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## Cable Operators May Be Moving Towards Open Access Despite FCC's Refusal to Order Them To Do So

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In our [February 4, 2000 Internet Alert](#), we reported on the intensifying battle between cable operators, Internet service providers (“ISPs”) and local regulators for the provision of cable modem service to the millions of American businesses and consumers demanding high speed Internet access. At the time, several major cable providers had entered into strategic or exclusive relationships with ISPs for such services, or decided to provide the services themselves. These cable providers had come under fire from consumer groups, other ISPs and especially municipalities and local governments for not offering “open access” to competing ISPs to provide cable modem services.

“Open access” advocates supported the imposition (most notably by municipalities in connection with their cable franchising authority) of requirements on cable operators to allow non-affiliated ISPs to lease their cable lines and provide competing service. They argued that opening up the “last mile” of cable that runs directly into the consumer’s home or business would foster competition and lower prices.

By March 2002, however, the [recent ruling](#) of the Federal Communications Commission (“FCC”) regarding the proper regulation of cable modem services, as well as the earlier outcome of litigation pursued by cable operators against municipalities, seems to have settled the debate in favor of

the cable operators and against the efforts of local regulators and competing ISPs to impose “open access” requirements.

In 1999, AT&T, one of the largest cable operators, challenged the authority of the City of Portland and Multnomah County in Oregon to enforce “open access” requirements as a condition to AT&T’s obtaining local cable franchises and transfers of licenses. In June 2000, the [Ninth Circuit Court of Appeals decided the case](#) in favor of AT&T. The FCC had declined at that time (both in its regulatory capacity and as amicus curiae in the case) to state its view on the statutory interpretation of the Communications Act of 1934 with respect to cable modem services and access to the Internet.

Accordingly, the Ninth Circuit proceeded to interpret the relevant statutes and found that cable modem and broadband services were not “cable services” as defined in the Communications Act, and thus could not be regulated by local governments or municipalities. Therefore, Portland and Multnomah County could not impose a condition that AT&T, as a franchisee, provide non-discriminatory or “open access” to its cable modem platform to competing ISPs. The Ninth Circuit further held that such cable broadband services were “telecommunications services” under the Communications Act and were therefore directly subject to federal regulation by the FCC and not local authorities. Although the FCC had not imposed any regulations on cable broadband services, the Ninth Circuit left it to the FCC to address this issue through the exercise of its authority over telecommunications policy.

On March 14, 2002, the FCC, in a 3-to-1 [Declaratory Ruling](#) (with one Commissioner dissenting), concluded that cable Internet services should be classified as “information services” and regulated as interstate communications under the FCC’s regulatory authority. This ruling effectively forecloses any regulation of cable modem services by local authorities and the ability of local authorities to require cable operators to provide “open access” for cable modem services to competing ISPs. While

the FCC acknowledged the Ninth Circuit's decision in [City of Portland](#), it also concluded that cable Internet services were not "telecommunications services" and therefore not subject to the stricter regulations applicable to common carriers that provide traditional wireline services and facilities. In its ruling, the FCC also began outlining its view of a national policy for the regulation of cable Internet services. It stated that its overarching policy is "to encourage the ubiquitous availability of broadband to all Americans" by seeking first to remove barriers to developing the necessary infrastructure and encouraging those companies that were prepared to make such investments with "a minimal regulatory environment that promotes investment and innovation in a competitive market." While this is the first step, the FCC is also interested in establishing what it views as a "comprehensive and consistent national broadband policy." As part of this policy, the FCC highlighted that its analytical approach towards the classification of cable modem services was one that it believed in the future may apply "over multiple technologies and network architectures, including wireline, cable, terrestrial wireless and satellite."

Notwithstanding what appears to be an initial move away from strict regulation of cable modem services, how the FCC will further exercise its regulatory authority over cable modem services has not been completely decided. In the [Notice of Proposed Rulemaking](#) portion of its decision, the FCC stated that in light of certain developments in the marketplace, it would consider whether the FCC should regulate cable modem services in the future to impose a multiple ISP or "open access" requirement on cable operators. Apparently, despite initial recalcitrance, certain companies were offering multiple ISPs to customers, and the FCC took note of this development. For example, as a condition to its [approval of the merger between Time Warner and America Online](#), the FTC required AOL Time Warner Inc. to provide non-discriminatory access to competing ISPs, which AOL Time Warner Inc. agreed to and has been implementing. AOL Time

Warner Inc. stated that the FCC's decision would not affect its merger and that it would continue to offer cable modem services using both affiliated and unaffiliated ISPs. Interestingly, since the [City of Portland](#) decision, AT&T has also been one of the first cable operators to conduct technical trials regarding the provision of cable modem services by multiple ISPs. Although AT&T and Excite @Home were among the first cable providers and ISPs to develop an exclusive relationship, in December 2001, as a result of the bankruptcy of Excite@Home, contracts between AT&T and Excite were terminated and AT&T began providing ISP services on its own. On March 12, 2002, AT&T announced an agreement with EarthLink for the provision of high-speed cable Internet service but continues to consider multiple ISP options. Many other cable operators are also conducting technical trials to determine how cable modem service can be offered using multiple ISPs and are entering into negotiations with several ISPs to prepare for such service. These trials involve reviewing technical, operational and financial issues, such as implementation of routing techniques to accommodate multiple ISPs, as well as quality of service, compensation, billing and customer service issues. The FCC noted that cable operators face many technical and business challenges in a multiple ISP environment.

Accordingly, the FCC is currently seeking public comment on whether it should exercise its regulatory authority to impose a multiple ISP access requirement and requested that commenters refresh the FCC's record on current developments in the marketplace and various models of multiple ISP access. In addition, the FCC is seeking further public comment to clarify the authority of state and local governments with respect to cable modem services, as it recognizes that such services are provided over cable systems occupying public rights of way in local communities that are subject to such local regulatory authority.