to administer. The ambiguities of the Communications Act and particularly the Telecommunications Act of 1996, are legion<sup>498</sup> and the need for administrative policy and interpretative guidance has been nowhere more clearly demonstrated than by the cable open access litigation.

## V. THE FCC'S OPEN ACCESS INQUIRY

As stated above, in view of its recognition of the widespread confusion regarding the regulatory

status of Internet services provided over cable, as well as the controversial issues raised regarding the need to establish a national policy with respect to "open" or "forced" access to the cable Internet platform, the FCC initiated a Notice of Inquiry on September 28, 2000.<sup>499</sup> The stated purpose of the *Open Access NOI* was to gather information regarding, among other things, the appropriate regulatory classification for Internet services provided over facilities originally constructed for the delivery of cable television signals.<sup>500</sup> The *Open Access NOI* remains a "Pandora's Box" of possible regulatory consequences for an array of communications service providers, including broadcasters, competitive local exchange carriers, wireless service providers and entities using unlicensed spectrum technologies. Although the focus is primarily on the issue of third-party access to the cable Internet platform, the *Open Access NOI* also sends the unmistakable message that the FCC could adopt an approach that would fundamentally alter the provision of Internet services by all industry sectors.

The *Open Access NOI* acknowledges that the FCC's approach has been one of regulatory restraint with respect to cable's high-speed Internet services<sup>501</sup> and asks whether it should continue its existing "hands off" policy.<sup>502</sup> Among the many unanswered questions is whether FCC policy should encourage facilities-based competition among a variety of vertically integrated networks, or impose common carrier-like requirements on each infrastructure provider, regardless of the media or technology used.<sup>503</sup> The relevant legal and policy issues are explored through the approximately 180 questions posed regarding the regulatory framework for cable, information, telecommunications and advanced services, the status of access to cable's infrastructure, whether access

<sup>497</sup> See, e.g., Reply Comments of the California Cable Television Association, GEN Docket No. 00-185, 11-16 (filed Jan. 10, 2001) ("[T]he regulatory classification issues at stake in the NOI have a real impact on cable operators' taxes and fees"; *Portland II* holding may also trigger provision of the California Internet Tax Freedom Act, which bars imposition of franchise fees on cable modem services if the services are considered telecommunications services as well as a "utility user" tax that applies in the City of Los Angeles to telecommunications but not cable services; California law subjects regulated telephone companies to assessment by the State Board of Equalization whereas cable companies are subject to local assessment under a different set of rules); see also Internet Tax Freedom Act, Pub. L. No. 105-277, tit. 11, 112 Stat. 2681-719 (1998). In addition, under federal tax law,

cable plant and telecommunications plant are subject to different depreciation schedules and related tax treatment.

<sup>498</sup> See *Iowa Util. Bd.*, 525 U.S. at 397.

It would be a gross understatement to say that the [1996 Act] is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction. That is most unfortunate for a piece of legislation that profoundly affects a crucial segment of the economy worth tens of billions of dollars.

*Id.*

<sup>499</sup> *Open Access NOI*, 15 FCC Rcd. 19,287.

<sup>500</sup> *Id.* at 19,293, para. 14.

<sup>501</sup> *Id.* at 19,288-89, para. 4.

<sup>502</sup> *Id.* at 19,288-89, 19,301, paras. 4, 35.

<sup>503</sup> *Id.* at 19,305, paras. 44-46.

should be mandated, and what that mandate would specifically entail.<sup>504</sup>

The FCC's underlying concept appears to be similar to the Ninth Circuit's approach in *Portland II*; namely, that cable Internet service might be comprised of two distinct elements or components—an unregulated information service element and a telecommunications or transport element—and that these separate components potentially could be treated differently for regulatory purposes. If the FCC departs from its own precedent and takes this approach, two key questions will emerge. The first is whether the FCC is willing to permit the “telecommunications” component of the cable Internet service to be provided on a “private carriage” basis (as it arguably is today) or will insist on imposing “common carrier” obligations on the cable or other network operator, including the obligation to serve all ISPs indiscriminately and on non-discriminatory rates, terms and conditions of service. The second is whether this approach will be confined to the cable Internet service and platform, or will be applied to other facilities-based providers of Internet connectivity or transmissions.<sup>505</sup> Applying open access only to the cable Internet service would raise issues of fundamental fairness, while the imposition of common carrier obligations on every communications distribution technology would call for a wholesale revamping of the existing regulatory framework, with significant effects on existing businesses.

The first portion of the *Open Access NOI* sought comment on the appropriate regulatory classification for Internet over cable, including whether it should be treated under the Communications Act as a Title VI cable service, a Title II telecommunications service, a Title I (unregulated) information service, a section 706 “advanced telecommunications capability” or as a yet undefined, new category.<sup>506</sup> The FCC also sought comment on

how it should treat services that may fall into more than one category.<sup>507</sup>

The second portion is devoted to issues surrounding the implementation of mandatory open access, including: (a) how the FCC should define open access; (b) whether it is a desirable policy goal and, if so, what would be appropriate means of achieving that objective (*i.e.*, the present market-based approach or regulatory intervention); (c) whether a uniform framework should apply to all providers of high-speed services; and (d) an examination of the technical and operational issues associated with open access.<sup>508</sup>

The *Open Access NOI* observed that most open access proposals entail two broad elements that would provide unaffiliated ISPs with the right to (1) purchase transmission capability and (2) access the customer directly through the incumbent cable operator's facilities.<sup>509</sup> These obligations appear to be simply variants of the traditional common carrier requirements of just, reasonable and non-discriminatory rates, terms and conditions of service.<sup>510</sup> Significantly, the FCC sought comment on how the imposition of any of the foregoing open access paradigms on cable networks would affect other providers of high-speed services, such as those that use wireless, satellite, broadcast and unlicensed spectrum technologies.<sup>511</sup> Like cable operators, currently none of these providers is prohibited from having an exclusive relationship with a particular ISP.<sup>512</sup> The adoption of any of the open access models discussed in the *Open Access NOI* for cable and other providers of high-speed Internet services would undermine many existing and planned business models based upon the exclusive and bundled provision of Internet content and transmission over any medium.

For the last two years, the FCC has repeatedly declined calls to regulate cable Internet services in light of its findings that market conditions have shown increasing levels of facilities-based competi-

<sup>504</sup> *Id.* at 19,293–308, paras. 14–56.

<sup>505</sup> For example, the American Automobile Association (“AAA”) filed reply Comments in which AAA seeks the imposition of open access requirements on the Telematics industry so that drivers will have a choice among service providers in their cars. Telematics integrates conventional wireless technology, high-speed mobile connections to the Internet, global positioning systems and other technology to produce devices capable of providing safety to drivers. Today, automobile manufacturers are entering into exclusive contractual arrangements with wireless and other communications service providers to provide telematics features in their automobiles.

AAA fears that, without government intervention, drivers will be forced to change automobiles in order to change service providers. Reply Comments of the AAA, GEN Docket No. 00-185, at 12 (filed Jan. 10, 2001).

<sup>506</sup> *Open Access NOI*, 15 FCC Rcd. at 19,296–98, paras. 22–24.

<sup>507</sup> *Id.* at 19,297, para. 23.

<sup>508</sup> *Id.* at 19,300–06, paras. 32–49.

<sup>509</sup> *Id.* at 19,298, para. 27.

<sup>510</sup> See, e.g., 47 U.S.C. §§ 201, 202 (2000).

<sup>511</sup> *Open Access NOI*, 15 FCC Rcd. at 19,305, para. 44.

<sup>512</sup> *Id.* at 19,299, para. 29.

tion in "last mile" markets for broadband Internet access. The final section of the *Open Access NOI* addressed the FCC's options: continuation of its current "hands off" approach, initiation of a rulemaking proceeding, and/or exercise of its forbearance authority under the Act with respect to telecommunications carriers or services.<sup>513</sup>

Specifically, the FCC questioned whether market conditions warrant forbearance from regulating Internet over cable.<sup>514</sup> In recognition of telephone company calls for "regulatory parity" between the high-speed cable Internet service and their DSL offerings, the FCC asked whether those same market conditions should result in forbearance under section 10 of the Communications Act from current regulatory requirements imposed on telecommunications carriers' provision of high-speed access services.<sup>515</sup> Section 10 permits the FCC to forbear from applying any regulation or provision of the Act "to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services."<sup>516</sup> There is no comparable broad statutory forbearance authority for Title VI cable services.<sup>517</sup>

Without endorsing this outcome, the authors note that an FCC desiring to preserve its regulatory jurisdiction has much to gain from classifying the Internet transmission services of any facilities-based carrier as telecommunications services, including:

- The ability of the FCC to exert jurisdiction over a vast array of providers that it does not now regulate for this purpose, while at the

same time reducing the scope of local government authority;

- The ability to assess universal service fund contribution requirements, to apply requirements that networks be designed to accommodate access for persons with disabilities, and to impose the telecommunications service subscriber privacy rules;
- The ability to utilize its Section 10 forbearance authority, should the record reveal a marketplace solution for open access has emerged and taken hold;
- A cleaner answer to the question of the appropriate regulated pole attachment rate for cable lines carrying Internet traffic; and
- A defined set of service and interconnection obligations under both the Act and FCC rules that would require only pruning and fine-tuning if applied to the architecturally distinct features of the cable modem platform.

Conversely, the FCC appears to have little to gain from classifying the transmission component of Internet over cable as a Title VI cable service, *unless* it desires to keep its "hands off" posture as a permanent policy mandate. As the *Open Access NOI* acknowledged, cable operators are not legally prohibited from having an exclusive agreement with the ISP of their choice.<sup>518</sup> Title VI precludes the imposition of common carrier regulation on cable operators insofar as they are providing cable services.<sup>519</sup> And, no other provision of Title VI readily accommodates mandatory carriage for third-party ISPs.<sup>520</sup> If Internet over cable is a cable

<sup>513</sup> *Id.* at 19,306–08, paras. 50–56.

<sup>514</sup> *Id.* at 19,307–08, paras. 53–56.

<sup>515</sup> *Id.* at 19,296–97, para. 22.

<sup>516</sup> 47 U.S.C. § 160(a) (2000).

<sup>517</sup> See Esbin, *supra* note 1, at 117.

To reconcile the conflicting directives of placing cable Internet services under a Title VI regulatory regime, and yet preserving the unregulated nature of the Internet, the Commission may need additional, express Title VI forbearance authority. If it had such authority, the Commission could then fully effectuate congressional intent with respect to cable Internet services by combining such targeted regulatory actions as it finds are necessary to promote infrastructure development and competition, with equally targeted regulatory 'forbearance' where application of the full panoply of regulation would slow infrastructure development or competition.

*Id.*

At the FCC's regularly scheduled February 22, 2001, Open Agenda meeting, the then Chief of the FCC's Cable Services

Bureau, Deborah Lathen, raised the possibility of a need for Title VI forbearance authority to provide a "safe harbor" for providers of new services that do not fit easily within traditional regulatory classifications. *Cable Bureau Suggests Regulatory Forbearance for New Services*, COMM. DAILY, Feb. 23, 2001.

<sup>518</sup> *Open Access NOI*, 15 FCC Rcd. at 19,299, para. 29.

<sup>519</sup> 47 U.S.C. § 541(c) (2000).

<sup>520</sup> Congress required cable operators to set aside limited channel capacity for particular kinds of programming. 47 U.S.C. § 531 (2000) (public, educational, and governmental channels); 47 U.S.C. § 532 (2000) (leased commercial access); 47 U.S.C. §§ 534–35 (2000) (mandatory carriage of certain commercial and educational broadcasters). Congress, however, specifically prohibited "[a]ny Federal agency, State, or franchising authority [from requiring] any cable system to designate channel capacity for commercial use by unaffiliated persons in excess of the capacity specified in [title VI]." 47 U.S.C. § 532(b)(2) (2000). See also *Henrico County I*, 97 F. Supp. 2d at 715; *IVI Leased Access Order*, 15 FCC Rcd. 3247.

service, neither the FCC, states nor cities may impose open access mandates.<sup>521</sup> Cable service providers do not contribute to the universal service fund on the basis of their cable service revenues, nor are their networks subject to disabilities access requirements. These may be among the reasons why the Kennard FCC did not appear to favor the "cable service" classification.<sup>522</sup> In addition, the cable classification leaves the FCC in the difficult posture of explaining why the transmission of Internet communications over local phone networks is treated differently than cable-provided transmissions when many, including most incumbent LECs, argue that in a digital world, "bits are bits."

The other category that could easily apply to the cable Internet service is the information service category. The legislative history accompanying passage of the 1996 Act explicitly states that the purpose of adding the words "or use" to definition of cable services was 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*."<sup>523</sup> Thus, Congress intended to bring information services provided by cable operators over cable systems under the Title VI framework. This result is desirable because such a classification simultaneously secures Title VI treatment for advanced cable Internet services provided on a commingled basis with traditional cable television offerings, while leaving the manner in which cable operators provide their Internet services free from unnecessary common carrier regulation. Indeed, all cable services can be considered a specialized form of "information service"—there is no conflict because both cate-

gories were created to wall-off from common carrier regulation these specialized forms of "programming" or content services.<sup>524</sup>

Moreover, cable Internet service fits the statutory definition of information services very well. Like other Internet services, cable Internet service offers end users "[the] capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."<sup>525</sup> The FCC already has ruled that Internet service providers provide Internet access, e-mail, web-hosting and a variety of related applications that fall under the information service category of Title I.<sup>526</sup>

One open question is whether the FCC will make explicit that this classification applies to facilities-based information service providers as well as non-facilities-based value-added networks. Some parties filing comments in response to the *Open Access NOI* argued that the FCC's prior rulings on this issue extend only to non-facilities-based ISPs who purchase or lease use of the underlying telecommunications facilities from telecommunications providers.<sup>527</sup>

Another open question relates back to the telecommunications category: whether the FCC would treat the "via telecommunications" component of the cable-provided information service as a form of private (as opposed to common) carriage. Finally, it remains to be seen how the FCC will respond to the arguments of incumbent LECs who maintain that extending the information service classification to Internet over cable raise serious questions regarding an alleged "lack of regulatory parity" between the local telephone company-provided and cable-provided Internet services, in much the same way the Title VI classi-

<sup>521</sup> Compare *Henrico County I*, 97 F. Supp. 2d 712, with *Portland I*, 43 F. Supp. 2d 1146. See 47 U.S.C. § 541(c) (2000).

<sup>522</sup> Amicus Curiae Brief of the FCC at 19–20, *Portland II*, 216 F.3d 871 (No. 99-35609); Amicus Curiae Brief of the FCC at 14, 16–18, *Henrico County II*, 257 F.3d 356 (Nos. 00-1680(L), 00-1709, 00-1719).

<sup>523</sup> 1996 *Conf. Report*, at 169, reprinted in 1996 U.S.C. C.A.N. 10, 182 (emphasis added). Esbin, *supra* note 1, at 94–99 (analyzing intent of this change). But see Comstock & Butler, *supra* note 56; Duffy, *supra* note 56 (disputing theory).

<sup>524</sup> Esbin, *supra* note 1, at 51–52 (information service and cable service share common origin in that neither may be regulated as a common carrier offering); see also FCC, OPP WORKING PAPER NO. 24, THROUGH THE LOOKING GLASS: INTEGRATED BROADBAND NETWORKS, REGULATORY POLICY AND INSTITUTIONAL CHANGE (authored by Robert M. Pepper), at

25 (1998) ("[I]t seems reasonable to assume that cable television is an 'information service' under terms of the decree." [i.e., the antitrust consent decree directing the break-up of the unified Bell system, from which the 1996 Act derived its definition of 'information services' in 47 U.S.C. § 153(20)]).

<sup>525</sup> 47 U.S.C. § 153(20) (2000).

<sup>526</sup> *Universal Service Report to Congress*, 13 FCC Rcd. 11,501; *In re Access Charge Reform, First Report and Order*, 12 FCC Rcd. 15,982 (1997), *aff'd sub nom.* *Southwestern Bell v. FCC*, 153 F.3d 523 (8th Cir. 1998); *In re Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 21,905 (1996).

<sup>527</sup> Reply Comments of Earthlink, Inc., GEN Docket No. 00-185, at 50 (filed Jan. 10, 2001) (quoting *Universal Service Report to Congress*, 13 FCC Rcd. at 11,534 n.138).

fication would.<sup>528</sup>

An FCC dedicated to maintaining the “vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation” as mandated by section 230 of the Act,<sup>529</sup> might choose the information service classification for all providers of Internet services because that would ensure a deregulatory outcome for all industry segments.<sup>530</sup> The FCC would retain its “ancillary” jurisdiction under Title I to intervene if future market failure endangered its ability to carry out specific regulatory mandates arising under Title II, III or VI of the Act.<sup>531</sup>

## VI. CONCLUSION

The sometimes difficult policy issues surrounding communications companies’ use of the public rights-of-way for their equipment and facilities pale in comparison to the thorny, nearly intractable category and policy issues arising from the provision of cable Internet service. The plethora of commentary and administrative and judicial writing on these issues demonstrates only one thing with certainty: there are no clear answers under the law today. Only clear-sighted policy choices can rescue us from this bewildering morass of finely crafted, but never entirely satisfactory, statutory definitions and consequences intended for the services of the past, not the future.<sup>532</sup>

These policy choices may be guided by the policy principles that Congress has already established through the Communications Act. The purpose of the Act and the FCC itself, from the outset, has been to achieve:

a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at

reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication.<sup>533</sup>

The addition of the Cable Act in 1984 was for the purpose of achieving similar goals; namely, among other things, to:

- (1) establish a national policy concerning cable communications;
- (2) establish franchise procedures and standards which encourage the growth and development of cable systems . . . ;
- (3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;
- (4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public; and . . .
- (6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.<sup>534</sup>

The 1996 Act similarly calls for the provision of “a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and service to all Americans by opening all telecommunications markets to competition.”<sup>535</sup>

Section 253 of the Communications Act explicitly mandates the removal of state and local legal and regulatory barriers to entry, not the erection of whole new local regulatory regimes for telecommunications carriers.<sup>536</sup> Section 621(c) prohibits the imposition of common carrier regulation on cable services.<sup>537</sup> Section 230 explicitly calls for the continued forbearance from regulation for the Internet and interactive computer ser-

<sup>528</sup> Comments of the United States Telecom Association, GEN Docket No. 00-185, at 9-13 (filed Dec. 1, 2000).

<sup>529</sup> 47 U.S.C. § 230(b)(2) (2000).

<sup>530</sup> In fact, SBC and BellSouth argue precisely this in their *Open Access NOI* Comments and Reply Comments. They propose that all broadband facilities-based information services be given unregulated Title I “information service” classifications, regardless of the identity of the provider. Comments of SBC Communications Inc. and BellSouth Corporation, GEN Docket No. 00-185, at ii (filed Dec. 1, 2000). In other words, regulatory parity would effectively deregulate the Bell Companies’ advanced service offerings.

<sup>531</sup> See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-78 (1968) (recognizing FCC’s authority over cable television systems to the extent “reasonably ancillary to the

effective performance of the Commission’s various responsibilities for the regulation of television broadcasting”).

<sup>532</sup> Esbin, *supra* note 1, at 118 (“It is increasingly likely that the above-mentioned regulatory categories [cable, telecommunications service, information service, advanced telecommunications capability] painstakingly established over many years to further particular policy goals must necessarily collapse of their own weight in the digital communications world of tomorrow.”).

<sup>533</sup> 47 U.S.C. § 151 (2000).

<sup>534</sup> 47 U.S.C. § 521 (2000).

<sup>535</sup> 1996 *Conf. Report*, at 113, reprinted in 1996 U.S.C. C.A.N. 10, 124.

<sup>536</sup> 47 U.S.C. § 253 (2000).

<sup>537</sup> 47 U.S.C. § 541(c) (2000).

vices.<sup>538</sup> Section 10 mandates forbearance from telecommunications regulation where specified public interest tests are met and, specifically in the case of sections 251(c) and 27, only when these provisions are “fully implemented.”<sup>539</sup> Section 706 directs the FCC and the state commissions to encourage the deployment of advanced telecommunications capabilities through various de-regulatory means, including forbearance, price cap regulation, measures that promote competition “or other regulatory methods that remove barriers to infrastructure investment.”<sup>540</sup>

Given these overarching, federal de-regulatory policy mandates, even assuming *arguendo* that individual municipalities retained regulatory authority over cable Internet services, they should exercise their discretion to refrain from regulation. Imposing additional regulation on cable Internet services would contravene long-standing and frequently reiterated policy principles by: (1) discouraging investment in advanced communications facilities and services, thereby delaying their deployment; (2) increasing transaction costs for communications providers, thereby increasing consumer prices; and (3) causing an unstable and unpredictable regulatory environment, thereby impeding competitive entry for new communications providers.

In the case of a single platform providing multiple services, differing and potentially inconsistent levels of regulation may apply to the various services and to the platform itself. Regulatory regimes may be harmonized by keeping paramount the overall policy objective of increasing the number of communications “pipes” in the so-called “last mile” and thereby increasing competition and consumer choice while restraining prices. This may mean the imposition of a single franchise to use the public rights-of-way for a single system, regardless of the number of communications services or capabilities that platform may provide.

Local policies that require redundant authori-

zations to utilize the public rights-of-way will delay and may undermine facilities-based competition, and are more likely to be found inconsistent with federal law than those that attempt creative solutions to rights-of-way management challenges. Ironically, municipal support for increased regulation of Internet services provided by cable television systems will likely result in retarding the expansion of services provided by cable systems, which historically has been a long sought-after goal of local franchising authorities.

Ultimately, mandated carriage on cable networks, no matter how it is labeled, or by whom it is imposed, would raise First Amendment concerns no less significant than those raised by the statutory “must-carry” requirements, as the *Broward County* court recognized.<sup>541</sup> Cable operators are recognized First Amendment speakers.<sup>542</sup> In the case of analog must-carry, the preservation of free over-the-air television broadcast stations was found to be a sufficiently compelling government interest by a bare majority of the Supreme Court.<sup>543</sup> At least one court has found that there is no equally compelling government interest to be found in ensuring mandatory carriage for ISPs, many of whom provide nothing more than basic Internet connectivity without content.<sup>544</sup> To the extent ISPs compete with cable operators as content providers, it is unclear why their speech should be accorded preferential carriage rights over the cable operator’s own chosen speech or content.<sup>545</sup>

Additional constitutional concerns arise under the Fifth Amendment’s Takings Clause.<sup>546</sup> Cable operators, like other non-common carriers, attract investments in the capital markets on a set of expectations about their businesses, many of which would be defeated by the imposition of after-the-fact common carrier regulation that effectively takes and physically occupies significant portions of the operator’s facilities for third-party use without the consent or permission of the property owner.<sup>547</sup> Should policymakers conclude that they

<sup>538</sup> 47 U.S.C. § 230 (2000).

<sup>539</sup> 47 U.S.C. § 160 (2000).

<sup>540</sup> 47 U.S.C. § 157 note (2000).

<sup>541</sup> *Broward County*, 124 F. Supp. 2d at 697.

<sup>542</sup> See *Turner I*, 512 U.S. at 622; *Leathers*, 499 U.S. at 444; *Preferred Communications*, 476 U.S. 488, 494 (1986); *Century Communications*, 835 F.2d 292 (D.C. Cir. 1987); *Quincy Cable TV*, 768 F.2d 1434, cert. denied sub nom. 476 U.S. 1169; *Broward County*, 124 F. Supp. 2d at 685.

<sup>543</sup> *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 185–86

(1997) [hereinafter *Turner II*].

<sup>544</sup> *Broward County*, 124 F. Supp. 2d at 696–97.

<sup>545</sup> Raymond Shih Ray Ku, *Open Internet Access and Freedom of Speech: A First Amendment Catch-22*, 75 TUL. L. REV. 87, 125 (2000).

<sup>546</sup> U.S. CONST. amend. V.

<sup>547</sup> See generally *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982) (a permanent physical occupation of property is always a taking); *Chicago, R.I. & P.R. Co. v. United States*, 248 U.S. 80, 96 (1931) (passage of



must intervene in the vibrant Internet markets and impose access regulation on a variety of information superhighway technologies, they may find that unanticipated constitutional roadblocks ulti-

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title is not necessary to effect a taking); *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) (occupation can take

mately bar their way. In the final analysis, constitutional questions may be avoided through the prudent and sparing exercise of regulatory authority by all levels of government.

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the form of an easement; appropriation of navigation right is a taking).

