

# Mandatory open access to cable systems for internet access providers

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Cable subscribers access broadband internet service largely through proprietary services such as AT&T's @Home and Time Warner's Roadrunner, or by services that enter into agreements with the cable companies. Competitive internet service providers have been apparently offered uneconomic terms for connections to the cable customers using the cable system. Some local authorities have imposed open access requirements, others have declined to do so. «Open access» requires a cable operator to allow competing internet service providers to access the broadband network on nondiscriminatory terms.

## The AT&T vs. Portland litigation

The long distance service provider AT&T Corp. has acquired Tele-Communications, Inc. (TCI), a nationwide cable service operator. AT&T owns a proprietary internet network and internet access service, @Home, which connects cable subscribers to the internet. Once an agreement is established with the cable operator, individual customers can connect a cable modem to the television and access the internet through the television set. Signals are transmitted by the @Home service to the «headend» or transmission source for broadband internet services. @Home becomes the exclusive provider of internet services for that cable operator in that region. If competing internet access providers wish to provide their customers with access to the broadband service, they must subscribe to the @Home access service - that is - pay retail rates for access service. This access fee, which is not the same as the terms offered to cable operators, makes internet service providers' use of the service economically impossible.

In the AT&T litigation, the local cable franchising authorities, the City of Port-

land (Oregon) and Multnomah County, imposed an open access requirement on AT&T as a condition of approval of transfer of TCI's local cable licenses. AT&T rejected the open access condition. The City and County then rejected AT&T's request for transfer of the licenses. AT&T filed for declaratory judgment in the District Court for the District of Oregon.

The District Court of the District of Oregon has found that the local authorities may impose mandatory access requirements as a condition for transfer of a cable license if necessary to promote competition. It held that the local regulators retained authority to protect local competition under the Cable Act. The court rejected AT&T's argument that the open access conditions regulate its cable activities as common carrier activities. A common carrier offers transmission or carriage services to all members of the public or all members of a category of potential customers. The Court correctly stated that requiring a business to allow access to an essential facility does not create a common carrier. And the court notes, correctly, that offering content has traditionally not been categorized as common carriage.

## The FCC's point of view

From the Federal Communications Commission's (FCC) point of view, internet access and internet services are broadband services under Section 706 of the Telecommunications Act. The regulatory policy required by Section 706 of the Act is non-regulation. The FCC supports that policy on the strength of the growth of number of users, revenues made by business-to-business activity on the internet (\$300 billion), the jobs created (1.2 million), and the contribution of the communications industry to the sustained national prosperity (electronic commerce,

**Zusammenfassung:**  
Abonnenten von Kabelnetzen haben zum grossen Teil Zugang zu Breitband-Internet über proprietäre Angebote wie AT&T's «@Home» und Time Warner's «Roadrunner» oder über Angebote mit entsprechenden Vereinbarungen mit Kabelnetzbetreibern. Von konkurrenzierenden Internet-Anbietern jedoch wurden erhöhte Preise für den Zugang ihrer Kunden zum Kabelnetz verlangt. Lokale Regulierungsbehörden sowie -ansatzweise - die FCC erwägen nun den Kabelnetzbetreibern einen «offenen Zugang auf nicht-diskriminierende Weise» für alle Internet-Anbieter aufzuzwingen.

**Résumé:** *Les abonnés des réseaux câblés ont en grande partie un accès rapide à Internet par l'intermédiaire d'offres propriétaires comme «@Home» de AT&T et «Roadrunner» de Time Warner ou d'offres comportant des arrangements spéciaux avec les câblo-opérateurs. A cause d'une concurrence accrue, un prix excessivement élevé est demandé pour l'accès aux réseaux câblés. Les autorités de régulation locales, comme d'ailleurs la FCC, considèrent maintenant qu'il faut obliger les câblo-opérateurs à accorder aux donneurs d'accès un véritable «accès libre et non-discriminatoire».*

which will be 90 percent business-to-business, is projected to be a trillion-dollar activity in the next three to five years). The FCC Chairman indicates that the internet is linked to one-third of the U.S.'s real economic growth. He adds that because costs are decreasing in these sectors and in the internet, the internet also has helped reduce the rate of inflation by one-third. All of these successful results have occurred without regulation. On the basis of this information, and in the context of Section 706, the FCC's Chairman has affirmed repeatedly the determination not to regulate internet access or services. The FCC then will not be a likely source of support for open access.

### Implementation of unbundling requirements

One argument that the Oregon federal court encountered is that AT&T/TCI should be regulated as a telecommunications service provider in the context of providing internet access. The issue was not squarely before the Court, but is worthy of consideration. It is interesting to note a trend in the telecommunications area against mandating access to the networks of Incumbent Local Exchange Carriers (ILECs). «Unbundling» is the process of isolating «network elements»-distinct services and equipment - into discrete, individually priced units. It is required by the 1996 Act, and implemented by the FCC. These units are then to be made available to competitors on a non-discriminatory basis. The implementation of the unbundling requirements had been hotly contested by the ILECs, who favored less unbundling, and the Competitive Local Exchange Carriers, who favored more unbundling.

The FCC had issued detailed regulations to force the unbundling of additional network elements to be offered to ILECs. The Supreme Court ultimately sustained challenges to the unbundling requirements, and threw out the FCC's regulations. Subsequent regulations were substantially less demanding. The burden of proof shifted to the carrier requesting and unbundled service to satisfy several tests of need, unavailability, and that the requested element is not proprietary to

the ILEC. The regulatory trend in the telecommunications area has been against opening access.

### The Market

So far, there have been no challenges to the cable operators' ability to control internet access by selecting exclusive providers with privileges to connect to the head end. Instead, large companies have tried to consolidate their means of access. AT&T provides local, long distance and wireless service and claims to be the largest provider of internet access service. It also owns and controls networks for all of these services. It owns an interest in Cablevision, and recently acquired Tele-Communications, Inc., (TCI), the largest nation-wide cable operator. And Time Warner has merged with AOL, which will result in the combination of the largest or second largest cable system with another company that claims to serve the largest number of internet customers.

### An Assessment

The FCC hinted that the Cable Act would permit it to mandate open access if it were necessary to promote or preserve competition. While the competitive market may yield competing technologies in the future, the issue is whether the current technology should be accessible to competitors. The FCC hesitates to act because it finds that the absence of regulation has stimulated competition. Others may fear situations, such as unbundling, in which the laxity of regulation led to greater expansion on the part of the larger, more entrenched dominant carriers. The cable industry enjoyed monopoly status for a long time, supported by the FCC and local governments. During this protected period the cable companies were able to build their initial networks, consolidate, invest in other businesses, and grow to their current dominance. The infrastructures that were developed are as much a part of the public domain as are the infrastructures of the ILECs. And, in the interest in preserving and strengthening the existing infrastructure, the cable systems should be required to provide open access to all competitors. ■