SIDLEY & AUSTIN
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

CHICAGO
DALLAS
LOS ANGELES
NEW YORK
SEATTLE

1722 EYE STREET, N.W.
WASHINGTON, D.C. 20006
TELEPHONE 202 736 8000
FACSIMILE 202 736 8711

FOUNDED 1866

HONG KONG
LONDON
SHANGHAI
SINGAPORE
TOKYO

WRITER'S DIRECT NUMBER
(202) 736-8224

WRITER'S E-MAIL ADDRESS
cbeckner@sidley.com

DOCKET FILE COPY ORIGINAL

January 10, 2001

RECEIVED
JAN 10 2001
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Federal Communications Commission
224 12th Street, SW
TW-B204
Washington, DC 20554

Re: Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities (GN Docket NO. 00-185)

Dear Ms. Salas:

Enclosed for filing are the Reply Comments of AT&T Corp. in the above captioned docket. Please contact undersigned if you have any questions.

Yours truly,

C. Frederick Beckner III

Attachments

No. of Copies rec'd 0+4
List A B C D E

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

RECEIVED

JAN 1 0 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

# REPLY COMMENTS OF AT&T CORP.

David W. Carpenter
Peter D. Keisler
David L. Lawson
C. Frederick Beckner III
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006

Mark C. Rosenblum
Stephen C. Garavito
Douglas Garrett
AT&T Corp.
295 N. Maple Avenue
Basking Ridge, New Jersey 07920

Howard J. Symons
Thomas G. Krattenmaker
James J. Valentino
Michelle M. Mundt
Catherine Carroll
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004

Michael H. Hammer
Francis M. Buono
Jonathan A. Friedman
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036-3384

January 10, 2001

ORIGINAL

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY ..... 1

I. THE COMMENTS DEMONSTRATE THAT THE COMMISSION'S LONGSTANDING POLICY OF "VIGILANT RESTRAINT" WITH RESPECT TO CABLE INTERNET SERVICES HAS PRODUCED A COMPETITIVE MARKETPLACE THAT HAS YIELDED SIGNIFICANT BENEFITS FOR CONSUMERS. ..... 4

A. Substantial Evidence Submitted In This Proceeding Reaffirms That The Commission's Current Policies Have Contributed Directly To The Development Of Robust Competition And High Levels Of Investment And Innovation In Broadband Internet Services. ..... 5

B. AT&T's Boulder And Massachusetts Trials Provide Further Evidence That The Commission's Market-Based Approach Is Succeeding In Giving Consumers Broadband Internet Choices. ..... 11

II. AS THE COMMENTS DEMONSTRATE, GOVERNMENT-MANDATED ACCESS WOULD IMPOSE SIGNIFICANT BURDENS WITHOUT ANY COMMENSURATE BENEFIT ..... 15

A. Commenters Request A Cornucopia Of Burdensome Access Regulations, Proving That There Is No Such Thing As "Light Touch" Or "Minimal" Open Access Regulation. ..... 17

B. Many of the Proposed Requirements Go Far Beyond Access to Cable and Would Enmesh the Commission in Regulation of the Internet Generally. ..... 22

C. Government-Mandated Access Would Harm Consumers By Deterring Investment, Impeding Innovation, and Delaying and Impairing the Provision of Broadband Services. ..... 26

III. GOVERNMENT-MANDATED ACCESS CANNOT BE RECONCILED WITH THE PLAIN TERMS OF THE COMMUNICATIONS ACT ..... 28

A. Today's Cable Internet Services Are "Cable Services." ..... 29

B. Today's Cable Internet Services Are Also "Information Services," And Therefore Cannot Be "Telecommunications Services." ..... 33

C. The Proponents of Government-Mandated Access Identify No Authority For Common Carrier Regulation of Cable Internet Services. ..... 39

IV. "REGULATORY PARITY" CANNOT JUSTIFY CABLE INTERNET ACCESS REGULATION OR ABANDONMENT OF CORE REGULATION AIMED AT LOCAL EXCHANGE MONOPOLIES ..... 43

CONCLUSION ..... 51

## INTRODUCTION AND SUMMARY

The comments confirm that the Commission's longstanding cable Internet policy of "vigilant restraint" has produced enormous benefits for consumers in the form of increased competition, investment and innovation in the provision of broadband Internet services. *See infra* Part I. Although cable operators were the first to make the necessary investments to upgrade their networks to provide high speed Internet services, incumbent local exchange carriers ("LECs") have responded by spending billions of dollars to upgrade their ubiquitous networks. As a result, digital subscriber line ("DSL") services are now widely available and experiencing explosive growth. As one analyst recently noted: "The proliferation of DSL in the telecom industry has seen one of the fastest technology adoption rates ever recorded. The total installed base of lines has grown from under 500,000 to over 2,000,000 in only one year's time."[1] Satellite-based broadband service is also now available throughout the country and fixed wireless networks are being rapidly deployed. Indeed, the evidence of intense competition from multiple competing networks is so overwhelming that even some incumbent LECs finally concede that there is no market failure justification for government regulation of cable Internet services.

A handful of industry participants ask the Commission to ignore this overwhelming evidence and to adopt new regulations designed to advance their own particular business models at the expense of the public interest. *See infra* Part II. Internet service providers ("ISPs") and some municipalities demand that ISPs be granted "access" to cable systems at government prescribed rates, and terms and conditions. Although they attempt to slap "light touch" labels on

---

[1] *DSL Market: Demand Doesn't Seem To Be An Issue, But Carrier Deployment Execution Does*, Robertson Stephens (January 3, 2001).

numerous, far-reaching inconsistent requests, the resulting common carrier regulation they seek would, in fact, impose enormous burdens on cable companies, the Commission, and the public. Indeed, some of these commenters ask for the creation of a whole new Internet bureaucracy – funded through cable tariffs – that would act as "gatekeepers" to establish and administer "interconnection tariffs and standards."

Owners of rival broadband networks hope to gain the Commission's help in hobbling their cable competitors. WorldCom, for example, argues that the Commission should impose intrusive access and bundling regulations on cable Internet services, but not its own competing wireless broadband services. EchoStar goes even further, arguing that cable "open access" rights should extend beyond ISPs to competing distributors such as EchoStar. Tellingly, EchoStar does not explain how such access is feasible, let alone why it should not also apply to EchoStar's own recently deployed two-way, broadband satellite network. And, the incumbent LECs continue to argue that cable operators, which face fierce competition from direct broadcast satellite ("DBS") providers and others in their core markets, should be subject to local competition provisions of the Communications Act that were enacted solely to pry open the incumbent LECs' local bottleneck monopolies. Other commenters demand regulation of caching, access to broadband content, and video streaming services and other issues that go well beyond cable Internet services to generic regulation of the Internet.

Not only are these self-serving regulatory proposals unnecessary as a matter of sound economics and public policy, they have been foreclosed by Congress. *See infra* Part III. Both the plain language of section 522(6) and the legislative history compel the conclusion that cable Internet services are "cable services." As such, Commission-mandated unbundling and access requirements are categorically prohibited by sections 621(c) and 624(f) of the Communications

Act. Notwithstanding the claims of proponents of forced access, this is true even if cable operators' cable Internet services include incidental, non-"cable services."

Cable Internet services are also "information services" because they make available "information via telecommunications." Some commenters claim that this gives the Commission ancillary Title I jurisdiction to impose common carrier obligations on cable Internet providers. In fact, "the Commission's general jurisdiction over interstate communication and persons engaged in such communication 'is restricted to that reasonably ancillary to the effective performance of [its] various responsibilities' under title[] II . . . of the Act."[2] And cable "open access" cannot be said to further the provisions of Title II because cable Internet services are *not* telecommunications services, and Congress expressly directed that Title II common carrier regulations should apply *only* to telecommunications services.[3] Moreover, the Commission has consistently and properly ruled that it will rely on Title I to impose access and unbundling requirements only in clear cases of market failure, and the record in this proceeding starkly confirms that there is no such market failure here.

The few commenters that take contrary positions on the statutory classification issues are able to do so only by claiming that cable Internet services can be decomposed into separate "information" and "telecommunications" offerings, the latter of which are subject to Title II. But that argument has been repeatedly rejected by the courts and the Commission.[4] An information service provider "uses telecommunications" but "does not offer telecommunications."[5]

---

[2] *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1479 (D.C. Cir. 1994) (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968)).

[3] *See* 47 U.S.C. § 153(44).

[4] *See, e.g.*, *Howard v. America Online, Inc.*, 208 F.3d 741, 752 (9th Cir. 2000); Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd. 11501, 11520 (¶¶ 39,

(continued . . .)

Finally, vague notions of regulatory parity cannot justify imposing cable Internet access regulation. *See infra* Part IV. DSL services are thriving under the current regulatory scheme, but government mandated access would impose considerable burdens on cable operators because of the unique technologies and architecture used to provide cable Internet services. Nor is there any merit to the incumbent LECs' attempt to make a virtue out of necessity by arguing that existing broadband competition requires the abandonment of core regulation aimed at local exchange monopolies. These arguments ignore the continuing ability of incumbent LECs to leverage their existing voice monopolies into emerging advanced services and to use bundling and access to foreclose nascent local voice competition.

## I. THE COMMENTS DEMONSTRATE THAT THE COMMISSION'S LONGSTANDING POLICY OF "VIGILANT RESTRAINT" WITH RESPECT TO CABLE INTERNET SERVICES HAS PRODUCED A COMPETITIVE MARKETPLACE THAT HAS YIELDED SIGNIFICANT BENEFITS FOR CONSUMERS.

Substantial evidence produced by cable and non-cable commenters alike demonstrates that there is vigorous competition among providers of broadband Internet services and that investment in and deployment of such services continues at a breakneck pace. This evidence reaffirms that the Commission's policy of "vigilant restraint" is working.[6] By contrast,

---

(. . . continued)
44) (1998) ("*Report to Congress*"); Report and Order, *Third Computer Inquiry*, 104 F.C.C.2d 958, 1017-18 (1986); Final Decision, *Second Computer Inquiry*, 77 F.C.C.2d 384, 428 (¶ 114) (1980) ("*Computer II*").

[5] *Report to Congress* ¶ 39.

[6] *See, e.g.*, Cable Services Bureau, *Broadband Today*, Report No. CS 99-14, at 49 (Oct. 1999) ("*Broadband Today*") ("By forbearing from imposing 'open access' regulations on cable operators, the Commission has fostered an environment that encourages investment not only in cable, but also in the alternative broadband technologies, wireless, satellite, and DSL."). *See also* AT&T at 38-43 (detailing Commission findings that broadband Internet services competition is developing precisely as it should without government intervention).

advocates of forced access regulation have submitted no evidence that competition is lacking, relying instead on speculation and unsupported claims of market failure and consumer harm. These unsupported claims are rebutted conclusively by the actual evidence in the record. Perhaps the clearest indication that the Commission's vigilant restraint policy should be continued are the multiple ISP trials now being conducted by AT&T and other cable operators. These trials demonstrate that competition and consumer demand give cable operators strong incentives to allow their customers to choose from among multiple ISPs and that operators are taking concrete steps to provide such choice.

### A. Substantial Evidence Submitted In This Proceeding Reaffirms That The Commission's Current Policies Have Contributed Directly To The Development Of Robust Competition And High Levels Of Investment And Innovation In Broadband Internet Services.

The record in this proceeding proves emphatically that the Commission's market-based approach has resulted in increased competition, investment, and innovation in the provision of broadband Internet services. AT&T and other commenters submitted substantial evidence showing that competition in the broadband Internet services area is robust and that the Commission's policy of "vigilant restraint" is working. For example, AT&T highlighted the Commission's own findings that DSL is competing effectively with cable and that new broadband competition is quickly developing.[7] AT&T also noted that these Commission

[7] *See* AT&T at 43-44 (citing the Commission's *October 2000 Broadband Report*, which found, among other things, that DSL lines in service increased by 157% to one million lines in the first half of 2000, the fastest rate of growth among high-speed providers). *See also* Ordover/Willig Dec. ¶ 13 (attached hereto as Exh. A) (observing that by 2002 SBC will make DSL available to 77 million customers); National Cable Television Assn. ("NCTA") at 46 (noting that residential DSL subscribership increased by 260% during the first nine months of 2000, and by 844% over the past year).

findings of vigorous competition are fully supported by recent independent industry analyst reports.[8]

Leading DSL providers agreed with these findings as well. SBC and BellSouth, for example, concluded that incumbent LECs and cable operators are engaged in a fierce battle of equals over Internet services and that both face competitive threats from fixed wireless and satellite providers.[9] Qwest concurred, stating that there is no rational distinction between the incumbent LECs and cable operators when it comes to Internet services: "In point of fact, customers view DSL service and cable modem service as being interchangeable."[10]

The satellite industry also highlighted the robust competition among broadband Internet services providers. For example, the Satellite Broadcasting and Communications Association ("SBCA"), the satellite industry's trade association, noted that competition among cable, DSL, fixed wireless, and satellite providers is rapidly increasing and that broadband "services via satellite are also now being offered nationwide" by DirecPC and StarBand.[11] More importantly, SBCA pointed out that "more than a dozen additional two-way, high-speed satellite Internet

---

[8] *See* AT&T at 44-48 (detailing findings of analysts). Analyst reports issued since the filing of initial comments in this proceeding further underscore the intense level of competition among broadband Internet service providers. *See* Gary H. Arlen, Telecomm. Reports, *Reality Hits: Free ISPs Report Active Users to Tone Down 'Subscribership,' DSL Begins in Earnest*, TR's Online Census, , at 1 (Nov. 2000) (showing that total ISP subscriber numbers at 63,249,757, of which 3,505,050 use cable modem service, and 1,264,253 use DSL, and that third quarter 2000 growth rates for cable modem service and DSL were 26.6% and 341.58% respectively). *See also* Atlantic-ACM, *xDSL Market Sizing: Provider Report Card 2000-2006*, at 35 (June 2000) (concluding that the economics of DSL (with a total cost per subscriber of $620 versus cable's cost per subscriber of $1,550) and its declining prices make it a "luring opportunity for both carriers and customers").

[9] *See* SBC/BellSouth at 4, 10-11.

[10] Qwest at 8.

[11] SBCA at 4-5.

service providers [] have been licensed by the FCC," and concluded that the emergence of intense, technologically-varied competition in this nascent marketplace demonstrates that regulation is at best premature and will likely slow deployment and harm competition.[12]

Cable commenters also underscored that competition among broadband Internet services providers is driving substantial investment and innovation in the cable industry. The National Cable Television Association ("NCTA"), for example, noted that "the cable industry alone is investing billions of dollars in network enhancements, new facilities, hardware, and software, not to mention more on research and development," and that other segments of the communications industry were making similar investments.[13] NCTA concluded that these pro-consumer developments rendered government-mandated access to cable unnecessary.[14] Likewise, the recent survey of the American Cable Association ("ACA") indicated that independent small cable companies are also responding to market forces by making substantial investments to offer cable modem service in smaller, rural markets. ACA cautioned, however, that these companies "would not risk additional capital at this point if the service were to face burdensome regulations in their markets."[15]

Other commenters from across a wide range of industries agreed that government regulation is unwarranted. RCN, a major cable overbuilder, noted that large-scale deployment of

---

[12] *See id.* at 3-4. *See also* Competition Policy Institute at 11 ("Developments in the market for broadband access simply do not provide a compelling reason to impose [common carrier] regulation and, in fact, demonstrate that the Commission has not erred in its policy choice.").

[13] NCTA at 41-47 (noting investments by cable, DSL, satellite, and other leading broadband Internet services providers).

[14] *See id.* at 43.

[15] *See* ACA at 10.

DSL and entry by fixed wireless and satellite Internet providers demonstrate strong and increasing competition.[16] Metricom, a wireless Internet provider, concluded that given the "availability of multiple high-speed access platforms, . . . the Commission need only continue its 'hands-off' treatment."[17] The Information Technology Industry Council ("ITIC"), an association that represents numerous leading high-technology companies, echoed these assessments of the intense competition for broadband Internet services.[18] The Newspaper Association of America similarly stated that "market incentives currently are working to encourage cable modem open access, and that the Commission need not take a more aggressive regulatory action at this time."[19]

The economic analysis prepared by Professors Ordover and Willig and attached to AT&T's reply comments confirms this conclusion. Ordover and Willig conclude that:

> the competition from DSL, other broadband technologies, and dial-up services . . . places powerful incentives on cable operators to offer cable modem services to customers with as much choice as possible both in content and access to ISPs.[20]

Notwithstanding this clear evidence of vigorous competition, a few parties contend that forced access requirements are justified because of alleged market failures in the provision of

---

[16] *See* RCN at 6-9.

[17] Metricom at 6.

[18] *See* ITIC at 6 (noting that DSL is growing at three times the rate of cable modem service and that the investment of $1.2 billion by providers planning to deploy wireless broadband indicates confidence that alternative technologies will be effective and profitable competitors). *See also* Mercatus Center at 2 ("Imposing economic regulation on such a young, rapidly-changing market runs the risk of discouraging investment and diverting firms' energies from rolling out service to fighting each other in the regulatory forum.").

[19] Newspaper Association of America at 5.

[20] Ordover/Willig Reply Dec. ¶ 45.

broadband Internet services. However, none of these commenters submit any evidence to support their claims, relying instead on unsubstantiated allegations, speculative harms, and conclusory statements about the lack of competition and the need for intrusive government regulation.[21] Moreover, their allegations are undercut by the comments of other parties, often from the same industry. For example, while Verizon asserted that cable operators are the dominant, "bottleneck" providers of broadband Internet services and that DSL is not a competitive alternative,[22] SBC and BellSouth stated that "[f]or broadband Internet services, *there is no bottleneck*."[23] Similarly, contrary to the efforts of EchoStar and CompTel to downplay the ability of satellite and wireless technologies to compete effectively with cable Internet services,[24]

---

[21] In fact, the only evidence any of these commenters cite is a previous decision by some cable operators, based on technical considerations, to place restrictions on streaming video. *See, e.g.*, OpenNet at 8. But, as AT&T pointed out in its comments and describes below, it has no incentive to prohibit video streaming, and, in fact, already publicly committed that it would ensure the availability of streaming video to customers who desire it. *See* AT&T at 53 & n.155 (citing Ex Parte letter from Betsy Brady, AT&T, to Magalie Roman Salas, FCC, filed in CS Docket No. 99-251 (filed May 10, 2000)).

[22] Verizon at 4. Moreover, Verizon's statements about the inferiority of DSL flatly contradict Verizon's recent public statements touting its DSL service. *See, e.g.*, Verizon Press Release, *Verizon Completes Purchase of OnePoint; Unit to be Renamed "Verizon Avenue"* (Dec. 19, 2000) (quoting Bruce Gordon, president of Verizon Retail Markets, as saying: "Verizon Avenue will offer residents and tenants in apartments and other multi-unit and community settings *a clear and superior alternative to cable modems*.") (emphasis added); Verizon Press Release, *Verizon Reaffirms Financial Targets* (Dec. 19, 2000) (quoting Verizon Chairman and co-CEO Charles R. Lee as saying: "We continue to see strong demand and volumes, especially for our high-growth data, DSL, long-distance, and wireless services."); Verizon Press Release, *Verizon Online Cuts DSL Prices for Consumers in 14 Midwest, Southeast and Western States and for Small Businesses Nationwide* (Sept. 5, 2000) (quoting Alex Coleman, vice president and general manager of Verizon Online, as saying: "By lowering our [DSL] pricing and eliminating [DSL] start-up fees, we're making it clear that we plan to compete aggressively for new residential and business customers.").

[23] SBC/BellSouth at 11 (emphasis added).

[24] CompTel at 14-16; EchoStar at 5, 9.

SBCA noted that "the satellite industry itself is rapidly deploying numerous competitive offerings,"[25] and Starband stated that "[i]n the near term, the potential satellite options for users can only be expected to grow."[26] OpenNet Coalition and Consumers Union argued that forced access requirements are necessary because cable operators have the means and the motive to discriminate against alternative ISPs and content providers.[27] But this argument is destroyed by cable's multiple ISP trials, described in AT&T's initial comments and below, which demonstrate the exact opposite – *i.e.*, that cable operators are highly motivated to develop the means to provide their customers with access to multiple ISPs.

In short, all the evidence in this proceeding demonstrates clearly that competition among broadband Internet services providers is significant and growing. This record evidence lends powerful support to the Commission's findings – articulated four times in the last two years – that regulation is unnecessary and would be counterproductive.[28]

---

[25] SBCA at 4. *See also* Ordover/Willig Reply Dec. ¶ 23 (noting that "EchoStar is deploying a bundled package of high-speed services and video programming services in competition with cable operators" and that its "representations to investors and shareholders in this regard contrast starkly with the pessimistic tone of its assertions to the FCC") (citations omitted).

[26] Starband at iii.

[27] OpenNet at 7-11; Consumers Union at 18-20.

[28] The Consent Order entered by the Federal Trade Commission ("FTC") approving the AOL-Time Warner merger and imposing certain forced access conditions on the combined company, *see In the Matter of America Online, Inc., and Time Warner Inc.*, Dkt. No. C-3989, Decision and Order (Dec. 14, 2000), is irrelevant to the Commission's inquiry here. The FTC's Order was premised on the specific and unique circumstances of the companies involved in the merger, in particular the fact that AOL has 28 million Internet customers, approximately half of all such customers in the U.S. Neither AT&T, nor any other cable operator, serves more than a small percentage of the Internet access market. Thus, the conditions imposed on the AOL-Time Warner merger by the FTC do not constitute precedent for the imposition of similar conditions on the entire cable industry. Indeed, under similar antitrust and regulatory review, AT&T's mergers with TCI and MediaOne were each approved without imposition of forced access conditions notwithstanding numerous demands for such conditions.

### B. AT&T's Boulder And Massachusetts Trials Provide Further Evidence That The Commission's Market-Based Approach Is Succeeding In Giving Consumers Broadband Internet Choices.

The vibrant competition described above provides AT&T and other cable operators with strong incentives to deliver high-quality, low-cost, easy-to-use cable Internet services that afford consumers as much choice and innovation as possible.[29] As noted, a few commenters dispute this reality, arguing (without evidentiary support) that cable operators have the incentive to limit consumer choice of ISPs. However, AT&T's "Broadband Choice" program provides strong evidence that this argument is simply wrong. Broadband Choice, to be commercially deployed nationwide in 2002, will enable customers to purchase services from multiple ISPs offered over AT&T's cable systems.[30] As described in its initial comments, AT&T commenced a Broadband Choice trial in Boulder, Colorado and will initiate a follow-on trial in Massachusetts later this year.[31] The Boulder trial, which began on November 1, 2000 and will run for six months, now

---

[29] *See* NCTA at 51 (noting that "the advent of competition among broadband providers creates strong economic incentives for cable operators to give their subscribers a choice of Internet services offering features, functions, and content that subscribers want").

[30] Broadband Choice will be guided by the policies set forth in the joint AT&T-MindSpring letter and subsequent filings with the Commission. *See* AT&T at 52-53 & n.155 (detailing AT&T's commitments to customers and ISPs).

[31] AT&T notes that other cable operators are pursuing similar trials. For example, Time Warner commenced a trial in Columbus, Ohio in July, 2000, and Comcast announced a trial to start in the first quarter of this year in the Philadelphia area. *See* NCTA at 79. As the Telecommunications Industry Association ("TIA") noted, these efforts by cable operators to provide multiple ISP access on a voluntary basis demonstrate that government regulation is premature and unnecessary. *See* TIA at 24.

includes over 280 customers, and AT&T anticipates it will add another 150 users this month.[32] Seven ISPs have agreed to participate in the trial.[33]

AT&T's Broadband Choice trials will address the technical and operational challenges associated with providing consumers a choice of ISPs over the cable plant.[34] It is worth noting, for example, that most ISPs currently do not operate in a manner that supports consumer choice, *i.e.*, where a household may use the same computer equipment to subscribe to more than one ISP simultaneously, or where a consumer can easily change his or her choice of ISP provider. In fact, in many cases installing the software to activate an ISP service can have a number of unwanted effects in a multiple ISP environment, such as: disabling another ISP by changing registry and network settings; rebranding or substituting a new browser for the customer's current browser; installing proprietary software that creates software conflicts on the customer's PC; or preventing the customer from completely uninstalling the ISP's software when the

---

[32] AT&T expects that the trial will ultimately involve approximately 500 customers. *See* AT&T at 62.

[33] The ISPs include: EarthLink, Excite@Home, Juno, MSN, RMI.net, Winfire, and WorldNet. Flashcom and FriendlyWorks, which had originally agreed to join the trial, have decided not to participate. Of the seven participating ISPs, three (EarthLink, Juno, and WorldNet) launched last year, two more will likely launch this month, and another is expected to launch in February. The remaining ISP may begin service at a later date. AT&T also notes that it continues to entertain requests from other ISPs that may be interested in participating in the Boulder trial.

[34] As detailed in its initial comments, AT&T will have to modify its existing cable data network and architecture to support multiple ISPs, while at the same time ensuring that the Broadband Choice service is as consumer friendly as possible. *See id.* at 56-61 (noting that challenges will include: (1) reconfiguration of the cable system and development of hardware to accommodate multiple ISPs; (2) development of systems and software to manage third-party bandwidth demand; and (3) development and implementation of the operational support systems necessary to provide access to ISPs, including ordering, billing, and maintenance). *See also* Excite@Home at 11-12 (detailing challenges associated with accommodating multiple service providers on cable networks); NCTA at 69-76 (highlighting technical and operational issues associated with multiple ISP access).

customer chooses to change to a different ISP. AT&T is investing substantial resources and working with ISPs that have agreed to participate in the Boulder trial to address and resolve these challenges.

Not only is AT&T striving to allow consumers to choose among ISPs without experiencing these negative side-effects, but it is also attempting to make such choice as easy to execute as possible. In that regard, AT&T has designed the "Service Agent," a new software program that provides customers with a suite of tools that will enable them to easily initiate, customize, and monitor their experience in a multiple ISP environment. As part of the Boulder trial, AT&T is refining the Service Agent based on feedback from trial participants as well as AT&T's own experiences in managing the trial.[35]

As the software is currently configured, a Broadband Choice customer simply clicks on a static icon on the customer's PC desktop to initiate the Service Agent. If the customer is setting up an account for the first time, the Service Agent will present a series of easy-to-follow prompts that will ask for information, such as name, password, account number, and registration code. The Service Agent will also ask the customer to choose an ISP from a menu of ISPs. In general, the ISP selection process can be accomplished by clicking on the ISP of choice from one side of the screen and dragging the icon of the selected ISP to the name of the user on the other side of the screen. Finally, the user can simply click an "OK" button to begin the service. Other users in the household can follow the same simple steps to establish service, and may choose the same or a different ISP.

[35] AT&T therefore expects that the Service Agent software deployed in the Massachusetts trial later this year and eventually nationwide will likely differ in certain respects from the software being used today in Boulder.

Once service is initiated, the Service Agent provides a toolbar that will include a number of different service buttons. Each button, in turn, includes a dropdown menu with further options. One button, for example, allows customers to easily and quickly select a different ISP,[36] change e-mail accounts, change connection speeds, and troubleshoot problems that might arise during use of the service. Another button on the toolbar enables a customer to review his or her account information, including a list of all the services the customer is receiving from AT&T and participating ISPs, the cost of those services, and the number of hours the user has utilized the services. There also are buttons to launch the browser of the selected ISP and to give the customer access to local content, such as weather, news, and sports. Finally, there is a "Help" button to answer customer questions about the service.

The various features and functions described above can generally be accessed by the "point and click" method familiar to all PC users. AT&T is conducting the Boulder and Massachusetts trials – and striving to make Broadband Choice as easy to use as possible – because it fully understands the need to provide its customers with as much choice as feasible consistent with reliable, easy to use and affordable service.

As the foregoing discussion suggests, AT&T is committing substantial resources to develop innovative solutions to the various technical and operational challenges associated with providing a choice of multiple ISPs over a cable system.[37] Indeed, AT&T has already spent $20

[36] Trial participants will be testing the ability to switch ISPs by changing, adding, and deleting ISPs several times during the trial. Consequently, all ISPs in the trial, regardless of entry date, will have the opportunity to experience customer behaviors relative to new installation, disconnection, reinstallation, and use in a multiple ISP environment.

[37] AT&T is also using state-of-the-art hardware to provide multiple ISP access over its cable facilities. In particular, AT&T has configured the Boulder trial for multiple ISP traffic using Cisco's new (and, to date, commercially untested) policy-based routers, and is also testing routers manufactured by Juniper Networks. *See* AT&T at 64 & n.172.

million on this effort and will provide additional resources, as needed, to the Boulder and Massachusetts trials.[38] AT&T continues to believe that this level of commitment, as well as the robust competition and investment in broadband Internet services generally, strongly argues for continuation of the Commission's established policy of relying on voluntary, industry-led efforts, rather than governmentally-imposed forced access requirements, to provide multiple ISP access to cable systems.[39]

## II. AS THE COMMENTS DEMONSTRATE, GOVERNMENT-MANDATED ACCESS WOULD IMPOSE SIGNIFICANT BURDENS WITHOUT ANY COMMENSURATE BENEFIT.

The diversity and breadth of forced access requirements demanded by certain commenters vividly demonstrate the burdensome nature of forced access regulation and belie any claim that such regulation could be imposed with only a "light touch."[40] As the Commission's experience in implementing the market opening provisions of the 1996 Act attests, government-mandated access raises complex issues that require vast resources from the Commission and industry to resolve. A policy of forced access to the cable modem platform will embroil the Commission in broad rulemakings, oversight proceedings, and litigation that are completely unnecessary where, as here, cable operators face vigorous competition in the provision of broadband services.

---

[38] *See id.* at 65 (noting that Massachusetts trial will likely focus on the myriad commercial and back-office aspects of the multiple ISP model not addressed in the Boulder trial, including, among other things, how to bill customers and ISPs, how to coordinate customer service calls with multiple ISPs, what other business arrangements with participating ISPs need to be established, and how to market the product).

[39] *See* NCTA at 79 (noting that "[multiple ISP] trials themselves demonstrate that government-mandated access is unnecessary as well as unwise").

[40] *See* Progress and Freedom Foundation at 12.

Moreover, despite the blithe assertions of certain commenters regarding the ease of superimposing the existing common carrier regime on entirely new high-speed Internet services,[41] that regulatory framework cannot be simply transferred wholesale to an industry that has never been subject to that scheme.[42] As a threshold matter, the comments make clear that, even among proponents of forced access, there is substantial disagreement about how to apply this framework to the cable industry. Far from being a "simple" matter, harmonizing and implementing the proposals put forward by forced access supporters in this proceeding would require the Commission and the courts to address the same range of costing, pricing, and unbundling issues that have yet to be finally resolved in the telephony context despite years of rulemaking and litigation.[43]

The comments also clearly illustrate that a forced access regime would quickly expand to encompass regulation of Internet services themselves.[44] Some commenters urge the Commission to regulate caching, content, and video-streaming, issues that affect the Internet as a whole and not simply cable operators. Others suggest that new services and functionalities that have not even been developed yet should nevertheless be subjected – in advance – to an access mandate.[45]

---

[41] *See, e.g.*, Texas Office of Public Utility Counsel at 18-20; OpenNet at 21.

[42] *See* H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 83 (1992) (even when Congress reimposed rate regulation on cable operators, "[i]t [was] not the Committee's intention to replicate Title II regulation").

[43] *See Broadband Today* at 44-45.

[44] *See* Millennium Digital Media at 3-4; Competitive Policy Institute at 7. *Cf.* Assoc. for Maximum Service Television ("AMST") at 1; Assoc. of Public Television Stations at 4.

[45] *See, e.g.*, EarthLink at 24; Consumers Union at 21, 24.

As AT&T demonstrated in its initial comments, the costs to industry and the public from such extensive regulation are likely to be heavy,[46] yet forced access proponents have failed to provide any justification for these costs. No commenter has shown that high-speed Internet access would be deployed more efficiently or economically if market forces were replaced by forced access regulation. Indeed, the opposite is true, as Canada's forced access experience demonstrates. Although its lengthy and costly forced access proceeding has been underway since 1996, Canada is no farther along than the United States in its deployment of high-speed Internet access.

### A. Commenters Request A Cornucopia Of Burdensome Access Regulations, Proving That There Is No Such Thing As "Light Touch" Or "Minimal" Open Access Regulation.

The comments submitted in this proceeding illustrate the "regulatory creep" that would inevitably accompany any government-mandated forced access requirement. As their comments demonstrate, forced access proponents would have the Commission and specially created government agencies regulate virtually every aspect of the provision of high-speed Internet access by cable operators. From broad issues such as pricing and the proper point for interconnection to narrow issues such as the time period for response to access requests, nothing would be outside the reach of regulation. This list of demands will only grow as interested parties seek to use forced access proceedings to promote a wide variety of unrelated objectives and competitors attempt to slow the growth of cable modem services by miring cable operators in complicated rulemaking proceedings, enforcement actions, and litigation. Even a cursory review of these proposals demonstrates the broad scope of business and technical issues the

[46] *See* AT&T at 66-85.

government will have to resolve in the context of complex, ever changing relationships between cable operators and ISPs.

**Complex Administrative Schemes.** Several commenters suggest the establishment of various new committees and bureaucracies to manage any open access regulatory regime. These range from independent cable modem platform administrators ("ICMPAs"), who would "act as gatekeepers to establish and administer interconnection tariffs and standards,"[47] to various unnecessary committees that would develop mandatory technical standards applicable to cable operators, despite the existence of private sector bodies like the Internet Engineering and Technology Forum that already set voluntary standards.[48] These proposals – all in addition to the ongoing, and expanded, role contemplated by forced access proponents for the Commission itself – are merely invitations to complexity and controversy that will significantly retard the deployment of broadband facilities and services.

**Detailed Pricing Structures.** Numerous commenters suggest an array of inconsistent standards for pricing access to the cable modem platform. While each of these different pricing regimes presents different problems, implementation and enforcement of any of them would require intensive regulatory oversight. The leased access pricing rules, for example,[49] are

---

[47] National Association of Towns and Townships ("NATT") at 11-12. This additional layer of bureaucracy would be funded through cable tariffs, which would require additional regulatory proceedings to establish and administer. In addition to the obviously cumbersome nature of this proposal, conflict is certain to arise over the scope and exercise of the duties and authority of such new and untested entities.

[48] *See* Rodopi at 5, 9-10. *See also* Center for Democracy & Technology at 19 (proposing vague process "involving policymakers, the public interest community, and the Internet industry . . . to monitor the implementation of open access" and to ensure that democratic values are protected).

[49] *See* Rodopi at 4-11; Competitive Access Coalition ("CAC") at 41-42; NATT at 7-15.

entirely inapposite because they are based on the assignment of dedicated channels to individual video programmers. As AT&T explained in its initial comments, that is not the model it (or any other cable operator) is using to provide subscribers with a choice of ISPs. Complicated government-supervised fee structures[50] and simplistic demands for "cost-based rates"[51] likewise ignore the complex nature of the business relationship that will be established between a cable operator and unaffiliated ISPs.[52] And commenters who urge the Commission to require cable operators to offer "broadband Internet transport services. . . on rates, terms, and conditions that are at least as favorable as those on which it provides such access to itself, to its affiliates, or to any other entity,"[53] ignore the fact that cable companies do not separately price their transport capability whether it is used by affiliated ISPs or video programmers like HBO or Discovery.

**Micromanagement of Business Relationships.** Many commenters urge the Commission to insert itself into disputes over the precise terms of access to be provided to cable network facilities and mediate complex business relationships that are best left to private negotiations. These commenters ask the Commission to regulate not only the speed at which cable operators provide access to ISPs,[54] but also issues such as caching or replication, firewalls, protocol masking, timely notification of any new network or operational interface, and routing

---

[50] *See, e.g.,* Rodopi at 7 (advocating an "implicit fee formula incorporating the actual audited enterprise costs incurred by the cable operator in expanding it's [*sic*] plant facilities to accommodate Internet service, amortized over seven years plus any actual on-going costs associated with maintenance of the Internet-only portion of its operation [not including costs defrayed by profits on Internet business], divided by subscriber potential for Internet access.").

[51] *See* CompTel at i, 6; Big Planet at 14. *See also* Consumers Union at 22.

[52] *See* AT&T at 83-84.

[53] *See* Communications Workers Association ("CWA") at 5; *see also* EarthLink at 55.

[54] *See, e.g.,* EarthLink at 52; Rodopi at 12.

delays.[55] Some argue that cable operators should be required to vary terms in order to accommodate the specific needs of the ISP seeking access depending upon its size, location, and business model,[56] while others note the purported dangers of such prioritization or variation of treatment by cable operators.[57] Any of these approaches would require the Commission to monitor individual relationships between hundreds of cable operators and thousands of ISPs.

**Restrictions on Network Management**. Commenters also ask the Commission to adopt numerous restrictions on cable operators' ability to effectively manage their networks. Forced access proponents argue that cable operators should be permitted to offer only standard interfaces and be forced to comply with a single technical standard for interconnection.[58] Some proposals would limit cable operators' access to information on traffic flow,[59] discounting the importance of such information to effective network management.[60] They also suggest that cable operators be precluded from requiring ISPs to provide financial information, demonstrate creditworthiness, provide a bond or substantial security deposit, or obtain insurance coverage, thus effectively preventing cable operators from taking reasonable precautions to protect themselves and their customers from problems stemming from the use of their networks by unaffiliated ISPs.[61]

---

[55] *See, e.g.*, Consumers Union at 21; CWA at 5.

[56] *See* Consumers Union at 21; OpenNet at 20.

[57] *See, e.g.*, Consumers Union at 21.

[58] *See* Consumer's Union at 21; OpenNet at 23; Rodopi at 5.

[59] *See* Consumers Union at 27; EarthLink at 54.

[60] *See* AT&T at 83-85.

[61] *See* Rodopi at 5, 8; Consumers Union at 27.

**Technical Issues.** Forced access proponents' demands for government regulation of technical issues would place the Commission in the position of adjudicating disputes over what form of interconnection is "technically feasible,"[62] what are "valid technical" constraints,[63] and what is the maximum number of ISPs a cable operator can accommodate because of "legitimate technical limitations."[64] Such requests would require the Commission to make technical judgments in an area where technological advances occur, novel services emerge, and new business models develop on an almost daily basis.

Commenters also have asked the Commission to address issues regarding privacy,[65] confidentiality,[66] service quality,[67] operational support systems,[68] the bundling and unbundling of services,[69] content,[70] and access for local and noncommercial ISPs.[71] While these issues will

---

[62] *See* Rodopi at 11; OpenNet at 20.

[63] *See* Consumers Union at 21; EarthLink at 53. Indeed, one commenter contends that "any unaffiliated ISP with the desire to connect to the cable network should be permitted to do so, and . . . cable operators should be prohibited from discrimination without limitation." Rodopi at 5.

[64] *See* Consumers Union at 22; Center for Democracy & Technology at 17; Rodopi at 11.

[65] *See* Consumers Union at 21, 27-28.

[66] *See, e.g.,* Big Planet at 14; Consumers Union at 21; EarthLink at 54 (urging Commission to require cable operators to treat as confidential any information submitted to them by unaffiliated ISPs, but to provide any ISP seeking access to their networks with any information necessary for interconnection, apparently without any guarantee of confidentiality).

[67] *See* Big Planet at 10-14; Consumers Union at 24, 27.

[68] *See* Consumers Union at 21; Center for Democracy & Technology at 17; EarthLink at 54.

[69] *See* CompTel at i, 6, 32-33 (arguing that cable operators should be barred from engaging in "anticompetitive bundling," but should be required to permit unaffiliated content providers to resell cable programming to create a "complete bundle" of their own). *See also* Big Planet at 14; Rodopi at 12; Consumers Union at 22.

[70] *See, e.g.,* Big Planet at 14; Rodopi at 9; OpenNet at 24.

[71] *See* Consumers Union at 21.