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**Placing the Internet in a Box:  
Some Implications of Regulatory Classification of Cyberspace**

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## Table Of Contents

	<u>Page</u>
<b>I. The Practical Consequences of Telecommunications Regulation .....</b>	<b>3</b>
A. The Statutory Framework: “Telecommunications” Versus “Information Services” .....	3
B. Regulation of Telecommunications.....	4
<b>II. The FCC’s 1998 Report to Congress .....</b>	<b>8</b>
A. The FCC’s Conclusions.....	8
B. Issues Sidestepped or Ignored by the FCC .....	10
<b>III. Trend in Recent Decisions To Treat More Internet Activities As “Telecommunications” .....</b>	<b>13</b>
A. The Cable Open Access Debate And The Portland Decision.....	14
B. The Reciprocal Compensation Debate .....	21
C. Decisions In Cases Involving Mergers, Acquisitions, And Similar Transactions .....	27
<b>IV. Broader Implications Of The Classification Of Internet Services.....</b>	<b>29</b>
A. Regulation Of Content .....	29
B. Electronic Surveillance.....	33
<b>V. Conclusion.....</b>	<b>35</b>

## Introduction

Politicians and regulators have voiced a commitment to keeping the Internet free of traditional regulation. “No regulation of the Internet!” is a frequently heard rallying—cry. But the reality is that certain aspects of the Internet are already subject to telecommunications regulation, and all indications are that the extent of such regulation is likely to increase in the future. Most Internet traffic currently travels over traditional phone lines, thus implicating telecommunications regulation. In addition, various Internet applications duplicate or replace particular telecommunications services. For example, Internet applications like e—mail can be used as a substitute for telecommunications services like fax transmissions. More significantly, the Internet increasingly is being used to provide telephone services such as the rapidly growing Voice Over Internet Protocol (“VOIP”) services directed to retail consumers, and Internet—based technologies are transforming the “backbone” of telecommunications networks of traditional local and long distance telephone companies. These and other developments make it more and more likely that some forms of telecommunications regulation may be applied to the Internet. However, the full implications of such regulatory treatment are far from obvious and may have far—reaching effects.

This article explores some of these implications. First, it discusses the practical consequences of telecommunications regulation, if and when it is imposed on components of the Internet. Second, the article analyzes the FCC’s 1998 Report to Congress, the Commission’s most comprehensive statement to date regarding the application of telecommunications regulation to the Internet, paying special attention to what the FCC did not address. Third, the article examines trends in decisions of the FCC, other administrative

agencies, and the courts, and what they might mean for Internet regulation in a broader context. In particular, the article discusses the implications of (a) the reciprocal compensation debate, (b) the high—speed cable Internet “open access” debate, and (c) decisions of the FCC and other agencies on recent cases involving mergers and similar transactions, (d) cases recognizing the First Amendment editorial prerogatives of Internet Service Providers (“ISPs”) as contrasted with common carriers, and (e) U.S. law requiring telecommunications providers — but not “information service” providers — to modify their networks to facilitate electronic surveillance..

## **I. THE PRACTICAL CONSEQUENCES OF TELECOMMUNICATIONS REGULATION**

What does telecommunications regulation involve, as a practical matter? In discussing whether Internet services will be regulated as “telecommunications,” rather than left unregulated as “information services,” we first consider the statutory definitions of these terms. Then we address the practical consequences of the “telecommunications” classification.

### **A. THE STATUTORY FRAMEWORK: “TELECOMMUNICATIONS” VERSUS “INFORMATION SERVICES”**

As part of the Telecommunications Act of 1996 (“1996 Act”)<sup>1</sup> amending the Communications Act of 1934 (“Act”),

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<sup>1</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 *et seq.*

Congress added definitions of the terms “telecommunications” and “information service.”<sup>2</sup>

Specifically, the 1996 Act defines “telecommunications” as “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 or received.”<sup>3</sup> By contrast, “information service” is defined as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications. . . .”<sup>4</sup> Thus, potentially regulated “telecommunications” consists of transmitting data from place to place. Unregulated “information service” consists of providing information or the ability to store or interact with information over telecommunications facilities.

## **B. REGULATION OF TELECOMMUNICATIONS**

Some policymakers who have foresworn telecommunications regulation of the Internet apparently believe (or assume) that telecommunications regulation necessarily involves the type of comprehensive regulation of market entry, rates, and service terms and conditions that was traditionally applied to monopoly local telephone companies. But in fact, such regulation has never been applied to the Internet and no one is seriously considering applying it. Rather, classification of particular Internet activities as

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<sup>2</sup> These new definitions basically track the pre-existing distinctions of “basic services” and “enhanced services,” respectively, that the FCC had adopted in its 1980 *Computer II* decision. *Amendment of Section 64.702 of the Commission’s Rules and Regulations*, 77 FCC 2d 384 (1980), *recon.*, 84 FCC 2d 50 (1980), *further recon.*, 88 FCC 2d 512 (1981), *aff’d sub nom. Computer and Communications Industry Ass’n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

<sup>3</sup> 47 U.S.C. § 153(47).

<sup>4</sup> 47 U.S.C. § 153(20).

“telecommunications” would affect the provider of those services in the following ways:

(a) ***Requirements To Pay Certain Regulatory Fees, Taxes, And Surcharges.*** Unlike information service providers, providers of “telecommunications” are required to pay regulatory fees to the FCC, and to assess and remit telecommunications taxes to federal and state taxing authorities. Telecommunications providers are also required to make so-called “contributions” — *i.e.*, mandatory payments, based on a percentage of gross telecommunications revenue from certain sources — to support “universal service” (subsidies for low-priced basic phone service in rural areas and for low-income consumers, and subsidies for schools and libraries to obtain Internet connections). These contributions amount to a significant amount of money — about 6% of gross interstate telecom revenues from end-users — and in some states are matched by state universal service fund contribution requirements. The politically charged question of whether ISPs should pay universal service contributions was the starting point of the FCC’s 1998 analysis of the categorization of Internet activities.

(b) ***“Common Carrier” Requirements.*** Providers of telecommunications “for a fee directly to the public, or to such classes of users as to be effectively available to the public,” are considered to be “common carriers” or “telecommunications carriers.”<sup>5</sup> Common carriers are required to provide service to prospective customers “upon reasonable request.”<sup>6</sup> While common carriers are under a general obligation to provide service at rates, terms, and conditions that are just, reasonable, and not unreasonably

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<sup>5</sup> 47 U.S.C. §§ 153(10), (44), (46).

<sup>6</sup> 47 U.S.C. § 201.

discriminatory,<sup>7</sup> the FCC and most state commissions generally do not impose detailed regulations upon the services of carriers other than the historical monopoly local telephone companies.

(c) ***Regulation of Entry and Transactions Causing Changes of Control.*** Unlike information service providers, telecommunications common carriers must, before initiating service, obtain licenses from the FCC<sup>8</sup> (only for international services) and “certificates of public convenience and necessity” from state public utilities commissions. A corollary obligation is the need to obtain the FCC’s and state commissions’ consent before consummating transactions, such as mergers and acquisitions, that result in a change of control of a carrier.

(d) ***Interconnection.*** Telecommunications carriers have rights and responsibilities relating to interconnection with other carriers that do not apply to information service providers. As discussed below, interconnection issues are leading to the most significant controversies involving regulation of the Internet. Telecommunications carriers have broader interconnection obligations than information service providers: First, the former are required to interconnect with other carriers.<sup>9</sup> Carriers that provide local phone service — *i.e.*, “local exchange carriers” — are required to enter “reciprocal compensation” arrangements with other local exchange carriers, in which the one carrier must compensate the other carrier for local traffic passing from the first carrier to the second.<sup>10</sup> “Incumbent” local exchange carriers

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<sup>7</sup> 47 U.S.C. § 202.

<sup>8</sup> 47 U.S.C. § 214.

<sup>9</sup> 47 U.S.C. §§ 201, 251(a).

<sup>10</sup> 47 U.S.C. § 251(b)(5). Carriers may opt for “bill and keep” arrangements in which neither carrier compensates the other - essentially, each carrier “bills”

(“ILECs”) (*i.e.*, the dominant local phone companies) are subject to more exacting interconnection duties, such as requirements to offer interconnecting carriers elements of their networks on an unbundled basis at rates based on forward—looking costs, and to allow competitors to collocate equipment on their facilities.<sup>11</sup>

At the same time, telecommunications carriers have different types of interconnection rights than information service providers. Telecommunications carriers are entitled to interconnect with ILECs and other carriers; information service providers may lack such entitlements. On the other hand, telecommunications providers are obligated to pay “access charges” to ILECs for certain types of interconnections; the FCC has exempted information service providers from paying access charges.<sup>12</sup>

(e) ***Other Forms of Regulation.*** Finally, telecommunications carriers are subject to a variety of other requirements, including federal and state rules regarding service quality, billing format, and privacy of customer information, that may not apply to information service providers. In addition, as discussed below, information service providers may be entitled to a broader extent of First Amendment protection in their decisions exerting editorial control over the content carried over their systems than are telecommunications carriers. Similarly, telecommunications carriers are subject to broader obligations to grant law

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its own customers and “keeps” the revenue rather than looking to interconnecting carriers for interconnection compensation.

<sup>11</sup> 47 U.S.C. § 251(c).

<sup>12</sup> *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, ¶¶ 344-48 (1997). *aff’d sub nom. Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

enforcement and national security agencies access to private data than are information service providers.

## II. THE FCC'S 1998 REPORT TO CONGRESS

The FCC conducted a comprehensive examination of whether Internet services should be treated as “telecommunications” or “information services” in a 1998 Report to Congress.<sup>13</sup> “The Commission closely parsed the statutory definitions and the available precedent, and concluded that typical “Internet access services” fall squarely within the information service category. As discussed below, the FCC carefully sidestepped several issues, including the classification of Internet backbone services and the direct Internet access and related services used by large corporations.

### A. THE FCC'S CONCLUSIONS

In its Report to Congress, the FCC first concluded that services that include both an information service element (the capacity for interacting with information) and as an inseparable part of the service also include a telecommunications element (information is transmitted by or for the user) should fall within the information services category.<sup>14</sup> Next, the FCC found that the underlying telecommunications inputs used by Internet service providers, including data transport over digital transmission facilities such as DS3 and OC3 circuits, constitute telecommunications for regulatory purposes.”<sup>15</sup>

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<sup>13</sup> *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 (1998) (“1998 Report to Congress”)

<sup>14</sup> *Id.*, 13 FCC Rcd at 11529-30, ¶¶ 56-59.

<sup>15</sup> *Id.*, 13 FCC Rcd at 11532-34, ¶¶ 66-68.

The FCC went on to find that Internet access services are appropriately classed as information services, not telecommunications.<sup>16</sup> The FCC based this conclusion on the factual observation that “Internet access providers typically provide their subscribers with the ability to run a variety of applications, including World Wide Web browsers, FTP clients, Usenet newsreaders, electronic mail clients, Telnet applications, and others.”<sup>17</sup> The FCC concluded that such services “combine computer processing, information provision, and other computer—mediated offerings with data transport,” and therefore constitute “information services.”<sup>18</sup> While the FCC specifically considered the case of e—mail and concluded that it is an “information service” (because it involves storage of data on a computer, forwarding of that data, and retrieval of that data from another computer),<sup>19</sup> the FCC did not analyze Internet access based on the separate applications and capabilities that can be run over Internet access connections. Rather, the Commission examined Internet access based on the bundle of functionalities that such service affords to users.<sup>20</sup>

Finally, the FCC considered Internet protocol telephony or VOIP. The Commission tentatively concluded that “phone—to—phone” VOIP offerings probably fall within the telecommunications category if the provider holds itself out as providing voice telephony or fax transmission service, and the service does not require the use of computers, software, or any other

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<sup>16</sup> *Id.*, 13 FCC Rcd at 11536-40, ¶¶ 73-82.

<sup>17</sup> *Id.*, 13 FCC Rcd at 11537-40, ¶ 76.

<sup>18</sup> *Id.*, 13 FCC Rcd at 11536, ¶ 73.

<sup>19</sup> *Id.*, 13 FCC Rcd at 11538-39, ¶ 78.

<sup>20</sup> *Id.*, 13 FCC Rcd at 11539-40, ¶¶ 79-81.

special equipment besides an ordinary phone or fax machine.<sup>21</sup> (The FCC left its conclusion “tentative” to allow itself some wiggle room “pending the development of a more fully—developed record” in more focused proceedings.)<sup>22</sup> On the other hand, when considering “computer—to—computer” IP applications, in which subscribers install software on their own computers that allow them to conduct voice conversations over their Internet access connections, the FCC found that neither the software suppliers nor the Internet access providers should be regulated as “telecommunications” providers.<sup>23</sup>

## **B. ISSUES SIDESTEPED OR IGNORED BY THE FCC**

The FCC avoided addressing a number of important issues in the 1998 Report to Congress. First, in concluding that the underlying telecommunications services utilized for Internet transmissions should be regulated as telecommunications, the FCC carefully avoided addressing the proper classification of Internet backbone service. The FCC reasoned that “[t]he technology and market conditions relating to the Internet backbone are unusually fluid and fast—moving, and we are reluctant to impose any regulatory mandate that relies on the persistence of a particular market model or market structure in this area.<sup>24</sup> Thus, while the Commission made it clear that ordinary data transport (referred to as “layer one” of the Internet) constitutes telecommunications, it

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<sup>21</sup> *Id.*, 13 FCC Rcd at 11543-44, ¶¶ 88-89.

<sup>22</sup> *Id.*, 13 FCC Rcd at 11544-45, ¶¶ 90-91.

<sup>23</sup> *Id.*, 13 FCC Rcd at 11543, ¶¶ 86-87.

<sup>24</sup> *Id.*, 13 FCC Rcd at 11535-36, ¶ 72.

avoided addressing Internet protocol—based service (so—called “layer three”).<sup>25</sup>

Second, in the same context, the, FCC expressly declined to address “the applicability of this analysis to cable operators providing Internet access service.”<sup>26</sup> Moreover, the Commission assumed the dial—up Internet access provider model, and deliberately sidestepped the question of the appropriate classifications where the Internet access service includes connectivity all the way to the customer’s premises. Indeed, in the context of its conclusion that a service that bundles together telecommunications and information service is an “information service,” the FCC specifically noted that this result might not apply if “functionally, the consumer is receiving two separate and distinct services” from a facilities—based provider.<sup>27</sup> The FCC did not address when a bundled service should be treated as a single service, and when it should be considered as “two separate and distinct services.”

Third, in concluding that Internet access services should be classified as information services, the FCC presupposed what can be called the America Online (“AOL”) model, in which the service consists of a combination of access to proprietary information content and access to public information content over the Internet, and bundles together e—mail, instant messaging, web browsing, and access to other software applications. While the conclusion that such a bundle of services is “information service” is straightforward, the question

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<sup>25</sup> The website <http://www.whatis.com> includes helpful definitions of “layer one” and “layer three” in the Internet context.

<sup>26</sup> *1998 Report to Congress*, 13 FCC Rcd at 11535, ¶ 69 n. 140.

<sup>27</sup> *Id.*, 13 FCC Rcd at 11530, ¶ 60.

becomes less obvious when the provider offers nothing more than bare connectivity to the Internet. Customers of such Internet access providers supply their own data processing applications (*i.e.*, web browsers, e—mail applications, and so on) and use the Internet access connection to interact with remote information provided by entities other than the ISP. The FCC did not appear to consider the case where the Internet access provider offers *no* information processing elements, and simply a form of data transport and access to remote data using Internet protocol.<sup>28</sup> Rather, the Commission classified *all* Internet access service as “information service.”

The FCC also declined to address the internal computer networks and direct Internet access (“DIA”) connections purchased by large corporate users, based on part on the factually incorrect conclusion that users of such services “receive somewhat different functionality than do residential dial—up subscribers.”<sup>29</sup> But in fact the only difference is that corporate DIA users receive greater bandwidth (*i.e.*, faster data transmission). Indeed, DIA offerings could be analyzed in either of two ways: (1) DIA services are simply more sophisticated, higher bandwidth versions of retail Internet access service (in which case they should also be classified as information services); or (2) DIA services are little more than access to the underlying Internet backbone facilities (in which case they might be telecommunications, but might be information services — as noted above, the FCC leaves the treatment of Internet backbone unclear as well). The FCC’s failure to consider these services is puzzling given that a very substantial number of users obtain access to the Internet

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<sup>28</sup> See, *e.g.*, *id.*, 13 FCC Rcd at 11539-40, ¶ 80.

<sup>29</sup> *Id.*, 13 FCC Rcd at 11539, ¶ 80 n. 164.

over such connections rather than over retail dial—up Internet access service.

In sum, while the FCC’s 1998 Report to Congress represents the most comprehensive and thoughtful analysis of the classification of Internet activities to date, the report declines to address a number of important Internet—based services, including (a) Internet backbone services, (b) provision of Internet access over cable television infrastructure, (c) “unadorned” Internet access services, in which the provider offers nothing but a “pipeline” into the Internet, and (d) DIA and related “high—end” services purchased by large corporate users.

As discussed below, subsequent decisions of the FCC, other administrative agencies, and courts reflect a trend toward treating each of such offerings as “telecommunications.”

### **III. TREND IN RECENT DECISIONS TO TREAT MORE INTERNET ACTIVITIES AS “TELECOMMUNICATIONS”**

Decisions of the FCC, other state and federal administrative agencies, and federal courts since 1998 indicate a strong trend toward treating many more Internet activities as forms of “telecommunications.” In particular, as discussed below, the Ninth Circuit, in *AT&T Corp. v. City of Portland* (“*Portland*”),<sup>30</sup> indicated that cable—based Internet access services, or at a minimum the “local loop” component of such services (*i.e.*, the link from the end user’s premises to the Internet access provider’s location), are telecommunications and should be regulated as such. This has broad implications for other Internet service providers as well. The FCC’s

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<sup>30</sup> 216 F.3d 871 (9<sup>th</sup> Cir. 2000).

decision regarding interconnection between incumbent local phone companies and competitive local carriers that serve Internet access providers indicates that Internet access can be analyzed as merely one component of an overall telecommunications path. And in merger and acquisition cases, the FCC and other agencies have asserted regulatory authority over Internet services, including backbone service and even applications such as AOL's Instant Messaging service.

#### **A. THE CABLE OPEN ACCESS DEBATE AND THE PORTLAND DECISION**

A debate has raged through federal, state, and local regulatory agencies, legislatures, and courts, regarding whether broadband Internet connections over cable television infrastructure should be subject to an "open access" obligation. That debate between representatives of cable operators, on the one hand, and independent Internet access providers and other interests, on the other, continues through the pages of other articles in this volume. This article touches briefly upon the issue, with a particular focus on the *Portland* decision, in order to illustrate broader issues affecting the possible treatment of Internet services as telecommunications.

The proponents of "open access" to the cable broadband platform argue that it should be subject to the interconnection and non—discrimination rules that apply to "telecommunications services." These parties contend that such connections over cable facilities are comparable to the dial—up connections and broadband Digital Subscriber Line ("DSL") services provided by local telephone companies, which can be used to obtain access to multiple Internet access providers. They argue that cable companies, like local phone companies, have market power over these "local loops" and should not be able to

leverage this power into forcing consumers to subscribe to their affiliated Internet access providers' services.

On the other side, the cable companies opposing what they call "forced access" take the position that, as with other unregulated Internet—based "information services," the marketplace should determine interconnection arrangements for the cable broadband access platform. They argue that they lack market power, particularly given competition from DSL services and other emerging modes of broadband Internet access. They also contend that there is no statutory basis for local governments to impose such requirements. They assert that, given the rapid and difficult—to—predict development of technologies and market structures, the government should keep its "hands off the Internet" and allow the marketplace to develop through private negotiations between cable operators and Internet service providers.

To date, the FCC has sided with the cable companies. The Commission has declined either to impose rules generically or to impose restrictions as a condition for recent cable mergers.<sup>31</sup> (At the same time, the FCC has shown an awareness of the asymmetry between the lack of regulation of cable operators and the relatively burdensome regulation of local phone companies' comparable DSL offerings. The FCC has begun reducing regulation of the latter, removing DSL multiplexers and packet switches from the list of network facilities that

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<sup>31</sup> *Applications of AT&T Corp. and Tele-Communications, Inc. for Transfer of Control of Tele-Communications, Inc. to AT&T Corp.*, 14 FCC Rcd 3160, 3206-07 (1999); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T Corp.*, Memorandum Opinion and Order, CS Docket No. 99-251, FCC 00-202, ¶ 117 (released June 6, 2000); *Inquiry Concerning Development of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, First Report, 14 FCC Rcd 2398, 2449 (1999).

must be offered on an unbundled basis at rates based on forward—looking cost.)<sup>32</sup> In response to the *Portland* decision, however, the FCC recently announced that it intends to open a broad inquiry into the issue.<sup>33</sup>

Even before the *Portland* decision, the ground appeared to be beginning to shift. While only a handful of municipalities have imposed “open access” mandates on cable operators, a number of cable companies recently announced that they did not plan to renew their exclusive contracts with their affiliated Internet access providers (Excite@Home, previously known as @Home, is majority—owned by AT&T, the largest cable operator, with other cable companies owning minority shares; Time Warner, the second largest cable operator, owns a significant interest in Road Runner). AT&T announced an agreement in principle with Mindspring/Earthlink regarding open access, and Time Warner announced a similar agreement with Juno. Most significantly, the planned merger between cable giant Time Warner and AOL, formerly the most active proponent of open access requirements, has reduced the momentum toward governmental open access mandates, while at the same time increasing the marketplace momentum toward the negotiation of such arrangements.

Notwithstanding these developments, the Ninth Circuit’s *Portland* decision is likely to have an important impact. The main holding of the case, ostensibly a win for cable companies and a loss for local governments, is that

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<sup>32</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order, 15 FCC Rcd 3696 (1999).

<sup>33</sup> Press Release, “FCC Chairman to Launch Proceeding on Cable Access” (released June 30, 2000).

local governments may not impose open access mandates upon broadband access services provided over cable systems because those services do not fall within the statutory definition of “cable services” in the Act.<sup>34</sup> However, the reasoning of the case — and certain dicta included in the decision — indicate that certain components of cable broadband services constitute “telecommunications,” raising a host of questions for the FCC and other regulators.

The court analyzed AT&T’s @Home service as “consist[ing] of two elements: a ‘pipeline’ (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline.”<sup>35</sup> The court found that the former element constitutes “telecommunications,” and that the latter constitutes “information service.”<sup>36</sup> By itself, this ruling appears to provide a definite (if not necessarily final) answer to one of the important questions left unresolved in the FCC’s 1998 Report to Congress — whether a packaged offering including “local loop” service as well as conventional Internet access, should be regulated as a single “information service” offering or as two separate services, the “telecommunications” local loop and the “information service” Internet access.<sup>37</sup>

But the *Portland* decision not only fills in ambiguities from the FCC’s 1998 Report to Congress; it also appears to contradict the FCC in certain respects. In stating its

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<sup>34</sup> 47 U.S.C. § 522(6) (definition of “cable service”); see *Portland*, 216 F.3d at 876-77 (section II.A).

<sup>35</sup> *Portland*, 216 F.3d at 878.

<sup>36</sup> *Id.*

<sup>37</sup> *1998 Report to Congress*, 13 FCC Rcd at 11530, ¶ 60.

conclusion that the “local loop” component of @Home’s cable broadband Internet access service is “telecommunications,” the court unfortunately uses imprecise language: “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>38</sup> One possible reading of this language is that not only the “local loop” component of the service, but the entire bundled service, constitutes “telecommunications.” This would directly contradict the FCC’s conclusion in the 1998 Report to Congress that hybrid services including both telecommunications and information services are *information services*.

An even more troubling aspect of the *Portland* case is the court’s lengthy dictum addressing a matter that, while of great interest to all parties, was not technically before the court: whether AT&T’s cable broadband service (or the telecommunications component of the service) should be subject to “open access” requirements.<sup>39</sup> The court opined that, because cable broadband is a form of “telecommunications,” the statutory interconnection obligations of common carriers to furnish communications service upon reasonable request and to interconnect with the facilities and equipment of other telecommunications carriers “mandate a network architecture that prioritizes consumer choice .... As applied to the Internet, *Portland* calls it ‘open access’ . . . . The Internet’s protocols themselves manifest a related principle called ‘end—to—

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<sup>38</sup> *Portland*, 216 F.3d at 878.

<sup>39</sup> This uninvited discursus by the court would appear to transgress the Constitutional requirement that Article III federal courts may address only “cases and controversies” and may not issue advisory opinions on matters not brought before them.

end’: control lies at the ends of the network where the users are, leaving a simple network that is neutral with respect to the data it transmits, like any common carrier. On this rule of the Internet, the codes of the legislator and the programmer agree.”<sup>40</sup>

This startlingly broad dictum would have extremely far—reaching potential implications. First, aside from whether the court’s characterization of transmission across the Internet as a “simple” and “neutral” transmission network is accurate as a technical matter, as a legal matter that characterization (and use of the term “like any common carrier”) would appear to classify *all* Internet access services as “telecommunications” rather than “information service.” This impression is reinforced by the court’s citation of Section 251(a)(1) of the Act in support of its conclusion regarding open access — that provision only governs interconnections between *telecommunications carriers* and other *telecommunications carriers*. In other words, the court’s language implies not only that the local loop component of AT&T’s cable broadband service constitutes telecommunications, but also that, in the court’s view, the independent Internet access providers seeking to interconnect with that local loop may also be telecommunications providers.

Second, building on its doubtful conclusion that all Internet access services are “telecommunications,” the court jumped to unfounded conclusions regarding the interconnection obligations of telecommunications carriers. Specifically, in contrast to the detailed interconnection obligations of incumbent local exchange carriers found in Section 251(c)(3) of the Act, neither the

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<sup>40</sup> *Portland*, 216 F.3d at 879 (citing 47 U.S.C. §§ 201(a), 251(a)(1)).

FCC nor any court (before *Portland*) has ever concluded that either the interconnection obligations of Section 201(a) or Section 251(a)(1) of the Act impose any specific technical requirements regarding how and where carriers must interconnect. Indeed, the FCC held in 1996 and quite recently reaffirmed that those interconnection duties can be satisfied through *indirect* interconnections — *i.e.*, carriers subject to Sections 201 and 251(a)(1) could satisfy their interconnection obligations by interconnecting via another carrier such as an ILEC.<sup>41</sup> AT&T and/or @Home clearly could satisfy such a duty through the standard peering, transit, and other existing connections between Internet service providers; under this clear precedent, even if these entities were all deemed to be carriers, they would not necessarily be required to establish physical connections between their networks. But the court overlooked this precedent, and found that these statutory interconnection requirements mandate some form of what the City of “Portland calls . . . ‘open access.’”

The court may not have been fully aware of the broad implications of its discursus. Indeed, the court purported to recognize, but then appeared to ignore its own recognition, that “Congress has reposed the details of

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<sup>41</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15991, ¶ 997 (1996), *rev'd in part sub nom. Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd sub nom. AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 319 (1999); *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Service Providers*, Fourth Report and Order, CC Docket No. 94-54, FCC 00-253 (released July 24, 2000). The FCC has interpreted Section 201(a) to require more specific interconnection arrangements only in the context of carriers with market power, such as ILECS. *See, e.g., Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369 (1992), *rev'd sub nom. Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

telecommunications policy in the FCC, and we will not impinge on its authority over these matters.”<sup>42</sup>

The FCC now appears to fear that other appellate courts will follow the Ninth Circuit’s troubling example. Shortly after the issuance of the *Portland* opinion, the FCC filed a brief before the U.S. Court of Appeals for the Fourth Circuit supporting a lower court decision that had invalidated a local government open access mandate. The FCC asked the Fourth Circuit not to follow the Ninth Circuit’s lead, but rather to decide no more than the narrow question presented. The FCC warned that a broader decision “could have profound and largely unforeseen consequences in a variety of regulatory contexts,” and asked the court to allow the FCC to set national policy and determine how cable—delivered Internet access should be classified and regulated.<sup>43</sup>

Thus, the cable open access debate raises broad questions about the nature of Internet services. The *Portland* case purports to resolve many of these questions, but there is no doubt that they will be addressed again in the FCC’s further review and by other reviewing courts.

## **B. THE RECIPROCAL COMPENSATION DEBATE**

A second set of decisions that has important implications for the regulatory treatment of Internet services relates to the reciprocal compensation debate between ILECs and competitive local exchange carriers

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<sup>42</sup> *Portland*, 216 F.3d at 879-80.

<sup>43</sup> “FCC Urges 4th Circuit to Avoid Larger Open Access Issue,” *Communications Daily* (Aug. 14, 2000); see also *MediaOne Group, Inc. v. County of Henrico*, 97 F.Supp.2d 712 (E.D. Va. 2000), *4th Circuit appeal pending*.

(“CLECs”). Section 251(b)(5) of the Act requires interconnecting local exchange carriers to compensate one another for completing local calls. Thus, if an ILEC’s customer places a local call to a customer of a CLEC, the ILEC must compensate the CLEC, and vice versa.

Shortly after the enactment of the 1996 Act, the ILECs and CLECs began negotiating interconnection agreements. Early in the process, many of the ILECs, apparently assuming that more local calls would be placed from CLEC customers to ILEC customers, negotiated for relatively high per—minute reciprocal compensation rates. In response, many CLECs saw an opportunity in signing up Internet access providers (also referred to as Internet service providers or “ISPs”) as customers. When an ILEC’s subscriber places a local call to dial up an ISP for an online session, if the ISP is served by a CLEC then the ILEC will owe the CLEC a substantial amount of per—minute reciprocal compensation if the subscriber stays online for a long period of time. With the dramatic increase in Internet usage over the past few years, the amounts of reciprocal compensation that CLECs claimed from the ILECs grew to the hundreds of millions of dollars.

In response to this enormous, unanticipated liability, the ILECs argued that these dial—up calls from their subscribers to ISPs are not local calls at all, and therefore the CLECs do not qualify for reciprocal compensation for completing such calls. Rather, the ILECs argued, these calls should be analyzed as through calls — *i.e.*, as a single “telecommunications” transmission — from the end user’s premises, through the interconnection between the ILEC and the CLEC, through the ISP’s local point of presence, all the way to the distant web site or other information source with which the user is interacting.

Thus, the ILECs asserted that these calls were more akin to long—distance calls than to local calls. The ILECs contended that the FCC had traditionally analyzed end—on—end communications provided by two or more carriers as a single call for jurisdictional purposes (*i.e.*, whether the communications are interstate and thus subject to FCC authority, or intrastate and thus subject to state authority).

The CLECs responded that the Internet access providers are providing “information services” to their customers, and the customers are placing local calls to get access to the point where the information is delivered. According to the CLECs, the fact that the ISP is buying transmission from others is a separate transaction and a separate communication, which that provider (not the end user) uses to bring information to the point where it is handed to the user. The CLECs also pointed out that the ILECs have always treated the calls from end users to ISPs’ local phone numbers in the same exchanges as local calls. They contended that it would be an unreasonable departure from precedent to change that treatment only for purposes of the reciprocal compensation issue.

The question thus came down to whether the dial—up call from a subscriber to an Internet access provider, followed by an Internet navigation to a distant web site or other information source, constituted “one call” or “two calls.” About 30 state public utility commissions were presented with this issue in disputes over ILEC/CLEC interconnection agreements, and (prior to the FCC’s ruling) every one of them agreed with the CLECs. The FCC, however, came down on the side of the ILECs on the jurisdictional nature of the traffic, holding that such traffic is interstate and is not properly subject to reciprocal

compensation requirements.”<sup>44</sup> (This had the desirable consequence, from the FCC’s point of view, of ensuring that the FCC, rather than the states, would retain jurisdiction over this important matter.) On the other hand, on the substantive point the FCC was somewhat sympathetic to the CLECS, holding that states could reasonably hold that preexisting interconnection agreements included such traffic (meaning that ILECs would have to pay CLECs the outstanding reciprocal compensation charges), and issuing a proposed rule that would treat this jurisdictionally interstate traffic as if it were local for compensation purposes.

The FCC’s rationale for its jurisdictional holding regarding traffic bound for Internet access providers should be analyzed for its implications for regulation of the Internet. In response to the CLEC argument that “for jurisdictional purposes, ISP—bound traffic must be separated into two components: an intrastate telecommunications service, provided in this instance by one or more LECS, and an interstate information service, provided by the ISP,”<sup>45</sup> the FCC cited a 1988 decision for the proposition that “an otherwise interstate basic [*i.e.*, telecommunications] service . . . does not lose its character as such simply because it is being used as a

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<sup>44</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 3689 (1999) (“*Intercarrier Compensation Declaratory Ruling*”), *rev’d sub nom. Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

<sup>45</sup> *Intercarrier Compensation Declaratory Ruling*, 14 FCC Rcd at 3698-99, ¶ 13.

component in the provision of a[n enhanced, *i.e.*, information] service. . . .”<sup>46</sup>

In other words, the FCC analyzed the jurisdictional issue by examining the totality of the communication, including the telephone call from the user to the ISP and the underlying telecommunications used by the ISP to provide the Internet access service. The FCC essentially ignored the information service component of the Internet service for this purpose and focused only on the telecommunications component. Thus, the ruling opens the door to treating Internet access service as a form of telecommunications for some (if not all) regulatory purposes. This appears inconsistent with the FCC’s conclusion in the 1998 Report to Congress that Internet access is an information service, and that for regulatory purposes the telecommunications component would be subsumed into the information service aspect of the service.

The D.C. Circuit vacated the FCC’s decision for failing to provide an adequate justification of its result — primarily for failing to explain why this treatment of the ISP’s information service made sense — and remanded to the FCC for further proceedings. The court held that the FCC had not explained or justified the use of the “end—to—end analysis” traditionally used to determine whether calls are interstate or intrastate made sense in the context of an information service.”<sup>47</sup> The court found that the two cases on which the FCC had principally relied — one involving voice mail and the other involving 800 calls —

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<sup>46</sup> *Id.* (citing *Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1, 141 (1988), *aff’d sub nom. California v. FCC*, 3 F.3d 1505 (9th Cir. 1993)).

<sup>47</sup> *Bell Atlantic Tel Cos. v. FCC*, 206 F.3d at 5.

are distinguishable because they involved a single conventional circuit—switched call over the public switched telephone network, and not “information services” or Internet connectivity as in the present case.<sup>48</sup> The court held, “Even if the difference between ISPs and traditional long—distance carriers is irrelevant for jurisdictional purposes, it appears relevant for purposes of reciprocal compensation. Although ISPs use telecommunications to provide information service, they are not themselves telecommunications providers (as are long—distance carriers).”<sup>49</sup>

The court found that the FCC had not adequately responded to MCI WorldCom’s argument: “In this regard an ISP appears . . . no different from many businesses, such as pizza delivery firms, travel reservation agencies, credit card verification firms, or taxicab companies, which use a variety of communication services to provide their goods or services to their customers. Of course, the ISP’s origination of telecommunications as a result of the user’s call is instantaneous (although perhaps no more so than a credit card verification system or a bank account information service). But this does not imply that the original communication does not ‘terminate’ at the ISP. The Commission has not satisfactorily explained why an ISP is not, for purposes of reciprocal compensation, simply a communications—intensive business end user selling a product to other consumer and business end—users.”<sup>50</sup>

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<sup>48</sup> *Id.*, 206 F.3d at 6.

<sup>49</sup> *Id.*, 206 F.3d at 6-7.

<sup>50</sup> *Id.*, 206 F.3d at 7 (cites and internal quotations omitted).

The case is now pending before the FCC on remand from the D.C. Circuit. This will give the FCC another opportunity to develop a more coherent analysis that properly distinguishes between telecommunications services, such as the basic connectivity provided by ILECs and CLECs, and the information services provided by ISPs.

### **C. DECISIONS IN CASES INVOLVING MERGERS, ACQUISITIONS, AND SIMILAR TRANSACTIONS**

Mergers, acquisitions, and similar cases provide a further indication that the FCC views Internet access service and other Internet—based services as subject to its regulatory authority. For example in such cases,

- The FCC has indicated that it views Internet backbone service as a separate “market” from unregulated Internet access service for purposes of its antitrust—style competition analysis.<sup>51</sup> This conceivably opens the possibility of regulating the former as telecommunications.
- The FCC has taken actions indicating that it has regulatory authority over Internet backbone and Internet access services, such as imposing conditions requiring divestitures of such services.<sup>52</sup>

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<sup>51</sup> *Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, 13 FCC Rcd 18025 (1998) (antitrust-style competition analysis treated Internet backbone and retail Internet access as separate service markets).

<sup>52</sup> *Id.* (requiring divestiture of Internet MCI to Cable & Wireless); *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee*, CC Docket No. 98-184, FCC 00-221 (released June 16, 2000) (“*Bell Atlantic/GTE*”) (requiring divestiture of GTE Internetworking as spin-off named Genuity).

- The FCC staff has indicated its belief that the Commission may have regulatory authority over Internet—based software applications, such as AOL’s Instant Messaging service.<sup>53</sup>
- In cases involving mergers of Bell operating companies and involving Sections 271 and 272 of the Act, the FCC, following the statutory treatment of so—called “interLATA information services”, regulates Bell operating companies’ Internet services based on the underlying telecommunications even if that is transparent to the end—user.<sup>54</sup> This approach essentially looks right through the information service component of the Internet service.
- Law enforcement and national security agencies, led by the FBI and by the Department of the Treasury’s Committee on Foreign Investment in the United States (“CFIUS”), have used such transactions with foreign companies to seek to impose rules and procedures for surveillance of e—mail and other Internet—based transmissions similar to those in place for telephone “wiretapping.” Thus, despite their lack of statutory authority to do so, these agencies have

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<sup>53</sup> In the AOL/Time Warner merger proceeding, the FCC staff issued a number of interrogatories to AOL relating to its provision of Instant Messaging. See “Third Request for Further Information,” Letter from Royce Dickens, Deputy Chief, Policy & Rules Division, FCC, to Counsel for AOL and Time Warner, CS Docket No. 00-30 (Aug. 14, 2000) (available at <http://www.fcc.gov/csb/aoltw/inforequ3.txt>).

<sup>54</sup> *Bell Atlantic/GTE; Qwest Communications International Inc. and U S WEST, Inc.*, 15 FCC Rcd 11909 (2000); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, 22023, ¶ 248 (1996),

used mergers and similar transactions to try to treat Internet services as telecommunications for wiretapping purposes.<sup>55</sup>

#### **IV. BROADER IMPLICATIONS OF THE CLASSIFICATION OF INTERNET SERVICES**

While basic Internet access service probably will retain its classification as an “information service,” we have shown that a number of recent decisions indicate a trend towards treating certain Internet services as “telecommunications.” Such a classification has potential implications that are broader than the specific rules that apply to providers. The regulatory box into which the Internet is placed may have significant effects on the rights and responsibilities of ISPS. We discuss below two areas where the differences in these rights and responsibilities are particularly significant: the regulation of content and electronic surveillance by law enforcement agencies.

##### **A. REGULATION OF CONTENT**

The ability of a service provider to exert editorial control — to choose which content to include or exclude on its system — is related directly to how that provider is classified. This maxim applies both to statutory and constitutional inquiries.<sup>56</sup> In *Columbia Broadcasting*

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<sup>55</sup> *AT&T Corp. and British Telecommunications plc*, 14 FCC Rcd 14140 (1999). Another recent example of such a process involves the acquisition of Internet service provider Verio by NTT, the major Japanese telephone company. While the process was not made public and there is no written decision because of the lack of FCC involvement, the companies apparently agreed to some, but not all, of what the agencies demanded. Ultimately, the companies appealed from CFIUS all the way to President Clinton and apparently prevailed.

<sup>56</sup> See generally Zuckman, Corn-Revere, Frieden & Kennedy, *MODERN COMMUNICATIONS LAW* 198-213 (West Group 1999).

*System, Inc. v. Democratic National Committee*, for example, the Supreme Court held that a broadcaster could adopt a blanket policy of rejecting paid editorial announcements because the Communications Act specifies that a person “engaged in radio broadcasting shall not . . . be deemed a common carrier.”<sup>57</sup> The Court held that such decisions are protected by the First Amendment. Such editorial selectivity is the antithesis of common carriage, which requires that the communications facilities be open to all on a nonselective basis. Accordingly, the United States Court of Appeals for the Fourth Circuit has noted that, “common carriers are not members of ‘the press’ insofar as the [Communications Act] precludes them from exercising editorial control over the communications they transmit.”<sup>58</sup>

This is not to suggest that entities doing business as common carriers are entirely without First Amendment rights. A series of decisions that led up to passage of the Telecommunications Act affirmed the right of telecommunications carriers to devote a portion of their networks to non—common carrier purposes (e.g., entertainment programming) over which they would retain editorial control.<sup>59</sup> In addition, courts have affirmed the right of common carriers to decline to offer non—

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<sup>57</sup> 412 U.S. 94, 108-109 (1973), quoting 47 U.S.C. § 153(h).

<sup>58</sup> *Chesapeake & Potomac Tel. Co. of Virginia v. United States*, 42 F.3d 181 (4th Cir. 1994), cert. granted, judgment vacated following passage of 1996 Telecommunications Act, 516 U.S. 415 (1996).

<sup>59</sup> *Id.* See also *U.S. WEST, Inc. v. United States*, 48 F.3d 1092 (9<sup>th</sup> Cir. 1994), cert. granted, judgment vacated following passage of 1996 Telecommunications Act, 516 U.S. 1155 (1996); *United States Telephone Ass’n. v. United States*, CA No. 94-1961 (D.D.C. Jan. 27, 1995) (transcript of proceedings); *NYNEX-V Corp. v. United States*, No. 92-323-P-C (D. Me 1994); *Ameritech Corp. v. United States*, 867 F. Supp. 721 (N.D. 111. 1994); *BellSouth Corp. v. United States*, 868 F. Supp. 1335 (N.D. Ala. 1994).

common carrier services (e.g., billing) to information service providers where the carrier deems the content of the information to be objectionable (e.g., dial—a—porn).<sup>60</sup> These judicial developments prompted the FCC and Congress to develop the “hybrid” regulatory classifications of Video Dial Tone (“VDT”)<sup>61</sup> and Open Video Systems (“OVS”)<sup>62</sup> that attempt to combine elements of common carriage with rights of editorial control.

ISPs have not been subject to such classifications, and to date both Congress and the courts have affirmed the ability of Internet businesses to exert editorial control. In Section 230 of the Communications Act (a surviving provision of the ill—fated Communications Decency Act), Congress preserved the editorial independence of “interactive computer services” by freeing them from civil liability for their decisions either to restrict or make available information posted by third parties.<sup>63</sup> According to the legislative findings, Section 230 was necessary to “ ‘promote the continued development of the Internet and other interactive computer services and other interactive media’ ” and “ ‘to preserve the vibrant and competitive free market’ ” for such services, largely “ ‘unfettered by Federal or State regulation.’ ”<sup>64</sup>

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<sup>60</sup> Cf. *Information Providers’ Coalition for Defense of the First Amendment v. FCC*, 928 F.2d 866, 872 (9th Cir. 1991).

<sup>61</sup> E.g., *Telephone Company-Cable Television Cross-Ownership Rules*, Sections 63.54-63.58, Fourth Further Notice of Proposed Rulemaking, 10 FCC Rcd. 4617 (1995).

<sup>62</sup> 47 U.S.C. § 571-573.

<sup>63</sup> 47 U.S.C. § 230.

<sup>64</sup> *Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D.D.C. 1998), quoting 47 U.S.C. § 230(b)(1) and (2). See *Zeran v. America Online, Inc.*, 129 F.3d 327,

The approach adopted by Congress in Section 230 does not fit within traditional regulatory constructs for communications industries. On the one hand, it adopts a concept that applies fully to traditional common carriers: the service provider is not responsible legally for information posted or transmitted by users.<sup>65</sup> At the same time Section 230 applies the very *un*—common carriage mandate that “[n]o provider or user of an interactive computer service shall be held liable on account of ... any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.”<sup>66</sup>

Apart from Section 230, various courts have held that ISPs are not common carriers, with an obligation to accept all communication traffic.<sup>67</sup> Thus, ISPs may enforce policies against the transmission of bulk unsolicited commercial e—mail (“spam”). Similarly, ISPs may deny service to subscribers whose postings are

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330 (4th Cir. 1997) (“Section 230 was enacted ... to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.”), *cert. denied*, 524 U.S. 937 (1998).

<sup>65</sup> Section 230(c)(1) provides, in pertinent part, that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1).

<sup>66</sup> 47 U.S.C. § 230(c)(2)(A).

<sup>67</sup> *E.g.*, *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1025 (S.D. Ohio 1997) (“As a general matter, the public possesses a privilege to reasonably use the facilities of a public utility, but Internet service providers have been held not to be common carriers.”). *See also America Online v. Greatdeals.Net*, 49 F. Supp. 2d 851, 856 (E.D. Va. 1999), *Religious Technology Center v. Netcom On-Line Communications Services, Inc.*, 907 1. Supp. 1361 (N.D. Cal. 1995).

considered to be a violation of the provider's terms of service.<sup>68</sup>

With respect to issues involving content, treatment of ISPs as telecommunications carriers would constitute a significant break from the status quo. Such a change would limit drastically the ability of ISPs to make choices about the content that may be made available over their networks.

## **B. ELECTRONIC SURVEILLANCE**

The regulatory classification of ISPs also could significantly affect the law governing electronic surveillance. For example, Congress enacted Communications Assistance for Law Enforcement Act ("CALEA") in 1994 as part of an effort to respond to developments in communications technology that, in some respects, had made electronic surveillance by law enforcement officials more difficult than such activity had been in the past.<sup>69</sup> However, the initial proposals for CALEA were far broader than the law that finally was adopted. In February 1992 the FBI circulated a first draft of a digital telephony bill that proposed amending the Communications Act of 1934 to require that all "providers of electronic communications systems and private branch exchange operators . . . provide such assistance as necessary to ensure the ability of government agencies to implement lawful orders or authorizations to

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<sup>68</sup> E.g., *Horsley v. MindSpring Enterprises, Inc.*, Civ. Action No. 99A-9543-4 (Ga. Superior Ct., July 20, 2000) (upholding ISP decision to terminate service to publisher of the "Nuremberg Files"). See *Planned Parenthood v. American Coalition of Life Activists*, 41 F.Supp.2d 1130 (D. Or. 1999).

<sup>69</sup> See H.R. Rep. No. 827, 102d Cong., 2d Sess., pt. 1, at 13-14 (1994), reprinted in 1995 U.S.C.C.A.N. 3492-93 ("House Report").



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