

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brand X Internet Services, <i>et al.</i> ,)	
)	Nos. 02-70518
Petitioners,)	02-70684
)	02-70685
v.)	02-70686
)	02-70879
Federal Communications Commission)	02-71425
and the United States of America,)	02-72251
)	
Respondents.)	

OPENING BRIEF OF CONSUMER FEDERATION OF AMERICA,
CONSUMERS UNION, AND CENTER FOR DIGITAL DEMOCRACY

Cheryl A. Leanza
Andrew Jay Schwartzman
MEDIA ACCESS PROJECT
1625 K St., NW
Suite 1118
Washington, DC 20006
(202) 454-5683
Counsel for Public Interest Petitioners

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CORPORATE DISCLOSURE STATEMENT

Public Interest Petitioners (“PI Petitioners”), Consumer Federation of America, Consumers Union, and Center for Digital Democracy, do not issue shares to the public and have no parent corporations that issue shares to the public.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
JURISDICTIONAL STATEMENT	1
ISSUES PRESENTED	2
STATEMENT OF THE CASE	2
PI Petitioners’ Efforts to Obtain Protection for Individuals Using Cable Internet Access	5
AOL/TimeWarner Merger Approval: Conditioned On The Need to Assure Diversity	8
Safeguards Imposed by Local Governments: the Ninth Circuit’s <i>Portland Case</i>	10
STATEMENT OF FACTS	14
Basic Structure of Internet Access	15
Distinctive Attributes of High-Speed Broadband Internet Access	19
Technical Management Tools Can Control the Speed and Functionality of Internet Access for Good Purposes or Ill.	21
Incentives to Discriminate Against Non-affiliated Content	23
SUMMARY OF ARGUMENT	25
ARGUMENT	27

I.	The Commission Arbitrarily and Capriciously Ignored Its Obligation Under the Public Interest Standard to Consider the First Amendment Issues Relevant to Its Decision.	28
A.	The Supreme Court and the FCC Have Interpreted the Public Interest Standard As Promoting First Amendment Goals.	28
B.	The Commission Arbitrarily and Capriciously Ignored Its Obligation.	32
C.	The Commission Impermissibly Deferred Consideration of its Decision’s Impact on Constitutional Questions.	35
II.	The Commission’s Decision Unnecessarily Endangers the First Amendment Rights of Individuals Who Use the Internet to Speak and to Receive Information, Favoring the Rights of Some Speakers over Others.	38
A.	The Present-Day Internet, Developed Under Common Carriage, has Flowered Into the Paradigmatic First Amendment Ideal because No One Can Control the Transmission of Content.	39
B.	Common Carrier Regulation Promotes the First Amendment.	42
C.	When the Internet is Accessible via Common Carriage, All Speakers Obtain an Equal Ability to Exercise Their Free Speech Rights.	46
D.	The Commission Chose a Model that is Least Friendly to the First Amendment.	51
III.	If the Court Determines Remand is Necessary, the Court Should Retain Jurisdiction To Ensure Reasonably Timely Implementation of the Remand.	54
	CONCLUSION.	58

TABLE OF AUTHORITIES

CASES

<i>ACLU v. Reno</i> , 929 F.Supp. 824 (E.D. Pa. 1996)	3, 41
<i>American Library Ass'n, Inc. v. U.S.</i> , 201 F.Supp.2d 401 (E.D. Pa. 2002), <i>appeal pending</i> , 71 U.S.L.W. 3177 (No. 02-361) (Sept. 6, 2002).	34, 39, 42, 47-48
<i>Associated Press v. US</i> , 52 F.Supp. 362 (S.D.N.Y. 1943)	29
<i>Associated Press v. United States</i> , 326 U.S. 1 (1945)	28
<i>AT&T v. Portland</i> , 216 F.3d 871 (9th Cir. 2000)	<i>passim</i>
<i>AT&T v. Portland</i> , 43 F.Supp.2d 1146 (D. Ore. 1999) <i>rev'd on other grounds</i> 216 F.3d 871 (9th Cir. 2000)	10-11
<i>Beno v. Shalala</i> , 30 F.3d 1057 (9th Cir. 1994)	33
<i>Brower v. Evans</i> , 257 F.3d 1058 (9th Cir. 2001)	33, 56
<i>California v. FCC</i> , 39 F.3d 919 (9th Cir. 1994)	33, 56-57
<i>California v. FCC</i> , 75 F.3d 1350 (9th Cir. 1996)	33
<i>CBS, Inc. v. FCC</i> , 453 U.S. 367 (1981)	52
<i>Columbia Broadcasting System, Inc. v. FCC</i> , 412 U.S. 94 (1973)	26, 28
<i>Cincinnati Bell Telephone Company v. FCC</i> , 69 F.3d 752 (6th Cir. 1995)	55
<i>City of Los Angeles v. Preferred Communications, Inc.</i> , 476 U.S. 488 (1986)	49
<i>Dennis v. United States</i> , 341 U.S. 494 (1951)	49
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976)	36

<i>FCC v. NCCB</i> , 436 U.S. 775 (1978)	28
<i>FCC v. WNCN Listeners Guild</i> , 450 U.S. 582 (1981)	28
<i>Heckler v. Day</i> , 467 U.S. 104 (1984)	54
<i>INS v. St. Cyr</i> , 533 U.S. 289 (2001)	35
<i>ITT World Communications, Inc. v. FCC</i> , 725 F.2d 732 (D.C. Cir. 1984)	35
<i>Lamont v. Postmaster General of U. S.</i> , 381 U.S. 301 (YEAR)	43, 45
<i>Meredith Corp. v. FCC</i> , 809 F.2d 863 (D.C. Cir. 1987)	35
<i>Metro Council of NAACP Branches v. FCC</i> , 46 F.3d 1154 (D.C. Cir. 1995)	29
<i>Motor Vehicle Mfrs. Ass'n v. State Farm Mut.</i> , 463 U.S. 29 (1983)	32-33
<i>NARUC v. FCC</i> , 533 F.2d 601 (D.C. Cir. 1976)	42
<i>Nat'l Broad. Co. v. U.S.</i> , 319 U.S. 190 (1943)	28
<i>Nat'l Cable Television Ass'n, Inc. v. FCC</i> , 747 F.2d 1503 (D.C. Cir. 1984)	28-29
<i>People of State of Cal. v. FCC</i> , 905 F.2d 1217 (9th Cir. 1990)	33
<i>Red Lion Broadcasting Co. v. FCC</i> , 395 U.S. 367 (1969)	29-30, 46, 50, 52
<i>Reno v. ACLU</i> , 521 U.S. 844 (1997)	34, 39, 42, 47-48
<i>Schurtz v. FCC</i> , 982 F.2d 1043 (7th Cir. 1992)	54
<i>Time Warner Entertainment Co., L.P. v. FCC</i> , 93 F.3d 957 (D.C. Cir. 1996)	52
<i>TRAC v. FCC</i> , 750 F.2d 70 (D.C. Cir. 1984)	55
<i>Turner Broadcasting System, Inc. v. FCC</i> , 512 U.S. 622 (1994)	29-30, 47, 49, 52

<i>Turner Broadcasting System, Inc. v. FCC</i> , 520 U.S. 180 (1997)	52
<i>United States v. Storer Broad.</i> , 351 U.S. 192 (1956)	28
<i>United States v. Am. Tel. & Tel. Co.</i> , 552 F.Supp. 131 (D.D.C. 1982) <i>aff'd sub nom Maryland v. United States</i> , 460 U.S. 1001 (1983)	44
<i>United States v. Western Electric Co., Inc.</i> , 673 F. Supp. 525 (D.D.C. 1987)	44
<i>US West v. FCC</i> , 182 F.2d 1223 (10th Cir. 1999)	35
<i>Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.</i> 435 U.S. 519 (1978)	34
<i>Warner Cable Communications, Inc. v. City of Niceville</i> , 911 F.2d 634 (11th Cir. 1990)	49
<i>Williams v. Babbitt</i> , 115 F.3d 657 (9th Cir. 1997) <i>cert den.</i> 523 U.S. 1117 (1998)	34-35
<i>Wilson v. A.H. Belo Corp.</i> , 87 F.3d 393 (9th Cir. 1996)	1-2

STATUTES & REGULATIONS

5 U.S.C. § 706(1)	56
28 U.S.C. § 2112(a)(3)	1
28 U.S.C. § 2342(1)	1
28 U.S.C. § 2344	1
47 U.S.C. § 402(a)	1-2
47 U.S.C. § 202	44
47 U.S.C. § 153(43)	44

47 U.S.C. §521(4)	31
47 C.F.R. §§ 1.4(b)(2) and 1.103(b)	1

ADMINISTRATIVE AND LEGISLATIVE MATERIAL

<i>Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities</i> , 17 FCC Rcd 5355 (2002)	57
<i>AT&T/MediaOne Merger Order</i> , 15 FCC Rcd 9816 (2000)	8, 9-10, 31
<i>AOL/Time Warner Merger Order</i> , 16 FCC Rcd 6547 (2001)	7, 9-10, 17, 31
<i>AT&T/TCI Merger Order</i> , 14 FCC Rcd 3160, 3198, 3205-07 (1999)	8
Complaint, <i>America Online, Inc. and Time Warner, Inc.</i> , Docket No. C-3989 (rel. Dec. 14, 2000).	9
Decision and Order, <i>America Online, Inc. and Time Warner, Inc.</i> , Docket No. C-3989 at 6-7, 11 (rel. Dec. 14, 2000).	9
Communications Competitiveness and Infrastructure Modernization Act of 1991 S. 1200, 102d Cong., 2d Sess. §§ 101(14) (1992)	43
<i>Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities</i> , Declaratory Ruling and NPRM, 17 FCCRcd 4798 (2002)	<i>passim</i>
S. Rep. No. 102-93 at 50 (1991)	30, 51
<i>United States v. AT&T and MediaOne</i> , Amended Complaint, Case No. 1:00CV001176 (RCL), (D.C. Cir. May 26, 2000)	20
Federal Communications Commission, Cable Services Bureau, <i>Broadband Today</i> (Staff Report), (October 1999)	5
<i>Technological and Regulatory Factors Affecting Consumer Choice of Internet</i>	

<i>Providers</i> , GAO-01-93 at 9 (October 2000)	15
United States v. AT&T and MediaOne, Amended Complaint, Case No. 1:00CV0011 76 (RCL), (D.C. Cir. May 26, 2000)	20

OTHER MATERIALS

<i>Amazon.com Comments</i> , CS Docket No. 02-52, (filed June 17, 2002)	23-26
<i>AT&T Comments</i> , CS Docket 02-52(filed June 17, 2002)	37
Bar, <i>et al.</i> , <i>Defending the Internet Revolution in the Broadband Era: When Doing Nothing is Doing Harm</i> , E-conomy Working Paper No. 12 (Berkeley Roundtable on the International Economy August 1999)	40
Barron, Jerome A., <i>The Telco, the Common Carrier Model and the First Amendment, the “Dial-a-Porn” Precedent</i> , 19 Rutgers Computer & Tech. L.J. 371 (1993)	45
<i>Comcast Comments</i> , CS Docket 02-52 (filed June 17, 2002)	37
<i>Consumers Union, et al. Comments</i> GEN Docket No. 00-185 (filed Dec. 1, 2000)	8
<i>Consumers Union, et al. Motion to Dismiss AT&T/MediaOne Merger</i> CS Docket 99-251(filed Aug. 17, 1999)	8
<i>Consumers Union, et al. Petition to Deny AOL/Time Warner Merger</i> , CS Docket 00-30 (filed April 26, 2000)	8
<i>Consumers Union, et al. Petition to Deny AT&T/TCI Merger</i> , CS Docket 98-178 (filed Oct. 29, 1998)	8
<i>Cox Communications Comments</i> , CS Docket 02-52(filed June 17, 2002)	37
Internet Protocol DARPA Internet Program Protocol Specification, I.E.T.F. RFC 791, I.E.T.F. RFC 793 (1981)	18

Lemley & Lessig, *The End of End-To-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. Rev. 925, 932 (2001) 42

LESSIG, LAWRENCE, CODE (1999) 40

POOL, ITHIEL DE SOLA, TECHNOLOGIES OF FREEDOM (Harvard University Press 1983) 43

ZUCKMAN, HARVEY L., *ET AL.*, MODERN COMMUNICATIONS LAW (West 1999) 49

JURISDICTIONAL STATEMENT

(A) The Federal Communications Commission has jurisdiction to issue the order below under sections 1, 2, 3, 4, 303, 403, and 601 of the Communications Act of 1934 (“the Act”), 47 U.S.C. §§ 151, 152, 153, 154, 303, 403, 521, Title II of the Act, 47 U.S.C. §§ 201-276, and under the Commission’s rules adopted pursuant to section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 554(e); 47 C.F.R. § 1.2.

(B) This Court has jurisdiction over the Commission’s *Declaratory Ruling* under 28 U.S.C. § 2342(1) and section 402(a) of the Act, 47 U.S.C. § 402(a). *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 397, 398 (9th Cir. 1996) (Court of Appeals has exclusive jurisdiction over FCC declaratory ruling).

(C) The Commission adopted its *Declaratory Ruling* on March 14, 2002, and was released to the public on March 15, 2002. Under the Commission's rules, non-rulemaking documents become final upon release to the public. 47 C.F.R. §§ 1.4(b)(2) and 1.103(b). This appeal is timely under 28 U.S.C. § 2344. PI Petitioners filed their Petition for Review on March 25, 2002, in the United States Court of Appeals for the District of Columbia Circuit, *CFA et al. v. FCC*, (D.C. Cir. Docket No. 02-1099). Pursuant to 28 U.S.C. § 2112(a)(3), the Judicial Panel on Multi-district Litigation issued an order on April 1, 2002 in Docket No. RTC-63, consolidating the relevant pending cases and transferring PI Petitioners'

appeal to this Court.

(D) The *Declaratory Ruling* appealed from is final because it contains a definitive interpretation of key statutory terms and fixes legal relationships dependent upon those definitions. *See Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 397 (9th Cir. 1996) (FCC declaratory order “final order” reviewable under 47 U.S.C. § 402(a)). Under this *Ruling*, cable operators offering Internet access are permitted to control or limit Internet speech that is transmitted over cable company infrastructure.

ISSUES PRESENTED

- (1) Whether the Commission arbitrarily and capriciously ignored its obligation under the public interest standard to consider the First Amendment issues relevant to its decision.
- (2) Whether the Commission’s decision unnecessarily endangers the First Amendment rights of individuals who use the Internet to speak and to receive information, favoring the rights of some speakers over others.

STATEMENT OF THE CASE

In this case, corporate petitioners, Brand X and Earthlink, public sector petitioner, the State of California, and PI Petitioners, seek review of a far-reaching Federal Communications Commission decision. The Commission’s decision not only violates the Communications Act (as demonstrated by Petitioners Brand X and Earthlink), but does violence to the First Amendment rights of Internet speakers and users. In addition to misapplying the Communications Act, the Commission’s

decision arbitrarily and capriciously ignored the First Amendment implications of its decision and, as a consequence, impermissibly chose a course of action that imperils the public's First Amendment rights on the Internet and threatens the Internet's promise to become the "most participatory form of mass speech yet developed." *ACLU v. Reno*, 929 F.Supp. 824, 883 (E.D. Pa. 1996) *aff'd* 521 U.S. 844 (1997).

PI Petitioners appear before this Court to represent the general public, which uses the Internet to speak, and to obtain information.¹ Petitioners seek review of a *Declaratory Ruling* by the FCC that determined, as a matter of law, the statutory classification of high speed access to the Internet over wires provided by cable

¹ PI Petitioners represent the interests of citizens and consumers in speaking freely on the Internet, in obtaining unfettered and affordable access to the diverse sources of information available through the Internet, and in benefitting from technical innovation and advances available because of the Internet's open character. Each of the PI Petitioners participated singly or jointly in various combinations in one or more of the proceedings leading up to the decision now before this Court. The Consumer Federation of America ("CFA") is the nation's largest consumer advocacy group, composed of two hundred and eighty state and local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power and cooperative organizations, with more than fifty million individual members. CFA is online at www.consumerfed.org. Consumers Union ("CU"), publisher of *Consumer Reports*, is an independent, nonprofit testing and information organization serving only consumers. CU is online at www.consumersunion.org. The Center for Digital Democracy ("CDD") is committed to preserving the openness and diversity of the Internet in the broadband era, and to realizing the full potential of digital communications through the development and encouragement of noncommercial, public interest programming. CDD is online at www.democraticmedia.org.

television operators.² *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and NPRM, 17 FCC Rcd 4798 (March 15, 2002) (“*Ruling*”); APP 0110-84.

The appropriate classification of this service is no minor regulatory matter. The Commission’s decision determines, as a matter of law, whether Internet speech over cable television wires will be protected by the core nondiscrimination obligations that currently protect Internet speech. The Commission concluded that these protections do not apply.³ But its order did not include even one sentence explain

² As explained in more detail below, “cable modem” service offers customers access to the Internet using a coaxial cable used to provide cable television service, rather than the copper telephone wire used with traditional dial-up Internet access. *See infra pp. 15-24.*

³ Specifically, as explained below, the Commission concluded that cable Internet access does not include a “telecommunications service” component, which removed common carrier protections from Internet access. *Ruling*, 17 FCC Rcd at 4822, 4823-24; APP 0135-36. Understanding the impact of the Commission’s decision requires familiarity with three definitions: “telecommunications,” “telecommunications service,” and “information service.” To understand PI Petitioners’ argument (and to avoid repetition), a quick explanation of these terms will suffice here. In colloquial terms, “telecommunications” is transmitting content over a wire or other “pipe,” without changing it. See 47 U.S.C. § 153(43). A “telecommunications *service*” is transmitting content without changing it (*i.e.*, “telecommunications”) on a common carrier basis, that is, on nondiscriminatory terms to the public for a fee. *Id.* at §§ 153(46), (44). By contrast, an “information service” combines a transmission component with content creation, alteration, and/or storage. *Id.* at § 153(20). Thus, a company offering an information service will store, create, or alter content, and transmit it to the user. A simple example of an “information service” is voice mail provided by local telephone company. A caller telephones another (using a “telecommunications service”) and the message is stored for later

ing how its statutory interpretation was informed by First Amendment jurisprudence or promoted free speech on the Internet.

PI Petitioners' Efforts to Obtain Protection for Individuals Using Cable Internet Access

This case arises after many years during which the Commission followed an explicit policy of inaction despite repeated entreaties to address the classification issue, and to address its First Amendment implications. *Broadband Today (Staff Report)*, (October 1999), <http://ftp.fcc.gov/Bureaus/Cable/Reports/broadbandtoday.pdf> (accessed Oct. 8, 2002) (“[A]t the Chairman’s direction, the Cable Services Bureau has vigilantly monitored the broadband industry....”).⁴ In part because of the Commission’s refusal to take action, this Circuit is already somewhat familiar with these issues as detailed in *AT&T v. Portland*, 216 F.2d 871 (9th Cir. 2000).

As early as 1998, PI Petitioners had raised concerns before the FCC that cable television company offerings of Internet access were not consistent with nondiscrimination principles, and that these offerings could jeopardize the public’s

retrieval. For a detailed discussion of these terms, see Earthlink Brief at Part VII.A.2.

⁴ See also *FCC Chairman Kennard Shares Goal of Local Governments to Achieve Open Broadband Access*, http://ftp.fcc.gov/Bureaus/Cable/News_Releases/1999/nrcb9014.html (“[T]he FCC is conducting a series of ‘on-going broadband monitoring sessions....’”); *The Unregulation of the Internet: Laying a Competitive Course for the Future (Remarks by FCC Chairman William E. Kennard)* http://www.ftp.fcc.gov/Bureaus/Cable/News_Releases/1999/nrcb9014.html.

freedom to speak and obtain information over the Internet. *See* Letter to Chairman William E. Kennard, Federal Communications Commission (September 15, 1998). PI Petitioners wrote to “seek ... assurance that the FCC will guarantee that Internet access obtained via cable television systems will provide citizens with the same freedom and choice presently available on Internet services obtained via more traditional switched telephone networks.” Drawing on the Commission’s long-standing obligation under the public interest standard to promote the public’s access to diverse information, PI Petitioners explained:

Although the Commission is constitutionally and statutorily mandated to nurture free expression and free commerce, some cable operators providing Internet access want to retain control over the content their Internet subscribers can receive. We are among those who believe that the wonders of the Internet have developed because of, not in spite of, the common carrier policies the FCC has employed.

Id. PI Petitioners explained that the Commission’s decisions about the appropriate regulatory treatment accorded to these services would determine whether cable operators could legally alter or control the content provided to their Internet consumers. *Id.*

Over time, PI Petitioners gathered and presented evidence to the Commission showing that not only was discrimination technically feasible, but that cable companies had particular economic incentives to disfavor the content of competitors or noncommercial speakers. *See, e.g.,* Letter to Chairman William Kennard, Federal

Communications Commission (July 29, 1999); APP 0085-90. Cable operators planned to profit directly from exploiting the content offered on their preferred sites by owning or sharing revenue with those content providers. *Id.* Cable companies proposed to keep their customers in the cyber-equivalent of “walled gardens.” Although these gardens contained a means of egress, the cable operators possessed both the incentive and the means to keep customers within the garden. *Id.*; *see, e.g., AOL/Time Warner Merger Order*, 16 FCCRcd 6547, 6584-92 (2001).

Public interest groups raised their concerns at the FCC repeatedly in various regulatory proceedings. PI Petitioners asked the Commission and other regulatory bodies to impose a nondiscrimination policy (called “open access”) on cable Internet access, which would protect the First Amendment rights of Internet users and the ability of technological innovators and entrepreneurs to succeed. PI Petitioners argued that imposing conditions on cable operators offering Internet access, like those required of telephone companies offering the identical service, would benefit the public by preserving freedom of speech and access to speech on the Internet.

Among other proceedings, PI Petitioners addressed the First Amendment questions and the need for a definitive classification of cable modem services in three mergers for which FCC approval was required: AT&T’s proposed merger with TCI, AT&T’s proposed merger with MediaOne, and AOL’s proposed merger with Time

Warner. Petitioners opposed each application, in part on the grounds that these companies planned to offer Internet access in a manner that would compromise the First Amendment rights of the public. *Consumers Union, et al. Petition to Deny AT&T/TCI Merger*, CS Docket 98-178, at 11-14 (filed Oct. 29, 1998), *Consumers Union, et al. Motion to Dismiss AT&T/MediaOne Merger*, CS Docket 99-251, Attachment, *Breaking the Rules* at 10-13 (filed Aug. 17, 1999); *Consumers Union, et al. Petition to Deny AOL/Time Warner Merger*, CS Docket 00-30 at 84-90, 128 (filed April 26, 2000).

Despite intense debate among the parties in each of these cases, in none of the proceedings did the Commission classify the service under the Communications Act. Indeed, the Commission did not even address PI Petitioners' concerns in the first two of three proceedings, other than to reiterate its promise to "monitor" trends. *AT&T/TCI Merger Order*, 14 FCCRcd 3160, 3198, 3205-07 (1999); *AT&T/MediaOne Merger Order*, 15 FCCRcd 9816, 9861-73 (2000).⁵

**AOL/Time Warner Merger Approval: Conditioned On The Need
to Assure Diversity**

In its decision conditionally granting the application for merger of AOL and Time Warner, the Federal Communications Commission had before it a newly-issued

⁵ In *AT&T/TCI Merger Order*, the Commission relied on its similar prior holding that it would take no action and monitor the situation. 15 FCCRcd at 3192 (citing *Advanced Services Report*, 14 FCCRcd 2398, 2449 (1999)).

consent decree in which the Federal Trade Commission required the merging companies to accept strong “open access” obligations as a condition of its decision not to block the merger.⁶ The FCC adopted the FTC’s conditions and made them integral to its own action as well.

While the FTC remedies were deemed essential to the FCC’s approval, the FCC’s decision was based on separate legal grounds. Noting that the FTC’s action was necessarily based entirely on the need to preserve competition in high speed Internet access,⁷ the FCC adopted the terms of the consent decree as also being necessary to protect diversity of content on the broadband Internet. *AOL/Time Warner Merger Order*, 16 FCCRcd 6547, 6593-6596 (2001); *see also AT&T/Media-One Merger Order*, 15 FCCRcd 9816, 9861, 9866, 9871, 9873 (2000).

⁶ The FTC found that the merger between AOL and Time Warner would violate the antitrust laws, *inter alia*, by reducing competition in the market for broadband Internet access service. Complaint, *America Online, Inc. and Time Warner, Inc.*, Docket No. C-3989 (rel. Dec. 14, 2000). The FTC required AOL/Time Warner to carry three non-affiliated ISPs when it offered its own service and prohibited from AOL/Time Warner from discriminating in its transmission of content for non-affiliated content. Decision and Order, *America Online, Inc. and Time Warner, Inc.*, Docket No. C-3989 at 6-7, 11 (rel. Dec. 14, 2000).

⁷ The Commission’s analysis is “informed by traditional antitrust principles... [whereas] antitrust analysis ... focuses solely on whether the effect of a proposed merger ‘may be substantially to lessen competition,’ the Communications Act requires the Commission to make an independent public interest determination, which includes evaluating public interest benefits or harms of the merger’s likely effect on future competition.” *AOL/Time Warner Merger*, 16 FCCRcd at 6555 (footnotes omitted).

The FCC's public interest evaluation rested heavily on the agency's concern for First Amendment values. In defining the scope of its analysis, it said:

The Supreme Court has found that decentralization of information production serves values that are central to the First Amendment. Indeed, the Court has repeatedly emphasized the Commission's duty and authority under the Communications Act to promote diversity and competition among media voices: It has long been a basic tenet of national communications policy that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." Accordingly, the Court had "no difficulty" in concluding that the Commission's interest in "promoting widespread dissemination of information from a multiplicity of sources" is "an important governmental interest."

AOL/Time Warner Merger, 16 FCCRcd at 6556 (footnotes omitted).⁸

**Safeguards Imposed by Local Governments:
the Ninth Circuit's *Portland* Case**

While the FCC was "vigilantly monitoring" the cable operator Internet access, several local governments, which shared the concerns of PI Petitioners, required AT&T to open its cable facilities to competing ISPs as part of local franchise authority approval of AT&T's mergers with TCI and MediaOne. In one instance, the local efforts of the City of Portland and Multnomah County were challenged, in part on First Amendment grounds. *AT&T v. Portland*, 43 F.Supp.2d 1146, 1150 (D. Ore. 1999) *rev'd on other grounds* 216 F.3d 871 (9th Cir. 2000). The District Court for

⁸ For purposes of this case, it is of particular importance that this remedy was applicable only to the merging parties, and that the broadly applicable definitional questions considered in the *Declaratory Ruling* were deferred. *See generally, AOL/Time Warner Merger*, 16 FCCRcd 6547.

the District of Oregon held that the obligation imposed upon AT&T did not violate the First Amendment rights of AT&T. *Id.* at 1154. It concluded, *inter alia*, that the obligation could not be interpreted as “forced speech” because it did not require the operator to carry any particular speech and the public would not associate speech on the Internet with the cable Internet provider. *AT&T v. Portland*, 43 F.Supp.2d at 1154. It further found that, even if the obligation could be interpreted as affecting the cable operators’ free speech rights, the regulation was an economic regulation that met the *O’Brien* test, by furthering a substantial governmental interest in preserving competition, and was unrelated to the suppression of free speech. *Id.*

The case was appealed to this Court. *AT&T v. Portland*, 216 F.2d 871 (9th Cir. 2000). The Commission participated as *amicus curiae*, but, yet again refused to make a determination as to the regulatory classification of cable Internet services or to address the First Amendment implications of the question. *Id.* at 876. This Court recognized that “[t]he history of the Internet is a chronicle of innovation by improvisation, from its genesis as a national defense research network, to a medium of academic exchange, to a hacker cyber-subculture, to the commercial engine for the so-called ‘New Economy.’” *Portland*, 216 F.3d at 876. This Court determined that the local governments did not have authority to impose the open access condition because cable Internet access was not a cable service subject to the jurisdiction of the

local authority. *Id.* at 876. This court concluded that Internet access via cable consists of two elements, including an content-centered “information service” and a neutral “pipe” over which the content is transmitted, properly classified as a “telecommunications service.”⁹ *Id.*, 216 F.3d at 878. Thus, although the decision did not allow the local governments to impose a separate open access provision, it did protect the First Amendment rights of the public by ensuring that broadband Internet access over cable wires is subject to the same non-discriminatory regulatory structure that protects citizens who use telephone wires to reach the Internet. *Id.*

This Court explained that its interpretation was consistent with the Communications Act and with the architecture of the Internet itself. This Court described the Act as containing an overarching “competitive principle embodied by the dual duties of nondiscrimination and interconnection.” which was consistent with the Internet’s own “end-to-end” architecture, in which a neutral network allows control to be exercised at the ends. *Id.* at 879. “On this rule of the Internet,” this Court emphasized, “the codes of the legislator and the programmer agree.” *Id.*

The Commission did not consider this Court’s decision to be a final determination of the question. In September 2000, the Commission finally did end,

⁹ Pursuant to the Communications Act, a telecommunications service is a common carrier offering. *See* 47 U.S.C. § 153(44) (any carrier offering a telecommunications service is a telecommunications carrier, and “[a] telecommunications carrier shall be treated as a common carrier under this Act”); *see also* note 3, *supra*.

in a limited fashion, its deliberate refusal to consider the issue. It initiated a *Notice of Inquiry* seeking comment on how it ought to classify Internet access offered by cable companies over coaxial cable. *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Notice of Inquiry, 15 FCCRcd 9287 (2000). However, the Commission still failed to seek comment on any First Amendment issues. *Id.*

Despite the Commission's studied indifference to the First Amendment questions, PI Petitioners and other parties once again set forth their First Amendment concerns. Comments of Consumers Union, *et al.*, GEN Docket No. 00-185 at 1-9 (filed Dec. 1, 2000); *see Ruling*, 17 FCCRcd at 4843 (recognizing the record includes discussion of First Amendment issues); APP 0155. PI Petitioners exhorted the Commission to consider the First Amendment rights of the public to communicate over the Internet. *Id.* at ii, 3-6. Other parties took issue to dispute those claims. *See Ruling*, 17 FCCRcd at 4843, n. 302 (citing comments discussing First Amendment issues); APP 0155. PI Petitioners reminded the Commission that it, "alone among federal agencies, has a unique statutory and constitutional obligation to preserve and promote diversity of viewpoint in the Nation's electronic media." *Consumers Union Comments* at 3.

In the reaching its decision, now before this Court, the Commission once again

did not address PI Petitioners' First Amendment concerns. The Commission's *Declaratory Ruling* concluded that Internet access offered over a coaxial cable is not a cable service, but concluded that it was an "information service." *Ruling*, 17 FCCRcd at 4822; APP 0134. More important, the Commission determined for the first time that an information service does not include within it a "telecommunications service." *Id.* at 4823-24; APP 0135-36. Under the Commission's decision, companies offering Internet access over a coaxial cable television wire face no legal prohibition precluding them from controlling or limiting the content their customers receive and produce on the Internet. *See supra* note 3.

While the Commission's *Ruling* did not address the First Amendment matters raised in the pleadings before it, it nonetheless initiated a new First Amendment inquiry as part of a Notice of Proposed Rulemaking accompanying the *Ruling*. *Id.* at 4843; APP 0155. Even at this time, however, the Commission continued to ignore its own historic emphasis on the "paramount" First Amendment rights of the public: the Commission's First Amendment queries were directed exclusively to how open access might impact *cable operators'* First Amendment rights. *Id.*

STATEMENT OF FACTS

A basic understanding of the structure of Internet access, its technical protocols and capabilities, and economic incentives of infrastructure owners is necessary to

analyze the Commission’s decision below.

Basic Structure of Internet Access

The basic structure of Internet access does not vary according to the technology employed. To access the Internet, according to the General Accounting Office, an individual requires two components: (1) the physical connection to the Internet and (2) an Internet Service Provider function, or the servers, routers, switches and software necessary to compile and transmit information over the Internet.¹⁰ GAO, *Technological and Regulatory Factors Affecting Consumer Choice of Internet Providers*, GAO-01-93 at 9 (October 2000) (“*GAO Report*”);¹¹ APP 0119-20. Once an individual is connected to the Internet, she may use a wide array of content and tools. Some entities aggregate other’s content and tools, and others create their own.

¹⁰ GAO simply states that a customer needs an “ISP.” *Id.* We refer here to an “ISP function.” It is important to note that while today virtually any provider calling itself an ISP will offer this component of Internet access (servers, routers, switches and software), some ISPs also offer a myriad of other services such as niche marketing, customer support, web site hosting, filtering and content which are not essential components of Internet access. Indeed, these are completely separate services sometimes offered independent of the functions identified by GAO. APP 0121.

¹¹ This schematic was recognized by this Circuit in *Portland*, although the breakdown presented here between the services was not relevant in that proceeding and is relevant here. In *Portland*, this Court determined there were two components to Internet access, the “pipeline” or physical link, and the Internet service transmitted through the pipeline. *Portland*, 216 F.3d at 877. Here, we identify ISP services as the software and servers necessary to transmit content and applications.

GAO Report at 10-11; APP 0116-18.

Various entities can provide all aspects of Internet access, or can provide only isolated portions of the total package. For example, a small non-profit might create web pages for the public to access, but not own any network hardware. At the other end of the spectrum, a large corporation such as AOL/Time Warner might offer every element of Internet access, from the physical connection to the creation and aggregation of content. APP 0116-18.

The most common means for individuals to connect to the Internet is via telephone lines (either dial-up or highspeed DSL) or cable television lines. Recent U.S. Census data shows that eighty percent of users today reach the Internet over dial-up telephone lines. National Telecommunications and Information Administration, *A Nation Online* at 35 (2002); APP 0114-15. Cable modems are the second most common means of reaching the Internet, at 12.9 percent, and DSL, over high speed telephone lines, is at 6.6 percent. *Id.*¹²

Because of history and the regulatory regimes applied to the two predominant means of Internet access, telephone companies and cable companies offer access to

¹² While a few individuals reach the Internet through a “non-physical” wireless link, via DBS connections or cellular telephones, these numbers continue to be negligible. According to the most recent U.S. Census data, these alternate access mechanisms total 0.5% of the on-line population. *A Nation Online* at 35, Figure 4-1; APP 0114-15.

the Internet using different business models and different technological configurations. *See Portland*, 93 F.3d at 874, 877-78; APP 0124-30. Individuals obtaining access over dial-up or high speed telephone lines select an ISP in the marketplace. *Id.*; APP 0115, n.21 (citing *AOL/Time Warner Merger Order*, 16 FCCRcd at 6568, 6571-74). If the ISP is not the telephone company itself, the ISP contracts with the telephone company to obtain transmission between the ISP's facilities, the user's home, and the Internet backbone. *Id.* Currently many thousands of dial-up ISPs compete in the marketplace. In the vast majority of cases, cable Internet subscribers must take the entire service from the one ISPs that is affiliated with their monopoly cable television provider.

The second essential element of Internet access is, under the GAO rubric, the ISP function. This function is necessary because at the heart of the Internet is a group of software "protocols" which enable disparate computer networks all over the world to transfer data among them.¹³ By following a common protocol, Internet network operators and access providers move information between and among computers.

A computer breaks information into groups of digital information expressed as

¹³ In the context of the Internet, a "protocol" is a formal set of rules and conventions that governs how computers exchange information over a network medium.

ones and zeroes called “packets” through the use of two primary protocols,¹⁴ the Transfer Control Protocol (“TCP”) and the Internet Protocol (“IP”) (collectively “TCP/IP”). *See generally* Internet Protocol DARPA Internet Program Protocol Specification, I.E.T.F. RFC 791, I.E.T.F. RFC 793 (1981); *see also* APP 0121-22. Data, software, electronic mail, music, and all other forms of data that originate in a single computer file may be divided into hundreds, thousands or millions of packets. The protocol labels each packet indicating where it came from and where it must go. Each packet then travels its own path independently to their final destination. When the packets arrive at their final destination, the receiving computer uses the TCP/IP protocols to put the packets in the right order and restore the file to its original condition. *Id.*

Using this protocol, the Internet network does not alter or modify in any way the information between the time it leaves the transmitting computer and the time it arrives at the end-user. The following analogy shows why:

If someone in Los Angeles decided to send a three page (or “three packet”) letter to someone in San Francisco, she could send the first page by U.S. mail, the second page by Federal Express, and the third page by UPS. She would place each

¹⁴ In the context of the Internet, a “protocol” is a formal set of rules and conventions that governs how computers exchange information over a network medium.

page in an envelope and write the destination address on the outside of the envelope. The recipient in San Francisco could then assemble the whole letter using the “page number” protocol. See Vincent Cerf, *How the Internet Works*, <http://www1.worl.com.com/global/resources/cerfs_up/prose/hownetworks.xml> (visited June 25, 2002).

None of the three “networks” (the US Postal Service, Federal Express, or UPS) knows anything about the content carried within the envelopes. They deliver these envelopes in exactly the same way they deliver every other envelope, using the information provided on the outside of the envelope.

Distinctive Attributes of High-Speed Broadband Internet Access

Increased speed changes dramatically the utility of Internet access. The faster that data can move between a user’s personal computer and the Internet, the more information she can receive in a short amount of time. When the speed of Internet access crosses a certain threshold, it is referred to as “broadband” access. APP 0117. This term colloquially refers to the width of the “pipe” over which data moves, a larger pipe allows more data to flow. APP 0114.

There is not complete consensus about the definition of broadband. For example, the FCC’s definition of broadband, 200 kbps (kilobits per second) in each direction, would not even be enough to support a single TV quality video stream. Computer Science and Telecommunications Board, National Research Council,

Broadband: Bringing Home the Bits at 62-64 (National Academy of Sciences 2002) (available at <http://www.nap.edu/books/0309082730/html/>); APP 0111-12, n.2. Similarly, DSL technology, for example, will not support the highest speed applications, and will never be able to match cable technology for transmitting video. *Bringing Home the Bits*, App. A; *ACLU Technology Report* at 4.

Eventually, broadband Internet access will enable a wide array of services, many of which can only be imagined today and which will not be available via narrowband connections. In its consent decree with AT&T and MediaOne, the Justice Department found that:

[M]any firms are developing content that will be particularly attractive to residential broadband consumers. ... broadband service allows customers to access content that contains much larger quantities of data, such as high quality "streaming" video and various forms of interactive entertainment. Much of this broadband content will not be readily accessible or attractive to narrowband users, because of the much longer times that are needed to transmit the data through narrowband facilities.

United States v. AT&T and MediaOne, Amended Complaint, Case No. 1:00CV00 1176 (RCL), (D.C. Cir. May 26, 2000) at ¶ 22, available at www.usdoj.gov/aatr/cases/f4800/4840.pdf (“*DOJ AT&T/MediaOne, Amended Complaint*”). For example, audio and video files are extremely time-sensitive. *Bringing Home the Bits* at 87-95. A user wishing to hear a rock concert or a Congressional hearing on-line will not be satisfied if substantial breaks occur during transmission. *See Bringing Home the Bits* at 84, n.1

(citing research that shows a consumer will abandon a web site if it takes more than 8 seconds to load); APP 0117.

Technical Management Tools Can Control the Speed and Functionality of Internet Access for Good Purposes or Ill.

The Internet functions without central management because Internet protocols permit parts of the network to manage data flow independently. Sometimes, the number of packets flowing into a network exceeds the capacity of the network to sort them. This can cause all Internet traffic to slow down, making it very difficult for those trying to use real-time or interactive services. These delays are more noticeable and problematic for broadband Internet applications and content that take advantage of rapid data transfer.

ISPs can utilize management tools to prioritize certain packets over others to break the traffic congestion and restore data flow. APP 0122. These tools are similar to a traffic cop that arrives at a busy intersection, and stops one line of cars so that the others may pass. These tools, therefore, are often used for completely benign, content-neutral, purposes. On the other hand, these tools also enable content discrimination.

Three management tools, “caching” and “policy based routing” (“PBR”), or “quality of service” (“QoS”) are of immediate relevance. APP 0085-90. Caching stores information closer to a user to make it more accessible more quickly. For

example, a network operator might store the contents of a popular web page locally rather than traverse the whole Internet to retrieve the information from its original location for each user. While caching moves content closer, Policy Based Routing and Quality of Service technology, among other things, can distinguish among packets and deliver particular packets at a faster pace. *See* Columbia Telecommunications Corporation, Report to the ACLU, *Technology Analysis of Open Access and Cable Television Systems* at 26 (December 2001) (hereinafter “*ACLU Technical Report*”) (available at http://www.aclu.org/issues/cyber/broadband_report.pdf); APP 0085-87. To use the analogy introduced above, some letters go by “overnight” service and others go as “first class” or “parcel post.” Network operators can distinguish among packets by looking at the address, which identifies the packet’s source destination, and the general nature of the contents, *e.g.*, e-mail, music files or streaming media.

PBR and QoS can also allow network providers to discriminate over content by favoring affiliated services and disfavoring rivals. *ACLU Technical Report* at 25-27; APP 0085-87. In one notable example, Cisco Systems, a leading network equipment manufacturer, issued a document advertising its equipment that offered QoS controls. Cisco explained that QoS can be used to:

restrict the incoming push broadcasts [from competitors] as well as subscriber's outgoing access to the push information site to discourage its use. At the same time, you could promote and offer your own or partner's services with full-speed features to encourage adoption of

your service, while increasing network efficiency.

Controlling Your Network - A Must for Cable Operators, Cisco Systems, 1999 at 5 (emphasis added) (cited in Letter to Chairman Kennard (July 29, 1999); APP 0085-90. Moreover, these controls can “*isolate network traffic by the type of application, even down to specific brands, by the interface used, by the user type, and individual user identification, or by the site address.*” *Id.* (emphasis added.) In another example, cable Internet access services have deliberately blocked “streaming video” files.¹⁵ APP 0086.

The use of this technology does not reveal itself to the user. While the end-user will perceive a difference in the quality of information, *e.g.*, a rival's video streaming will appear jerky and slow, or a rival's web page may take many more minutes to download than favored content, the source of the delay is not identifiable as a network management as opposed to general Internet congestion. *ACLU Technology Report* at 6-7.

Incentives to Discriminate Against Non-affiliated Content

Not only can infrastructure owners utilize tools to distinguish among content and to favor some content, but infrastructure owners that also benefit financially from

¹⁵ Jerome H. Saltzer, “*Open Access*” is Just the Tip of the Iceberg (Oct. 22, 1999), available at <http://web.mit.edu/Saltzer/www/publications/openaccess.html>. (noting that cable operators have a conflict of interest because video streaming will someday directly compete with Cable television).

certain content have every incentive to favor that content. For example, even though the United States Postal Service has a sponsorship relationship with the U.S. cycling team, Fedex cannot refuse to deliver a package that the team manager might wish to send via that company's service.

The potential harm to commerce has not gone unnoticed by those with the greatest understanding of the new technologies. For example, Amazon.com, the Internet retailer, recently outlined for the FCC the potential harms when an infrastructure owner can control content with unusual precision. Amazon.com used the example of a fictional business called Joe's Pizza. Customers trying to reach Joe's web site by typing "www.joespizza.com" could be automatically directed to David's Pizza, or a pop-up window for David's Pizza could appear over Joe's web site, or create a "frame" with advertisements for David's Pizza around Joe's web site. Comments of Amazon.com, CS Docket No. 02-52, at 7-8 (filed June 17, 2002). The infrastructure owner would gain a financial incentive to do this if it owned David's Pizza, or if David's Pizza paid a set price for the preference, or offered a percentage of sales that David obtains from the infrastructure owner's customers. Amazon explains that, alternatively, Joe's customers could suffer when his web site takes an extremely long time to download as compared with David's because his site is not cached locally but David's is cached. *Id.* Finally, Amazon points out that the

infrastructure owner might simply sell information about its customers to marketers or others. *Id.* at n.7. David's Pizza could buy a list of all Joe's Internet customers.

Each of these examples is equally applicable to non-commercial speech. Consumer organizations' web sites might not be cached, or a link to the infrastructure owner's editorial supporting a particular mayoral candidate might appear at the bottom of every Internet screen. To return again to the package analogy, UPS cannot refuse to carry a letter tendered by its competitor criticizing UPS, or a candidate for public office who supports a tax on shipping services.

SUMMARY OF ARGUMENT

PI Petitioners concur with Petitioners Brand X and Earthlink that this court can and should reverse the decision below because, a matter of law, Internet access includes a common carriage, telecommunications service component.

This brief is principally addressed to what this Court must do if it nonetheless were to conclude that this matter cannot be resolved on the basis set forth in the Brand X and Earthlink briefs. PI Petitioners believe that if this court were to find that this case cannot be resolved solely on the basis of statutory construction, this Court must reverse and remand because the FCC's determination that Internet access is an information service was arbitrary and capricious.

PI Petitioners demonstrate in Part I below that the Commission's failure to

consider whether its action would impede the marketplace of ideas is inconsistent with the public interest standard of the Communications Act and contrary to judicial precedent that “the ‘public interest’ standard necessarily invites reference to First Amendment principles.” *Columbia Broadcasting System, Inc. v. FCC*, 412 U.S. 94, 122 (1973). The Commission’s action inexplicably departed from decades of agency decisions construing the public interest standard as requiring the Commission to insure that its decisions promote the goals of the First Amendment, including its recent holdings that the obligation to promote diversity of voices extends to actions affecting the Internet. Thus, in the decision under review, the Commission has not only violated its own prior policy decisions, but has also endangered the free speech rights of citizens that will seek to use the Internet to communicate.

Moreover, the Commission’s only explicit mention of First Amendment issues, in a Notice of Proposed Rulemaking issued with the *Ruling*, impermissibly defers consideration of an integral constitutional issue. On remand, the Commission should be directed to remedy its arbitrary and capricious omission.

In Part II, PI Petitioners show that the Commission has selected a mode of regulation that is the least friendly to First Amendment principles. The Internet flourished into the medium Americans know today over telephone lines regulated as common carriers. These lines were not allowed to discriminate on content. Indeed,

the characteristics of the Internet, in contrast with other mass media, demonstrate that it is the low barriers to entry and the non-exclusive nature of Internet speech that make the Internet a paradigmatic First Amendment ideal. Under a common carriage regime, each party receives the equal right to communicate with the public, and no one's right to communicate trumps or interferes with another's.

The Commission, when faced with a watershed moment in history, ignored its own expertise, and failed to evaluate the possible effect of its action on how citizens receive and disseminate information.

Finally, in Part III, PI Petitioners ask this Court to ensure that the Commission does not repeat its past history of delaying consideration of critically important First Amendment issues.

ARGUMENT

PI Petitioners concur with Petitioners Brand X and Earthlink that this court can and should reverse the decision below because, as a matter of law, Internet access encompasses a common carriage, telecommunications service component. The FCC went beyond its statutory authority by attempting to classify Internet access as an information service without a common carriage component.

This brief is principally addressed to what this Court must do if it nonetheless were to conclude that this matter cannot be resolved on the basis set forth in the Brand

X and Earthlink briefs.

I. The Commission Arbitrarily and Capriciously Ignored Its Obligation Under the Public Interest Standard to Consider the First Amendment Issues Relevant to Its Decision.

PI Petitioners believe that if this court were to find that this case cannot be resolved solely on the basis of statutory construction, this Court must reverse and remand because the FCC's determination that Internet access is an information service was arbitrary and capricious.

A. The Supreme Court and the FCC Have Interpreted the Public Interest Standard As Promoting First Amendment Goals.

The Commission is obligated, under the public interest standard, to promote First Amendment objectives. As the Supreme Court has explained, "the 'public interest' standard necessarily invites reference to First Amendment principles," *Columbia Broadcasting System, Inc. v. FCC*, 412 U.S. 94, 122 (1973), and, in particular, to the First Amendment goal of achieving "the widest possible dissemination of information from diverse and antagonistic sources." *FCC v. NCCB*, 436 U.S. 775, 795 (1978), (citations omitted); *Associated Press v. United States*, 326 U.S. 1, 20 (1945). The FCC's broad public interest authority includes the duty to ensure that the public has access to diverse sources of information. *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 604 (1981); *United States v. Storer Broad.*, 351 U.S. 192, 203 (1956); *Nat'l Broad. Co. v. U.S.*, 319 U.S. 190, 216 (1943); *Nat'l Cable*

Television Ass’n, Inc. v. FCC, 747 F.2d 1503, 1506 (D.C. Cir. 1984); *Metro. Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1162 (D.C. Cir. 1995) (citations omitted).

This obligation promotes goals identical to those of the First Amendment, to educate the electorate so they may participate in the democratic process.¹⁶ “At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration and adherence. Our political system and cultural life rest upon this ideal.” *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994) (“*Turner I*”). As Judge Learned Hand wrote in his district court opinion in the *Associated Press* case, “it is only by cross-lights from varying directions that full illumination can be secured.” *Associated Press v. US*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943) *aff’d* 326 U.S. 1 (1945). The Supreme Court has held that “the people as a whole retain their interest in free speech ... and their collective right to have the medium function consistently with the ends and purposes of the First Amendment.” *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 389 (1969).

“[T]he First Amendment's command that government not impede the freedom

¹⁶ The government’s obligation to protect the marketplace of ideas when threatened by private interests was first articulated by no less a figure than James Madison, who regarded deliberative debate as a necessary element of democracy. *See* Cass R. Sunstein, *Democracy and the Problem of Free Speech* at xvii (1993); William J. Brennan, Jr. “The Supreme Court and the Meiklejohn Interpretation of the First Amendment,” 79 *Harv. L. Rev.* 1, 14-16 (1965).

of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.” See *Turner I*, 512 U.S. 622, 657.¹⁷ In this connection, the importance of facilitating democratic discourse predominates over commercial and competitive interests:

It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount * * * * It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

Red Lion, 395 U.S. at 390 (citations omitted).

The goal of maximum possible diversity extends to all of the electronic media under the Commission’s jurisdiction, not just to broadcasting. For example, the preamble of Title VI of the Communications Act, addressing cable television regulation, states that one central purpose of the subchapter is to “assure that cable communications provide and are encouraged to provide the widest possible diversity

¹⁷ These ideas have been reinforced repeatedly when Congress amends the Communications Act. For example, when Congress required enacted the “must carry” provision upheld in *Turner I*, it concluded:

[T]he First Amendment implies an affirmative role for the government to encourage a diversity of voices. In some instances, the First Amendment requires the government to ensure that there will be free competition of ideas and voices.

S. Rep. No. 102-93 at 511.

of information sources and services to the public.” 47 U.S.C. §521(4). Section 2 of the 1992 Cable Act also made similar findings. 47 U.S.C. § 521 at note. Congress has applied similar standards to Direct Broadcast Satellites as well. *See, e.g.,* 47 USC §335 (b)(setting aside satellite capacity for additional perspectives).

The Commission’s obligation to promote a diversity of voices has been extended to Internet communications. *See AT&T/MediaOne Merger Order*, 15 FCCRcd 9816, 9861, 9866, 9871, 9873 (2000) (analyzing various aspects of the merger to determine whether it would frustrate the Communications Act’s goals of competition and diversity in the provision of broadband Internet services); *AOL/Time Warner Merger Order*, 16 FCCRcd 6547, 6569-70 (2001). Specifically, in reviewing the AOL/Time Warner merger, the Commission found that its “duty to ensure the proposed transaction serves the public interest” obligated it to ensure the transaction would not “interfere with the objectives of the [Communications] Act or of other statutes.” *Id.* at 6569. Among the objectives it identified was the “basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.” *Id.* at 6570 (quoting *Turner I*, 512 U.S. at 663). Pursuant to its public interest obligation, the Commission imposed conditions on AOL/Time Warner because it determined that otherwise, the merger would “diminish the public’s ability to obtain information from

diverse sources” and could “constrain consumers’ access to the ‘widest possible’ array of information over high-speed technology.” *Id.* at 6571.

As this brief explains, because the FCC has completely overlooked these fundamental precedents and its own prior decisions, and its decision must be reversed.

B. The Commission Arbitrarily and Capriciously Ignored Its Obligation.

The Commission’s analysis concluding that Internet access does not include a telecommunications service was in error because it “entirely failed to consider” the First Amendment implications of its decision. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut.*, 463 U.S. 29, 43 (1983). This omission is particularly egregious for several reasons. This omission is less acceptable than the typical agency omission, which ignores factual material or alternative proposals. The Commission completely omitted from its legal analysis a constitutional matter—a constitutional matter that is part of the central mandate of its organic statute.¹⁸

Under the Administrative Procedure Act, agency action is arbitrary and capricious if, *inter alia*, it entirely fails to consider an important aspect of the problem.

¹⁸ To the extent the Commission belatedly recognized the issue’s importance, by seeking comment on First Amendment issues after the fact, it asked the wrong question by focusing on cable operators’ First Amendment rights alone. *See supra* at page 15. More important, the Commission put the cart before the horse by seeking comment on First Amendment issues after its statutory analysis was complete; the First Amendment component is a necessary prerequisite to the agency’s finding, not an afterthought. *See infra* Part I.C.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut., 463 U.S. 29, 43 (1983); *Brower v. Evans*, 257 F.3d 1058, 1065 (9th Cir. 2001); *California v. FCC*, 75 F.3d 1350, 1358 (9th Cir. 1996); *California v. FCC*, 39 F.3d 919, 925 (9th Cir. 1994).

When an agency's analysis supporting a rule or policy completely omits consideration of an important issue, this Circuit has not hesitated to reverse. *Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994), *see also People of State of Cal. v. FCC.*, 905 F.2d 1217, 1230-31 (9th Cir. 1990) (reversing FCC decision because FCC omitted consideration of structural separation's benefits when it lifted those obligations from monopoly Bell operating companies). For example, in *Beno*, this Court reviewed an HHS waiver. The Court considered whether HHS had properly considered the impact of a waiver she granted that reduced AFDC benefits. *Id.* at 1057. This Court found HHS's letter stating it "considered the issues [plaintiffs] raised," but including *no* analysis of these issues, was insufficient. *Id.* at 1075. Terming the lack of analysis "stunning" *id.* at 1074, this Court remanded to the agency to consider the implications of its decision. *Id.* at 1075. The factual pattern before this Court today is no different. The Commission received extensive comments on the First Amendment implications of its decision, but did not address them at all in its *Declaratory Ruling*.

The constitutional question raised by PI Petitioners is central to the Commission's goals. As explained above, the Commission has, for over sixty years,

interpreted its obligation under the public interest standard to include promotion of First Amendment goals. Thus, this issue is not unimportant enough or too undeveloped to deserve a response. *Cf. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978) (agency need not “include every alternative device and thought conceivable by the mind of man”). On its face, PI Petitioners’ argument that the First Amendment rights of American citizens to communicate over the Internet, a medium which the Supreme Court has described as “as diverse as human thought” and worthy of the highest First Amendment protection, *Reno v. ACLU*, 521 U.S. 844, 870 (1997) merits analysis.

Constitutional issues are extremely relevant to statutory interpretation. An Agency’s right to *Chevron* deference interpreting statutes diminishes when constitutional rights are implicated. This circuit has held, “[w]hen agencies adopt a constitutionally troubling interpretation, however, we can be confident that they not only lacked the expertise to evaluate the constitutional problems, but probably didn’t consider them at all.” *Williams v. Babbitt*, 115 F.3d 657, 662 (9th Cir. 1997) *cert den.* 523 U.S. 1117 (1998). Moreover, the agency is obligated to construe the statute to avoid constitutional questions. “[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, we are obligated to construe the statute to avoid such

problems.” *INS v. St. Cyr*, 533 U.S. 289, 298 (2001) (citations omitted); *Williams v. Babbitt*, 115 F.3d at 661-62; *see also US West v. FCC*, 182 F.2d 1223, 1228 (10th Cir. 1999) (vacating FCC decision that “failed to adequately consider the constitutional ramifications” of regulations implementing the Communications Act).¹⁹

C. The Commission Impermissibly Deferred Consideration of its Decision’s Impact on Constitutional Questions.

Although the Commission’s decision seriously and irreversibly harms First Amendment and other interests, it defers consideration of that issue to the future. After the Commission ignored the First Amendment when interpreting the statute, it sought additional comment on the First Amendment issues related to its decision in the Notice of Proposed Rulemaking accompanying the *Declaratory Ruling. Ruling*, 17 FCCRcd at 4843, APP 0155.

The Commission cannot defer intrinsic elements of its decision to another day. *See ITT World Communications, Inc. v. F.C.C.*, 725 F.2d 732 (D.C. Cir. 1984) (Commission not free to adopt sweeping decision restructuring communications industry without considering impact of its decision). If the First Amendment import of the decision was important enough for the agency to seek additional comment, it surely was important enough to consider *before* the legal conclusion was drawn, not

¹⁹ The Commission has been instructed, in an enforcement context, to consider a First Amendment defense raised before it. *Meredith Corp. v. FCC*, 809 F.2d 863, 872-73 (D.C. Cir. 1987).

after. At a minimum, the Commission is required, under the APA, to explain why the First Amendment questions are necessary to implement its statutory interpretation, but not relevant to the statutory interpretation itself.

The harm from decision cannot be remedied at a later time. First, the delay in protecting the public's right to communicate over the Internet is irreparable. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

The harm the FCC's *Ruling* inflicted on the public's First Amendment interests is not easily remedied for another reason. The FCC concludes that, as a matter of law, cable Internet access offerings do not include a common carrier component. This is not a matter of policy that the agency can easily remedy later. This decision has significant implications for the Commission's jurisdictional authority to adopt safeguards, should it identify problems in the future.

The classification of high speed cable Internet offerings below determines whether the offering will be considered a common carriage service. The Commission receives the explicit obligation and the authority to regulate common carriage services from Title II of the Communications Act. 47 U.S.C. §§ 201-276. Thus, if the nondiscrimination obligations pursuant to Title II were insufficient to protect the public, the Commission could rely on its general Title II authority to adopt additional

safeguards.

For services outside of Title II (or the other titles in the Act), the Commission must rely on a different source of authority, its ancillary, or Title I, authority. The Commission's authority pursuant to Title I, however, is much less sweeping and assured than its authority under Title II. As the Commission explained, its Title I authority "is not 'unrestrained' and may only be exercised provided such action is 'necessary to ensure the achievement of the Commission's statutory responsibilities.'" *Ruling*, 17 FCCRcd at 4841 (quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979)); APP 0153. Courts scrutinize more closely the Commission's regulations under Title I. In *Midwest Video*, for example, the Supreme Court struck down the Commission's attempt to promote diversity of voices over cable television because the Commission did not have authority to adopt them. *Id.* It is not clear what latitude the Commission possesses to adopt safeguards based on its Title I authority. Many parties argued before the Commission that in light of its *Ruling*, the Commission does not have the Title I authority to regulate cable Internet access. *See, e.g.*, CS Docket 02-52, AT&T Comments, at 19; Comcast Corporation Comments, at 15-2; Cox Communications Comments, at 7-11 (each filed June 17, 2002). Whether the Commission will be able to justify further steps to protect the public under Title I is not clear, and it is completely clear that its Title II authority is exceedingly broad.

Thus, not only does the Commission's decision remove the statutory common carrier nondiscrimination obligation, but it also reduces the Commission's power to adopt other safeguards in the future.

If the Commission's legal conclusions are allowed to stand, the Commission must rely on this weaker authority if it later determines that cable Internet access requires additional regulation. Therefore, if the Commission concludes, after it ultimately considers whether its regulations infringe on the public's ability to communicate over the Internet, that rules or safeguards are warranted, it will have left itself many fewer arrows in its quiver to attack the problem.

II. The Commission's Decision Unnecessarily Endangers the First Amendment Rights of Individuals Who Use the Internet to Speak and to Receive Information, Favoring the Rights of Some Speakers over Others.

The Commission has selected a mode of regulation that is the least friendly to First Amendment principles. Common carriage is the most compatible with the First Amendment because it removes both the government and private parties from content decisions. The Internet flourished into the medium Americans know today because it uses common carriers to transmit information, which protects it from discrimination. Common carriage regulation grants all parties, including cable companies, equal First Amendment rights, without infringing on any parties' First Amendment rights. Each party receives the equal right to communicate with the public, and no one's right to

communicate trumps or interferes with another's.

A. The Present-Day Internet, Developed Under Common Carriage, has Flowered Into the Paradigmatic First Amendment Ideal because No One Can Control the Transmission of Content.

The Internet is a distinct tool in the history of communication: it allows users a virtually unlimited ability both to produce and to receive speech. Not since the days when the American public received most of its information from pamphleteers on the village green or via the public mails has there been a medium that allowed *any* person to disseminate ideas and information so easily to *any* other person, without mediation, significant economic investment, or government permission.²⁰ Without this nondiscrimination principle, the Internet's core characteristic would be threatened.

The Internet developed into this free speech nirvana because, in large part, it was accessible over common carriage telephone lines. A distinctive feature of the Internet, as the Supreme Court noted, is that there is "no centralized point from which individual Web sites or services can be blocked from the Web..." *Reno v. ACLU*, 521 U.S. at 853. It further described the Internet's decentralized characteristics:

²⁰ "The architecture of the Internet, as it is right now, is perhaps the most important model of free speech since the founding.... Two hundred years after the framers ratified the Constitution, the Net has taught us what the First Amendment means.... The model for speech that the framers embraced was the model of the Internet— distributed, noncentralized, fully free and diverse." LAWRENCE LESSIG, CODE 167, 185 (1999) *quoted in American Library Ass'n, Inc. v. U.S.*, 201 F.Supp.2d 401, 470 (E.D. Pa. 2002), *appeal pending*, 71 U.S.L.W. 3177 (No. 02-361) (Sept. 6, 2002).

[The Internet] provides a relatively unlimited, low-cost capacity for communications of all kinds. Through the use of chat rooms, *any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox*. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.

Reno v. ACLU, at 2344 (emphasis added).

As this Circuit noted in *Portland*, “[t]he history of the Internet is a chronicle of innovation by improvisation, from its genesis as a national defense research network, to a medium of academic exchange, to a hacker cyber-subculture, to the commercial engine for the so-called ‘New Economy.’” *Portland*, 216 F.3d at 876. The Internet could be improvisational because the Internet is based on a common carriage infrastructure that forwards information without changing it, and thus places place intelligence at the *ends* of the network. *See id.* at 879. This so called “end-to-end” network design facilitates innovation and competition from many sources. *See Lemley & Lessig, The End of End-To-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. Rev. 925, 932 (2001) (“By architecting the network to be neutral among uses, the Internet has created a competitive environment where innovators know that their inventions will be used if useful.”); Bar, *et al.* “Defending the Internet Revolution in the Broadband Era: When Doing Nothing is Doing Harm,” E-conomy Working Paper No. 12 at 2 (Berkeley Roundtable on the International Economy August 1999) <[http://e-conomy.berkeley. ed u/](http://e-conomy.berkeley.edu/)

publications/wp/ewp12.pdf> (visited July 10, 2002). When the network is open to all, and simply passes on information, an innovator located anywhere in the network can create a new software application or service, and offer it to the public with little to stop her. *Id.*

The Internet, thus, appears to herald a new, ideal era when those seeking to communicate do not have to go through a central medium to disseminate their message: “[a] broadband communications infrastructure will be every American's tool of personal emancipation; will generate a quantum increase in Americans' freedom of speech ... and freedom of ideas; will allow Americans to recapture, yet expand upon, the democratic tradition and community spirit of the early years of this nation.” *See, e.g., Communications Competitiveness and Infrastructure Modernization Act of 1991, S. 1200, 102d Cong., 2d Sess. § 101(14) (1992).*

The Internet, as a medium, does share a critical characteristics with earlier mass media. The Eastern District of Pennsylvania, which this year undertook extensive fact-finding about the Internet, its content, and access to that content, encapsulated clearly the distinction between the Internet and other mass media:

The Internet presents low entry barriers to anyone who wishes to provide or distribute information. Unlike television, cable, radio, newspapers, magazines or books, the Internet provides an opportunity for those with access to it to communicate with a worldwide audience at little cost.

ALA v. U.S., 201 F.Supp.2d at 416. As such, the Internet is “most participatory form

of mass speech yet developed.” *ACLU v. Reno*, 929 F.Supp. at 883 (Dalzell, J., concurring) *aff’d* 521 U.S. 844 (1997). Speakers need not seek permission, a license, or persuade another that their speech is worthy of dissemination. Those who seek out information and opinions need not look to another’s schedule or defer to another’s choices.

Because of the Internet’s characteristics, speech over the Internet has received the highest First Amendment protection. *Reno v. ACLU*, 521 U.S. 844, 870. Because of the Internet’s characteristics, courts have not been forced into any uncomfortable balancing of First Amendment interests when considering Internet speech. “Internet access..., in addition to sharing the speech-enhancing qualities of fora such as street, sidewalks, and parks, also supplies many of the speech-enhancing properties of the postal service, which is open to the public at large as both speaker and recipients of information and provides a relatively low-cost means of disseminating information to a geographically dispersed audience.” *ALA v. U.S.*, 201 F.Supp.2d 401, 469.

B. Common Carrier Regulation Promotes the First Amendment.

Common carriage regulation facilitates First Amendment principles because communications between and among citizens transmitted via common carriage infrastructure are protected against discrimination and censorship. Central to common carriage is the non-discrimination obligation: common carriers may not alter the

content transmitted over their networks. *See NARUC v. FCC*, 533 F.2d 601, 609 (D.C. Cir. 1976) (common carriers transmit material not subject to their own editorial control); 47 U.S.C. §§ 202, 153(43). Individual communications by common carrier are protected by the First Amendment. *See, e.g., Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989); *Lamont v. Postmaster General of U. S.*, 381 U.S. 301 (1965).

Common carrier regulations effectuate the First Amendment by facilitating unrestricted and nondiscriminatory communication by ordinary citizens. ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 106 (Harvard University Press 1983). In his seminal work, Pool explains:

[T]hough common carrier doctrine often lacks explicit reference to civil liberties, ... [i]n its own way the law of common carriage protects ordinary citizens in their right to communicate. ... The law of common carriage rests on the ... assumption that, in the absence of regulation, the carrier will have enough monopoly power to deny citizens the right to communicate.

Id.; *see also* Jerome A. Barron, *The Telco, the Common Carrier Model and the First Amendment, the “Dial-a-Porn” Precedent*, 19 Rutgers Computer & Tech. L.J. 371 (1993). As Pool explains, the telecommunications network, rather than being analogous to a pamphleteer or newspaper publisher in 17th century America, is analogous to the postal system. POOL at 17, 80-81 (“No stronger instrument of censorship can be imagined than a monopoly on the means of delivery.”) The

network passes along protected speech, by transmitting bits or by delivering a newspaper. It is the neutrality of the network that allows others to speak freely. POOL at *id.*

No less a common carrier expert than Judge Greene, who supervised the break-up of AT&T for fourteen years, concluded that common carriage obligations promote the diversity of voices protected by the First Amendment. In language that appears prescient today, Judge Greene rejected common carriers' arguments that the First Amendment was violated by Commission policies that applied common carriage to the infrastructure over which unregulated data and information services flowed. *See United States v. Am. Tel. & Tel. Co.*, 552 F.Supp. 131,184-85 (D.D.C. 1982) *aff'd sub nom Maryland v. United States*, 460 U.S. 1001 (1983) (argument by AT&T); *see United States v. Western Electric Co., Inc.*, 673 F.Supp. 525, 585-86 (D.D.C. 1987) (argument by Regional Bell Operating Companies).²¹

Judge Greene rejected these First Amendment challenges by the infrastructure owners, holding instead that ***absence*** of common carriage requirements would threaten the values of the First Amendment. *Western Electric*, 673 F.Supp. at 585-86. The findings of the court are as true today as they were then:

That the ability for abuse exists as does the incentive, of that there can

²¹ PI Petitioners presented this to the Commission. *See CU, et al. Cable Open Access Comments* in CS Docket 00-185 at 4-9 (filed Dec. 1, 2000). APP 0078-83.

be no doubt. As stated above, information services are fragile, and because of their fragility, time-sensitivity, and their negative reactions to even small degradations in transmission quality and speed, they are most easily subject to destruction by those who control their transmission. Among more obvious means of anti-competitive action in this regard are ... manipulation of the quality of access lines; impairment of the speed, quality, and efficiency of dedicated private lines used by competitors; development of new information services to take advantage of planned, but not yet publicly known, changes in the underlying network; and use for Regional Company benefit of the knowledge of the design, nature, geographic coverage, and traffic patterns of competitive information service providers.

Id. at 566.

For these reasons, the Court concluded that “[c]ontrol by one entity of both the content of information and the means of its transmission raises an obvious problem” that “enable [the network provider] to discriminate” and “***thus pose a substantial threat to the First Amendment diversity principle.***” *Id.* at 586 (emphasis added).

Communication by individuals over common carriers receive full First Amendment protection. In *Sable Communications*, the Supreme Court struck down a statute that prohibited the transmission of constitutionally-protected indecent speech over telephone lines. *Sable*, 492 U.S. 115, 130. In *Lamont v. Postmaster General*, the Supreme Court struck down a statute that required the post office to withhold communist mail unless the recipient affirmatively requested that it be delivered. The Court stated, “[t]he United States may give up the post-office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the

right to use our tongues....” *Lamont v. Postmaster General of U. S.*, 381 U.S. 301, 305 (1965) (quoting *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burluson*, 255 U.S. 407, 437 (Holmes, J., dissenting)).

C. When the Internet is Accessible via Common Carriage, All Speakers Obtain an Equal Ability to Exercise Their Free Speech Rights.

Common carriage regulation of Internet access grants all parties, including infrastructure owners such as cable companies, equal First Amendment rights, without infringing on any party’s First Amendment rights. Each party receives the equal right to communicate with the public, and no one’s right to communicate trumps or interferes with another’s. This scenario under which all speakers win, and no one must cede their rights to another, occurs because the Internet does not suffer from the infirmity of scarcity that characterizes other mass media. It allows an equal opportunity to speak or edit regardless of whether speakers own the infrastructure used to disseminate it. Most important, although the infrastructure owner has no speech right to control the content of others, the infrastructure owner is completely free to speak as forcefully or eloquently as it wishes. Thus, the infrastructure owner maintains its full and unimpaired speech rights at the same time that all citizens retain theirs.

Because of history, technology, or economics, the content disseminated over most mass media is controlled by the owner of the means of distribution.

Broadcasters select programming, as do cable operators and direct broadcast satellite operators. In particular, the space available for speech in each of these media is limited. A limited number of licenses are available to broadcasters, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), a limited number of channels can be transmitted over a cable television system, *Turner I*, 512 U.S. at 656, and a limited number of orbital slots and transponders are available to direct broadcast satellite (DBS) operators, *DirectTV, Inc. v. FCC*, 110 F.3d 816, 821 (D.C. Cir. 1996). The Internet, as the Supreme Court has found, suffers from no such limitation. *Reno v. ACLU*, 521 U.S. at 870 (“the Internet can hardly be considered a ‘scarce’ expressive commodity”). The characteristics of the Internet distinguish the Internet from other media. *Id.*, 521 U.S. at 868-69.

The ability of the Internet to support speech from infrastructure owners and non-infrastructure owners alike is evident. Although telephone companies do not control the content transmitted over telephone lines, they fully exercise their rights to transmit their own e-mail, post their own web sites, and operate their own list-serves and instant messages. SBC, Inc., the owner of Pacific Bell, California’s predominant local telephone provider, posts information to the web at <http://www.sbc.com/> (visited October 6, 2002). SBC is free to trumpet the community service of its employees, http://www.sbc.com/corporate_citizenship/0,5931,1,00.html; solicit

members of the public to receive e-mail from its subsidiary Pacific Bell <http://www.pacbell.com/0,1952,22,00.html>; advocate on matters of public policy, and more. From a First Amendment perspective, it is especially important that, at the same time, the public can *also* obtain information from the web site www.sbsucks.com operated by a company called Sucks500.com, which allows critics to discuss the activities of various corporations. SBC customers are free to read the material on www.sbsucks.com and can exchange e-mail with other citizens discussing their disdain or pleasure at its customer service, corporate policies, or most recent quarterly earnings. This structure is easily understood, requires no complex First Amendment balancing, and has been subject to little debate under the Commission's previous regime. Moreover, nothing prohibits SBC, in a role as a content packager, from creating a subsidiary that selects and edits content, and from selling that content to members of the public, alongside similar packages available from AOL/Time Warner, AT&T, Yahoo, and others.²² This system adheres to the

²² One lower court decision held common carriage principles as applied to cable companies providing Internet access violates cable companies' First Amendment rights. *Comcast Cable Vision v. Broward County*, 124 F.Supp.2d 685 (S.D. Fla. 2000). This decision was based on a factual misunderstanding about the dissemination of information over the Internet. The court in *Broward County* incorrectly found that users would attribute potentially offensive speech provided by an alternative ISP to the cable operator. *Id.* at 696-97. This finding ignores the fact that Internet access has traditionally been supplied by common carriers that have no control over Internet content, thus few users would attribute Internet speech to the access provider. Internet access most typically supplies access to a wide range of

First Amendment principle that the best manner to fight or contest corporate speech is with more speech. “[T]he basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies. It is for this reason that this Court has recognized the inherent value of free discourse.” *Dennis v. United States*, 341 U.S. 494, 503 (1951).

As the previous example makes clear, critical to accurate First Amendment analysis is identifying expressive activity. Cable operators, for example, receive First Amendment protection insofar as they engage in expressive activity such as editing and creating content. “Through ‘original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,’ cable programmers and operators ‘see[k] to communicate messages on a wide variety of topics and in a wide variety of formats.’” *Turner I*, 512 U.S. at 636 (1994); *see also City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) (Blackmun, J., concurring); *Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634, 637 (11th Cir. 1990). “The key to cable’s First Amendment regime lies in distinguishing, as reasonably as possible, among the expressive and non-expressive

content, none of which is offered by the access provider. In addition, some affirmative action on the part of the user is typically required to obtain content, including offensive content. *See Reno v. ACLU*, 521 U.S. at 868-69.

activities of operators. That regime should provide First Amendment protection when content-related expressive activities are involved, and pull back that protection when such activities are not.” Daniel Brenner, *Cable Television and the Freedom of Expression*, 1988 Duke L.J. 329, 331 (1988).²³

Common carrier regulation will allow citizens to enjoy their First Amendment rights by requiring cable companies to pass along their content unfiltered, uncensored, and unharmed in any way. Common carrier regulation will also allow cable companies to exercise their expressive First Amendment rights by creating packages of information to sell to consumers.

The Commission’s choice may have far-reaching effects beyond those discussed here. Because Supreme Court precedent grants First Amendment protection based on each medium’s characteristics, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-87 (“differences in the characteristics of new media justify differences in the First Amendment standards applied to them”), it is possible that speech on the Internet under a system where cable operators can exercise control will receive the more limited protection granted cable television programming under the First

²³ To wit, common carriers have not received First Amendment protection because they do not edit when acting as common carriers. See HARVEY L ZUCKMAN, ET AL., MODERN COMMUNICATIONS LAW 187 (West 1999) (common carriers “receive the lowest level of First Amendment protection by definition, for they do not have a recognized right to speak on their own and are denied editorial control over their communication traffic”).

Amendment. In *Turner*, the Supreme Court distinguished cable operators from newspaper publishers because cable operators can preclude viewers from seeing certain programming, whereas print publishers cannot prevent individuals from purchasing alternative print media. *Turner I*, 512 U.S. at 565. The Court concluded: “[t]he potential for abuse of this private power over a central avenue of communication cannot be overlooked.” *Id.*; see also S. Rep. No. 102-93 at 50 (1991) (making a similar distinction between cable operators and print publishers in support of the constitutionality of the 1992 Act). The characteristics of the Internet under a non-common carriage system could eventually undermine the protections granted to speech over that medium.

D. The Commission Chose a Model that is Least Friendly to the First Amendment.

The Commission’s *Declaratory Ruling* blindly throws aside its many years of experience and selects a regulatory model that invites private and governmental intervention into content decisions, a model that was the least First Amendment friendly alternative before it. The Commission has an unprecedented opportunity to shape the technical and economic manner in which citizens transmit and receive information with significant foresight as to its impact. Congress’ and the Commission’s history regulating mass media—and the court decisions reviewing that regulation—are replete with complicated and difficult task of balancing speakers’ rights

when one party controls infrastructure and retains the ability to control speech over that infrastructure. Thus, unlike many of its prior decisions, the Commission currently possesses extensive experience with a variety of models of regulation. The Commission may examine the present Internet under current regulation and compare it with other media industries that are vertically integrated and allow more content-control by the facilities owner. Perhaps because the Commission ignored the First Amendment issues before it, it selected a statutory interpretation and a regulatory model that inflicts the most harm on First Amendment principles.

Because it does not depend on a non-discrimination principle, mass media regulation is more difficult to apply and tailor. In mass media, many regulatory and statutory obligations ensure that citizens have access to political and noncommercial discourse, and access to views other than those of the distribution medium's owner. The Commission and the courts have wrestled with the First Amendment status of a wide variety of these rules designed to promote diversity of viewpoints. The Commission and the courts have considered the merits of "must carry" obligations, which require cable operators to carry broadcast signals, *Turner I*, 512 U.S. at 641, *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*"); the Fairness Doctrine, rule under which broadcasters are obligated to cover issues of public importance fairly, *Red Lion*, 395 U.S. 367 (1969); a statute granting federal

candidates the right to use the airwaves, *CBS, Inc. v. FCC*, 453 U.S. 367 (1981); and a statute requiring non-commercial set asides on direct broadcast satellite systems, *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996); *see also* *Satellite Broadcasting And Communications Ass'n v. FCC*, 275 F.3d 337 (4th Cir. 2001) (considering obligation by satellite television providers to carry broadcast channels).

“In applying [the public interest] standard, the Commission has traditionally sought to formulate sound communications policies that (1) maximize First Amendment principles, yet (2) minimize the role of government to that essential in assuring that these First Amendment principles and objectives and the public interest itself are furthered.” *In the Matter of Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees*, 2 FCCRcd. 5272, 5275(1987). At the heart of this compromise is to preserve free speech while minimizing government intervention in particular content decisions. The Commission, by removing the neutral, common carrier disseminator of information, creates an environment, like other mass media, where a corporate entity can control the information available to the public. The *Ruling* will unnecessarily lead to a situation where the FCC and the courts will be forced back into difficult constitutional balancing. The American people will lose its

paradigmatic First Amendment ideal.

III. If the Court Determines Remand is Necessary, the Court Should Retain Jurisdiction To Ensure Reasonably Timely Implementation of the Remand.

If this Court agrees with Earthlink, Brand X and the PI Petitioners that this case may be resolved entirely on the basis of statutory construction, and that this Court should conclude that cable Internet access includes a telecommunications service within the meaning of the Communications Act. In such an event, PI Petitioners respectfully urge that the Court reverse and vacate the decision below. No further proceedings would be needed, except insofar as necessary for the agency to terminate any pending proceedings which rely upon the erroneous *Ruling*.

If this Court were to reach the issue of whether the agency's decision is in conflict with the public interest standard of the Act, however, PI Petitioners respectfully ask that this Court reverse for the reasons set forth in this brief, and remand for further proceedings in light of such decision. In this event, PI Petitioners also ask that this Court establish a firm deadline for completion of the remand, or retain jurisdiction for the limited purpose of assuring timely completion of the remand.

The judiciary is understandably reticent to establish timeframes for completion of agency proceedings absent unusual circumstances. *See Heckler v. Day*, 467 U.S. 104 (1984). Nevertheless, those circumstances do arise, albeit infrequently. *See*

Schurz v. FCC, 982 F.2d 1043, 1057 (7th Cir. 1992) (ordering the Commission to act within 120 days because the Commission's history of procrastination in dealing with issue and because vacatur left the public with no rules); *Board of Trade v. SEC*, 883 F.2d 525, 536-37 (7th Cir.1989) (similar); *Quincy Cable TV, Inc. v. FCC*, 730 F.2d 1549, 1551 (D.C. Cir. 1984) (six month deadline to complete proceedings); *Nader v. FCC*, 520 F.2d 182, 207 (D.C. Cir. 1975) (directing agency to establish compliance plan within 30 days).

Another mechanism to assure compliance in certain cases is for the reviewing court to retain jurisdiction. *In re United Mine Workers of America*, 190 F.3d 545, 551-552 (D.C. Cir. 1999) (retaining jurisdiction with instructions to report on progress every six months); *LaFlamme v. FERC*, 852 F.2d 389, 398 (D.C. Cir. 1988) (retaining jurisdiction to assure compliance with applicable statutes); *In re Monroe Communications Corp.*, 840 F.2d 942, 946 (retaining jurisdiction even though agency inaction falls short of standard which would justify writ of mandamus); *TRAC v. FCC*, 750 F.2d 70, 72, 81 (D.C. Cir. 1984) (retaining jurisdiction to ensure timely response by FCC); *MCI Telecommunications Corp. v. FCC*, 627 F.2d 322, 345-346 (D.C. Cir. 1980) (requiring schedule and retaining jurisdiction to monitor); *see also Cincinnati Bell Telephone Company v. FCC*, 69 F.3d 752, 768 (6th Cir. 1995) (requiring the

agency to conduct inquiry promptly in light of 14 year delay).²⁴

There are three reasons why this Court should provide some form of supervisory relief:

First, as outlined in the Statement of the Case, the explicit policy of the Commission has been to delay granting Petitioners the relief they have sought. For this reason, it is not unreasonable to fear that agency delay is likely in the absence of judicial oversight.

Second, PI Petitioners are legitimately concerned that the Commission's resistance to this Court's *Portland* decision may portend a similar response in the event of a remand. Specifically, in the *Declaratory Ruling*, the Commission described this Court's conclusions in detail, but nonetheless made a legal finding that contradicts *Portland. Ruling*, 17 FCCRcd at 4831-32; APP 0143-44. Moreover, the Commission "tentatively" concluded that because it disagreed with this Court's analysis, that it would, as necessary, invoke statutory forbearance procedures in this Circuit alone. *Ruling*, 17 FCCRcd at 4847-48 (citing 47 U.S.C. § 160); APP 0159-60. PI Petitioners respectfully suggest that the Commission's expressed desire to skirt this Circuit's decisions could deprive them of effective relief unless protective steps are taken.

Third, at some point, relief delayed is relief denied. Under the APA, courts are

²⁴ It is not unfair to observe that a disproportionate number of agency delay cases involve the FCC.

authorized to provide relief when agency action is “unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1); *Brower v. Evans*, 257 F.3d 1058, 1068 (9th Cir. 2001). A frustratingly instructive example of agency delay is a remand from this Circuit in *California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (“*California III*”) which, ironically, is closely related to this proceeding. In that case, this Court completed a third review of the Commission’s open access safeguards requiring telephone companies to offer its enhanced services (services analogous to Internet access) through a separate subsidiary. The Court determined the manner in which the Commission had abandoned those safeguards was arbitrary and capricious. 39 F.3d at 929-30. Today, *eight years later*, far from completing action on the remand directive, the Commission has recently incorporating the remand record into a brand new proceeding. *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 17 FCCRcd 3019, 3024 (2002).²⁵

PI Petitioners have proceeded with deliberation in proffering this request, and Petitioners recognize that this Court will wish to assure itself that such relief is truly warranted. However, in view of the agency’s foot-dragging, and the importance of broadband deployment to the nation’s economy and to the marketplace of ideas,

²⁵ “Because the instant inquiry overlaps with the Commission’s pending *Computer III Further Remand*, we incorporate the *Computer III Further Remand* proceeding by reference insofar as it relates to the BOCs’ access obligations with respect to broadband services.” *Id.*

special action is fully justified.

CONCLUSION

PI Petitioners respectfully request that this Court grant the relief requested by Petitioners Brand X and Earthlink for the reasons set forth by those Petitioners. If this court does not so rule, Petitioners request that, for the reasons described herein, this Court find that the Commission's Declaratory Ruling was arbitrary and capricious, contrary to the Communications Act, contrary to the First Amendment, and otherwise unlawful. PI Petitioners ask that, if this Court orders the Commission to undertake further proceedings, this Court establish a firm deadline for completion of the remand, or to retain jurisdiction for the limited purpose of assuring timely completion of the remand. PI Petitioners request all other relief that this Court deems to be just and proper.

Respectfully Submitted,

Cheryl A. Leanza

Andrew Jay Schwartzman

MEDIA ACCESS PROJECT
1625 K St., NW
Suite 1118
Washington, DC 20006
(202) 454-5683
Counsel for PI Petitioners

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