

obligations apply with full force in the context of broadband services, and the Commission has no discretion to forbear from enforcing them until they are fully implemented.<sup>217</sup>

In any context in which Congress has left the decision whether or not to impose regulation to the Commission's sound discretion, the decision should likewise account for the particular benefits and burdens of access regulation in that context. In all such determinations, the Commission should, of course, be guided by one universally accepted economic and public policy principle: regulators should not dictate the terms and conditions under which a firm provides access to its facilities unless there is a risk of abuse of a bottleneck monopoly. *See* Ordovery and Willig Decl. ¶¶ 11, 14.

The Commission's existing broadband policies and regulations are fully consistent with that principle. The general rule, applicable to cable, satellite, and wireless broadband networks, is that the terms and conditions of access are determined in the marketplace, because no bottleneck monopoly threatens the full and fair play of market forces. The sole exception is access regulation of the telephone networks of incumbent LECs, where the very real risk of bottleneck monopoly abuse easily justifies both the section 251 access regulation imposed by Congress and the Commission's own *Computer II* "tying" prohibition. As the Commission recently explained to the D.C. Circuit, the incumbent LEC's local "loops" remain "a quintessential bottleneck facility for competing telecommunications carriers." FCC DSL Br. at 22. Until the incumbents' voice monopolies are broken, existing regulation will therefore remain necessary to prevent them from using their control over facilities used simultaneously to provide both voice and advanced services to "perpetuate their monopolistic dominance" of "existing" markets and to leverage that dominance into "emerging" markets. *Id.*

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<sup>217</sup> See, e.g., Memorandum Opinion and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd. 24012 ¶¶ 11, 72 ("Section 706

In these circumstances, no legitimate notion of “regulatory parity” or “competitive neutrality” could, at the present time, support altering the *status quo* to impose “the same regulations on different types of providers of high-speed services.” NOI ¶ 45. Incumbent LECs simply are not similarly situated with cable and other broadband providers in respect to either the benefits or the burdens associated with access regulation. In this regard, there is no merit to incumbent LECs unsupportable assertions that regulatory reform is necessary to encourage their investment in and deployment of DSL and other advanced services. As the Commission’s most recent inquiries have confirmed, incumbent LECs are deploying advanced services at a blistering pace – DSL sales are growing at 3 times the rate of cable Internet sales, DSL service is available to *more* homes than cable Internet service, and analysts now forecast that there will soon be more DSL subscribers than cable Internet subscribers.<sup>218</sup>

If and when the incumbent LEC monopolies are broken and competitive local telephone markets emerge, it may well be appropriate to reconsider the need for regulation of access to the incumbents’ networks. However, we are a long way from that point today.

**A. As The Commission Has Consistently Recognized, Congress Imposed Very Different Regulatory Frameworks On Cable Networks And Telephone Networks.**

Any discussion of “whether to impose the same regulations on different types of providers of high-speed services,” NOI ¶ 45, must begin with the regulatory framework

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Order”); Order on Remand, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd. 385 ¶ 11 (“*Section 706 Remand Order*”)

<sup>218</sup> See Federal Communications Commission Releases Data On High Speed Services For Internet Access, FCC Press Release (October 31, 2000); Cable vs. DSL: Which One Is The Tortoise; Suddenly Phone Companies Look Poised To Take The Lead (citing a study by Cahners In-Stat of Scottsdale, Ariz.) <[www.businessweek.com/2000/00\\_39/b3700073.htm?scriptFramed](http://www.businessweek.com/2000/00_39/b3700073.htm?scriptFramed)>); David Kravets, *DSL Throttles Modems in IQ*, *Cable World*, at 8 (May 29, 2000) (2000 WL 12302944); Lawrence J. Magid, *Small Business Tools/Software, Technology and New Products to Help Your Company The ABCs of DSL: Options Abound in Fast Internet Access Service*, Los Angeles Times, at C6 (June 28, 2000).

established by Congress in the Communications Act. As explained above, Title VI of the Communications Act expressly precludes common carrier regulation of cable operators.

In contrast, Title II of the Communications Act expressly requires incumbent LECs to provide competitors nondiscriminatory access to their networks.<sup>219</sup> As the Commission has repeatedly held, “the facilities and equipment used by incumbent LECs to provide advanced services are network elements and subject to the obligations in section 251(c)(3).” *Section 706 Order* ¶ 11. The Commission has emphasized that excepting advanced services from these access regulations would be inconsistent with “Congress’ aim to encourage competition in all telecommunications markets.”<sup>220</sup> And section 10(a) of the Communications Act “expressly forbids the Commission from forbearing from the requirements of section 251(c) . . . ‘until it determines that those requirements have been fully implemented.’”<sup>221</sup> Given the incumbent LECs’ continued dominance of local telephone markets, there can be no serious claim that the requirements of section 251(c) have been fully implemented. Accordingly, the market-based approach required by law and policy in the context of cable networks is, at least for now, foreclosed as a matter of law in the context of incumbent LECs’ local telephone networks.

**B. There Are Strong Public Policy Reasons For Treating Incumbent LEC Telephone Networks Differently Than Cable And Other Networks.**

Even if Congress had not spoken on this precise issue, there are sound public policy reasons for regulating incumbent LEC telephone networks differently than cable and other networks. As explained above, there are no competition problems for access regulation to solve

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<sup>219</sup> See, e.g., Memorandum Opinion and Order, *Applications of Ameritech Corp., Transferor and SBC Communications, Inc., Transferee for Consent to Transfer Control of Licenses*, 14 FCC Rcd. 14712 ¶ 452 (1999) (“section 251[c] requires all incumbent LECs to provide nondiscriminatory access to their network facilities”).

<sup>220</sup> *Section 706 Remand Order* ¶ 12. See also *Local Competition Order* ¶ 11 (observing that Congress determined that such access to incumbent networks and services was essential to permit “efficient entry into the monopolized local market”).

in the cable context, and, thus, there are no possible benefits associated with such regulation. At the same time, inflexible cable access regulation could seriously undermine the delivery of advanced services over cable given the unique technology, cost, and quality of service implications of cable system architecture.

This calculus is exactly reversed with respect to incumbent LEC telephone networks. As explained below, access regulation is absolutely necessary if the incumbent LECs are to be prevented both from further entrenching their enduring local telephone monopolies and from leveraging those monopolies into broadband and other advanced services. On the other hand, there are no competitively significant burdens associated with maintaining the *status quo* of access regulation, as demonstrated in the marketplace by the incumbent LECs' enormous broadband investments and remarkable subscriber base growth.

**1. The Incumbent LECs' Enduring Voice Monopolies Raise Competition Issues That Are Not Present In The Cable Context.**

Incumbent LEC networks, especially the local loop, remain “a quintessential bottleneck facility for competing telecommunications carriers” that incumbents can, absent regulation, leverage to “perpetuate their monopolistic dominance of existing and emerging telecommunications markets.” FCC DSL Br. at 22. Despite the efforts by Congress and the Commission, incumbent LECs face little competition, particularly for residential customers. Nearly five years after the Communications Act, incumbents retain nearly all of the customers.<sup>221</sup> The most recent Commission Industry Analysis shows that only about 0.4 percent of the incumbent LECs' 167 million switched access lines were provided to CLECs under UNE

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<sup>221</sup> *Id.* at ¶ 72 (quoting 47 U.S.C. § 160(d)).

<sup>222</sup> See, e.g., *Bell Atlantic-GTE Merger Order* ¶ 104 (noting that “Bell Atlantic and GTE remain dominant within their traditional service areas”); Third Report and Order and Memorandum Op. and Order, *To Establish Rules And Policies For Local Multipoint Distribution Service And For Fixed Satellite Services*, 15 FCC Rcd. 11857, ¶ 10 (2000).

arrangements<sup>223</sup> – a principal means by which Congress intended to foster local broad-scale competition.<sup>224</sup> Indeed, the incumbent LECs’ resistance to the market opening conditions of the Communications Act has proven so successful that the competitive LEC industry now stands on the verge of collapse. Competitive LECs have become “marginalized” because they do not “own the strategic assets” necessary to compete but must “rely on the ubiquitous Bell network” – a network that remains largely closed to new entrants.<sup>225</sup> “[I]nvestors [have] los[t] confidence in the fundamentals of the CLEC business model,”<sup>226</sup> “there has been ‘carnage’ among CLEC stocks,”<sup>227</sup> and numerous competitive LECs have filed (or are on the verge of filing) for bankruptcy.<sup>228</sup>

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<sup>223</sup> Industry Analysis Division, Trends in Telephone Service, at Table 9.4 (March 2000).

<sup>224</sup> Memorandum Op. and Order, *Application for Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Services in the State of New York*, 15 FCC Rcd. 3953, ¶ 230 (1999) (“*Bell Atlantic-New York 271 Order*”). See also Memorandum Op. and Order, *Application of BellSouth Corp. Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide in-Region, InterLATA Services in South Carolina*, 13 FCC Rcd. 539, ¶ 195 (1997) (“*BellSouth South Carolina 271 Order*”); Memorandum Op. and Order, *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd. 20543, ¶ 332 (1997) (“*Ameritech Michigan 271 Order*”).

<sup>225</sup> Janet Whitman, *New Entrants: Battling the Bells*, Wall Street Journal, at R17 (Sept. 18, 2000). See also Brian Ploskina, *It’s Open Season For CLEC Consolidators*, Interactive Week (Oct. 11, 2000) (reporting that competitive local exchange carriers are “facing hard times” because they are forced to rely “on the incumbent carriers”).

<sup>226</sup> Mike Farrell, *ICG Tanks, Depressing Other CLECs*, Multichannel News (Oct. 2, 2000).

<sup>227</sup> John T. Mulqueen, *ICG Hit Hard by Revenue Shortfall, Resignations*, Interactive Week (Oct. 8, 2000). See also *id.* (“Another piece of the crumbling new carrier industry has plummeted to the ground”).

<sup>228</sup> Paul Sherer, *Deals & Deal Makers: Too Much Telecom*, Wall Street Journal, at C1 (Aug. 15, 2000) (“[T]he telecom landscape is littered with troubled firms.”); Jeff St. Onge, *Amer MetroComm Asks to Abandon Cisco Gear It Calls Faulty*, Dow Jones News Service (Oct. 10, 2000) (reporting on Aug. 23 Chapter 11 filing and ongoing bankruptcy proceedings); Jeff St. Onge, *A Bankruptcy Boom Is Starting To Have Ripple Effects*, Dow Jones News Service (Oct. 5, 2000) (“[I]n just the past few months, dozens of [ISPs] and telecom start-ups have filed for bankruptcy.”); Heather Draper, *ICG’s Tumble A Wake-Up Call to Telecom Firms*, Denver Rocky Mountain News, at 1G (Sept. 24, 2000) (“Certainly, ICG is at risk of bankruptcy and other CLECs will be in the same boat”); John T. Mulqueen, *Carrier’s Purchasing Plans In Question*,

Congress required incumbents to provide new entrants with unbundled networks because “[d]uplicating [ILEC] facilities would be prohibitively expensive...and in most areas there is no readily available technological substitute for bridging the last mile between end users and national telecommunications networks.” FCC DSL Br. at 22 (citing *UNE Remand Order* ¶¶ 181-95). Although AT&T and other cable companies have begun to deploy alternative facilities-based local telephone services, those offerings are not widely available today.

In these circumstances, continued regulation of access to the incumbent LECs’ facilities is clearly necessary. Consumers are increasingly demanding voice and high speed data services over a single line. Incumbent LECs are already satisfying that demand today and have made clear they consider the ability to offer voice and data services over a single line a significant competitive advantage.<sup>229</sup> If competitors lacked the ability to offer both voice and data services

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Interactive Week (Oct. 1, 2000) (“Several [securities analysts] noted that some competitive local exchange carriers were not meeting revenue projections, some had gone bankrupt and that the capital markets, especially junk bonds, were closed to new carriers.”); *Darwin Claims Another CLEC*, Communications Today (Oct. 4, 2000) (“Nettel is just the latest telecom casualty in the dog-eat-dog CLEC arena.”); Janet Whitman, *McLeodUSA’s CapRock Buy May Mark New Consolidation Round*, Dow Jones News Service (Oct. 3, 2000) (“Troubled CLECs that don’t manage to secure additional funding” are “likely to face bankruptcy” unless they can find a buyer).

<sup>229</sup> *SBC Launches \$6 Billion Broadband Initiative to Transform It Into America’s Largest Single Broadband Provider*, Business Wire (Oct. 18, 1999) (quoting SBC CEO Ed Whitacre as stating that “[b]y converting the ‘last mile’ into a high-speed ‘first mile’ on-ramp to the Internet, [SBC is] making nearly all of [its] approximately 60 million access lines more powerful for customers and more valuable to shareholders...Project Pronto [*i.e.*, SBC’s DSL service], together with [its] expanding service footprint and plans to provide long-distance service, is an integral part of our plan to be a full-service, global provider and the only communications company our customers need”); Dick Kelsey, *Qwest 3Q Profit Up 18 Percent*, Newsbytes (Oct. 24, 2000) (reporting Qwest’s CEO Joseph Nacchio has stating that Qwest intends to push “bundled” voice/data services to its customers); *Verizon Posts Strong Third Quarter Revenue Growth on Sustained Demand for High-Growth Services* (Oct. 30, 2000) <[http://investor.verizon.com/news/VZ/2000-10-30\\_X294729.html](http://investor.verizon.com/news/VZ/2000-10-30_X294729.html)> (quoting Verizon President and co-CEO Ivan Seidenberg as stating that “With the premier set of local wireline and wireless assets in the industry, we have the right platform – a fiber-rich, data-centric network architecture – on which to build a truly integrated bundle of broadband communications services that will create value for customers and shareholders”); Duane Ackerman, *Take Another Look at BellSouth* (Oct. 4, 2000) (<http://www.bellsouth.com/investor/100500goldmansachs.doc>) (“we have last-mile connectivity

over a single loop, they would be at a severe competitive advantage in the vast majority of the nation where there is no other facility over which both services can be provisioned. Continued regulation is therefore necessary to prevent incumbent LECs from further entrenching their voice monopolies. *See* Ordoover and Willig Decl. ¶ 43.

Retention of existing access regulation is also necessary to prevent incumbent LECs from leveraging their bottleneck monopolies into nascent advanced services “offered over the same bottleneck facilities.”<sup>230</sup> For example, a dominant local carrier might harm competition for a non-monopoly DSL service by implicitly pricing it at a non-compensatory level when it is sold as a part of a voice bundle. Ordoover and Willig Decl. ¶ 44. This strategy entails setting the unbundled price of the basic local service and the price of the combined bundle of services close enough to each other so that the differential is less than the incremental cost of supplying the DSL service alone. *Id.* In this scenario, the direct effect of the conduct is to squeeze out the competing suppliers of the enhanced service that might otherwise serve as attractive complements to the basic services offered by the incumbent LEC. *Id.*

Allowing incumbent LECs to bundle basic services with enhanced services provided over bottleneck facilities could also better enable them to squeeze out efficient potential competitors through non-price means – *e.g.*, by offering lower quality monopoly bottleneck services to customers of their competitors, and by providing quicker or more complete disclosure of their

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to our customers. In case you haven’t noticed, this is a scarce asset, ... [w]e have the most robust local network in the U.S., if not the world. Through prudent and consistent levels of investment, we are leveraging this asset by systematically transforming the network to digital broadband and IP.”).

<sup>230</sup> ILECs clearly have a strong incentive to engage in such leveraging. The motive exists because federal and state regulations are designed to prevent them from fully exploiting pricing power over monopoly bottleneck local services. Bundling enables the carrier to exercise this unexploited pricing power in otherwise-competitive markets for complementary goods or services.

network interface specifications and protocols to favored vendors. *Id.* ¶ 45. That is so because bundling potentially “covers up” discrimination. *Id.*

Finally, if the incumbents were exempt from regulation merely because they are using their bottleneck facilities to provide advanced services, they could simply migrate captive local telephony customers to DSL before cable telephony or any other alternative to these monopoly services is available. Then the LECs could exploit their telephony monopoly over local customers without regulation, by means of pricing of local services to end-users as well as pricing of access to long distance providers, all under the rubric of “advanced services” offerings. *Id.* ¶ 46.

No comparable competitive concerns exist with regard to cable systems because, unlike the ILECs, cable operators do not control bottleneck facilities. Non-cable MVPDs are now firmly established as significant competitors to cable MSOs.<sup>231</sup> Indeed, non-cable MVPDs now serve more than 20 percent of all multichannel video subscribers nationwide and have the capacity to serve nearly all remaining cable customers. *See The Kagan Media Index*, at 8 (July 31, 2000).

DBS in particular is thriving. DBS providers have deployed alternative systems that can serve cable customers throughout the nation, already have 13 million subscribers,<sup>232</sup> and are

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<sup>231</sup> AT&T (and NCTA) have detailed the extensive competition faced by cable companies for video programming distribution in their recent comments in *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming* (CS Docket No. 00132). In these comments, AT&T summarizes this analysis and incorporates those comments by reference.

<sup>232</sup> According to recent statistics in *The Kagan Media Index*, there are 17 million non-cable subscribers (or 20 percent of the 84.9 million MVPD subscribers), including: 13.4 million DBS subscribers, 1.3 million backyard dish subscribers, 1.5 million SMATV subscribers, and 0.8 million wireless cable subscribers. *See The Kagan Media Index* at 8 (July 31, 2000).

adding 3 million new subscribers a year.<sup>233</sup> They are each far larger than any cable MSO in terms of reach and population of potential subscribers. The DBS subscriber base is growing at a percentage rate that is 20 times as fast as cable (and more than half of new DBS subscribers are former cable customers).<sup>234</sup>

While the two major DBS providers' offerings are ubiquitously available to consumers nationwide, they are not the only alternative distribution networks to cable systems. Cable overbuilders have raised "billions of dollars of equity"<sup>235</sup> and are deploying broadband facilities on a large-scale basis. The potential ability to offer – and receive revenues from – telephone, and high-speed Internet services, as well as traditional cable offerings, appears to be providing new incentives to "overbuild."<sup>236</sup> Video programming will soon be distributed using "fixed wireless" facilities<sup>237</sup> – a technology that appears poised to take off because of its ability to offer

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<sup>233</sup> *Cable, DBS, Other Video Players Square Off Over Regulations*, Communications Daily (Sep. 12, 2000).

<sup>234</sup> See Sixth Annual Report, *Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming*, 15 FCC Rcd. 978, ¶¶ 20, 70 (1999) (comparing cable's 1.8 percent subscriber growth rate to the 39 percent growth rate for DBS); *Pay-TV War Between DBS And Cable Heats Up*, Communications Daily (Aug. 23, 2000) (estimating half of new DBS customers former cable customers).

<sup>235</sup> Donaldson, Lufkin & Jenrette, *Cable Operators: Who Wants To Borrow a Billion?*, Media and Entertainment, at 7 (April 18, 2000)

<sup>236</sup> The CEO of Digital Access, Inc., a company that intends to compete against the incumbent cable operator in Indianapolis, puts it nicely: "What makes this work, and what didn't make it work five years ago, is that instead of competing for a market share of a \$35 average cable bill, you are competing for the opportunity to take \$100 to \$150 out of the home for voice, video and data." *Comcast Has a Battle on its Hands*, Philadelphia Inquirer, June 11, 2000.

<sup>237</sup> Local Multipoint Distribution Service ("LMDS") can provide residential consumers with data rates of 35 to 58 Mbps downstream. Multi-Point to Multi-Point Distribution Service ("MMDS"), which operates at a lower frequency than LMDS, can transport data at rates up to 10 Mbps. These fixed wireless technologies can support multiple services such as cable TV programming, fast Internet connectivity, and videoconferencing. Capacity for both LMDS and MMDS is scalable and can be expanded incrementally by increasing the number of base stations in each area.

a seamless package of voice, data and video programming.<sup>238</sup> Sprint currently provides wireless broadband services to customers in Tuscon and Phoenix, Arizona and has recently committed to expanding those services to an additional 45 markets across the United States covering 24.8 million households.<sup>239</sup> Industry leader WorldCom is deploying fixed wireless facilities with comparable coverage.<sup>240</sup>

**2. “Regulatory Parity” Is Not Appropriate Because Of The Substantial Differential In The Costs Of Imposing Access Regulation On ILECs And Cable Operators.**

Even apart from the clear competition differences that foreclose any plea for uniform regulation, there are also important differences in the burdens associated with access regulation. Incumbent LECs and cable operators are not similarly situated. As explained above, because of the unique nature of cable Internet services, inflexible government-mandated access regulation would impose enormous costs on cable operators and result in lower quality of service. Such regulation would not only handicap cable operators relative to their broadband rivals, but would directly harm consumers.

On the other hand, the costs of imposing “open access” on incumbent LEC networks – which grew up under a common carrier regulatory regime – are not competitively significant. The same architecture that an incumbent LEC uses to provide its own line-shared DSL service is capable of providing line sharing to a competitor with minimal modifications. (Third Report and Order and Fourth Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd. 20912, ¶ 67 (1999)). Further, it is straightforward

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<sup>238</sup> 1999: *The Year Broadband Wireless Entranced the Industry*, Wireless Today (Jan. 6, 2000).

<sup>239</sup> See *Broadband to Fon du Lac*, tele.com, Sept. 4, 2000, at 37 (Sprint fixed wireless plans to reach 45 markets and approximately 30 million households); Steve Young & Bruce Francis, *Sprint Broadband Wireless President*, CNNfn (Interview Transcript), Aug. 22, 2000 (Tim Sutton of Sprint Fixed Wireless Group discusses plans to enter 45 markets passing 30 million households).

to deploy DSL technology that does not interfere with voiceband services. *Id.* Finally, it is notable that incumbent LEC's are required to accommodate line sharing with only a single provider. *Id.* ¶ 71.

Any doubt that existing incumbent LEC access regulations are unduly burdensome is dispelled by the fact that ILEC DSL services are thriving today. SBC is expected to become America's largest single broadband provider within the next three years.<sup>241</sup> Likewise, Verizon subscribers have ballooned from 30,000 subscribers to 250,000 subscribers since the beginning of this year and Qwest has increased its subscribership by 280% since the beginning of this year.<sup>242</sup> In fact, driven by the aggressive ILEC deployment, DSL is now expected to overtake cable Internet services in terms of market share by 2002.<sup>243</sup>

In this regard, the Commission should squarely reject any claim that the existing regulatory scheme has chilled ILEC "innovation." The basic infrastructure used by incumbent LECs to provide high speed services was deployed by incumbent LECs under a regulatory regime that shielded them from competition and guaranteed a return on equity. And the incumbent LECs faced no research and development risk with regard to the use of DSL technology; it was developed by Bell Labs prior to the Bell system divestiture.<sup>244</sup> Moreover, it is

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<sup>240</sup> See *The Year of the Launch*, Wireless Week (June 5, 2000).

<sup>241</sup> *Id.*

<sup>242</sup> *Cable vs. DSL: Which One Is The Tortoise; Suddenly Phone Companies Look Poised To Take The Lead* (citing a study by Cahners In-Stat of Scottsdale, Ariz.) (<[http://www.businessweek.com:/2000/00\\_39/b3700073.htm?scriptFramed](http://www.businessweek.com:/2000/00_39/b3700073.htm?scriptFramed)>).

<sup>243</sup> *Id.*

<sup>244</sup> See, e.g., Lee Gomes "Telecommunications (A Special Report): Cable Connection," *Asian Wall Street Journal*, 1996 WL-WSJA 12474757 (Sept. 23, 1996).

well-documented that the ILECs only began to deploy DSL technology when faced with competition from new entrants.<sup>245</sup>

In sum, imposing unnecessary regulation on cable operators or abandoning necessary regulation of incumbent LECs in this context would place cable operators at a significant competitive disadvantage with the incumbent LECs (who already enjoy greater economies of scale). Not only would such action impede the deployment of advanced services in contravention of § 706 of the Communications Act, it would also greatly diminish the ability of cable operators to offer local telephone services and provide consumers with meaningful choice.

**V. REGULATION OF INTERACTIVE TV WOULD BE HARMFUL BECAUSE THE BUSINESS IS NASCENT, AND IS UNNECESSARY BECAUSE THE BUSINESS IS SHOWING ALL THE SIGNS OF BROAD COMPETITIVE ENTRY WITH HIGH LEVELS OF INVESTMENT AND INNOVATION.**

In the NOI, the Commission seeks comment on “the potential services that may develop that make use of a combination Internet and television broadcast channel platform.”<sup>246</sup> In addition, the Commission raises the issue of potential “problems” that may arise by allowing an “affiliated or preferred ISP the ability to combine Internet services to the television broadcast channel.”<sup>247</sup> AT&T wishes to make the following points as these questions relate to the issue of interactive TV (“ITV”):

- It is premature to consider regulating ITV because the business is in the very early stages of its development, and many important questions about technology, service, and consumer preference are yet to be resolved.

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<sup>245</sup> See *Broadband Today* at 27 (“The ILECs’ aggressive deployment of DSL can be attributed in large part to the deployment of cable Internet service. Although the ILECs have possessed DSL technology since the 1980s, they did not offer the service, for concern that it would negatively impact their other lines of business.”); *First Enhanced Services Report* ¶ 42 & n.132 (“All this investment, especially that by cable television companies and competitive LECs, appears to have spurred incumbent LECs to construct competing facilities.”).

<sup>246</sup> *NOI* ¶ 49.

<sup>247</sup> *Id.*

- Regulation of ITV is unnecessary because many companies are rapidly entering the business, and competition, investment, and innovation are thriving.
  - It would be inappropriate for the Commission to adopt regulations – or even to propose regulations – of ITV based on this NOI, which addresses an entirely different issue.
- A. Regulation Of Interactive TV Would Be Harmful Because The Business, While Growing, Is Still Nascent With Many Fundamental Business And Technical Questions Still Unanswered.**

The concept of ITV has been around since the early 1980s, but it has failed to reach its potential largely because of a perceived lack of interest on the part of consumers and limits in the technology.<sup>248</sup> However, these dynamics are changing. Consumers are becoming increasingly comfortable interacting with their TVs, whether through remote controls, interactive game systems, or other devices. Likewise, technology advancements, most notably the growth of digital technologies, are promoting convergence between the TV and other devices and thereby facilitating the use of interactivity. As a result, “[t]oday the prospects for interactive television have never been higher” and “ITV is receiving an unparalleled level of investment and involvement from a wide variety of major media and technology players.”<sup>249</sup>

Notwithstanding these positive developments, it is clear that ITV is a nascent and fluid business. Many of the core issues involving the technology, the business model (or models), and consumer preferences have only recently begun to be seriously explored. Indeed, there is not even a common understanding of what ITV is. Potentially, it includes services such as electronic program guides, video-on-demand, e-commerce, requests for more information about TV shows, time-shifted programming, interactive games, personal video recording, Web browsing on TV, e-mail, and home banking. But, it remains to be seen whether and to what extent consumers will

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<sup>248</sup> The Meyers Group, *Interactive Television Outlook 2000*, at 18-19 (June 2000) (“*Interactive TV 2000*”).

<sup>249</sup> *Id.* at 5.

accept these services (or a combination of them) delivered over TV. As one industry analyst has observed:

Despite growing industry enthusiasm, there still is no overwhelming evidence that any of these services will be deployed on a mass scale approaching, say, the Internet, VCRs or traditional television networks. As ITV developers have found time and time again, great intentions do not guarantee great results.<sup>250</sup>

In addition to the uncertainty about what ITV services consumers will want, there are a host of important unknowns about ITV technology. For example, there is no consensus on a technical platform for the distribution of ITV, no technical standards for applications to be run over the platforms, and no agreement on a consumer interface.<sup>251</sup> Although recent developments suggest that the marketplace will provide adequate solutions,<sup>252</sup> this will not be easy given the almost daily introduction of unique ITV applications and the varying and evolving business strategies of the many players in the ITV business.

Similarly, there is no clear business model for ITV advertising. Advertisers have not yet come to grips with the development of interactive measurement tools, techniques, and strategies for marketing in an interactive environment or with consumer attitudes about interactive advertising.<sup>253</sup> As a result, advertisers are experimenting with new advertising models, such as e-mail ads, affiliate marketing, and web-based promotions. Although there is increasing interest about ITV in the advertising community, many fundamental questions remain unanswered.

The uncertainties about advertising are particularly important because, as shown above, there are also many unanswered questions about the growth of the ITV business and the willingness of consumers to engage in e-commerce over their TVs. Thus, the three key

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<sup>250</sup> *Id.* at 9.

<sup>251</sup> *See id.* at 18.

<sup>252</sup> *See id.* at 81.

<sup>253</sup> *See id.* at 53-69.

determinants of the revenue potential of ITV – advertising, subscriptions, and e-commerce – remain unclear.<sup>254</sup> It is not surprising, then, that no clear ITV business model has emerged.

In such an environment, regulation is far more likely to cause harm than good. Neither the Commission nor any ITV participant can know how consumers will react, how technology will evolve, or how the business models will develop. Regulation at this early stage would skew the development of ITV in ways that nobody can possibly predict.<sup>255</sup>

**B. Regulation Of Interactive TV Is Unnecessary Because A Large And Diverse Range Of Companies Are Rapidly Entering The Business And This Is Spurring Significant Competition, Investment, Innovation, And Growth.**

Not only would regulation of ITV be harmful given the nascent state of the business, it is unnecessary because ITV is developing in a competitive manner with strong private sector investment and innovation.

Many companies are moving rapidly to provide a broad range of ITV technologies and services. For example, companies such as Liberate Technologies, Microsoft, and Lysis are creating the software necessary to provide ITV to consumers.<sup>256</sup> Content providers such as CBS, Disney, Intertainer, ESPN, NBC, and many others, are investing in the development of ITV

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<sup>254</sup> See *id.* at 13-15.

<sup>255</sup> *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd. 3696, ¶ 316 (1999) (In a “dynamic and evolving market, regulatory restraint . . . may be the most prudent course of action.”); *First Enhanced Services Report*, ¶ 74 (“[W]e need to be particularly careful about any action we take to promote broadband deployment, given the nascent nature of the residential market for broadband.”).

<sup>256</sup> See Microsoft, *Microsoft Strengthens Commitment to Enhanced TV Arena with Launch of European Content Developer Programme* at IBC2000 (Sept. 8, 2000), [http://www.microsoft.com/tv/press/news/ne\\_CDP.asp](http://www.microsoft.com/tv/press/news/ne_CDP.asp); Cisco Sys., Inc. & Liberate Techs., *Interactive Cable Is a Reality 1* (White Paper 1999) (“*Cisco/Liberate White Paper*”), [http://www.cisco.com/cable/solutions/cable\\_op\\_tech.html](http://www.cisco.com/cable/solutions/cable_op_tech.html); Compaq, Oracle & Lysis, *Integrated Solution for Managing and Delivering Digital TV Broadcasting 17* (White Paper 1999) (“*Compaq White Paper*”), <http://www.lysis.com>.

content.<sup>257</sup> TiVo, Replay TV, and other consumer electronics companies are creating new devices like interactive digital video recorders.<sup>258</sup> Companies like Wink and RespondTV are exploring e-commerce opportunities over the television.<sup>259</sup> Worldgate, Interactive Channel, and GemStar are creating interactive electronic program guides.<sup>260</sup> ACTV, ICTV, MoreCom, Diva Systems, and Seachange are using the TV to provide video-on-demand and other interactive services, such as e-mail, instant messaging, and on-screen shopping.<sup>261</sup> Set-top box manufacturers such as Pace, Uniview, Thomson, Phillips, Panasonic, and Motorola are devoting considerable resources to the development of consumer ITV equipment.<sup>262</sup> And, companies such

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<sup>257</sup> See xDSL.com, *Broadwing Pioneers DSL Delivery of Broadband Entertainment to Consumer TVs* (Oct. 27, 2000) (“xDSL Press Release”), <<http://www.xdsl.com/newsreleases/xDSL/19026.asp>; DirecTV, *Wink and THOMSON Multimedia Present Sneak Preview of New Interactive Channels from Barnes & Noble.com, ESPN, NBC and The Weather Channel* (Oct. 19, 2000) (“DirecTV Press Release”), <<http://www.directv.com/press/pressdel/0,1112,373,00.html>>; Microsoft, *CBS Television and Microsoft WebTV Networks to Deliver Broad Slate Of Interactive Television Programming* (Sept. 7, 2000) <[http://www.microsoft.com/tv/press/news/ne\\_cbs.asp](http://www.microsoft.com/tv/press/news/ne_cbs.asp)>.

<sup>258</sup> See Cliff Edwards, *Promise, Pitfalls of Interactive TV*, (Nov. 13, 2000) 2000 WL 29040386; *Interactive TV 2000*, at 25.

<sup>259</sup> See *Interactive TV 2000*, at 25.

<sup>260</sup> See *id.*

<sup>261</sup> See Fred Dawson, *Worldgate, ICTV, Others See ITV Momentum*, Dec. 13, 1999, <<http://www.multichannel.com/weekly/1999/51/webtop51.htm>>.

<sup>262</sup> See generally *Pace Bows Video-Ready ADSL Box*, Multichannel News Online (Oct. 27, 2000) (noting that Pace’s new DSL4000 set-top box “will enable telecommunications companies to offer video and interactive services via their existing copper lines”), <http://www.multichannel.com/daily/38d.shtml> every time you click on this article it goes to one about TNN; xDSL Press Release, DirecTV, *DIRECTV, Wink and Thomson Multimedia Commence National Launch of DIRECTV INTERACTIVE™ Television Service* (Oct. 10, 2000) (“Wink Press Release”); *AT&T Broadband Selects Philips Electronics For Advanced Digital Cable Set-Top Terminals*, AT&T Press Release (Aug. 14, 2000); *Panasonic Announces Alliance With AT&T Broadband To Drive Advanced Cable Set-Top Terminals In Retail Marketplace*, AT&T Press Release (Sept. 26, 2000).

as Oracle, Compaq, Cisco, and nCUBE are investing heavily in developing the network technology necessary to support ITV services.<sup>263</sup>

In addition, there is significant entry and burgeoning competition among companies seeking to provide ITV distribution. To be sure, cable operators are interested in pursuing the ITV business. AT&T recently introduced ITV services in its Waterloo and Cedar Falls, Iowa systems, and plans to launch ITV early next year in Tacoma, WA.<sup>264</sup> Other cable operators, such as Time Warner and Comcast, have also begun to offer ITV services.<sup>265</sup>

However, companies in the broadcast, satellite, telephone, personal computer, Internet, and consumer electronics industries are also providing ITV distribution.<sup>266</sup> For example, DirecTV and Echostar have vigorously pursued the ITV business, and, according to one observer, by year end they will “have beaten cable providers to the punch by providing advanced interactive capabilities to [their] subscribers.”<sup>267</sup> It has been estimated that by the end of 2003, DBS will have 9.3 million interactive customers, compared to 7.8 million for the cable industry.<sup>268</sup>

There is reason to believe that cable operators, DBS operators, telephone companies, and others will continue to make every effort to provide the broadband distribution capacity necessary to fuel the ITV business. They have incentives to do so because existing ITV service

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<sup>263</sup> See generally *Cisco/Liberate White Paper*, *Compaq White Paper*.

<sup>264</sup> See Kris Hudson, *AT&T Rolls Out Interactive TV* (Nov. 7, 2000), <<http://www.denverpost.com/business/biz1107e.htm>>.

<sup>265</sup> See Simon Applebaum, *Everybody's Getting Into the Inter-Act*, *Cablevision Online*, Oct. 31, 2000, at <<http://www.cvmag.com/contents/2000/1030/inkagan1030.asp>>; Ian Fried, *Will TV Lovers Pay the Ultimate Price?* (Oct. 26, 2000), <[http://www.nytimes.com/net/cnet/cnet\\_0\\_4\\_3303295.00.htm](http://www.nytimes.com/net/cnet/cnet_0_4_3303295.00.htm)>.

<sup>266</sup> See *Interactive TV 2000*, at 38.

<sup>267</sup> *Id.* at 51.

<sup>268</sup> *Id.*

providers will be “joined by startups, traditional media players and online companies that are eager to serve the TV as well as the PC once greater broadband distribution rollouts are achieved.”<sup>269</sup> Clearly, cable operators “find themselves vying with an increasing number of digital service providers for consumers’ time and money.”<sup>270</sup>

Not only is there significant entry and competition in the ITV business, but parties have also been able to successfully negotiate mutually beneficial commercial arrangements without the need for government intervention or assistance. For example, as the CEO of Wink has noted:

*Wink has not needed any regulatory relief to craft partnerships with over 90 companies in the business. . . . We believe interactive television is still evolving at a very rapid pace. It is not clear how technology, access to cable operator networks, or consumer demand will shape the business. The dynamic marketplace must be allowed to develop. . . . [W]e continue to build our business in the current environment, and we believe that it would be premature to attempt to regulate an industry that is in an embryonic stage.*<sup>271</sup>

Given the strong interest and investment in ITV by so many companies, it is not surprising that ITV is expected to experience strong growth. It has been estimated that there will be more than 20 million users of ITV by 2005.<sup>272</sup> Likewise, ITV revenues, generated primarily from advertising, e-commerce, and subscriptions, are expected to jump from \$920 million in 2000 to over \$32 billion in 2006.<sup>273</sup>

In short, the ITV business is developing precisely as one would hope. There is broad and easy entry by a wide range of companies in the cable, broadcast, telephone, satellite, content, Internet, hardware, advertiser, computer software, and consumer electronics industries.

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<sup>269</sup> *Id.* at 26.

<sup>270</sup> *Id.* at 42.

<sup>271</sup> *Hearing on Interactive Television Before the Telecomm., Trade, and Consumer Protection Subcomm. of the House Commerce Comm.*, 106<sup>th</sup> Cong. (Oct. 6, 2000) (statement of Maggie Wilderotter, CEO, Wink, Inc.) (emphasis added).

<sup>272</sup> *Interactive TV 2000* at 10.

<sup>273</sup> *Id.* at 13.

Investment is at an all-time high. Innovation is thriving. The expectations for growth are encouraging. And, there simply is no evidence that any particular company or industry has the incentive or ability to disrupt the current pro-consumer environment. Contrary to the suggestion of one party,<sup>274</sup> AT&T and other MSOs have every incentive to provide their customers with access to a broad array of quality ITV content and services, *regardless* of affiliation. Indeed, one sure way for AT&T to ensure its own failure in the ITV area would be to block or degrade consumers' access to a diversity of ITV content and service offerings. In this type of an environment, there is no reason for the Commission to consider adopting regulations that run the risk of dampening investment, stifling innovation, and increasing the cost of entry.

**C. It Would Be Inappropriate For The Commission To Adopt – Or Even To Propose – Regulations For Interactive TV Based On This Notice.**

It would be inappropriate for the Commission to make any decision to adopt – or even to propose – regulations for the service based on the one paragraph in the NOI that addresses ITV. Indeed, the reference to ITV appears to be nothing more than an afterthought in an NOI that addresses an entirely different issue – access to cable systems by independent ISPs.

The fact that some of the interactive content that is used in an ITV service may be kept on the Internet does not mean that ITV is an Internet service or that it raises issues that are appropriately addressed and resolved in this NOI. When used in this way, the Internet is simply a place where certain interactive data is stored, and it is not a critical or even necessary aspect of ITV. In fact, the leading proponent of early regulation of ITV has made clear that it prefers not to use the Internet to store ITV data because it believes the process of retrieving the data slows information delivery and disrupts synchronization of the data with the video.<sup>275</sup> Similarly, the

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<sup>274</sup> See Eric Haseltine, *Control of the Return Path For Interactive Television*, Sept. 25, 2000 (submitted as an attachment to the *ex parte* letter of Marsha J. McBride to Magalie Roman Salas, in Docket 00-30, Sept. 26, 2000).

<sup>275</sup> See *id.* at 3.

fact that some companies might offer the ability to browse the Web as part of an ITV service does not bring ITV within the scope of the NOI. In this case, Web access would only be one application among many offered as part of an ITV service. It would not transform ITV, which is a “program content service,”<sup>276</sup> into the type of Internet access service that is the subject of the *Notice*.

In short, ITV has little relationship to the issues raised in the NOI. Thus, even if ITV were not nascent, and even if it were not developing in a competitive fashion, this NOI would form no basis for the Commission to conclude, or to propose, that the service should be regulated.

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<sup>276</sup> See *Interactive TV 2000*, at 14.

## CONCLUSION

For the foregoing reasons, the Commission should confirm that existing cable Internet services are “cable services” and “information services,” but not “telecommunications services,” and the Commission should maintain its existing policy of “vigilant restraint,” relying on marketplace forces rather than unnecessary access regulation.

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December 1, 2000

**CERTIFICATE OF SERVICE**

I hereby certify that on this 1<sup>st</sup> day of December, 2000, I caused true and correct copies of the forgoing Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: December 1, 2000  
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