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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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| In the Matter of: |) | |
| |) | |
| Inquiry Concerning High-Speed |) | GN Docket No. 00-185 |
| Access to the Internet Over |) | |
| Cable and Other Facilities |) | |

**DECLARATION OF
JANUSZ A. ORDOVER AND ROBERT D. WILLIG**

I. QUALIFICATIONS

A. Janusz A. Ordover

1. I am Professor of Economics and Director of the MA Program at New York University, which I joined in 1973. At New York University, I teach undergraduate and doctoral level courses in industrial organization economics, the field of economics concerned with competition among business firms and upon which "antitrust economics" is founded. I have devoted most of my professional life to the study and teaching of industrial organization economics and to its application through antitrust and regulatory law and policy.
2. In July 1991, President George Bush appointed me to the position of Deputy Assistant Attorney General for Economics in the Antitrust Division of the United States Department of Justice ("DOJ"). In this post, I participated in the drafting of the 1992 Horizontal Merger Guidelines, which have been widely used by courts and antitrust enforcement agencies. In addition, I led many merger reviews that employed and developed methodologies to define relevant markets in merger and other cases. I returned to New York University in 1993.
3. I have been actively involved in the formulation of public policy in the telecommunications sector. In particular, I have submitted written and oral testimony for AT&T

to the Federal Communications Commission (“Commission”) and to the state regulatory commissions in the Midwest, New England, and New York on a number of issues, including the pricing of unbundled network elements and access to bottleneck facilities.

4. I have written extensively on a wide range of antitrust and telecommunications topics, such as mergers and joint ventures, predatory conduct and entry barriers. My antitrust articles have appeared in the *Yale Law Journal*, the *Harvard Law Review*, the *Columbia Law Review*, and many other journals, monographs and books, here and abroad.
5. I have lectured extensively on antitrust topics to the American Bar Association, the International Bar Association, and the Federal Trade Commission (“FTC”). I recently delivered lectures to the FTC during its hearings on the Future of Antitrust Enforcement, which were organized by FTC Chairman Robert Pitofsky. I have also lectured on antitrust policy at colleges and universities in the United States and abroad, and at many conferences and meetings sponsored by various legal organizations.
6. I have acted as a consultant on antitrust and other competition matters to the DOJ, the FTC, and the post-communist governments of Poland, Russia, and Hungary. I have also consulted for the World Bank and the Organization for Economic Cooperation and Development in Paris. I have acted as a consultant in numerous antitrust lawsuits and investigations, including market definition and anti-competitive conduct matters for the FTC, DOJ and private clients in the United States, Australia, Germany and the European Union. I have extensive experience in the analysis of competitive effects of business strategies, including tying and bundling.

B. Robert D. Willig

7. I am Professor of Economics and Public Affairs at the Woodrow Wilson School and the Economics Department of Princeton University, a position I have held since 1978. Before that, I was Supervisor in the Economics Research Department of Bell Laboratories. My teaching and research have specialized in the fields of industrial organization, government-business relations and welfare theory.
8. I served as Deputy Assistant Attorney General of Economics in the Antitrust Division of the DOJ from 1989 to 1991. I also served on the Defense Science Board task force on the antitrust aspects of defense industry consolidation and on the Governor of New Jersey's task force on the market pricing of electricity.
9. I am the author of *Welfare Analysis of Policies Affecting Prices and Products*; *Contestable Markets and the Theory of Industry Structure* (with W. Baumol and J. Panzar), and numerous articles, including "Merger Analysis, IO theory, and Merger Guidelines." I am also a co-editor of *The Handbook of Industrial Organization*, and have served on the editorial boards of the *American Economic Review*, the *Journal of Industrial Economics* and the MIT Press Series on regulation. I am an elected Fellow of the Econometric Society and an associate of The Center for International Studies.
10. I have been active in both theoretical and applied analysis of telecommunications issues. Since leaving Bell Laboratories, I have been a consultant to AT&T, Bell Atlantic, Telstra and New Zealand Telecom, and have testified before the U.S. Congress, the Federal Communications Commission, and the public utility commissions of about a dozen states. I have been on government and privately supported missions involving telecommunications throughout South America, Canada, Europe, and Asia. I have written and testified on such subjects within telecommunications as the scope of competition, end-user service pricing and costing, unbundled access arrangements and pricing, the design of regulation and methodologies for assessing what activities should

be subject to regulation, directory services, bypass arrangements, and network externalities and universal service. On other issues, I have worked as a consultant with the FTC, the Organization for Economic Cooperation and Development, the Inter-American Development Bank, the World Bank and various private clients.

II. SUMMARY OF MAIN CONCLUSIONS

11. We have been asked to examine whether access regulation of cable modem services would be consistent with economic theory and marketplace considerations. Our main conclusions are as follows:

- Access regulation should be confined to a bottleneck monopoly that: (1) is an essential facility in a relevant market and (2) whose owner has incentives anticompetitively to abuse its monopoly power. Prophylactic regulation of fledging markets is warranted only if: (1) the risk of anticompetitive abuse of monopoly power is great enough to warrant the costs and risks of regulation; and (2) if, and when, such power materializes, the regulations will actually make consumers better off.
- Neither of these conditions is met here by cable operators like AT&T. First, no single technology dominates, or will soon dominate, either broadband deployment or the market for Internet access services. Second, as explained below, forced access regulation of cable modem services will only impede, not promote, innovation. This is especially true here, where providing consumers with a choice of ISPs presents significant technical and operational challenges that do not lend themselves to quick resolution by government fiat. For a product, such as cable modem services, for which costs, demand, and technology are changing quickly, the *best* a prophylactic regulation could hope to achieve would be to freeze a policy conclusion, based on incomplete facts, into a technological “solution” that is certain to be outdated rapidly.
- There are appropriate market incentives in place that encourage AT&T and other cable modem service providers to enter into commercially reasonable access arrangements on a voluntary basis with unaffiliated ISPs. The competition from DSL, other broadband technologies, and dial-up services places a powerful incentive on cable operators to offer cable modem services to customers with as much choice as possible at costs consumers are willing to pay.
- Any claim that an overriding need for “regulatory parity” between DSL and cable modem access requires access regulation has no valid support from sound economic theory and cannot justify the imposition of forced access regulation upon cable modem services.

III. FORCED ACCESS REGULATION OF CABLE MODEM SERVICES IS CURRENTLY UNNECESSARY

A. The Commission's Current Hands-Off Policy Regarding Cable Modem Access Is Consistent with the Generally Accepted Economic Framework For Determining When Regulators Should Interfere With Market Mechanisms.

12. The Commission has rejected forced access requirements each time it has considered the issue. Instead, the Commission has adopted a consistent policy of "vigilant restraint" toward cable modem services and has relied on the marketplace to create an environment in which many companies have strong incentives to invest in broadband technology and the provision of innovative high-speed services for consumers.
13. Having considered whether forced access regulation should be applied to cable modem services on no less than four occasions, the Commission each time has concluded that the market is functioning well, and that there is no need for government intervention.¹ For example, in a comprehensive report, issued in 1999, examining the deployment of advanced telecommunications services, the Commission found that broadband

¹ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 14 FCC Rcd 2398, 2449, ¶¶ 100-101 (1999) ("First Report"); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, 14 FCC Rcd. 3160, 3207, ¶ 96 (1999) (concluding that forced access requirements were unnecessary); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group to AT&T*, 15 FCC Rcd 9816, 9872, ¶ 127 (2000) (declining to impose forced access "given the potential for competition from alternative broadband providers and the potential for unaffiliated ISPs to gain direct access to provide broadband services over the cable infrastructure"); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Second Report, CC Docket No. 98-146, ¶ 204 (2000) ("Second Report"). See also Cable Services Bureau, Federal Communications Commission, *Broadband Today, A Staff Report to William E. Kennard, Chairman, Federal Communications Commission, on Industry Monitoring Sessions Convened by Cable Services Bureau* (October 1999) ("Broadband Today"), at 42-44; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912, 20941-42, ¶¶ 58-59 (1999) ("Line Sharing Order").

deployment was occurring in a reasonable and timely fashion and that many companies throughout all segments of the communications industry had invested tens of billions of dollars in broadband facilities.² The Commission therefore declined to impose any new regulatory requirements on cable modem services, wisely choosing to rely instead on “free markets and private enterprise.”³ In October 1999, the Cable Services Bureau reached a similar conclusion, stating that “applying prophylactic ‘open access’ measures . . . before fuller development of the broadband industry would be unsound public policy that could have the unintended effect of impeding the rapid development of this industry.”⁴ Most recently, in August 2000, the Commission, noting that “competition is emerging, rapid buildout of necessary infrastructure continues, and extensive investment is pouring into this segment of the economy,”⁵ reiterated its belief that “competition, not, regulation, holds the key” to stimulating further broadband deployment.⁶

14. The Commission’s current hands-off policy regarding cable modem access is consistent with the generally accepted economic and public policy framework for determining when regulators should interfere with market mechanisms and dictate the terms and conditions upon which one firm provides access to its facilities and services to competitors. This framework holds that access regulation should be confined to a bottleneck monopoly that is an essential facility in a relevant market with incentives anticompetitively to abuse its monopoly power. At a minimum, those who favor such regulation should bear the burden of proving at least two things: (1) the risk of anticompetitive abuse of bottleneck monopoly power is great enough to warrant regulation; and (2) if confronted with such

² *First Report* ¶¶ 35-44.

³ *Id.* ¶¶ 5, 100-101.

⁴ *Broadband Today* at 42-44.

⁵ *Second Report* ¶ 8.

⁶ *Id.* ¶ 246.

power, the proposed regulatory standards will actually make consumers better off. Proponents of forced access cannot prevail on either of these criteria. We therefore conclude, for reasons more fully set forth below, that access regulation of cable modem services is completely unwarranted at this time and would be counterproductive to the public interest.

15. As a threshold matter, the level of investment, deployment, and competition (from both broadband and narrowband Internet access providers) underscores the wisdom of the Commission's present policy of regulatory restraint regarding cable modem services. If anything, it has become increasingly clear that no single communications technology or provider dominates, or will soon dominate, the market for Internet access services. As explained in detail in the Attachment to our declaration, the deployment of high-speed Internet access services capability by virtually all segments of the communications industry has accelerated since the issuance of the *First Report*.⁷ And competition for high-speed services is developing in all the major population centers of the country.⁸ As a result, broadband capabilities continue to be deployed at a rate that outpaces the rollout of many previous products and services in the communications field, such as cable television, telephone and color television.⁹ In particular, the incumbent local exchange carriers' ("LECs") aggressive deployment of high-speed digital subscriber line ("DSL") service -- which the Commission has "attributed in large part to the deployment of cable

⁷ See Attachment; see also Federal Communications Commission, *Federal Communication Commission Releases Data on High-Speed Services for Internet Access*, (Oct. 31, 2000) ("High-Speed Services Report").

⁸ See *High-Speed Services Report* at 2-3 (noting that multiple providers report having high-speed subscribers in more than 40 percent of the nation's zip codes).

⁹ See *First Report* ¶¶ 31-33; *Second Report* ¶ 219 (indicating that advanced services penetration is 1.0% after three years of commercial offering as compared to 0.3% for cable television, 0.2% for color television and 0.2% for telephones at the same stage of development).

modem service”¹⁰ -- has proceeded much more rapidly than almost anyone initially expected, and incumbent LECs’ DSL subscriptions have skyrocketed in the past two years. Likewise, satellite-based and wireless broadband technologies are emerging as competitive threats.¹¹

16. In the absence of monopoly power, there is simply no justification for undertaking such a daunting task as substituting government fiat for the competitive market process in arriving at optimal prices, quantities, technologies and business models. In practice, the results of access regulation are almost always markedly inferior to the outcome of unregulated competition.
17. Prophylactic regulation for problems that do not exist, particularly in markets that have not yet fully developed, is always a dangerous enterprise. Such regulation requires that government bodies, rather than market participants, make difficult judgments about appropriate technical and business terms and conditions for access. These same government bodies also must have the wisdom and flexibility to adjust and fine-tune the rules every time an important element of supply or demand changes. Prophylactic regulation will also require the government to resolve the inevitable disputes among those parties seeking access and the parties being forced to confer it on regulated terms. These disputes will often reflect private, not public, policy clashes and so government resolution of these disputes runs the risk of confounding private with public interests. It is inevitable, then, that the results of such regulation are almost always markedly inferior to the outcome of unregulated competition in a dynamic marketplace. Unlike regulation, competition acts quickly, responds flexibly to new developments, is driven by the public interest in expanded output at lower prices and operates on real products and prices, not

¹⁰ *Broadband Today* at 27; *see also id.* at 32.

¹¹ *See* Attachment ¶¶ 14-19.

just feared future events. Regulation should thus be avoided where, as here, it serves no valid economic purpose because of the existence of a robust, highly competitive market. Under these circumstances, regulation will impose a heavy, and entirely unnecessary, cost upon society.

18. For example, to implement and enforce access regulation over cable modem services, the Commission would need to address and resolve issues such as pricing, location of interconnection, billing, use of customer information, location of interconnection points, the application of the open access requirement to new services, the meaning of “nondiscriminatory access” in the Internet context, and the content of home web pages. Each of these issues would need to be re-addressed every time any significant change occurred in consumer demand, the costs of cable modem services, or the technology of access. The Commission would also need to establish a mechanism for resolution of disputes over the parties’ obligations. For services as complex and multidimensional as online services, this is a huge undertaking. Even more disturbing, any regulatory construct will tend to expand from the supposedly narrow confines of open access of cable modem services to include general regulation of the Internet. The burdens placed upon the industry, consumers, and the government itself by such a regulatory framework cannot be justified at this time.
19. Further, imposing a government mandated cable access regime will inevitably entail protracted regulatory disputes before the Commission, the courts and Congress.¹² The

¹² Commissioner Powell has aptly summarized “the expense . . . [m]andating open access to cable could unleash.” See Remarks by Michael K. Powell, Before the FCBA (Chicago Chapter), Chicago, IL (June 15, 1999), at <http://www.fcc.gov/Speeches/Powell/spmkp902.html> (“[I]t seems inescapable that if we mandate a right to equal access to cable plant, we will quickly find ourselves mired in ‘common carrier-like’ regulation. Undoubtedly, the minute that an entrant asks to have access to a proprietary cable Internet system, there would be disputes over the price. . . . Calls for collocation rules would soon follow [as would] [d]isputes over ordering (OSS), disputes over maintenance and trouble ticketing”).

many years of still-ongoing litigation over the terms and conditions of interconnection and access to unbundled network elements of the local Bell networks – where, unlike here, the criteria of incentives and ability for anticompetitive abuse of bottleneck control of an essential facility are met – vividly illustrates that forced access regulation over cable network architecture will also be a protracted, complicated, and costly process. And federal and state regulators have far more experience with local telephone service than with the Internet.

20. The costs of the regulatory process go beyond the substantial expenses that parties must incur in order to participate effectively in the modern regulatory arena – *e.g.*, fees for lawyers, economists, accountants, lobbyists and other experts. More significant, if harder to quantify, are the opportunity costs of the managerial time and attention diverted from running the business and instead focusing on regulatory litigation and lobbying. Regulation also makes it much more difficult for companies to change business models and anticipate changing market conditions. In stark contrast, as the recent deregulation of traditionally regulated entities such as airlines, trucking companies and railroads has made clear, when freed from regulatory oversight companies become much less bureaucratic and more entrepreneurial and innovative in their managerial conduct. Further, the reduction in entry barriers that accompanies such freedom from regulatory governance increases opportunities for new firms to compete, often by offering products not favored or imagined by regulators or traditional firms in the market.
21. Given the dynamic pace of change with respect to Internet services, regulation of access and its pricing is especially likely to be disastrous here. When the Internet was turned over to private control, its architecture began to change in order to accommodate the new and innovative applications of Internet entrepreneurs.¹³ The Internet has, in fact, thrived

¹³ See Jason Oxman, Federal Communications Commission, *The FCC and the Unregulation of the Internet*, OPP Working Paper No. 31, at 23-24 (July 1999) (noting that privatization of the

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and exploded into the phenomenon that it is today precisely because no one architecture has been immutably locked into place. Positive trends, such as declining prices, increasing quality and rapid innovation, are attributable in large part to a consistent regulatory philosophy of restraint. In this dynamic environment, any scheme of forced access and price regulation is likely to be dysfunctional from the outset.

22. This is especially true here, where providing consumers with a choice of ISPs presents significant technical and operational challenges that do not lend themselves to quick resolution by government fiat and whose parameters are changing constantly. We understand that cable operators are currently devoting considerable resources to overcome these challenges, which include, but are not limited to: (1) the reconfiguration of cable systems and development of hardware to accommodate multiple ISPs; (2) the development of systems and software to manage third-party bandwidth demand; and (3) development and implementation of the operational support systems that would be needed (*e.g.*, ordering, billing, maintenance) to provide access to multiple ISPs.
23. In a nascent, competitive market where the technology remains uncertain, and consumer demand and the costs of supplying it change every day, mandating a regulatory access solution would likely impede, not promote, innovation for several reasons. First, where, as here, cable operators must move quickly, decisively, and efficiently to develop the technical framework to support multiple ISP access to enhance the value of their networks, government intervention will delay refinement and implementation of possible solutions that they are currently working through. Second, government intervention might well result in the adoption of inferior “solutions” due to inadequate familiarity with

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Internet backbone in 1995 produced “an explosion of commercial Internet applications”); U.S. Department of Commerce, *The Emerging Digital Economy II*, at 1 (June 1999), *available at* <http://www.ecommerce.gov/ede/ede2.pdf> (noting that the “evolution of the Internet as a business tool [started] in 1995”).

the actual needs of the economic actors and consumers and with the technologies and options available. Third, government intervention might well force the parties into a technological straightjacket, where different solutions would better meet the needs of market participants.

24. Government regulation is particularly inapt where, as here, technology is constantly reshaping the marketplace, giving rise to new providers and service offerings and forcing existing participants to alter business models in response. Under these circumstances, any government attempt to establish forced access regulation for cable modem services would only risk inhibiting technological innovation. As the White House has recognized:

Business models must evolve rapidly to keep pace with the break-neck speed of change in the technology; government attempts to regulate are likely to be outmoded by the time they are finally enacted, especially to the extent such regulations are technology-specific.¹⁴

B. There Are Appropriate Market Incentives in Place That Encourage AT&T and Other Cable Modem Service Providers to Enter into Commercially Reasonable Access Arrangements on a Voluntary Basis With Unaffiliated ISPs.

25. Cable operators have independent incentives to explore reasonable access arrangements with unaffiliated ISPs because such arrangements could also increase the value of their cable modem services as compared to alternative networks. AT&T, for example, having spent billions on upgrading its cable systems,¹⁵ is in a competitive struggle with other

¹⁴ The White House, *A Framework for Global Electronic Commerce*,” available at <http://www.doc.gov/ecommerce/framework.htm> (July 1, 1997) (noting that commercial and technological development of electronic commerce is changing rapidly and that inflexible rules and regulations could harm the nascent industry).

¹⁵ For example, after spending \$48 billion for TCI in 1999, AT&T spent more than \$10 billion to upgrade the TCI network alone. Michel A. Hiltzik and Salle Hofmeister, *In Strategy Shift, AT&T to Split into 3 Firms*, L.A. TIMES, Oct. 26, 2000 at A1. In addition, AT&T has also had to spend significant sums on the upgrade of the MediaOne network, for which it paid \$54 billion. The cable industry as a whole is expected to spend over \$100 billion upgrading cable plant to

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Internet access providers to gain customers and generate the revenues necessary to earn a return on this enormous investment. Consumers can, do, and will leave AT&T if they find its services lacking. Therefore, AT&T has every incentive to negotiate reasonable access arrangements with unaffiliated ISPs -- particularly those ISPs that bring additional value to consumers through new content, services, features or functions -- because giving consumers more choices should enhance the overall value of AT&T's cable modem services.

26. Several major cable companies, including AT&T, have been preparing the foundation for such commercial arrangements. For example, in December 1999, AT&T, MindSpring (an ISP that has since been acquired by Earthlink) and the Chairman of the FCC Local and State Government Advisory Committee reached agreement in principle on a framework for commercial arrangements to provide ISPs with access to AT&T's cable facilities upon the expiration of its exclusive arrangements with Excite@Home. In a joint letter with MindSpring to the Chairman of the FCC, AT&T agreed to work toward, and implement, high-speed Internet access providing consumers with ISP choice; the ability to exercise that choice without having to subscribe to any other ISP; a choice of Internet connections at different speeds, and at prices reasonable and appropriate to those speeds; direct access to all content available on the World Wide Web without any AT&T-imposed charge to the consumer for such content; and the continued ability to change or customize their "start page" and other aspects of their Internet experience.¹⁶

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provide high-speed services. See Ferris, Baker, Watts, *Bring On the Bandwidth: An Investors Guide to Competitive Broadband Services*, at 82 (July 1999).

¹⁶ See Letter from David N. Baker (MindSpring Enterprises), James W. Cicconi (AT&T Corp.), and Kenneth S. Fellman (FCC Local & State Government Advisory Committee) to William E. Kennard, Chairman, Federal Communications Commission (Dec. 6, 1999).

27. Similarly, earlier this year, AOL Time Warner announced a Memorandum of Understanding pursuant to which AOL Time Warner will make a choice of multiple ISPs available to consumers on its broadband cable systems. AOL Time Warner has also reached an agreement in principle with Juno Online Services, an ISP, to provide access to Time Warner's high-speed cable network following the end of its exclusive arrangement with RoadRunner.¹⁷ Other cable operators, including Comcast, and Cox, have reportedly made similar commitments to provide access to their networks to unaffiliated ISPs on negotiated terms.
28. Even more recently, both Time Warner and AT&T have commenced technical trials to provide access to unaffiliated, multiple ISPs on a limited scale. In particular, we understand that AT&T has invested \$20 million and dedicated approximately 50 specialists to the development and implementation of its technical trial, known as AT&T Broadband Choice, which will offer up to 500 customers a choice of multiple ISPs over AT&T's cable architecture.¹⁸ We understand that AT&T hopes to use the Broadband Choice trial to work through and resolve the many technical and operational problems that stem from the interconnection of multiple ISPs.¹⁹ These actions further demonstrate that appropriate market incentives, and not government intervention, are currently encouraging AT&T and other cable operators to provide their customers with as much choice as possible by establishing voluntary access arrangements with unaffiliated ISPs.

¹⁷ See Mary Mosquera, *Time Warner Opens Cable Network to Second ISP*, Tech Web News, at <http://www.internetwk.com/story/INW20000731S0007> (July 31, 2000).

¹⁸ See AT&T Press Release, *Eight ISPs Join AT&T Broadband Choice Trial*, at <http://www.att.com/press/item/0,1354,3435,00.html> (Nov. 1, 2000).

¹⁹ See *id.*; see also Jim Wagner, *AT&T Broadband Outlines ISP Inclusion*, InternetNews, at http://www.internetnews.com/isp-news/article/0,,8_510851,00.html (Nov. 14, 2000) (discussing AT&T's Broadband Choice trials).

29. Given that consumers have broadband alternatives, if AT&T and other cable modem service providers were to deprive customers of what they want, they would be handing their competitors a formidable advantage in the upcoming battle for the patronage of tens of millions of Internet subscribers. This is true because, in an extremely competitive environment, actions that give DSL even a small competitive edge can have enormous profit consequences. To illustrate just how significant the impact of growth in competition between modes of broadband access is to a company's business model, we performed a sensitivity analysis utilizing the Morgan Stanley forecast cited in the Attachment. Under that forecast, DSL will grow at a monthly rate of 9.1 percent in 2001 and 5.7 percent in 2002. Suppose that the cable companies were to adopt content restrictions, and as a result DSL became more attractive and its monthly growth rate were boosted by only *one percent*. Assume, realistically, that incremental growth would come from customers who might otherwise sign up with cable companies. Under these assumptions, DSL would capture additional 4.38 million customers by 2002 who would otherwise have subscribed to cable modem services. That is a highly significant number, representing more than \$171 million in lost cable modem revenue per month, industry-wide.

C. Regardless of How One Defines the Relevant Market, Monopoly Power and Associated Leveraging Claims Are Simply Not Plausible.

30. Regardless of whether one defines the relevant market to include both broadband and narrowband access, there is no valid claim that cable operators such as AT&T have -- or are poised to gain -- monopoly power in that market. As noted above, the offering of broadband Internet access is still a nascent business, and at this early stage of development, there are numerous, well-financed competitors in the market today. There is no way of predicting which among these companies will be the winners in the competition to sign up customers. Indeed, it is quite likely that many will survive, each as a viable competitor to the others.

31. Moreover, cable operators like AT&T cannot leverage any existing monopoly power into other adjacent markets because there is, in fact, no monopoly to leverage. Unlike the incumbent LECs, cable operators do not control bottleneck facilities. Today, consumers across the nation face a wide range of competitive alternatives to cable in the delivery of video programming as well as in the provision of access to the Internet.
32. Regarding video programming, there has been explosive growth in the deployment of DBS and other MVPD technologies. We have reviewed both the FCC's various annual reports on competition in the delivery of video programming and the recent comments filed in the proceeding from which the FCC will issue its next report, and it is abundantly clear the industry has changed dramatically since the enactment of the 1992 Cable Act. Non-cable MVPDs, particularly DBS, are now firmly established as significant competitors to cable MSOs. Non-cable MVPDs now serve more than 20 percent of all multichannel video subscribers nationwide.²⁰ DirecTV and EchoStar alone have achieved a combined 15.8 percent national share of all MVPD subscribers and rank today as the third and sixth largest MVPDs, respectively, in terms of just current subscribers.²¹ 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).²²

²⁰ See *The Kagan Media Index*, at 8 (July 31, 2000).

²¹ *Id.*

²² See *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 15 FCC Rcd. 978, 989, 1011, ¶¶ 20, 70 (2000) (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).

33. Last year, Congress in the Satellite Home Viewer Improvement Act (“SHVIA”)²³ removed what was the last remaining regulatory obstacle to widespread acceptance of DBS – the inability of DBS providers to retransmit their subscribers’ local broadcast stations.²⁴ A recent study conducted by the satellite industry found that the availability of local broadcast channels contributed significantly to new subscriber growth for DBS in the first quarter of this year.²⁵ Indeed, we have been told that between July 1999 and July 2000, DBS added almost 3 million new subscribers – more than in any previous year.²⁶
34. 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 systems also face competition from a broad array of other competitors, including multichannel multipoint distribution system (“MMDS”), satellite master antenna systems (“SMATVs”), and private and municipally-owned cable system “overbuilders.” For instance, competitive cable wireline “overbuilders” are now, or will soon be, competing against alternative broadband providers in the top nine -- and 21 of the top 25 -- Nielsen television markets.²⁷ It is more obvious than ever that most consumers now have a choice of providers and that their options will continue to expand for the foreseeable future.

²³ Pub. L. No. 106-113, § 1000(9), 113 Stat. 1501 (1999) (enacting S. 1948, including the Satellite Home Viewer Improvement Act of 1999).

²⁴ Other recent developments have further smoothed the ability of DBS to offer services to customers. *See, e.g.*, 47 U.S.C. § 303 note (preempting local zoning regulations impinging on the ability of homeowners to deploy satellite dishes).

²⁵ *See* Satellite Broadcasting & Communications Association Press Release, *New Study Shows Satellite TV Growth Coming At The Expense Of Cable*, at <http://www.sbca.com/press/jun28-00.htm> (June 28, 2000).

²⁶ Even prior to the enactment of SHVIA, the Department of Justice observed that cable and DBS are “substitutable” services. *See* Complaint, *United States v. PRIMESTAR, Inc.*, No. 1:98CV01193, ¶ 63 (D.D.C. 1998).

²⁷ *See State of the Industry*, Cable Fax Daily, at 1 (Nov. 16, 2000).

D. “Regulatory Parity” Claims Do Not Justify the Imposition of Forced Access Regulation Upon Cable Modem Services.

35. As noted above, we have advocated – and continue to advocate – that regulation of access and its pricing is only necessary for essential services or facilities over which the owners retain monopoly power and have incentives for anticompetitive abuse of that power. In the absence of comparable problems, imposing access regulation on cable operators is likely to produce only a deadweight loss to consumers. Here, we agree with Commissioner Powell that regulators should:

start with a rule of decision . . . that anyone advocating the extension or intrusion of regulation into such a vibrant market bears a heavy burden of providing that the public will be harmed, absent doing so. . . . We should favor antitrust application to actual, substantial harms to consumers over industrial policy. Government-orchestrated industrial development may be unwise generally, but it is especially inappropriate in a market like the Internet. . . . [W]e should carefully assess the cost of regulation, including direct costs, indirect costs, and opportunity costs.

Remarks by Michael K. Powell, Before the FCBA (Chicago Chapter), Chicago, IL (June 15, 1999) <www.fcc.gov/speeches/Powell/spmkp902.html>.

36. This rule of decision is fully consistent with the Commission’s existing broadband policies and regulations. The general rule, applicable to cable, satellite, and wireless broadband networks, is that the terms and conditions of access should be determined in the marketplace, inasmuch as 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 justifies the section 251 access regulation imposed by Congress. Congress wisely determined that interconnection to the local telephone network and unbundled network elements are examples of services and facilities where access regulation unfortunately remains necessary – both to foster competition in existing monopoly markets and to prevent incumbent providers 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. If and when the incumbent LEC monopolies no longer exist and the market for local telephone service becomes competitive, the Commission may reconsider the need for regulation of access to the incumbents' networks.

37. The rule of decision articulated by Commissioner Powell also disposes of the amorphous appeals to "regulatory parity" that several incumbent LECs have unsuccessfully offered in the past as a justification for cable modem access regulation. In particular, the incumbent LECs maintain that their existing obligation to provide unbundled access to their local telephone networks to competing providers of DSL services warrants that the Commission likewise require AT&T to "unbundle" *its* last-mile cable modem platform.
38. This crude appeal to playground justice is completely ungrounded in sound economic theory because it rests on a false assumption that competitive LEC access to incumbent LEC networks, particularly the local loop, for providing advanced telephone services bears some regulatory similarity to ISP access to cable systems. In fact, 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.

1. **Differences in Competitive Risk, Costs of Compliance, and Methods of Upgrade**

39. For example, the "regulatory parity" argument ignores the clear differential in competition and risk that incumbent LECs face in deploying DSL services and that cable companies face in delivering cable modem services. First, cable companies start with no telephone or Internet customers. In stark contrast, incumbent LECs have nearly all the residential customers today (whether local telephone, DSL, or those that buy dial-up Internet access) and continue to have monopoly power over the basic loop plant infrastructure used to provide those services. Further, the infrastructure used by

incumbent LECs to provide DSL services was deployed by incumbent LECs under a regulatory regime that shielded them from competition and guaranteed a return on equity. Moreover, the incumbent LECs faced no research and development risk with regard to the use of DSL technology; Bell Communications Research (Bellcore), the former research and engineering consortium of the regional BOCs, developed it in the 1980s.²⁸ By contrast, cable companies bear the full risks of developing and deploying cable modem services in a vigorously competitive market.

40. Further, the costs of imposing “open access” on incumbent LEC networks -- which grew up under a common carrier regulatory regime -- are not commensurate with the costs of opening cable systems to direct interconnection to ISPs. As a threshold matter, we understand that incumbent LECs face far fewer costs in upgrading their networks to provide high-speed access services than do cable operators. With 75% of all households falling within the distance limits of a central office from which ADSL services may be provided,²⁹ incumbent LECs face the minimal cost of merely installing a DSLAM in the central office to serve these households. In addition, even when the incumbent LEC deploys remote terminal electronics to, in effect, shorten the local loop, these costs are still far less than the billions of dollars that the cable operators must spend essentially to reengineer their entire network architecture.³⁰ Very simply, cable providers are “faced with the daunting task of upgrading their one-way cable pipelines to the two-way lanes

²⁸ See, e.g., General Accounting Office, *Telecommunications: Issues Related to Local Telephone Service*, at 5, 18 (August 2000).

²⁹ See *Second Report* ¶ 195.

³⁰ See *id.* ¶¶ 187-192 (noting that “cable operators have increased their aggregate infrastructure investment expenditures by between 10 and 25% annually” and estimating that cable operators will spend \$5 billion in infrastructure improvements this year).

needed for Internet traffic,”³¹ while incumbent LECs need only to upgrade their existing two-way lines to accommodate high-speed data traffic.

41. Moreover, an incumbent LEC can upgrade its plant several lines at a time in response to consumer demand, providing incumbent LECs with the ability to invest efficiently in infrastructure upgrades. In contrast, a cable company cannot simply install a cable modem termination system at the headend, but must instead engage in an area-wide infrastructure upgrade before serving a single customer.³² The Commission has recognized that this upgrade includes “Internet backbone connectivity, routers, servers, and network management tools, as well as security and billing systems.”³³ Finally, incumbent LECs can simply provide competitors with the same architecture that an incumbent LEC uses to provide its own line-shared DSL service with minimal modifications.³⁴ Cable operators, on the other hand, must address significant technical, operational, and network management issues before competitors can gain access to the cable infrastructure.

2. Differences in Risks of Anticompetitive Cross-subsidization and Bundling

42. The current need for differential regulation arises because incumbent LECs’ enduring voice monopolies raise competition issues that are not present in the cable context. As

³¹ Roger O. Crockett, *Cable vs. DSL: Which One is the Tortoise?*, Business Week, Sept. 25, 2000, at 54 (“*Cable v. DSL Article*”). As a result, incumbent LECs are “able to upgrade a lot faster than the cable [providers].” *Id.* (quoting Adam Guglielmi, DSL analyst for TeleChoice Inc.).

³² *Broadband Today* at 23.

³³ *Id.*

³⁴ See *Line Sharing Order* ¶ 67 (“[t]he only technical limitations regarding implementation of line sharing appear to be that the requesting carrier has collocated a DSLAM at the incumbent’s central office, and that the requesting carrier deploy an xDSL technology that is designed not to interfere with voiceband services”).

noted above, cable operators face numerous rivals who provide multi-channel video services to residential consumers. This is not the case for incumbent LECs, and telephone service. As the Commission recently recognized, incumbent LEC networks, especially the local loop, remain “a quintessential bottleneck facility for competing telecommunications carriers” that incumbent LECs can, absent regulation, leverage to “perpetuate their monopolistic dominance of existing and emerging telecommunications markets.”³⁵ Nearly five years after the Act, incumbent LECs face little competition, particularly for residential customers. The most recent FCC Industry Analysis shows that only about 0.4 percent of the incumbent LECs’ 167 million switched access lines were provided to CLECs under UNE arrangements³⁶ – the principal means by which Congress intended to foster local competition in the Act.³⁷

43. In these circumstances, it is clearly necessary to continue to regulate access to the incumbent LECs’ facilities. Consumers are increasingly demanding voice and high speed DSL services over a single line. Incumbent LECs are able to satisfy that demand today and have acknowledged that the ability to offer voice and DSL telecommunications services over a single line is a significant competitive advantage.³⁸ Continued regulation

³⁵ FCC Brief for Respondents at 22, *WorldCom, Inc., et al. v. FCC*, No. 00-1002 (D.C Cir. Filed Nov. 2, 2000).

³⁶ See Industry Analysis Division, Federal Communications Commission, *Trends in Telephone Service*, at Table 9.4 (March 2000).

³⁷ See *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*”).

³⁸ See SBC Communications, Inc. Press Release, *SBC Launches \$6 Billion Broadband Initiative*, at http://www.sbc.com/News_Center/Article.html?query_type=article&query=19991018-01 (Oct. 18, 1999) (“*Project Pronto Press Release*”) (quoting SBC CEO Ed Whitacre’s statement 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

(continued . . .)

is therefore necessary at this time to prevent incumbent LECs from further entrenching their voice monopolies. Because cable operators do not control bottleneck facilities, there is no corresponding fear that cable operators can exclude or marginalize other MVPD providers by the manner in which cable rolls out high-speed Internet access.

44. It is also necessary to retain existing access regulation to prevent incumbent LECs from leveraging their monopolies into nascent advanced services offered over the same bottleneck facilities. ILECs clearly have a strong incentive to engage in such leveraging because federal and state regulations are designed to prevent them from fully exploiting their pricing power over their monopoly bottleneck local services. For example, a dominant local carrier could harm DSL competition by implicitly pricing its own DSL service at a non-compensatory level when it is sold as a part of a bundle. By doing so, the incumbent LEC would price the unbundled basic local service and the combined bundle of services close enough to each other so that the differential would be less than the incremental cost of supplying the DSL service alone. In this scenario, the direct effect of the conduct would be to squeeze out the competing suppliers of the enhanced service that might otherwise serve as attractive complements to the basic services offered

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communications company our customers need”); Dick Kelsey, *Qwest 3Q Profit Up 18 Percent*, Newsbytes, at <http://www.newsbytes.com/news/00/157117.html> (Oct. 24, 2000) (“*Qwest 3Q Results*”) (reporting Qwest’s CEO Joseph Nacchio has stated 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*, at <http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=44828> (Oct. 30, 2000) (“*Verizon 3Q Results*”) (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*, at 4 <http://www.bellsouth.com/investor/100500goldmansachs.doc> (Oct. 4, 2000) (“Ackerman Remarks”) (“we have last-mile connectivity 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 invest, we are leveraging this asset by systematically transforming the network to digital broadband and IP”).

by the incumbent LEC. Cable operators, who face vigorous competition in pricing their multi-channel video product, have no such opportunity or incentive to leverage into advanced services.

45. Moreover, it is necessary and appropriate to impose access regulation upon the incumbent LECs where, as here, owners of bottleneck facilities such as the local loop can bundle basic local voice service with a non-monopoly service such as DSL in order to better enable the incumbent LECs to discriminate against their DSL competitors. For example, incumbent LECs can harm their competitors by offering lower quality monopoly bottleneck services to customers of their competitors, and by providing quicker or more complete disclosure of their network interface specifications and protocols to favored vendors. The ability to bundle enhances the ability of incumbent LECs to “cover up” such discrimination because the incumbent LEC can claim that the lower price of the package allegedly stems from efficiencies made possible by close integration of the package.
46. There is another good reason for applying section 251 unbundling rules to incumbent LECs that is not present with respect to cable operators. 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 DSL offerings.

CONCLUSION

47. For the foregoing reasons, we conclude that forced access regulation of cable modem services is completely unwarranted at this time and would be counterproductive to the public interest. Proponents of such regulation are effectively asking the Commission to impose a uniform, rigid business plan on every advanced services provider, regardless of the technology it employs, with respect to how best to achieve open access. Surely, that is an inappropriate role for regulation of this dynamic and competitive industry at this time.