information, video or audio downloads of popular or specialist material, the daily transmission of the morning newspaper to the TV screen, the job-search classifieds, are unlikely to demand complex multimedia treatment.

But from our research so far, it is clear that the freedom to use the full range of formats in creating datacasting material is considered an essential component of the scope of datacasting, and a key aspect of its appeal.

By restricting the use of video formatted material, the datacasting decision restricts the use of an essential ingredient of the attractiveness of the *walled garden model*. This not only applies to specially created material but also the datacasting of existing web sites. The Government's decision permits datacasting services to deliver web sites "*(other than ones designed to carry TV programs)*"[17]. As the most popular web sites inevitably incorporate increasing amounts of video material, the Government's decision will inevitably restrict the delivery of these sites as part of a datacasting service, thereby robbing the *walled garden* of one of its essential elements.

CONCLUSION

Based on the effect of the datacasting decision on the development of the potential datacasting services identified in the Report, the Government's confidence that its decision will establish a thriving and vibrant datacasting industry appears misplaced.

By severely restricting the use of video formatted material, the decision robs datacasters of the opportunity to deliver a true multimedia experience - something that the Report identifies as essential to the commercial success of most types of datacasting services.

1 *The Television Broadcasting Services (Digital Conversion) Act 1998* (to be referred to in this article as "the Digital Act").

2 BSA Schedule 4 section 6(d), (e).

3 BSA schedule 4 section 6(3)(k).

4 BSA section 34(3); schedule 4 section 13, 27.

5 *Datacasting Charge (Imposition) Act 1998.*

6 BSA schedule 4 section 59(1)(dd).

7 BSA section 28.

8 BSA schedule 4 section 59(1)(dd).

9 BSA schedule 4 section 59(4).

10 To be referred to in this article as "the Options Paper".

11 BSA section 6.

12 "*Murdoch lashes TV's channel to the future*" Sydney Morning Herald, December 22 1999, page 1.

13 "*The Development of Datacasting Technologies and Services*", A Report for the Department of Communications, Information Technology and the Arts, Commonwealth of Australia, Communications Strategies & Management Pty Limited, February 1999 (to be referred to in this article as "the Report").

14 Report page 67.

15 The Report concludes that the point to multi point logic of terrestrial datacasting makes it technically inefficient to deliver full Internet access as opposed to the delivery of selected web site material (see Report page 86).

16 Ibid in 13 at page 4, 5.

17 See section titled "What is datacasting?" in the fact sheet titled "Digital Broadcasting and Datacasting" dated 21 December 1999.

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Access Through Cable: Who Will Control the Cable Internet Gateway?

Washington DC attorney, Ellen P Goodman, analyses cable access issues in the US.

At the turn of the millennium, the most controversial issue in US telecommunications policy has been whether or not cable companies should have to allow ISPs to use cable broadband infrastructure on a non-discriminatory basis. Dubbed the "open access" issue by ISPs and consumer advocates, and the "forced access" issue by the cable industry, the "access" question has attracted attention at all levels of government: the FCC, the federal courts, and the local franchising authorities, which have limited authority to regulate cable.

At stake in the debate is how cable broadband facilities should be regulated. Should they be treated like traditional cable services in which the cable operator negotiates freely with content providers and transmits content of its choosing (subject to limitations like must carry, leased access, and public interest channels that are reserved for policy reasons)? Or should cable broadband facilities be treated more like a common carrier telecommunications facility in which operators must carry all comers on a non-discriminatory basis. But something more is at stake as well. The FCC is challenged in this arena to do what Congress did not do in the *Telecommunications Act of 1996*: determine what services are functionally equivalent notwithstanding technical differences and reshuffle the regulatory categories to treat like-services alike.

THE ARGUMENTS

When a consumer signs up for a cable modem service through its local monopoly cable provider, such as AT&T, the cable operator will usually provide Internet access through a wholly or partially owned or affiliated ISP, such as Excite@Home.[1] The consumer can use other ISPs, but has to subscribe to his preferred service on top of the price already paid for the affiliated ISP. In addition, even though the consumer may be able to bypass the cable operator's affiliated ISP, the cable operator can make competing access services less attractive by controlling what kind of caching abilities competitors have and what sorts of services (*e.g.*, video streaming) they can offer. In this way, open access proponents argue, the cable operator can exercise control over its customer's choice of ISP as well as its customer's access to certain content. By forcing the customer to pay twice for access, the cable operator can diminish the attractiveness of an independent ISP; by slowing or even denying access to full motion video, the operator can disable content that might compete with the cable operator's affiliated programming.

Open access proponents (led by independent ISPs, some telephone companies and consumer groups) think this sort of control is unfair. They want the Government to mandate that cable operators open their networks to competing ISPs on fair and non-discriminatory terms.[2] Open access advocates claim that: the broadband internet access market is distinct from the narrowband market; cable has a near monopoly in the broadband market because of its bottleneck control over the last broadband mile to the home; cable operators will never provide access to competing ISPs on fair terms unless required to do so; it is technically feasible for cable systems to provide interconnection to independent ISPs; and it is unfair for the FCC to require telephone companies to unbundle digital subscriber line ("DSL") loops and even to provide for line sharing (enabling data to have a free-ride on voice traffic), while not imposing any access requirements on cable systems. Of course, AOL, which was once the most vocal open access proponent, has taken a more nuanced position since it announced its planned merger with Time Warner. AOL and Time Warner now say that cable facilities should be open to independent ISPs, but that government intervention is not necessary.

Opponents of open access claim that: the consumer already has many Internet access options (narrowband and, increasingly, broadband); it is not technically feasible to provide open access given the fact that the cable infrastructure is shared and it requires a single administrator to ensure that no customer hogs the bandwidth; business deals between cable and ISPs will ensure that cable customers have choices; localities have no authority to impose open access requirements and the FCC cannot impose them because it would be tantamount to regulating cable like a common carrier; and competitive forces will ensure that the consumer has at least two broadband pipes to the home.

THE BATTLEFIELDS

The Feds

At the national level - the only level at which consistent regulation is possible - the FCC has taken a wait-and-see attitude towards the open access issue. On two occasions in 1999, the FCC declined to apply open access requirements to AT&T (when it acquired TCI) and to adopt such requirements generally as part of its efforts to foster broadband telecommunications.[3] Then, in response to growing calls for action and in the face of action at the local level, the FCC's Cable Bureau released a report in October 1999 called *Broadband Today.*[4] This paper concluded that the broadband access market is still too new to support any conclusions about whether or not open access requirements are necessary. For example, the deployment of DSL, wireless, and satellite broadband access services could give most consumers a choice of broadband service provider.

The FCC repeated its mantra that it does not want to take action that would (or would appear) to regulate the Internet[5] and stated that its refusal to impose open access requirements had sped the development of cable modem services and was also promoting swifter roll-out of competing broadband technologies. However, the FCC did signal that it would not forebear from regulation if it learned that cable operators were building closed, proprietary networks. It stated that the FCC should take "*immediate and aggressive steps*" if it learned that "*cable operators were designing their networks in a way that irreversibly restricts the ability of unaffiliated ISPs to access the cable plant in a meaningful way.*"[6]

At the close of 1999, there may have been some barely perceptible movement of the FCC towards a more proactive approach to the open access issue. In a December speech before the cable industry, Chairman Kennard for the first time defined the type of open access that the Government wants to see:

> *... By open protocols, I mean that the interface standards that applications developers and equipment designers use are arrived at in an open transparent process, and then made accessible to everyone just like the IP protocol. By open boundaries, I mean that interconnection is encouraged, and bottlenecks and content control are eliminated. The borders are porous, not closed or walled off, and outside programming and services are allowed to enter the network and interact freely with consumers. By open prices, I mean that prices for access to the network are determined by a competitive market, not unilaterally by a rate setter, whether public or private. And the customer can reach the service provider of their choice without having to pay twice.*[7]

However, notwithstanding this public insistence on openness, it is likely that the FCC will continue to bide its time, particularly in light of AOL and Time Warner assurances that the merged entity will eventually try to support an open cable modem platform.

The Cities

Local authorities have not been as restrained as the FCC. Local franchising authorities, which have the power to approve the grant, renewal and transfer of cable franchises, have begun to require cable companies to "open up" or provide "open access" to their broadband platforms for competing ISPs as a condition for the approval of franchise transfers (*e.g.*, from TCI to AT&T or MediaOne to AT&T, as well as Comcast and Cox acquisitions). A handful of local authorities have decided not to approve franchise transfer requests unless the cable operator opens its broadband modem platform to unaffiliated ISPs on a non-discriminatory basis. These authorities include, Portland, Oregon, Broward County, Florida, Cambridge, Massachusetts, and Fairfax, Virginia. Other locales, such as San Francisco and Los Angeles, have expressly declined to adopt open access provisions.

The Courts

In two contexts, the open access battle has moved to the courts. First, the cable companies are challenging the local open access ordinances in court. AT&T, for example, sued the city of Portland in federal court on the grounds that Portland's open access ordinance was an unconstitutional infringement on its free speech and contrary to the Communications Act, which applies such open access provisions only to telecommunications services. A federal district court upheld the ordinance on June 7, 1999,[8] but AT&T has appealed the decision to the 9th Circuit Court of Appeals.[9] A decision is expected shortly. Comcast has challenged the Broward County ordinance in federal court in Miami.[10] In another area of litigation, the telephone company GTE has lodged a federal antitrust lawsuit against AT&T, Comcast and Excite@Home (which is partly owned by the two cable companies), charging that the bundled provision of internet access and cable services is an illegal tying arrangement.

WHAT THE FUTURE HOLDS

The FCC (and local authorities) will have another opportunity to opine on the open access debate in its consideration of the AT&T-MediaOne merger; in addition, local authorities will have to approve transfer of Time Warner franchises to AOL if that merger is consummated. It

is unlikely, however, that the FCC will decide the open access issue in the context of its review of any particular merger, since the issue affects all cable operators.

Alternatively, the FCC might deal with open access issues in an attempt to harmonize the rules governing broadband access generally. Such harmonization could entail the deregulation of certain telephony-provided broadband services or the regulation of certain cable-provided broadband services. In tackling this broader issue, the FCC will have to decide how to categorize cable modem services. Are they "cable services" (subject to Title VI cable rules and some local franchising regulation) or are they "telecommunications" or "information services" (subject, in some cases, to Title II common carrier rules). The cable industry has an interest in bringing cable modem services under the umbrella of cable services, which are subject to less federal regulation than are telecommunications or information services (the down side is that they are subject to local franchise regulations).

The Portland ordinance expressly relies on the classification of cable modem services as "cable services" under the Communications Act and FCC rules. As such, the ordinance assumes that the local franchising authority has the jurisdiction to regulate the provision of cable modem services. But, in its brief in the AT&T appeal of the Portland ordinance, the FCC signaled that it might find that cable modem services are *not* cable services. A determination that cable modem services fall into the category of "advanced telecommunications capability," the FCC said, would allow the agency to "develop a coherent regulatory policy that took into account the full range of broadband service providers, including cable systems." It is likely that the FCC will indeed attempt to develop such a coherent regulatory policy. This attempt will be well worth monitoring because it could raise issues about nondiscrimination and access issues that go well beyond the narrow issue of the cable modem platform.

To a large extent, both sides of the open access debate assume facts about the roll-out of broadband services and the feasibility of providing open access that support their claims. At this point, the FCC is clearly in favor of letting the factual scenarios play out before acting on the open access complaints. If the courts decide that the FCC has exclusive jurisdiction to regulate the cable modem platform, the FCC will probably be able to postpone making any decision. In the end, the question of open access may well depend on how successful DSL is in the marketplace and what other broadband options consumers have. Whether in this context or another, however, the FCC will have to face squarely the strains that converging technologies place on outdated regulatory constructs.

1 AT&T's exclusive agreement with Excite@Home is scheduled to expire in 2002 and AT&T has promised to enter into agreements with competing ISPs as of that date. Thus far, the terms of and parties to such agreements are only vaguely known; AT&T has apparently entered into an agreement to enter into an agreement with MindSpring, one of the largest ISPs in the U.S.

2 The open access proponents have been less vocal about ensuring access to full motion video, perhaps because the non-discrimination argument does not really work in this area. This is because many cable operators limit video streaming through their own affiliated ISPs and so, presumably, even under a non-discrimination provision, could do the same with independent ISPs.

3 *See Inquiry Concerning the Deployment of Advanced Telecommunications*, 14 FCC Rcd 2398, ¶¶ 45-6, 85-101 (1999) and *Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc. to AT&T Corp., 14 FCC Rcd 3160, ¶¶ 92-94 (1999).*

4 Available at http//www.fcc.gov.

5 *See also* Oxman, *The FCC and the Unregulation of the Internet*, FCC Office of Plans and Policy, Working Paper No. 31 (July 1999); Esbin, *Internet Over Cable: Defining the Future In Terms of the Past*, FCC Office of Plans and Policy, Working paper No. 30 (August 1998).

6 *Broadband Today*, Staff Report of FCC Cable Services Bureau (Oct. 1999) at 43.

7 *Broadband Cable: Next Steps*, Address of William Kennard, Chairman, FCC before the Western Show, California Cable Television Association, Los Angeles (Dec. 16, 1999).

8 *See AT&T Corp. v. City of Portland, et al.*, CV 99-65-PA, slip op. (D. Or., June 3, 1999).

9 *See AT&T Corp. v. City of Portland, et al.*, No. 99-3509 (9th Cir.) (Aug. 13, 1999).

10 *See Comcast Cablevision of Broward County, Inc. v. Broward County*, CV-99-6934 (S.D. Fl. filed July 20, 1999). The Broward County ordinance, adopted on July 13, 1999, is more sweeping than the Portland ordinance. It requires any cable company to provide any requesting ISP with nondiscriminatory "access to [the cable company's] Broadband Internet Access Transport Services" and states that if the cable company becomes subject to more extensive or different open access requirements, Broward County will automatically impose the same requirements.

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Editors Note: At the time of going to press, the Wall Street Journal reported that America Online and Time Warner were expected to announce that they will open their cable lines to multiple Internet service providers following consummation of their merger. The article stated:

"This commitment to giving consumers a choice of ISPs reflects some of AOL's original ideas regarding "open access." This stance should go a long way in placating regulators and open access proponents who might otherwise oppose the deal. Tuesday's expected announcement will likely provide few details about the policy, leaving room for speculation and scepticism. For the last year, AOL was one of the leading champions of government-mandated open-access policy. However, at the time that their merger with Time Warner, AOL backed off, saying that there was no longer a need for government regulation. This reversal has consumer groups wondering about the company's true commitment to open-access. Another group that might have reason to be concerned about Tuesday's expected announcement is Roadrunner, a cable Internet service provider in which Time Warner has a stake. Currently, Time Warner has an agreement with Roadrunner to use them as the sole ISP for their cable lines until the end of 2001."

The announcement is being treated with some scepticism as simply being an attempt to throw off pressure from the regulators.