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Comments of The Heartland Institute

Submitted by:

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

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In the Matter of)	
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Inquiry Concerning High-Speed)	GN Docket No. <u>00-185</u> ,
Access to the Internet Over)	
Cable and Other Facilities)	

COMMENTS OF THE HEARTLAND INSTITUTE

EXECUTIVE SUMMARY

The Heartland Institute hereby submits its comments in the above-captioned proceeding. The Heartland Institute is a nonprofit public policy research organization dedicated to meeting the information needs of the nation's state and national elected officials, journalists, and its members. Heartland is a genuinely independent source of research and commentary. It is not affiliated with any political party, business, or foundation. Its activities are tax-exempt under Section 501(c)(3) of the Internal Revenue Code.

Residential broadband access to the Internet is becoming a reality around the country as long-distance telephone and cable companies spend billions of dollars digitizing the nation's cable television network. Competition within the cable industry and among cable and providers of other broadband technologies is intense. Against this background, a group of Internet Service Providers, content providers, and local phone companies is demanding access to cable networks on terms as favorable as those that the cable companies offer to their own Internet affiliates and subsidiaries. Granting their demands would endanger future investments in broadband systems,

pose insurmountable technical problems, and harm rather than benefit consumers.

1. Cable companies are making massive investments in broadband internet access, setting off an explosion of innovation, competition, and growth.

Today, most Internet data move on a broadband network, but the "last mile" to a family's or small business' computer is on a narrowband, usually a dedicated phone line. This significantly reduces the speed at which data can be received or sent. Long distance telephone and cable companies are spending billions of dollars to convert the "last mile" to broadband. AT&T is spending \$1.8 billion to upgrade the TCI cable lines to bring broadband Internet to 10.8 million homes, and \$600 million to upgrade the lines serving 4.2 million MediaOne homes. Time Warner is spending \$4 billion, and Comcast is spending \$1.2 billion for its broadband upgrade.

Currently, 69 million homes have cable television;¹ half of them can obtain broadband Internet access through a cable modem. New cable modems are being installed at an increasing rate each year. By the end of 2000, there will be about 3.6 million cable modem subscribers, and about 10.3 million by 2003.²

2. Other companies that are not making similar investments are demanding access to cable's customers through the new broadband networks.

Some competitive providers of Internet access service have been demanding that they be given

¹ A.C. Nielsen, November 2000 Cable Universe Estimate.

² Based on industry forecasts from Paul Kagan Associates, Credit Lyonnais, and Forward Concept.

access to the networks of cable companies. They want AT&T, Time Warner, and other cable television companies to be forced to offer their customers content from any Internet Service Provider for exactly the same price that customers pay for content from the cable companies' own Internet Service Providers (e.g., @Home, RoadRunner). While telephone companies, cable television companies, and fixed wireless and satellite companies are working to build and expand broadband infrastructure, most of these competitive providers of Internet service have invested little in infrastructure.

These companies are, of course, free to sit down with cable companies and negotiate terms to be included in the cable companies' broadband offerings. Such negotiations in fact are taking place in many areas of the country. But instead of negotiating an agreed-upon price, these companies want to force their way into the country's largest cable broadband systems on terms they get to dictate. They call their plan "Open Access," and their lobbying group calls itself the "OpenNet Coalition." In these comments, we use the more appropriate term: "Forced Access."

3. Competition, not monopoly, characterizes the high-speed internet marketplace.

The OpenNet Coalition claims cable companies are poised to dominate the market for high-speed residential access to the Internet, but experts expect their dominance to be limited in scope and short-lived. Most of cable's bandwidth is taken up with television content, and what remains must be shared with neighbors. This is why the @Home and RoadRunner cable modem services do not allow their customers to watch more than 10 consecutive minutes of streaming

video, and why @Home has experienced slow or interrupted service problems at various times already.

Broadband cable faces severe competition from Digital Subscriber Line (DSL), which converts traditional telephone lines into high-speed broadband lines. By the end of this year, DSL will serve roughly 1.5 million homes and are projected to double in size in 2001.³ By 2002, 94 million phone lines owned by Regional Bell Operating Companies and GTE will have DSL available.

Wireless broadband, another competitor to cable, is likely to be a superior service for millions of rural customers. Motorola predicts there will be one billion wireless users worldwide by the year 2005. Electric utilities, which already have wired access to 95 percent of American homes and to almost 100 percent of businesses, are also poised to enter the broadband market. Electric wires can transmit data nearly 50 times faster than conventional telephone modems, though some technical problems remain to be solved.

Cable's eventual share of the U.S. Internet market is expected to reach only about 17 percent. Far from being a monopoly, cable companies will face stiff competition from the other 83 percent of the market.

4. Forced access would reduce investments in all types of broadband systems, to the detriment of consumers everywhere.

In an efficient economic system, risk and reward go together. If one company is made to bear all the risks, but the rewards are shared with its competitors, the company will stop taking

³ See Strategis Group report cited in *Broadcasting and Cable*, May 8, 2000, p.32; Paul Kagan Associates, *Cable TV Technology*, Mar. 28, 2000, p.1.

risks. This is exactly what would result from a Forced Access requirement. Thus, according to the investment firm Credit Suisse, if Forced Access requirements were to be authorized or required at the national level,

the deployment of broadband Internet access is likely to stall on both the cable and the ADSL side, affecting every Internet company under the sun. The biggest winners would be the narrowband ISPs. . . . Under this scenario, the biggest loser would be the average consumer, as the national deployment of broadband Internet access could be delayed by many years⁴

Cable and long-distance telephone companies are investing billions of dollars in broadband only because they believe they can legally exclude other companies from free-riding off their investments. Should Forced Access become public policy nationwide, such investments would dry up and widespread residential high-speed access to the Internet would be delayed indefinitely.

5. Continued reliance on markets, not new regulations, will insure the freedom and growth of the internet.

Forced Access isn't necessary. Competition is intense within the cable television industry and among industries using different technologies to provide high-speed access to the Internet. In this instance, markets are working to attract new investors, produce new

⁴ Credit Suisse First Boston Corp., *The Battle Over Broadband Access: Much Ado About Nothing*, June 7, 1999.

organizational forms, and drive down prices. There is no case for government intervention.

Forced Access would be counterproductive. It would cripple the growth of broadband Internet services for residential and small businesses customers by discouraging investment. Forced Access would remove the most important competitive pressure on all other broadband providers. And technical problems would degrade the quality of Internet access for many users.

Markets are the right choice. Advocates of Forced Access ask us to choose between a free-market Internet based on willing buyers and sellers, and a public utility model based on regulations and politics. Experience and common sense tell us that markets are the way to go.

Respectfully submitted,

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TABLE OF CONTENTS

Executive Summary	i - iv
Introduction	2
I. The Alleged Case for Forced Access	3
II. New Broadband Technologies and New Competitors	19
III. Antitrust Law and Forced Access	47
IV. Impact of Forced Access on Infrastructure Development	54
V. Summary and Conclusion	63

INTRODUCTION

The Heartland Institute hereby submits its comments in the above-captioned proceeding. The Heartland Institute is a nonprofit public policy research organization dedicated to meeting the information needs of the nation's state and national elected officials, journalists, and its members. These comments were written by David B. Kopel, director of Heartland's Center on the Digital Economy.

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Residential broadband access to the Internet is becoming a reality around the country as long-distance telephone and cable companies spend billions of dollars digitizing the nation's cable television network. Competition within the cable industry and among cable and providers of other broadband technologies is intense. Against this background, a group of Internet Service Providers, content providers, and local phone companies is demanding access to cable networks on terms as favorable as those that the cable companies offer to their own Internet affiliates and subsidiaries. Granting their demands would endanger future investments in broadband systems, pose insurmountable technical problems, and harm rather than benefit consumers.

Part I

The Alleged Case for Forced Access

The advocates of Forced Access offer a variety of dire warnings about what will happen if their policy is not adopted immediately. While most of these warnings are not credible, some are. Here, I examine them one-by-one.

Cable Modem's Early Lead Will Result in an Unbreakable Monopoly

By purchasing TCI and MediaOne, "AT&T will have full or partial control of more than 60 percent of all cable service into American homes."⁵ Forced Access supporters cite a report that predicts cable modems will have 86 percent of wireline broadband by 2002.⁶ Do these two facts, combined, show that AT&T will have a near-monopoly on broadband? Actually, the 86 percent figure does not account for *wireless* broadband, an important and growing part of the market that I will discuss later.

Although other researchers expect alternative types of technology to have much more than 14 percent of the wireline broadband Internet market in the next few years, let us assume that the 86 percent prediction is reasonable. Does this mean "consumer choice will be history," as

⁵ Opennet Coalition press release, "Opennet Urges Los Angeles to Require Competition in High-Speed Cable Internet," June 21, 1999, <http://www.opennetcoalition.org/news/929992187.shtml>.

⁶ Forrester Research study, cited in *Los Angeles Times*, cited in Erik Stein, Portland City Council Member, testimony on H.R. 1685, Committee on the Judiciary, United States House of Representatives, June 30, 1999.

Marc Jacobson, head of the ISP Prodigy Internet warns?⁷ William Barr, of GTE, agrees:

The policy of open access thus not only is necessary, but is necessary **now**. Those who are taking a “wait and see” attitude with respect to open access to the Internet are wrong. Once a firm gets a head start in closing off competition—as AT&T is attempting to do in the Internet access and ISP markets—the results can take years to undo. In fast-growing, network industries, anticompetitive tactics can lead to disastrous results very quickly. It is therefore imperative for legislators and regulators to act now to ensure open access.⁸

The Federal Communications Commission, however, has taken the opposite view:

We believe it is premature to conclude that there will not be competition in the consumer market for broadband. The preconditions for monopoly appear absent. Today, no competitor has a large embedded base of paying residential consumers. The record does not indicate that the consumer market is inherently a natural monopoly. Although the consumer market is in the early stages of development, we see the potential for this market to accommodate different technologies such as DSL, cable modems, utility fiber to the home, satellite and terrestrial radio. The facts that different companies are using different technologies to bring broadband to residential consumers and that each existing broadband technology has advantages and disadvantages as a means of delivery to millions of customers opens the possibility of intermodal competition, like that between trucks, trains, and planes in transportation. By the standards of traditional residential telecommunications, there are, or likely will soon be, a large number of actual participants and potential entrants in this market. Anti-competitive coordination among

⁷ Opennet Coalition press release, *supra* note 1.

⁸ William P. Barr, executive vice president and general counsel, GTE Corporation, Testimony on H.R. 1685 and H.R. 1686, Committee on the Judiciary, United States House of Representatives, June 30, 1999.

competitors is difficult in such markets.⁹

But suppose the FCC is wrong, and cable broadband Internet, much of which will be owned by AT&T, does garner an overwhelming market share. Will it ever be possible for AT&T to be dislodged from its dominant position?

To believe that AT&T, once in the lead, will necessarily stay in the lead permanently, one must ignore case after case in which one company, with a superior product, cornered an overwhelming share of the relevant market—but lost its dominant position a few years later to innovative competitors. For example:

- Before 1990, intraoffice computer networks were dominated by IBM and its 20 million installed “3278 terminals.” Today, office networks are created with a wide variety of different computers and different networking software. The 3278 standard is used only for backwards compatibility, so that newer computers can access data on old mainframes.¹⁰
- The dominant producer of operating systems for personal computers used to be Digital Research. But IBM eventually beat Digital Research with IBM-DOS, and then Microsoft (which had helped make DOS for IBM under an outsource contract) created its own version

⁹ *In the Matter of: 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*, FCC 99-5, February 2, 1999 (hereinafter “FCC Report”), pages 25-26.

¹⁰ Kim Maxwell, *Residential Broadband: An Insider's Guide to the Battle for the Last Mile* (New York, NY: Wiley, 1999), page 61 (hereinafter, Maxwell, *Residential Broadband: An Insider's Guide*).

of DOS, and then took over the market lead by introducing Windows.¹¹

- The first company to introduce modems in large numbers to small businesses and home consumers was Hayes. Other modem companies had to advertise that they were “Hayes compatible.” Today, Hayes no longer exists.
- The first broadly used business software application was the Visicalc spreadsheet. But Visicalc was displaced by Lotus 123, which in turn was displaced by Excel.
- Wordstar was the dominant program for word processing—until WordPerfect made a better product. And when WordPerfect failed to bring out new products for Windows, WordPerfect gave way to Word.¹²
- In the early 1990s, Intel had a commanding market share in the production of microprocessors for personal computers. But for computers selling for less than \$1,000, Intel has lost its leading market position to AMD, manufacturer of the K6 chip, and has also lost significant market share to Cyrix, manufacturer of the Cyrix M II. Intel is now losing its high-end chip dominance to AMD.¹³

¹¹ Windows 1.0 and 2.0 were market failures, but Windows 3.0 and its successors proved immensely successful.

¹² WordPerfect did not bring out a Windows-based word processor until several years after Windows 3.0 was introduced. WordPerfect took nearly a year after the introduction of Windows 95 to produce a compatible version. The first time, WordPerfect underestimated the popularity of Windows compared to DOS. The second time, WordPerfect underestimated the popularity of Windows 95 compared to IBM's OS/2 operating system.

¹³ James DeTar, “K7 Chip May Let AMD Battle Intel in High End,” *Investor's Business Daily*, June 21, 1999, page A6.

- The Mosaic Web browser, introduced in September 1993, provided a graphical interface that made it easy for ordinary computer users to “browse” the Internet—rather than having to rely on text-based, often-confusing Web file management programs such as “Gopher.” The Mosaic browser helped create the World Wide Web we know today . . . but Mosaic itself is mostly forgotten, having long been supplanted by superior products.

The clear lesson of the last 20 years is that companies with leading products stay in the lead only if they continue to produce superior products.¹⁴ There is no realistic danger that cable companies will dominate the broadband market, unless the companies consistently deliver better value to the consumer than does the competition.

ISP Employees Will Lose Jobs

As companies like AT&T and Time Warner introduce cable broadband, employees of smaller Internet Service Providers will lose jobs, the OPENNET Coalition warns.

It is true that superior technologies can reduce the number of jobs available in obsolete professions. Faxes and e-mail have reduced the demand for bicycle couriers. Automobiles devastated the blacksmith business. For that matter, the more people who sign up with AOL, the

¹⁴For additional examples, see Stan J. Liebowitz and Stephen E. Margolis, *Winners, Losers and Microsoft* (Oakland, CA: The Independent Institute, 1999).

fewer customers for the smaller ISPs. Yet “this process of Creative Destruction is the essential fact about capitalism.”¹⁵ The mass marketing of telegraph services put many Pony Express riders out of business, and the mass marketing of broadband will eventually put many ISPs out of business—unless they find new ways of bringing value to the consumer.

But the inability of ISPs to meet the competitive pressure from broadband need not mean lower employment in the Internet provider industry overall. While competition often means employees of inefficient firms lose jobs, it also means more successful firms will expand their hiring. The net impact on total employment will not necessarily be negative and, in fact, total employment might even increase.

¹⁵ Joseph A. Schumpeter, *The Theory of Economic Development* (Cambridge: Oxford University Press, 1963), page 83. Schumpeter, an Austrian economist, coined the phrase “creative destruction.” See *Capitalism, Socialism and Democracy* (New York, NY: Harper & Row Publishers, 1942; third edition 1950), pages 81-86.

Forced Access Will Improve Competition

Several Forced Access supporters have written to the FCC claiming that without FCC-imposed Forced Access, electronic commerce will be “driven not by the dictates of a free and open market, but by the self-interested decisions of monopoly providers.”¹⁶

Similarly, a Forced Access advocate in Los Angeles speaks of fostering competition:

[O]pen access ensures consumer choice, competition and innovation in the marketplaces for high-speed Internet access. Without open access, there is no level playing field; cable companies will control every aspect of high-speed Internet access (i.e., price, transport/conduit, packaging, interface, content, cost, technical standards, customer service, innovation, etc.). In fact, in the case of high-speed cable Internet access, the playing field does not even exist; there are no competitors and cable companies can do whatever they desire.¹⁷

The FCC acknowledges that Forced Access advocates have a point here. If the cable companies had to let any ISP use their system, there would immediately be greater competition among ISPs to serve the customers who were being delivered by the cable lines. But in the long run, competition would be harmed, the FCC explains: “While mandating access can bring about short-term improvements in retail competition, it also may undermine incentives for developing

¹⁶ Center for Media Education, Computer Professionals for Social Responsibility, Consumer Federation of America, Consumer Project on Technology, Consumers Union, Media Access Project, letter to William Kennard, Chair, FCC, January 28, 1998, <http://www.nogatekeepers.org/archive/19990127-1.shtml>.

¹⁷ Robert Duggan, letter of resignation to Mayor Richard Riordan, June 17, 1999, <http://www.opennetcoalition.org/news/929992187-resign.shtml>.

new methods to circumvent the influence of incumbents over distribution.”¹⁸

As the FCC recognizes, competition can occur only when competitors offer *different* things to the consumer. If cable broadband is eliminated as a competitive tool (since every ISP can offer it), then companies will not be competing over improved broadband hardware.

As Supreme Court Justice Stephen Breyer has observed: “Rules that force firms to share *every* resource or element of a business would create, not competition, but a pervasive regulation, for the regulators, not the marketplace, would set the relevant terms.”¹⁹ Forced Access is just the kind of rule described by Justice Breyer: The entire “last mile” from the Internet to the consumer’s residence would be shared; hence, there would be no competitive advantage for the property owner to improve or maintain the property.

As for the rhetoric about level playing fields, John Berresford writes for the Economic Strategy Institute:

The “playing field” is never “even” to begin with, and bringing in a lot of regulatory landscape architects and earth-moving equipment will, in most cases, only postpone the

¹⁸ FCC Report, *supra* note 5, Separate Statement of Commissioner Michael K. Powell, pages 3-4.

¹⁹ *AT&T v. Iowa Utilities Board*, 143 L. Ed. 2d 34 (1999) (Breyer, S., dissenting). Justice Breyer’s words were written in dissent, in a case involving Forced Access for telephone companies (the Incumbent Local Exchange Carriers, who formerly had legal monopolies in their territory). That Justice Breyer’s words came in a dissent does not prove that the majority of the Supreme Court disagrees with him; the *Iowa* case involved statutory interpretation of a law (the Telecommunications Act of 1996) that was plainly intended to impose Forced Access on the ILECs. (The issue in the case was exactly how much Forced Access the badly drafted and contradictory statute was meant to impose.) That the Court majority did not agree with Justice Breyer about the meaning of particular words in a particular statute does not undermine Justice Breyer’s broader point about Forced Access.

emerging competition and the benefits it will bring to consumers . . . all the other competitors will find something unfair to them and will want their valleys to be filled and their mountains and hills to be brought low. The process can become an endless one, and if carried to its logical conclusion, makes the regulator into a cartel manager. This guarantees jobs for regulators, lawyers and lobbyists, and oligopoly for the so-called competitors, but it will do little for consumers.²⁰

In short, it is Orwellian to allow the word “competition” to mean “protection of politically influential companies from competition.”

Cable Companies Will Be Able to Control Content

The ultimate bogeyman in the Forced Access debate is that cable companies will be able to use their market lead in broadband Internet to control the content of the Internet.

Although Internet censorship is popular in some quarters, most Internet supporters recognize that the wide-ranging, free content of the Internet is one of its most important benefits. Thus, scaring consumers about Internet content control is a superb tactic. For example, a collection of pro-Forced Access groups run a joint Web site topped by a picture of a computer in chains, along with the caption “Cable and phone companies could restrict the content you can see

²⁰ John Berresford, *Future of the FCC: Promote Competition, Then Turn Out the Lights?* (Economic Strategy Institute, May 1997), pages 21-22.

on the Web.”²¹

This message is undoubtedly frightening to Web surfers, but it is misleading. Cable and phone companies *could* give all their profits to Satanists; cable and phone companies *could* refuse to transmit any content from Web sites that disparage Barney the Dinosaur; cable and phone companies *could* charge customers one million dollars a day for Web access; cable and phone companies *could* try almost anything.

But the Coalition presents no evidence that cable or phone companies have actually tried to limit their customers’ access to Internet content. The only thing that could even arguably be called a limitation is the current cable limit on ten minutes of streaming video (which I will discuss below), which has nothing to do with the content of the video; it is simply a limitation based on cable’s limited bandwidth, and the need to preserve the vast majority of that bandwidth for television signals.

One method cable companies are using to improve Internet access speed is sometimes claimed to be “content control,” but the claim is wrong.

Suppose Internet surfers want to watch a trailer for a new movie; the trailer consists of 10 minutes of streaming video. If consumers simply access the trailer by clicking on the movie

²¹ Center for Media Education, Computer Professionals for Social Responsibility, Consumer Federation of America, Consumer Project on Technology, Consumers Union, Media Access Project, <http://www.nogatekeepers.org/>.

studio's Web site in southern California, then the 10 minutes of video data will be sent cross-country (for one consumer at a time) to consumers in Boston, Montgomery, Minneapolis, and so forth. All those cross-country trips eat up a lot of Internet bandwidth. And the farther the data must travel, and the more switches and routers along the Internet backbone that are necessary, the slower the delivery of the movie trailer to the consumer's computer screen.

To alleviate this problem, the Internet Service Provider (such as @Home, or AOL, or any other national ISP), makes a deal with the movie studio. The studio will pay the ISP a fee. Then, the ISP will make copies of the movie trailer and store them on local servers. So the consumer in Boston who wants to watch the trailer will not have to wait for the trailer to travel all the way from Hollywood to Boston; the data for his trailer will travel from the ISP's server in Boston to the consumer's home in Boston. By "caching" a copy of the movie trailer, the ISP makes the trailer available to the consumer more efficiently.

Everyone is better off with caching. Consumers get the movie trailer faster; more people watch the trailer, since they don't have to wait for a cross-country download. The movie studio gets more people to watch the trailer (and thus more people attend the movie, and give money to the studio). The ISP gets more money in the short run from the studio, and more money in the long run from contented customers. Everyone else who uses the Internet benefits too; since the Internet is not clogged with the movie trailer moving cross-country, the Internet is that much faster for everyone else to use—including people who don't like movies, and who don't use the particular ISP.

Caching is currently common on the narrowband Internet. AOL is among the most notable practitioners.²² The cable ISPs, such as @Home and RoadRunner, will also practice caching. Caching does not restrict Internet content in any way; it simply makes certain popular content available faster.

Does caching lead to content control? Plainly not—or America Online would *already* control Internet content. America Online owns about half of the current consumer Internet market (much more than cable could ever realistically hope to have). Has caching given AOL control over Internet content? The answer is obviously “no,” and there is no reason to fear that similar caching by cable television broadband providers will enable them to control content.

Similar fears were raised when Microsoft began using its Windows 95/98 and Internet Explorer programs to highlight content from certain Web sites. Internet Explorer 4.0 and 5.0 both have something called “channels,” which allow content from a Web site to be delivered to a user’s computer at a convenient time (such as midnight); later, the computer user can browse the delivered content, without having to log onto the Internet. Although any Web site can turn itself into a channel (by inserting some simple code), Microsoft creates preset channels for certain sites (e.g., Disney, CBS Sportsline) that pay Microsoft to do so. Microsoft’s operating system (which now includes Internet Explorer) is ubiquitous, and if any company has the market presence to control content, it should be Microsoft.

²² Maxwell, *Residential Broadband: An Insider's Guide*, supra note 6, page 114.

But channels have been a failure, and have not interested most Web users. Content on the World Wide Web today is just as free and wide-open (in fact, more so) as it was when Microsoft began pushing selected channels.

If neither Microsoft (with over 90 percent of new personal computer operating systems) nor AOL (with almost half the current ISP business) can use a market-leading position to control content, there is no realistic risk that cable broadband (which will probably never have even half of the total Internet access market) will be able to control content.

This is not to say the cable companies will not do their best to make as much money off content as possible. Telecommunications analyst Anna-Maria Kovacs explained to Congress:

It does not take much imagination to envision the potential for a player like AT&T that controls access to the majority of cable homes in the U.S. through its own properties or its affiliates . . . finding ways to advantage its own content and sites on its own network. But it also does not take much knowledge of history to understand that in a competitive market that is likely to be a highly self-destructive strategy. Consumers who, at comparable prices and speeds, can get unlimited choice of content over the telcos vs. limited choice over their cable network are not likely to opt for the cable network. Beta vs. VHS and Apple vs. Microsoft both tell us that customers primarily care about content and applications and will flock to the vendor that gives them the best and widest selection of each. Thus, if AT&T were inclined to try to limit the number of ISPs and the content on its network, it would be punished severely by the marketplace, assuming there

is another choice in that marketplace. Most Internet access would happen over the telcos' DSL pipes. [DSL is discussed below.] Given the enormity of AT&T's investment in cable systems and its inability to earn adequately over those systems without a hefty penetration of cable-modems and telephony, its stock would suffer severely if it maintained a closed-access strategy once DSL is readily available in the marketplace.²³

Telecommunication Monopolization in the Early Twentieth Century

William Barr, former U.S. Attorney General and currently the executive vice president of GTE, argues that Forced Access is appropriate in part because of AT&T's behavior at the start of the twentieth century, when AT&T established a telephone monopoly in most urban areas.²⁴ AT&T did indeed create a monopoly, but through three methods not available today.

First, the Bell Companies bought out many of the smaller competitive telephone service providers.²⁵ This precedent might be relevant if AT&T were buying out small ISPs today, but AT&T is doing no such thing. It is introducing a new form of competition, not buying out any competitors.²⁶

²³ Anna-Marie Kovacs, Testimony before the United States Senate Committee on the Judiciary, hearing on "Broadband: Competition and Consumer Choice in High-Speed Internet Services and Technologies," July 14, 1999.

²⁴ William P. Barr, *supra* note 4.

²⁵ *AT&T v. Iowa Utilities Board*, *supra* note 15 (Thomas, C., concurring and dissenting on other grounds), citing Robert Garnet, *The Telephone Enterprise: The Evolution of the Bell System's Horizontal Structure, 1876-1909* (Baltimore, MD: Johns Hopkins University, 1985), pages 146-53.

²⁶ Barr's criticisms might be better directed at GTE itself and the RBOCs. After the break-up of the Bell System, there were seven RBOCs. Today, there are only three, thanks to mergers. Each merger eliminates a strong potential competitor for local telephone service. Once Pacific Telesis merged with SBC, there was no risk that one company would attempt to compete with the other in the other's home territory.

Second, AT&T refused to interconnect with telephone exchanges it did not own.²⁷ In other words, if a customer was served by a small local phone company, and the person wanted to place a long-distance call to someone in another town (where AT&T owned the exchange), AT&T would not connect the call. Similar behavior would occur today if AT&T refused to deliver e-mail from Mindspring (not owned by AT&T) to a customer for @Home (40 percent owned by AT&T). But AT&T is not refusing to carry traffic from outside providers. Indeed, if AT&T/@Home customers could send e-mail only to other AT&T/@Home customers, almost no one would become an @Home customer in the first place.

The third key to the establishment of the Bell Companies' monopoly was state legislation outlawing local phone competition; much of this legislation was pushed by the Bell Companies themselves.²⁸ Today, though, it is not AT&T that is asking for the government to help it suppress competition; it is Internet service providers who want the government to suppress other companies' competitive advantages.

²⁷ Maxwell, *Residential Broadband: An Insider's Guide*, supra note 6, page 287.

²⁸ *AT&T v. Iowa Utilities Board*, supra note 15 (Thomas, C., dissenting), citing Kenneth Lipartito, *The Bell System and Regional Business* (Baltimore, MD: Johns Hopkins University, 1989), pages 185-207.