

approach. The Commission made it clear, just four months ago, that it saw no evidence that customers seeking to purchase residential broadband access will face monopolistic conditions that would require forced access regulations of cable modem services. Accordingly, we continue to agree with the Commission's most recent finding that "competition, not regulation, holds the key to stimulating further deployment" of cable modem services.<sup>23</sup>

**B. Claims that Cable Operators Like AT&T Have the Current Ability Anti-competitively to Leverage Their Existing Video Programming Distribution Services Are Without Merit.**

18. Some commenters, EchoStar in particular, claim that cable operators can leverage their position as multichannel video programming distributors ("MVPDs") and thereby lessen competition in the provision of broadband Internet access services to the detriment of consumers.<sup>24</sup> To address this supposed concern, EchoStar proposes that the Commission adopt a mandatory access framework for cable modem services similar to the unbundled access and interconnection rules imposed on incumbent local exchange carriers.<sup>25</sup>

19. Apart from the legal deficiencies in EchoStar's arguments -- Congress apparently limited its interconnection and unbundling rules to incumbent LECs -- these arguments do not make sense as matters of economics and public policy. The unique circumstances that provide the public interest rationale for access regulation of the telephone network of the incumbent LECs simply do not apply at the present time to cable operators like AT&T that offer broadband access to the Internet. As we indicated in our initial declaration, cable operators like AT&T cannot leverage any existing monopoly power into other adjacent markets because there is, in fact, no such monopoly to leverage.<sup>26</sup> Unlike the incumbent LECs, cable operators do not control bottleneck facilities in any relevant market.

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<sup>23</sup> *Second 706 Report* ¶ 246.

<sup>24</sup> *See* EchoStar at 6-7; *see also* WorldCom at 2, 5.

<sup>25</sup> *See* EchoStar at 6-7.

<sup>26</sup> *See* Ordovery/Willig Decl. ¶¶ 30-31.

20. While incumbent LECs still control virtually all residential and business local voice lines, as of June 2000, 20 percent of all MVPD subscribers received their video programming from some company other than a franchised cable operator, as compared to 18 percent a year earlier.<sup>27</sup> Unlike competitive LECs, which serve only a tiny fraction of the total residential local telephone market, DBS providers such as DirecTV and EchoStar have achieved a 15.4 percent share of the national MVPD market, and DirecTV and EchoStar rank today as the third and seventh largest MVPDs, respectively, in terms of current subscribers.<sup>28</sup>

21. EchoStar's concerns regarding the ability of AT&T, or a cable operator like AT&T, anticompetitively to leverage its position in cable by bundling various services and harm rivals in the delivery of video programming or other video services are groundless because they are inconsistent with the facts describing the current marketplace. The recent success of cable's competitors in those areas demonstrates that cable operators have no incentive or ability anticompetitively to bundle video programming with two-way broadband Internet or telephone service. Because of extant competition facing cable, any bundles offered by cable operators that are non-competitively priced or that are designed and marketed contrary to consumers' tastes for the purported purpose of foreclosure would simply not sell, and not foreclose. Subscribers who do not wish to pay for such a bundled package and who do not find attractive the alternatives offered by their cable operator will simply and easily migrate to competing video programming providers and/or to competing sources of Internet access. The inability of cable operators to wield such market power is clearly illustrated by the growth of DBS subscribership, which hardly has been slowed down by the deployment of cable broadband Internet access services.

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<sup>27</sup> See Seventh Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 00-132 at ¶ 5 (Jan. 8, 2001) ("*Seventh Video Competition Report*"). NCTA cites a slightly higher figure, approximately 21.5 percent. NCTA Report, *Cable Television Industry Overview 2000* at 10 (Dec. 2000), available at <http://www.ncta.com/home.html> ("*NCTA Report*").

<sup>28</sup> See *Seventh Video Competition Report* at ¶¶ 61-63.

Since June 1999, DBS operators added almost 3 million new subscribers -- more than in any previous year and three times as many as cable added during the same period.<sup>29</sup>

22. Cable operators' purported power to act anti-competitively in the provision of broadband Internet access services is equally implausible. Cable operators do not have the incentive or ability anticompetitively to bundle their video programming services and Internet services so as to foreclose competing broadband access providers or unaffiliated ISPs or content providers. Because competitors such as satellite television also offer access to both the video programming and Internet services that consumers demand, cable operators must do so as well to retain (and grow) subscribers. Thus, because cable operators face potent and growing competition both in the provision of video programming and the provision of Internet access services, they cannot effectively leverage their alleged monopoly power in the provision of either service to the detriment of competition and consumers.

23. Cable operators' introduction of high-speed Internet access has certainly not foreclosed DBS operators from doing the same. EchoStar is deploying a bundled package of high-speed Internet services and video programming services in competition with cable operators and its own StarBand Communications venture already offers two-way high-speed Internet access services throughout the entire U.S. using a state-of-the-art satellite network.<sup>30</sup> Indeed, EchoStar's up-beat representations to investors and shareholders in this regard<sup>31</sup> contrast starkly with the pessimistic tone of its assertions to the FCC that its two-way broadband plans are

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<sup>29</sup> See *Seventh Video Competition Report* at ¶ 61.

<sup>30</sup> See StarBand Communications Inc. Press Release, *StarBand Communications Launches Nation's First Consumer Two-way High Speed Internet Service Via Satellite*, available at <http://www.starband.com/howeare/pr/110600.htm>.

<sup>31</sup> See EchoStar Corporate Profile, available at [http://www.corporate-ir.net/ireye/ir\\_site.zhtml?ticker=dish&script=2100](http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=dish&script=2100) (last visited Dec. 28, 2000) (“[EchoStar] recently signed an agreement with Gilat -To-Home that will enable [them] to jointly offer consumers two-way high-speed satellite Internet access”).

“seriously bandwidth-limited.”<sup>32</sup> The Satellite Broadcasting and Communications Association, of which EchoStar is a member, makes similar claims.<sup>33</sup> In any event, EchoStar can solve its own “problem” by making the necessary investment to increase upstream capacity. Cable operators have already invested \$41 billion dollars to upgrade their networks to overcome such “problems,”<sup>34</sup> and some incumbent LECs are upgrading their networks to make DSL services available to nearly all of their subscribers. The Commission should not “solve” EchoStar’s problem by hamstringing cable operators, who have already upgraded their network architecture to deliver cable modem services, with unnecessary regulation because DBS providers have not yet invested the necessary resources to upgrade their own technology.

24. Undoubtedly, some proponents of mandatory access regulation for cable modem services will argue that the conditions set forth in the AOL Time Warner proposed consent order should be extended to cover all cable operators. Regardless of whether one agrees or disagrees with the economic soundness of the terms of the proposed consent decree, there is no doubt that the proposed merger of AOL and Time Warner created a unique set of market facts, including those related specifically to AOL’s substantial position as the leading provider of Internet access services, with a share of approximately 50 percent of all U.S. narrowband subscribers. Significantly, the FTC placed considerable weight on the fact that AOL’s position as the narrowband ISP company of choice to over 28 million subscribers,<sup>35</sup> coupled with its ability to

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<sup>32</sup> EchoStar at 9.

<sup>33</sup> See SBCA at 3-4 (confirming that the satellite industry is rapidly deploying numerous high-speed Internet offerings including more than a dozen additional two-way, high-speed satellite Internet services).

<sup>34</sup> NCTA Report at 1.

<sup>35</sup> Draft Complaint, *America Online, Inc and Time Warner, Inc.*, Docket No. C-3989 at ¶ 8 (Dec. 14, 2000) (“*Draft Complaint*”). The next largest ISP, Earthlink, has 4.6 million subscribers. See Earthlink Corporate Profile, available at [http://www.corporate-ir.net/ireye/ir\\_site.zhtml?ticker=ELNK&script=2100](http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=ELNK&script=2100) (last visited Jan. 2, 2001).

use both DSL and cable modem services, positioned the company to “become the leading provider of broadband internet access as well.”<sup>36</sup>

25. Extending the regulatory conditions stemming from that merger to cable operators like AT&T would be without any economic justification. Indeed, regardless of whether one agrees that the merged AOL Time Warner should be subjected to the access and content regulation envisaged by the consent order, it is clear that a cable operator -- like AT&T -- that lacks the market position that apparently created competitive concerns in the eyes of the FTC, ought not be subjected to the regulatory strictures embodied in the consent decree.

**C. As the Comments Demonstrate, Government Mandated Access Would Impose Significant Burdens Without Any Commensurate Benefit.**

26. Implementing a regulatory “remedy” for a purported problem that actually does not exist would be a dangerous mistake, especially in light of the significant costs imposed by such regulation upon consumers, industry, and the Commission. In our initial declaration, we explained that regulatory action in a dynamic, evolving, and competitive business such as high-speed Internet access should be undertaken only where evidence of a clear market failure exists.<sup>37</sup> Where, as here, competition is strong and no bottleneck monopoly exists, the Commission should avoid the imposition of new and burdensome regulations.

27. The concerns raised in our initial declaration have been echoed and amplified by a number of commenters from inside and outside of the cable industry.<sup>38</sup> As other comments have correctly recognized, the costs of forced regulation of cable modem services would be many and varied. For example, cable operators would be required to absorb the direct expenses of

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<sup>36</sup> *Draft Complaint* ¶ 8. Moreover, since AOL’s principal means of providing broadband internet services is currently through DSL, the FTC concluded that AOL will have less incentive to promote DSL as a transport medium in Time Warner cable areas after the merger. *Id.* at ¶ 14.

<sup>37</sup> See *Ordovery/Willig Decl.* ¶¶ 21-24.

<sup>38</sup> Cable & Wireless 17-18; TIA at 3-6; Annenberg Public Policy Center at the Univ. of Penn. at 4; Competition Policy Institute at 1, 3, 4-8; American Cable Association at 7.

compliance with the rules adopted. Some of the categories of indirect costs that would be borne by cable operators and their customers include decreased investment due to regulatory uncertainty and unexpectedly diminished returns on investment;<sup>39</sup> diversion of employee time and company resources away from developing or expanding consumer services to regulatory compliance and litigation;<sup>40</sup> and stifling of innovation in both technology and business models.<sup>41</sup>

28. The comments submitted by the proponents of forced access prove our point that such regulation would be very costly and burdensome. Several commenters suggest the establishment of a new Internet bureaucracy to manage any open access regulatory regime. These proposals range from independent cable modem platform administrators (“ICMPAs”), who would “act as gatekeepers to establish and administer interconnection tariffs and standards,”<sup>42</sup> to various 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.<sup>43</sup> Other commenters demand burdensome and complex rules, including rules initially designed to open the telephone monopoly as well as additional obligations that have the effect of reversing the Commission’s

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<sup>39</sup> See Progress and Freedom Foundation at 10-11; RCN at 10-11 (open access requirement would discourage deployment, investment, and innovation and results in delay); Utilicom at 7, 11-12.

<sup>40</sup> See Progress and Freedom Foundation at 11-12 (development, compliance, and enforcement of regulatory scheme imposes significant transaction costs); Utilicom at 7.

<sup>41</sup> See RCN at 10-11 (open access requirement would discourage deployment, investment, and innovation and result in delay).

<sup>42</sup> 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.

<sup>43</sup> Rodopi A+ Net (“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).

longstanding policy of exercising regulatory restraint in relation to the Internet.<sup>44</sup> The proposals -- even those that ask the Commission to impose “light touch” or “minimum” regulation -- would require that the Commission define, implement, and enforce a complex set of regulatory provisions, including but not limited to: location and means of interconnection; cost allocation; the meaning of “nondiscriminatory” rates, terms, and conditions of cable modem access; the nature and extent of proposed bundling prohibitions; the development and implementation of technical standards and operations support systems; the approval of architectural changes required by new services and the imposition of service quality standards.<sup>45</sup> When one considers that every one of these regulations would have to be revised periodically to account for changing technologies, costs, entrants, and consumer demands, the burden of these regulations can be expected to be staggering.

29. If anything, these comments prove the case against forced access, not for it. They reinforce, rather than rebut, the view that the regulatory costs -- and resulting risks -- of mandatory access regulation imposed upon cable modem services would significantly outweigh any purported benefit. Such forced access regulation would lead quickly and inevitably to a complex set of regulations that would hinder investment, competition, and distort business models, while imposing significant burdens on the Commission itself. For example, federal rules governing interconnection, “nondiscriminatory” terms and conditions of cable modem access, and the implementation of technical standards and operational support systems would, at best, unnecessarily raise the costs of cable modem services and, at worst, delay investment and deployment of cable modem services and chill innovation in high-speed services, both with respect to content and access to ISPs.

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<sup>44</sup> See Consumers Union at 21-22; Competitive Access Coalition at 43-45; CompTel at ii, 3-4, 16-19; Earthlink at 54; OpenNet at 8-11; Rodopi at 7; United States Internet Industry Association, et al. (“USIIA”) at 10-12; the Association for Maximum Service Television (“MSTV”) at 8-10.

<sup>45</sup> See, e.g., Competitive Access Coalition at 70-75; Consumers Union Comments at 21-22; Rodopi at 11; Competition Policy Institute at 6-7, 10-11; Earthlink at 53; Big Planet at 10-13.

30. While the costs imposed upon consumers, cable modem service providers and the Commission would be substantial and burdensome, forced access proponents do not demonstrate any benefits that would justify these costs. No market failure has been shown that would suggest that faster, more efficient, cheaper, or fairer deployment of high-speed Internet access would be ensured through regulatory action than through the unfettered operation of market forces. Indeed, positive trends, such as declining prices for broadband Internet access services, increasing quality and rapid innovation, are evidence that a consistent regulatory philosophy of restraint is working to the benefit of consumers.

#### **IV. INCUMBENT LECS' NOTIONS OF REGULATORY PARITY CANNOT JUSTIFY THE ABANDONMENT OF CORE REGULATION AIMED AT LOCAL EXCHANGE MONOPOLIES OR THE IMPOSITION OF FORCED ACCESS REGULATION UPON CABLE MODEM SERVICES**

31. As expected, the incumbent LECs argue that, like cable, satellite, and wireless companies, they too should be entitled freely to determine the terms and conditions of access to their networks, rather than be hampered by the interconnection and unbundling statutory framework imposed by Congress.<sup>46</sup> For example, Verizon, SBC/BellSouth, and Qwest all claim that the Commission's rationale for its policy of "vigilant restraint" toward cable operators providing cable modem service applies with equal or greater force to the incumbent LECs.<sup>47</sup>

32. The economic argument supporting the incumbent LECs' claims is set forth most fully in the Declaration of Kenneth Arrow, Gary Becker, and Dennis Carlton that accompanies Verizon's comments ("ABC Declaration"). Specifically, the ABC Declaration argues that there is no efficiency rationale or economic justification for leaving cable operators like AT&T free from regulation bearing on their provision of broadband services while requiring incumbent

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<sup>46</sup> SBC/BellSouth at 6-7, 38-42; Verizon at 17-27; Qwest at 7-10.

<sup>47</sup> Verizon at 5, 17-27; *see also* Qwest at 8 ("[t]here is simply no reason why a cable provider's cable modem service should be treated any differently from a regulatory perspective than the DSL service provided by an ILEC").

LECs to unbundle the high-frequency portion of the loop used to provide incumbent LEC voice service (line sharing) and sell DSL service to all ISPs on a wholesale basis at tariffed rates.<sup>48</sup> In this regard, the ABC Declaration states:

When competition prevails, it, not regulation, should determine which technologies and services succeed in the marketplace. While this general view has been recognized by the FCC in its reluctance to impose ‘open access’ condition on providers of cable modem services, the same logic has not been followed with respect to DSL services provided by local telephone companies. ABC Declaration at ¶ 32 (footnote citations omitted).

33. This argument is fundamentally flawed. Competition in emerging broadband services is not, in itself, a sufficient condition for deregulation of the incumbent LECs’ advanced services. This is so because the public interest needs for and issues surrounding regulation of the incumbent LECs’ advanced services are inextricably linked at this time to the incumbent LECs’ monopolies over the local telephone services that share the same facilities. There is no equivalent linkage between any regulated monopoly service and the provision of cable modem services by cable operators like AT&T. Hence, from an economic standpoint, there is no reasoned case for a constraint of regulatory parity between cable operators and incumbent LECs, and the notion of regulatory parity has no bearing on the question of whether cable operators should be subject to forced access requirements.

34. The conclusion of Verizon’s impressive team of declarants that “under competitive conditions, maintaining such a regulatory disparity would be likely to adversely affect consumers,”<sup>49</sup> simply ignores, or assumes away, the unique characteristics associated with the incumbent LECs’ ownership of the loop that provides the economic foundation for the interconnection and unbundling statutory framework adopted by Congress in the Telecommunications Act of 1996. Cable companies (and their networks) exhibit none of these characteristics. Incumbent LECs are monopolists with respect to their primary service offering --

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<sup>48</sup> ABC Declaration ¶¶ 5, 17-27, 32.

<sup>49</sup> ABC Declaration ¶ 6.

local telephony -- and their local loop remains a “quintessential bottleneck facility for competing telecommunications carriers.”<sup>50</sup> The Commission has recognized that absent existing common carrier regulations, incumbent LECs could use their control over the local loop both to “perpetuate their monopolistic dominance of existing” voice markets and to dominate “emerging” advanced services, thus negatively implicating competitive LEC viability.<sup>51</sup> Thus, even though the Commission has found that providers of broadband services face “competitive conditions,” it has contemporaneously and consistently found that, absent regulation, the incumbent LECs’ would retain the ability to use their bottleneck control over the facilities used to provide voice (and DSL) services to impede competition in both the voice and data segments:

[T]he loop connecting a subscriber to the incumbent’s central office is a key bottleneck facility that can be used either for circuit-switched voice telephony or for the xDSL-based services at issue here. Imposing the service specific limitations . . . on a competitor’s access to such facilities would allow incumbents, contrary to the central purpose of the 1996 Act, to leverage their ownership of bottleneck assets to continue exercising monopolistic control of telecommunications markets.<sup>52</sup>

35. Perhaps the best evidence regarding the complexity of this issue comes from examination of the incumbent LECs’ “regulatory parity” wish list. First, they would have the Commission relieve them of all line sharing and line splitting obligations.<sup>53</sup> Then, they would have the Commission forbid competitive LECs that pay for entire “loops” from offering data services over those loops.<sup>54</sup> And they propose terminating broadband-related collocation obligations, lifting the section 254(c)(4) resale requirement, and forbearing from applying the requirements of section 271 to advanced service.<sup>55</sup> If incumbent LECs were permitted to impose such limitations on the use of network elements, not only would competitive LECs be wholly

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<sup>50</sup> FCC Brief for Respondents at 22, *WorldCom, Inc., et al. v. FCC* (D.C. Cir. filed Nov. 2, 2000) (No. 00-1002) (“FCC Appellate Br.”).

<sup>51</sup> *Id.*; see also *AT&T* at 92-96.

<sup>52</sup> FCC Appellate Br. at 16; see also *id.* at 22-24.

<sup>53</sup> See *SBC/BellSouth* at 19-23; *Verizon* at 27-28.

<sup>54</sup> See *SBC/BellSouth* at 20 n.55.

<sup>55</sup> See *id.* at 19-23.

foreclosed from competing for DSL customers, but they would also be foreclosed from competing for those voice customers that want voice and broadband Internet access services on a single line.

36. In fact, consumers are increasingly demanding voice and high-speed data services over a single line.<sup>56</sup> Incumbent LECs are already satisfying that demand today by aggressively marketing packaged voice and data offerings to their customers and have made it clear that they consider the ability to offer bundled voice and data services over a single loop a significant competitive advantage.<sup>57</sup> If competitive LECs are denied access to local loops for advanced services, they would be unable to compete for consumers that increasingly demand a single voice/data offering<sup>58</sup> because consumers will have no choice but to turn to the one carrier who can meet that demand – the incumbent LEC.

37. We explained in our initial declaration some of the ways in which the incumbent LECs could anticompetitively leverage their local monopoly facilities into advanced services. Their monopoly bottlenecks give them the incentive and unique opportunity to impair

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<sup>56</sup> *Line Sharing Order* ¶ 39 (noting that small businesses and mass market residential customers “typically desire a single line for voice and data services”).

<sup>57</sup> See, e.g., Dick Kelsey, *Qwest 3! Profit Up 18 Percent*, Newsbytes (Oct. 24, 2000) (discussing how Qwest Chairman and CEO, Joseph Nacchio, stated “in a recent conference call with analysts that the company will push bundled services to business and resident customers. ‘We think bundles do play,’ he said. ‘We think people who are moving away from bundled services, frankly, don’t get it’”); Verizon News Release, *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, 2001) (“Verizon 3Q Results”) (quoting 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 shareowners”).

<sup>58</sup> See Goldman Sachs, *The Race to Build the Broadband Kingdom, Investment Research Report* at 26 (Aug. 12, 1999) (“*Broadband Kingdom*”) (“In order to make their services ‘sticky,’ DSL carriers must have the ability to bundle services to offer the cost-cutting advantages of having all products – data, voice, and Internet access – over a single copper line. A carrier’s success will ultimately be determined by its ability to deliver local, long distance, and Internet access over the same pipe”).

significantly voice and high-speed competition, implicating significant risks of anticompetitive cross-subsidization and bundling that are simply not present in the cable context.<sup>59</sup> In particular, we explained that it is necessary and appropriate to impose access regulation:

- to prevent incumbent LECs from forcing out of the market competing DSL service providers by implicitly pricing access at a non-compensatory level when it is sold as a part of a voice bundle;<sup>60</sup>
- where, as here, incumbent LECs can bundle basic services with advanced services provided over bottleneck facilities such as the local loop to facilitate non-price discrimination -- *i.e.*, the ability to offer lower quality monopoly bottleneck services to broadband competitors' customers, and by providing quicker or more complete disclosure of their network interface specifications and protocols to favored vendors -- because bundling enhances the ability of incumbent LECs to mask such discrimination;<sup>61</sup> and
- to prevent incumbent LECs from migrating captive local telephony customers to an "advanced service" such as voice over DSL before cable telephony or any other alternative to these monopoly services is available.<sup>62</sup>

38. Recent events have only heightened these concerns. Since we filed our initial comments, we have learned from AT&T that the incumbent LECs are currently using their control over the local loop as leverage to impair competition for voice and advanced services in exactly this fashion. First, we have been informed that some incumbent LECs are currently rejecting customer orders to switch voice service to a competitor when the incumbent LEC has an existing line sharing agreement in place with the incumbent's data affiliate.<sup>63</sup> Thus, if these

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<sup>59</sup> See Ordoover/Willig Decl. ¶¶ 43-46.

<sup>60</sup> See Ordoover/Willig Decl. ¶ 44.

<sup>61</sup> *Id.* ¶ 45.

<sup>62</sup> *Id.* ¶ 46.

<sup>63</sup> See *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147 and 96-98, BellSouth Ex Parte (Oct. 2, 2000) (claiming that ¶ 79 of the *Line Sharing Order* precludes it from turning over a line to a new competitive LEC if an existing data competitive LEC is using the line in a line sharing arrangement with BellSouth; customer's decision to choose a competitive carrier for voice service, and a new carrier for both voice and data, therefore cannot be accommodated). We understand that line sharing involves the obligation of an incumbent LEC to make the high-frequency portion of the loop separately

customers want voice service provided by the competitive LEC, the incumbent LEC requires that its DSL service be discontinued.

39. Second, we also understand from AT&T that, despite supportive Commission statements about incumbent LECs' obligations to develop and implement procedures to ensure that competitors have a meaningful opportunity to compete in providing both voice and data services over a single loop (a process known as "line splitting"),<sup>64</sup> the situation in most states today is that customers who use DSL service provided by an incumbent LEC are precluded from switching their voice service to a competitive LEC. In this instance, customers that wish to obtain both voice and DSL from the competitive LEC cannot do so because, according to AT&T, no procedures exist that will permit a competitive LEC to provide both voice and data services over a single loop (either on its own or with another competing carrier) in a competitively meaningful manner. Thus, as incumbent LECs sign up growing numbers of DSL customers, the number of potential customers that can choose carriers that use competitive LECs to provide both voice and data service will decrease correspondingly.

40. ABC also argue that existing advanced services regulation may impose "economic inefficiencies" and "price distortions" on incumbent LECs that make it harder for them to compete.<sup>65</sup> Although the ABC Declaration is certainly correct that access regulations may impose "economic inefficiencies," the ABC Declaration ignores the question of whether such costs of access regulation are currently justified by the incumbent LECs' unique

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available in instances in which the incumbent LEC provides voice service on the particular loop to which the requesting carrier seeks access. Line splitting involves a situation whereby both voice and data services are provided by competing carrier(s) over a single loop.

<sup>64</sup> See *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, FCC 00-238 ¶ 325 (rel. Jun. 30, 2000).

<sup>65</sup> ABC Declaration ¶¶ 33-34, 36.

competitive position and latent monopoly power in the provision of local telecommunications services.<sup>66</sup> As indicated in AT&T's comments, the unbundling, interconnection, and other requirements applicable to incumbent LECs were imposed by Congress in order to break open the incumbents' local telephone monopolies.<sup>67</sup> When the Telecommunications Act was passed, incumbent LECs controlled 99 percent of the local telephone market.<sup>68</sup> Five years later, incumbent LECs still provide local telecommunications services to nearly 94 percent of the nation's residential households and business customers.<sup>69</sup> No other providers have that kind of market power over bottleneck communications facilities.

41. In any event, the ABC Declaration's claims that regulation of advanced services significantly hampers the ability of the incumbent LECs to compete with cable operators in the broadband Internet access business are substantially overstated. First, unlike the entirely new and significant costs that the adoption of forced access would impose on cable operators (costs that are magnified by the different technology associated with cable modem services), the regulatory costs associated with a requesting carrier's access to the incumbent LECs' local loops are a fundamental part of the statutory framework established by the 1996 Telecommunications Act. Indeed, the ABC Declaration does not, and practically could not, oppose the application of section 251(c)(3) statutory provisions that require incumbent LECs to lease full loops to requesting carriers so that competitors may utilize the incumbent-owned loops to provide both voice and data services over that loop.<sup>70</sup> The Commission itself indicated that the additional

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<sup>66</sup> Moreover, ABC conveniently ignores the standard economic principle that some technical or pricing inefficiencies from regulation are accepted where, as here, the countervailing gains to customers are believed to exceed those costs.

<sup>67</sup> See AT&T at 90-91.

<sup>68</sup> See, e.g., NCTA at 21 n.64.

<sup>69</sup> See *Telephone Subscribership in the United States*, FCC Common Carrier Bureau, (Dec. 11, 2000), available at [http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/recent.html](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/recent.html).

<sup>70</sup> See ABC Declaration ¶ 27.

regulatory costs associated with implementing line sharing by making available the high-frequency portion of the local loop to competitive data LECs would be minimal.<sup>71</sup>

42. In the alternative, the incumbent LECs argue that if the Commission does not deregulate the incumbent LECs' unbundling, access, and interconnection obligations over facilities used to provide DSL services, the Commission should impose similar access obligations on cable operators. In particular, the incumbent LECs assert that notions of regulatory parity demand that cable operators should be required "to offer a transmission component" and meet other obligations of telecommunications service providers (such as loop conditioning, collocation, interLATA service restrictions, resale, universal service, separate advanced service affiliates, etc.).<sup>72</sup> The incumbent LEC's argument, however, is internally inconsistent. The ILECs agree that there is no economic or public policy reason to impose access regulation on the provision of broadband Internet access services because of intense competition in the provision of these services. Hence, incumbent LECs cannot logically or meaningfully "turn around" and argue that imposition of forced access on cable modem services is somehow necessary to level the economic playing field where, as here, the Commission has repeatedly recognized that one group of companies -- the incumbent LECs -- is in a position to leverage control of their bottleneck facilities to "perpetuate their monopolistic dominance of existing and emerging telecommunications markets."<sup>73</sup> Thus, we agree with ABC that if the only economic issue at stake were regulation of broadband access (which is not the case), then such regulation would be burdensome and unnecessary, given the intense competition faced by all

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<sup>71</sup> See *Line Sharing Order* ¶¶ 126-127 ("[t]he record indicates that incumbent LECs can perform the incremental modifications to the existing ordering processes required to provide competitive LECs with access to the high-frequency portion of the loop in an expedient manner and at modest expense.")

<sup>72</sup> SBC/BellSouth at 32-38; Verizon at 25-28.

<sup>73</sup> See FCC Appellate Br. at 22; see also *UNE Remand Order* ¶¶ 84-85; *Line Sharing Order* ¶ 29, n.53 (noting that "the 1996 Act does not permit the leveraging of a historic monopoly into a nascent industry or market"), *id.* ¶ 59 (stating that "the Act explicitly makes distinctions based on a common carrier's prior monopoly status").

providers of broadband access (competition that is further enhanced by the steady arrival of new technologies).

43. However, this is not the only public policy issue. As shown above, the provision of broadband access over local loops also implicates important competitive concerns in the provision of local access for voice and data. Moreover, the data show that incumbent LECs are not being hobbled by existing regulation. As one analyst recently noted: “[t]he 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.”<sup>74</sup> There is no cable “bottleneck” that justifies intrusive access regulation. Cable operators face intense competition in their core video programming market. Indeed, DBS providers have the ability and capacity to serve virtually every consumer in the United States. As a result, over 20 percent of U.S. subscribers now buy video programming from some company other than the local cable operator and three out of every five new customers are choosing such alternative providers.<sup>75</sup> In stark contrast, incumbent LECs control virtually all residential and business local voice lines.<sup>76</sup> And while a few competitive LECs have gained a toe-hold by serving niche markets, most competitive LECs have become “marginalized” because they do not “own the strategic assets” necessary to compete but must “rely on the ubiquitous Bell network” – a network that remains largely closed to new entrants.<sup>77</sup> “[I]nvestors [have] los[t] confidence in the fundamentals of the CLEC business model,”<sup>78</sup> “there has been ‘carnage’

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<sup>74</sup> *DSL Market: Demand Doesn’t Seem To Be An Issue, But Carrier Deployment Execution Does*, Robertson Stephens (January 3, 2001) (“For the December quarter, we estimate an incremental increase of over 573,000 lines, establishing an annual run rate in excess of two million units in the U.S. alone”).

<sup>75</sup> *See generally Seventh Video Competition Report*.

<sup>76</sup> *See generally Telephone Subscribership in the United States* (Dec. 11, 2000).

<sup>77</sup> Janet Whitman, *New Entrants: Battling the Bells*, Wall Street Journal, at R17 (Sept. 18, 2000). *See also Brian Ploskina, It’s Open Season For CLEC Consolidators*, Interactive Week (Oct. 11, 2000) (reporting that competitive local exchange carriers are “facing hard times” because they are forced to rely “on incumbent carriers”).

<sup>78</sup> Mike Farrell, *ICG Tanks, Depressing Other CLECs*, Multichannel News (Oct. 2, 2000).

among CLEC stocks,<sup>79</sup> and numerous competitive LECs have filed (or are on the verge of filing) for bankruptcy.<sup>80</sup>

**V. CONTRARY TO THE CLAIMS OF THE FORCED ACCESS PROPONENTS, ECONOMIC INCENTIVES CONTINUE TO ENCOURAGE CABLE INTERNET SERVICE PROVIDERS TO OFFER CUSTOMERS A CHOICE OF UNAFFILIATED ISPs AND INTERNET CONTENT**

**A. The Commenters Present No Compelling Reason to Disturb a Market-Based Approach That is Encouraging AT&T and Other Cable Modem Service Providers to Enter Into Commercially Reasonable Access Arrangements on a Voluntary Basis With Unaffiliated ISPs.**

44. WorldCom asserts that, without mandatory forced access requirements, cable providers will “dictate the choice of a particular ISP,” thereby depriving consumers from having their choice of ISPs.<sup>81</sup> As a result, WorldCom claims that only ISPs affiliated with the cable operators will flourish. As we explained in detail in our initial declaration, however, cable operators have an economic incentive *not* to limit arbitrarily the number of ISPs offered. Intense

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<sup>79</sup> John T. Mulqueen, *ICG Hit Hard by Revenue Shortfall, Resignations*, Interactive Week (Oct. 8, 2000). *See also id.* (“Another piece of the crumbling new carrier industry has plummeted to the ground”).

<sup>80</sup> Paul Sherer, *Deals & Deal Makers: Too Much Telecom*, Wall Street Journal, at C1 (Aug. 15, 2000) (“[T]he telecom landscape is littered with troubled firms.”); Jeff St. Onge, *Amer MetroComm Asks to Abandon Cisco Gear It Calls Faulty*, Dow Jones News Service (Oct. 10, 2000) (reporting on Aug. 23 Chapter 11 filing and ongoing bankruptcy proceedings); Jeff St. Onge, *A Bankruptcy Boom Is Starting To Have Ripple Effects*, Dow Jones News Service (Oct. 5, 2000) (“[I]n just the past few months, dozens of [ISPs] and telecom start-ups have filed for bankruptcy.”); Heather Draper, *ICG’s Tumble A Wake-Up Call to Telecom Firms*, Denver Rocky Mountain News, at 1G (Sept. 24, 2000) (“Certainly, ICG is at risk of bankruptcy and other CLECs will be in the same boat”); John T. Mulqueen, *Carrier’s Purchasing Plans In Question*, Interactive Week (Oct. 1, 2000) (“Several [securities analysts] noted that some competitive local exchange carriers were not meeting revenue projections, some had gone bankrupt and that the capital markets, especially junk bonds, were closed to new carriers.”); *Darwin Claims Another CLEC*, Communications Today (Oct. 4, 2000) (“Nextel is just the latest telecom casualty in the dog-eat-dog CLEC arena.”); Janet Whitman, *McLeodUSA’s CapRock Buy May Mark New Consolidation Round*, Dow Jones News Service (Oct. 3, 2000) (“Troubled CLECs that don’t manage to secure additional funding” are “likely to face bankruptcy” unless they can find a buyer).

<sup>81</sup> WorldCom at 4; *see also* Big Planet at 9; OpenNet at 8-11.

competition from DSL and other broadband distribution platforms -- along with narrowband alternatives -- significantly constrains any incentives of a cable operator like AT&T to disadvantage ISPs that compete with a cable operator's "affiliated" or "favored" ISP.

45. Indeed, competition from DSL, other broadband technologies, and dial-up services discussed in the Attachment to our initial declaration 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. Cable operators are new entrants into the provision of broadband Internet access and have thus far invested approximately \$41 billion to upgrade their cable systems.<sup>82</sup> The only way for cable operators to make these huge investments pay off is to gain market share and attract substantial numbers of new customers to its cable-based services such as cable modem services. AT&T and other cable operators like it have, therefore, every incentive to encourage innovation and to implement technological modifications to their network facilities to enable hosting competing ISPs and content, and to provide other innovative cable services. By doing so, cable operators can maximize the value of their cable modem offerings in an attempt to persuade consumers to choose their services over the many available alternatives such as DSL and narrowband services.

46. WorldCom's assertions also ignore the fact that AT&T and other MSOs are responding to competitive pressures resulting from the multiple ISP choices available on DSL and are actively working toward making multiple ISP choices available over the cable architecture, to the extent technically feasible.<sup>83</sup> To date, AT&T, Time Warner, and Comcast have either conducted technical trials or reached agreements with unaffiliated ISPs (or both) that will soon permit unaffiliated ISPs to offer their services over the cable modem platform.

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<sup>82</sup> See NCTA Report at 14.

<sup>83</sup> See AT&T at 41, 51-56; Excite@Home at 13-14; CIX at 9.

47. Some commenters suggest that the technical trials and agreements and negotiations initiated by AT&T and other cable operators are a clear indicator that the Commission can, and should, impose a panoply of forced access regulations on the cable industry.<sup>84</sup> We disagree. Contrary to these commenters' claims, the technical trials 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. As we indicated in our initial comments, AT&T and other cable operators are in a competitive struggle with other Internet access providers to gain customers and generate the revenues necessary to earn a return on their investment. Consumers can, do, and will leave AT&T if they find its services lacking. Thus, in a competitive arena where AT&T and other cable operators are competing with incumbent LECs and satellite and wireless broadband access providers, 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.

**B. Economic Incentives Induce Cable Internet Service Providers Like AT&T to Offer Customers a Choice of Unaffiliated Internet Content.**

48. In addition to requesting a mandatory forced access regime -- with the attendant costs associated with implementation, the delay and cost of litigation, and the dampening of innovation -- many forced access supporters also seek to have the Commission exert comprehensive and sweeping authority over Internet services themselves through the regulation of caching, video streaming, and access to content.<sup>85</sup> As we explain below, demands for

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<sup>84</sup> See WorldCom at 6, 15; Earthlink at 58.

<sup>85</sup> See OpenNet at 8-11 (suggesting that without regulation cable operators will restrict video-streaming); Verizon Communications at 34 (alleging that if cable operators were to provide access to outside content, revenues would be siphoned away from their core business); see also Competitive Access Coalition at 37-39 (explaining that regulation is necessary in order to

regulation of the Internet are entirely without merit. Competition in the provision of Internet access means that AT&T and other cable operators must satisfy consumer needs or lose those customers to competitors such as DSL and satellite. Such a substantial expansion of government involvement would add dramatically to the regulatory costs we have described, without delivering comparable benefits.<sup>86</sup>

**1. Cable operators like AT&T have no incentive to limit access to the content available to subscribers.**

49. Verizon, among others, claims that cable operators have a significant incentive to limit customer access to outside broadband content.<sup>87</sup> In a related argument, WorldCom and certain other commenters maintain that, without forced access regulation, consumers will lack choices, prices will rise, and the current explosion of innovative services will subside.<sup>88</sup> We believe there is no economic justification to support WorldCom's unfounded fears. Cable operators like AT&T utilize a business model that creates, not dampens, incentives to explore commercial arrangements to optimize the quantity and quality of the content, as well as deployment of new and innovative services, available to subscribers. In contrast, reducing the quantity or quality of the content that would be available via a cable operator's modem service would make that service less valuable. If a cable operator were so foolish as to impose unnecessary limitations on the content available to its customers, it would only succeed in

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prevent cable operators from limiting content); Pegasus Communications Corporation at 9-10. *See also* MSTV at 3-4 (noting cable operator incentive to discriminate against competing content providers); Big Planet at 10-13 (asserting that discriminatory practices regarding caching and quality control justify regulation). *But see generally* Association for Competitive Technology Comments (maintaining that consumers do not value a choice in ISPs).

<sup>86</sup> *See* Ordover/Willig Decl. ¶¶ 21-24.

<sup>87</sup> *See* Verizon at 34.

<sup>88</sup> *See* WorldCom at 4 (emphasizing that unless the cable loop is opened, content providers, particularly those whose success is contingent upon their ability to access the home, will be excluded from the market thereby further reducing consumer choice); *see also* OpenNet at 8-10. As discussed with more particularity above, cable modem service providers must afford customers with a myriad of choices in order to remain competitive.

driving existing subscribers to broadband competitors, or would encourage them to stick with a dial-up service provider.<sup>89</sup> Perhaps even more importantly, given a low number of cable broadband subscribers, such business strategies could induce potential subscribers to opt for an alternative broadband technology, or stick with dial-up for a bit longer.

50. For the same reasons, AT&T's ability to raise prices for cable modem services at some future time will likely be similarly constrained. Over the past few years, prices for broadband services have held steady or declined, and consumers are benefiting from incentives and promotions that lower installation costs. Monthly cable modem and DSL service prices are now comparable to, or even lower than, the monthly price paid by the typical narrowband service consumer utilizing a second line.<sup>90</sup> If AT&T were to raise its cable modem prices significantly above the competitive level it would be forced to watch customers flee to, or stay with, alternative Internet access services. Such accumulation of competitive forces, therefore, demonstrate that even in the absence of forced access regulation, AT&T and other similarly situated cable operators will not be able to raise prices, artificially confine consumer choice, or halt the emergence of innovative services.

51. In sum, AT&T and other cable operators have a strong incentive to provide customers with the content they want. And AT&T does precisely that. All AT&T customers can

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<sup>89</sup> Similarly, if any cable operator were to adopt a closed, proprietary platform, it would limit the applications that could be used, thus alienating both Internet users and applications developers. And if it were to raise prices for advertising on its home page, it would simply send advertisers to the vast number of Web sites and other media eager for their business.

<sup>90</sup> See Bruce Stewart, *Cable Modem Guide*, ZDNet available at <http://www.zdnet.com/zdhelp/stories/main/0,5594,2278598,00.html> (last visited Nov. 30, 2000) (noting that an Internet user employing a second line is "probably paying between \$35 and \$45 per month for dial-up Internet access at speeds up to 56kbps," while cable modem users generally "pay around \$40 per month for unlimited, 'always connected' access at speeds up to 10Mbps"); see also Vikas Bajaj, *DSL Rivals Unveil Lower Prices*, The News-Times Online Edition, Sept. 2, 2000, available at <http://www.newstimes.com/archive2000/sep02/bzd.htm>. (stating that "consumers are getting the benefit of active competition between cable companies and telecommunications carriers," and discussing cuts that have brought DSL prices to about \$40).

reach any content accessible over the public Internet with a single “click.” AT&T has also made it easy for customers to bypass content provided by AT&T and even to choose a different provider’s portal as the preferred home page.<sup>91</sup>

## 2. Caching

52. Some forced access proponents point to certain network management practices as providing the added rationale for regulation, even though these practices, in fact, have legitimate functions and are employed commonly by other ISPs.<sup>92</sup> Speculation and anxiety regarding the potential manipulation of caching systems and other network management tools in order to favor content partners bear no relationship to the manner in which we understand caching is actually used.

53. AT&T and other cable operators, like most ISPs, use caching servers to store content from heavily trafficked sites that would otherwise have to be repeatedly transmitted over the network. We understand that content from third party websites is cached through an automatic process that employs an algorithm based on traffic patterns -- *i.e.*, the number of “hits” that various sites receive from subscribers -- to determine which sites to cache. As we understand from AT&T, the technology is not utilized to degrade or block delivery of unaffiliated or disfavored content, but is instead designed to ensure optimal network performance and speed, as well as to detect and remedy potential network problems.<sup>93</sup> Moreover, we also

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<sup>91</sup> Of course, the vast majority of content available over the Internet is free. A few Internet and online service providers, such as AOL, have chosen to charge for content, but that approach is unusual. And AT&T customers that believe such content “for a fee” is valuable are free to access it and purchase it from AOL (for \$9.95/month under AOL’s “bring your own access” plan) or any other provider.

<sup>92</sup> See, e.g., Association of Communications Enterprises at 20 (“[Forced] access regulation would lessen opportunities for abusive caching practices that would allow a single provider to prefer favored advertisers or providers by strategically manipulating transmission priorities and speeds.”) See also Competitive Access Coalition at 37-39.

<sup>93</sup> See AT&T Reply Comments, Section II.B.

understand that the content providers themselves control whether, and to what extent, their content is cached.<sup>94</sup>

54. We understand that virtually all narrowband and broadband online content providers and ISPs use caching to enhance performance. For example, Akamai's extensive network of servers located in the POPs of ISPs and IXCs hosts content from its content-providing customers around the world, thus allowing end-users to access that content directly from the Akamai server closest to that customer.<sup>95</sup> Other companies, such as Inktomi, have introduced caching products that operate on the servers of ISPs or Web hosts, monitoring those servers in order to identify popular web pages and store them on servers close to end-users.<sup>96</sup> The technical ability to filter content exists in all of these caching solutions, but this has never been done because the business rationale strongly argues against it.

55. Thus, AT&T does not have any economic incentive to restrict or inhibit subscriber access to any content available on the Internet. High-speed access customers demand delivery of all web-based content as quickly as possible. It is in a company's best interest to meet that customer demand, and any unreasonable attempts to restrict content would cause customers to switch to one of the many other Internet access providers. The loss of subscribers would far outweigh any purported "benefit" of imposing anticompetitive restrictions.

### **3. Video Streaming**

56. Equally unavailing are the concerns expressed by commenters such as OpenNet and the Competitive Access Coalition concerning limits imposed on video streaming.<sup>97</sup> We understand that, given the bandwidth intensive nature of video streaming traffic, a ten minute

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<sup>94</sup> *Id.*

<sup>95</sup> See Brian Quinton, "Bringing It Home," *Telephony*, Sept. 18, 2000.

<sup>96</sup> *See id.*

<sup>97</sup> See OpenNet at 8; Competitive Access Coalition at 58-63; Newspaper Association of America at 4, n.5.

video streaming limitation was designed to help ensure the ability of cable operators and their ISPs to manage bandwidth use and preserve optimal network performance for all end-users, a concern which one proponent of forced access concedes is a “plausible and not unreasonable response to a concern about bandwidth.”<sup>98</sup>

57. In any event, concerns about cable operators’ attempts to stifle the development of video streaming technology are misplaced. AT&T, for one, has already committed to ensuring the availability of streaming video to customers who desire it.<sup>99</sup> In fact, it would be economically impractical to act otherwise. Moreover, there is no basis for allegations that cable operators will limit their customers’ ability to receive streaming video in order to protect their traditional video services from “cannibalization” by these new services. A cable operator will receive revenue whether it provides a customer with traditional video services or cable modem services. If a cable operator attempts to deny a customer the ability to obtain streaming video, however, it risks losing the customer to one of its many broadband competitors.

58. In all events, AT&T has powerful incentives to widen access to ISPs and offer its subscribers full access to all Internet content. In fact, AT&T’s cable modem service enables subscribers to access all Internet content and AT&T is committed to giving its customers a choice of unaffiliated ISPs. The only question is not a regulatory issue, but a practical one: what is the best business model to provide that access in the long run? Given these internal and external pressures, there is simply no reason for the government, in the guise of regulating cable modem access, to impress a uniform business model on every broadband provider.

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<sup>98</sup> Center for Democracy & Technology, *exh. 1*, at 59.

<sup>99</sup> *See AT&T Comments* at 53 n.155.

## **VI. CONCLUSION**

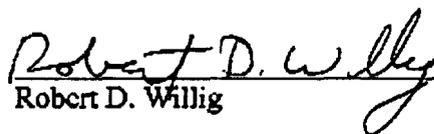
59. For the foregoing reasons, and for the reasons we set forth in our initial Declaration, we continue to conclude that forced access regulation of cable modem services is unwarranted at this time and would be counterproductive to the public interest.

I declare under the penalty of perjury that the foregoing is true and correct.

  
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Janusz A. Ordover

Dated: 01/09, 2001

I declare under the penalty of perjury that the foregoing is true and correct.

  
Robert D. Willig

Dated: 11/01, 2001



**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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

**DECLARATION OF ASSISTANT PROFESSOR JAMES B. SPETA**

**I. INTRODUCTION AND SUMMARY**

1. I submit this declaration to address certain issues raised by a number of commenters in response to the Federal Communications Commission's ("Commission's") Notice of Inquiry regarding whether a government-defined open access requirement should be imposed on high-speed Internet access services provided by cable system operators.

2. In particular, I respond to those commenters that ask the Commission to impose open access regulation upon cable modem services. I conclude that such access regulation for cable modem services is unnecessary because the nature of consumer demand for high-speed Internet access services provides a powerful market incentive for cable operators to offer customers unrestricted access to unaffiliated content and services. *Even if* cable operators enjoyed monopoly power in a hypothesized "market" for high-speed Internet access, which I do not believe to be the case, these market incentives for cable operators to provide open access voluntarily will exist. Consumer demand for high-speed Internet access will continue to depend upon -- and will increase strongly with -- the variety of content, applications, and services available over the access platform. As a result, I conclude that cable operators providing cable modem services will commit to open access in order to increase subscribership and maximize profits. The competition from DSL, wireless, satellite, and dial-up providers provides an

additional, powerful incentive for cable system operators to provide their users nondiscriminatory access to all of the content and services available on the Internet. Indeed, cable operators already provide open access to content, and they are conducting trials of open access arrangements for ISPs. The case for government regulation -- which should critically depend, at a minimum, on finding both market power and an incentive to use that power to restrict access to content and services -- simply has not been made.

3. I also here respond to arguments that cable operators like AT&T will restrict access to certain Internet content and services -- especially streaming video -- in order to protect the revenues that they derive from traditional video programming. These arguments, which some commenters have offered as a justification for government-imposed access regulation,<sup>1</sup> contend that cable operators will attempt to restrict consumer access to a good that by hypothesis consumers desire more (streaming video) in order to protect revenues garnered through a service that consumers desire less (traditional video). Again, cable operators will offer a wide variety of content and services -- including traditional video *and* streaming video -- in order to attract more subscribers and maximize their profits.

4. This declaration proceeds as follows. In Part II, I set forth my background. In Part III, I explain that consumer demand for Internet access services depends upon, and increases with, the variety of content or services available on the Internet. Therefore, cable operators like AT&T will have a profit incentive to maximize the variety of services available by providing access to unaffiliated ISPs and content providers on a voluntary basis. Moreover, I explain that this result should obtain *even if* a cable operator has persistent market power in a hypothesized market for high-speed Internet access services. In Part IV, I conclude that cable operators will

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<sup>1</sup> See, e.g., A+Net at 4; Association of Communications Enterprises at 19-21; Association for Maximum Service Television at 1-10; Big Planet at 8-13; Competitive Access Coalition at 37-39, 53, 58-62; Consumers Union at 3-5; OpenNet Coalition at 8-11; Pegasus at 9-10; USTA at 19; Verizon Communications at 34; WorldCom at 2-4.

not have an incentive to “protect” their revenues and therefore to deny consumers access to streaming video or other services.

## **II. BACKGROUND**

5. I am an assistant professor at the Northwestern University School of Law, where I teach telecommunications law among other courses. My writing focuses on telecommunications law and the related economics of regulation. I am a 1991 graduate of the University of Michigan Law School. Following graduation, I clerked for Judge Harry T. Edwards on the United States Court of Appeals for the District of Columbia Circuit.

6. Much of my recent academic work has focused specifically on the issue of open access regulation for high-speed Internet access platforms. I have published two articles on this topic,<sup>2</sup> have submitted comments on invitation of the staff of the Senate Commerce Committee,<sup>3</sup> have submitted ex parte written comments on my own behalf to the Commission in connection with the AT&T/Media One merger proceedings,<sup>4</sup> and have been invited to present these views at numerous conferences.

## **III. CABLE SYSTEM OPERATORS WILL HAVE STRONG MARKET INCENTIVES TO PROVIDE OPEN ACCESS**

7. Professors Ordoover and Willig, in their declaration submitted with AT&T’s initial comments, have detailed the inherent costs of government regulation, especially in a nascent and

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<sup>2</sup> James B. Speta, *Handicapping the Race for the Last Mile?: A Critique of Open Access Rules for Broadband Platforms*, 17 Yale J. on Reg. 39 (2000); James B. Speta, *The Vertical Dimension of Cable Open Access*, 71 U. Colo. L. Rev. 975 (2000).

<sup>3</sup> Those comments were filed in connection with hearings held April 13, 1999. See <<http://www.senate.gov/~commerce/hearings/0414spe.pdf>>.

<sup>4</sup> See Written Ex Parte of Assistant Professor James B. Speta, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group to AT&T*, CS Docket No. 99-251 (filed Dec. 20, 1999).

dynamic market such as the development of Internet access platforms.<sup>5</sup> These costs, which are well accepted by economists and public policy scholars, demonstrate that the advocates of mandatory access rules bear a burden of justifying government regulation.

8. The burdens associated with the imposition of open access rules should, at a minimum, be shouldered only where there is reason to believe that market forces will not provide incentives for cable operators to provide open access as part of their business plan. There is no basis for such a conclusion, however. Even in the unlikely event that cable companies possess market power in a hypothetical market for high-speed, residential Internet access, cable operators will nevertheless have strong economic incentives to provide access on a voluntary basis.

**A. Consumer Demand for High-Speed Internet Access Will Depend on the Variety of Content and Services Available.**

9. I begin by responding to claims made by some commenters that cable operators have the ability and/or incentive to restrict consumer access to unaffiliated content on the Internet.<sup>6</sup> Consumers value Internet access primarily for the information, applications, and services that are available over the Internet. The value of the Internet to consumers has grown as the amount and wide variety of information, applications, and services available there has increased. Consumers do not subscribe to Internet access services simply to gain access to a wire or a modem bank; rather, they subscribe because of the information and services that they gain access to, and the wider the variety of information and services the more they will value access.

10. This character of consumer demand for Internet access services -- that it is dependent upon the variety of services that are complements to it -- has many parallels. For example, video cassette players were not initially valued in their own right, but rather only for

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<sup>5</sup> Declaration of Janusz A. Ordover and Robert D. Willig ¶¶ 14-24 (“Ordover/Willig Decl.”).

<sup>6</sup> See, e.g., Circuit City at 6-7; Competitive Access Coalition at 37-39; Competitive Telecommunications Association at 19-21; Consumers Union at 3-5; OpenNet at 8-11; USTA at 19; Verizon Communications at 34; WorldCom at 4.

their ability to play videotapes of movies. The demand for video cassette players grew in response to an increase in the number of different movies that could be viewed on the player. Similarly, demand for computers increases with the number of available applications, and demand for compact disc players increases with the number of available compact disc recordings.

11. Communications analysts generally agree that the demand for broadband services will behave in this manner. As early as 1998, the Yankee Group wrote that “in the broadband service market, . . . content is king. Specifically, content that requires a fat pipe is king. Therefore, the proliferation of bandwidth-intensive applications is ultimately the key to extensive consumer adoption of broadband services.”<sup>7</sup> Other analysts and commentators agree that mass-market consumer appeal for high-speed Internet access services is dependent upon the availability of a wide variety of services and content.<sup>8</sup>

12. More recently, Morgan Stanley analysts have predicted that consumer demand would increase if cable operators were to provide access to multiple ISPs. This prediction rests upon the same theory -- that overall consumer demand for high-speed Internet access will be

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<sup>7</sup> The Yankee Group, *The Market and Marketing of Residential Broadband Internet Access* (Dec. 1998).

<sup>8</sup> See Rolf De Vegt & Elizabeth Steels, *Bandwidth Gluttony*, Industry Standard (Aug. 7, 2000) (forecasting that providers are searching for “killer apps,” such as streaming video, to “drive demand for higher bandwidth”); Kate Gerwig, *Content Rules – Broadband has made content king for any provider looking to rule the masses*, tele.com (May 15, 2000) (“What will get the average consumer onto a cable modem or a DSL connection . . .? Not the pure thrill of a bigger pipe. Only early adopters buy into that king of thinking. Everyone else is looking for the content that becomes available because of the pipe . . .”); see also Monica Hogan, *NorthPoint Bolsters DSL Content*, Multichannel News, Feb. 21, 2000, at 8 (as Jupiter Communications senior analyst Joe Laszlo stated, “there’s a need for new content to drive enough demand for broadband to reach a mass market”); Chrissy Moch, *Pumping Up Broadband Content*, Telephony (Feb. 21, 2000) (quoting Peter Meade, managing partner of TeleResearch: “High bandwidth content is the natural progression of DSL as competitors try to differentiate themselves.”); Andrew Kupfer, *Broadband: Still a Killer App Away*, Fortune (Feb. 7, 2000), p. 27 (quoting Ford Cavallari of Renaissance Strategy: “Customers are looking for the application that makes the broadband world touchable and believable to them, that underscores its benefit. And that application does not yet exist.”); FEI Response to the Invitation for Comments on the Communications Reform White Paper available at [http://www.culture.gov.uk/creative/dti-dcms\\_fei.htm](http://www.culture.gov.uk/creative/dti-dcms_fei.htm) (last visited Jan. 2, 2001) (reporting that global consumers “are demanding affordable access to high-speed broadband services delivered over a choice of networks.”).

sensitive to the scope and variety of services offered over the high-speed cable.<sup>9</sup> Chairman Kennard has similarly expressed the view that consumers will value variety and openness. “Consumers -- the people who actually drive a market -- deserve and will demand an open platform. They are used to openness in the dial-up world, and they will not want to be denied it in the broadband environment.”<sup>10</sup>

13. Most importantly, the cable companies are already operating in a manner that recognizes that consumers value access to all of the content of the Internet. As NCTA explains in its initial comments, because consumers would not “subscribe to a service that restricted their ability to access available content,”<sup>11</sup> all cable operators permit their customers to reach all of the content and services available on the Internet. It is true that high-speed Internet access over cable systems is generally marketed through a single ISP, but those ISPs permit consumers to “click-through” to all of the content available on the Internet.<sup>12</sup> Consumers may even alter their start

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<sup>9</sup> See Morgan Stanley, *Industry Overview: Telecom - Cable: Open Access Is Good* (Nov. 1, 2000); see also *Cable TV Industry Seeks Broadband Applications, Gets Warning Linking Retransmission*. ‘Open Access,’ TR Daily, May 15, 2000 (citing Chairman Kennard’s warning that if cable television does not supply consumers with the choice they demand, they are likely to migrate to other providers of high-speed Internet). In response, several cable operators have taken action to ensure that their consumers are afforded with a wide array of choices and services. See *Leading Cable MSOs Quietly Shifting Toward Open Access*, Communications Daily, Apr. 6, 2000, at 4-5 (reporting that “at least 7 of the largest 11 cable operators are looking at offering access to multiple ISPs” and cable operators attribute the “shift to growing consumer demand ... increased competition in high-speed data market ... [and] industry momentum”); see also Fred O. Williams, *Western New York Cable TV Dawdles in Dark Ages of Analog Lines*, Knight-Ridder Tribune Business News: The Buffalo News, Dec. 26, 2000 (quoting Jim McGann, AT&T spokesman, stating that “[i]f our customers want to have a choice of ISP, we want to give it to them ... we don’t want them to leave to another provider of high-speed access”); *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, CS Docket No. 00-132, ¶ 49 (rel. Jan. 8, 2001) (reporting that cable operators are beginning to offer multiple ISPs).

<sup>10</sup> *The Unregulation of the Internet: Laying a Competitive Course for the Future*, FCC Chairman William E. Kennard, Remarks before the Federal Communications Bar Northern California Chapter, San Francisco, CA (July 20, 1999) available at <http://www.fcc.gov/Speeches/Kennard/spwek924.html/>.

<sup>11</sup> NCTA at 55.

<sup>12</sup> See *Applications for Consent to Transfer Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3207 ¶¶ 94-96 (1999) (“*AT&T/TCI Order*”) (discussing AT&T’s commitment in this regard); see also *Applications for Consent to the Transfer of Control of Licenses and Section 214*

pages on AT&T's cable Internet service, so that they are not confronted with the cable system's ISP but are instead taken to whatever content provider they choose.<sup>13</sup> In this very relevant manner, cable Internet access systems are already "open" and the clamor for mandatory "open access" is a misnomer. Cable operators permit their subscribers to reach all Internet content because the operators understand that such access is the reason consumers value (and therefore the reason they purchase) Internet access.

14. Admittedly, it is too early in the development of broadband access services for econometric work that supports the demand hypothesis. Nevertheless, it is possible to be confident that consumer demand for high-speed Internet access does behave in the manner I have hypothesized. First, as noted, the leading analysts believe that both consumers and cable modem service providers will behave in this manner. Second, leading cable operators such as AT&T *are* behaving in this manner and *are* developing open access business models.

15. Third, and more importantly, economic theory that best describes this demand model is well established and the parallels to the demand for Internet access seem strong. This phenomenon, where demand for one good depends critically upon and increases with the variety of available complementary goods, is described in one branch of the economics literature as hardware/software networks.<sup>14</sup> Network economics generally focuses on the demand effects

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*Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, Memorandum Opinion and Order, 15 FCC Rcd 9816 ¶¶ 120-121 (2000) ("*AT&T/MediaOne Order*"); *see also* AT&T Comments at 49-50.

<sup>13</sup> *See AT&T/TCI Order* ¶¶ 94-96; *AT&T/MediaOne Order* ¶¶ 120-121; *see also* AT&T Comments at 49 n.149.

<sup>14</sup> *See generally* Kenneth D. Boyer, *Network Externalities*, in NETWORKS, INFRASTRUCTURE, AND THE NEW TASK FOR REGULATION 13-17 (Werner Sichel & Donald L. Alexander, eds. 1996); Anne Perrot, *Compatibility, Networks, and Competition: A Review of Recent Advances*, 27 TRANSP. SCI. 62, 64-66 (1993); Joseph Farrell & Garth Saloner, *Standardization, Compatibility, and Innovation*, 16 RAND J. ECON. 70, 70-71 (1985); Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424, 426-27 (1985); Speta, 17 Yale J. on Reg. at 78-81.

occasioned by “network” goods. A network exists when an individual consumer’s demand for a good depends upon the number of other consumers that also demand the good.

16. Network effects come in two varieties -- direct and indirect. In the case of direct network effects, a consumer’s demand for a good increases based on the number of other purchasers of the good because the good itself becomes more valuable to individual consumers as others also purchase that good. This is the network effect observed in the telephone system itself. Access to the telephone system is not valuable if only a single person purchases it; it becomes somewhat more valuable as a small number of others are on the network; it becomes much more valuable as adoption becomes widespread. The value of telephone service continues to increase (although not necessarily at a constant rate) as more individuals and businesses subscribe to telephone service.

17. Indirect network effects arise in markets in which there are complementary hardware and software goods such as the computer/software, VCR/tape, and CD player/CD markets described above. These markets display network effects when consumer demand for the hardware good is influenced by the variety of software goods that are compatible with the hardware. In the classic case of indirect network effects, the supply of different kinds of software for a particular hardware good responds to increases in the number of purchases of the hardware good, which in turn increases the value of the hardware/software combination.

18. As will be shown below, demand for Internet access exhibits these network effects and provides the cable operator with powerful incentives to give its subscribers access to the widest array of Internet content and services. The open access proponents, however, seek to use the regulatory process to require cable operators to unbundle their facilities and provide raw transport to all ISPs, whether those ISPs have content or services that provide any benefit to consumers or not. In this regard, the open access proposals are mere “ISP Protection Acts.” These proposals seek to protect ISPs merely to maintain their presence in the market, without any

showing that there is a corresponding benefit to consumers. As demonstrated above, however, regulation requiring cable operators to provide access to content or services providers is unnecessary because cable operators have sufficient profit incentives to provide access to the widest array of content and services; cable operators would have no disincentive to exclude these unaffiliated providers.

19. Just as a cable operator will provide open access so that consumers can choose from the widest possible variety of content, it will also make available a variety of unaffiliated ISPs so that subscribers will have access to the range of services they offer. In fact, I understand that AT&T, Comcast and other cable operators are currently exploring commercially reasonable access arrangements on a voluntary basis with unaffiliated ISPs and conducting technical trials to work through problems that stem from the interconnection of multiple ISPs.<sup>15</sup> In this manner again, the cable operator will choose a business model that maximizes the customer appeal of high-speed Internet access service and therefore maximize its own profits.

**B. There Are Strong Market Incentives that Will Likely Ensure that Cable Operators Will Provide Cable Modem Access on a Voluntary Basis Even if They Face No Competition.**

20. If consumer demand for high-speed Internet access services does depend upon the variety of content and services available, which I believe it does for the reasons set forth above, cable operators will have strong profit incentives to provide open access even if they face little or no competition.

21. Because consumer demand for high-speed Internet access services will respond strongly to the variety of content and services available through the high-speed access, it follows that consumers will prefer a provider that offers “open access” to Internet content and services

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<sup>15</sup> See AT&T at 61-66; Comcast at 37-38; *see also* Annenberg Public Policy Center at 9; Charter at 7-9; Excite@Home at 11-14; NCTA at 48-50; RCN at 9-10.

over a platform that does not offer open access. Therefore, even if there were to be only a small number of high-speed Internet access platforms, one would expect at least one of the companies to offer the “open” platform alternative. Given the nature of consumer demand, that strategy would dominate the “closed” platform strategy and thereby force the other providers to respond with an “open” platform strategy as well.

22. In fact, one would expect that an open platform strategy would be practiced by one of the players in even a two-platform market. If the first company to offer high-speed Internet access were to deploy a “closed” platform strategy, limiting the access of its subscribers to certain content and services, the second company would adopt the “open” platform strategy because such a strategy would allow it to capitalize on consumer demand and overcome the closed system’s first-mover advantage. Even if the initial system does not alter its strategy in response and remains closed, consumers will have the option of an open system.

23. Hence, even if, as some suggest, many areas will see high-speed Internet access offered only by cable systems and a single competitor (DSL or satellite), market forces will ensure that consumers will receive an open option.

24. The transformation of the early on-line service providers into Internet access providers supports the foregoing scenario. The early, dominant on-line services -- Prodigy, CompuServe, and AOL -- each initially marketed a “closed” system, without access to the content of the World Wide Web. As the web grew, each of those providers opened customer access to the web in order to retain consumers. This transformation was borne of competitive necessity. Each found that they could only increase and maintain subscribership if it offered access to the widest variety of content -- open access to the Internet and the web. As one analyst put it in 1995: “All online services are incorporating the World Wide Web into their strategy. If they

don't, they could have a limited future because the web is where the greatest amount of new content is being created.”<sup>16</sup>

25. Thus, even a small number of providers of high-speed Internet access platforms will compete to provide a wide variety of content and services – including ISP services. To gain customers, platform providers will offer inducements (including low access prices) in order to attract content and service providers to their platforms.

26. The foregoing model also suggests that cable companies will have strong incentives to provide open access even if one hypothetically assumes that they are the only providers of high-speed Internet access in a market. Of course, I do not believe that any such case of persistent monopoly power has yet been made. Even a hypothetical cable monopolist would have strong incentives to provide open access, however, making it unnecessary for the Commission to impose costly regulation on this new, innovative service.

27. In general, a monopolist has no incentive to seek to impede the competitive development of complementary goods. Cable systems' monopoly power, if they have any, derives from their ownership of wires into the homes, not from the content provided over those wires. Because the prices the cable systems may charge for Internet access services are not regulated, cable systems will have no economic incentive to try to monopolize the content provided over those services. Instead, they will have the incentive to encourage the development of complementary goods (*i.e.*, the content and services available on the Internet). This is simply an application of the now well-accepted understanding of the stringent limitations on the monopoly leveraging theory.<sup>17</sup>

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<sup>16</sup> See Jiri Weiss, *Online Services Take Web for a Spin*, PC World, Nov. 1995, at 54 (quoting Karen Burka of SIMBA Information); see also Mick O'Leary, *AOL versus the Web for Consumer Research*, Database, April/May 1998, at 79; Ross Laver, *High-Tech Dinosaurs?*, Maclean's, Nov. 11, 1996, at 50; Jack Eagen, *Online Goes Big Time: The Commercial Services Are Beating the Web by Joining It*, U.S. News & World Report, Nov. 20, 1995, at 104.

<sup>17</sup> See Herbert Hovenkamp, *Tying Arrangements and Class Actions*, 36 VAND. L. REV. 213, 260 (1983); Richard A. Posner, *Antitrust Law: An Economic Perspective* 173 (1976); Robert H. Bork, *The Antitrust*

28. Moreover, the indirect network effects that characterize demand for Internet access service provide additional incentive for a hypothetical cable monopolist to provide open access.<sup>18</sup> Where indirect network effects are present, a consumer's demand for the hardware good increases with an increase in the variety and availability of software goods. And where those network effects are strong, as I believe they are in the demand for high-speed Internet access, a monopolist will have the incentive to encourage a wide variety of information services in order to increase subscribership.<sup>19</sup>

29. Network effects provide an additional incentive for the monopolist to provide open access because demand for the hardware good is based upon consumers' expectations concerning the availability of software complements. A monopolist has a commitment problem with consumers. Consumers will rationally expect that a monopolist that attempts to control the supply of complementary goods will produce a smaller number and variety of complementary

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Paradox: A Policy at War with Itself 366-74 (1978). There are exceptions to the rule, of course, such as instances in which monopoly leveraging permits perfect price discrimination or where the upstream market is strongly characterized by diminishing returns to scale or the monopolist can effect a price squeeze. See POSNER, *supra* note 12, at 174; Patrick DeGraba, *Why Lever Into a Zero-Profit Industry: Tying, Foreclosure, and Exclusion*, 5 J. ECON. & MGMT. STRATEGY 433 (1996); Michael Whinston, *Tying, Foreclosure, and Exclusion*, 80 AM. ECON. REV. 837 (1990); J.A. Ordover, G. Saloner, & S. Salop, *Equilibrium Vertical Foreclosure*, 80 AM. ECON. REV. 127 (1990); T. Krattenmaker & S. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power over Price*, 96 YALE L.J. 209 (1986). But no one has demonstrated that the strict conditions necessary to these results obtain in the Internet access market.

<sup>18</sup> That network effects characterize demand for high-speed Internet access does not mean that consumers will be locked in to any particular ISP through network effects. Compare *City of Los Angeles* at 17-18; Competitive Policy Institute at 8. The network effect here described arises from connection to the Internet not from connection to any particular ISP, and a consumer switching from cable modem service to DSL will not lose its connectivity to the network any more than a consumer switching from a landline phone to a wireless phone would lose their connection to the telephone network. Moreover, as I explain below (¶ 29), the hypothetical cable monopolist can only maximize consumer demand by committing to provide access to unaffiliated content.

<sup>19</sup> Speta, 17 *Yale J. on Reg.* at 84; see Nicholas Economides, *Network Externalities, Complementarities, and Invitations To Enter*, 12 *Eur. J. Pol. Econ.* 211, 213-214 (1996) (demonstrating that, in the presence of strong network effects, network owners will have the incentive to open their systems to competitors' provision of complementary goods).

goods. The expectation is rational because monopolists always produce a smaller quantity than a competitive market. To relieve this commitment problem, a rational monopolist will make commitments to competition in the market for complementary goods. Where network effects are strong, this is the profit-maximizing strategy because it greatly increases consumer demand for the hardware good.<sup>20</sup>

30. Translated to this particular issue, this means that, even if a cable provider is a monopolist over high-speed Internet access, the cable provider will have a strong profit incentive to commit to provide open access. If it does not do so, consumers will expect that the cable company could restrict their access to desirable content and services. This expectation will suppress overall demand for high-speed cable Internet service. Hence, to maximize their profits from the only asset that is truly unique to them, cable systems will provide open access to their wires.

31. Moreover, in order to commit to provide a wide variety of content, the hypothetical monopolist will provide attractive access prices and other incentives to content providers in order to maximize subscribership.<sup>21</sup>

32. The foregoing suggests that cable operators will have strong incentives to provide open access to all providers of content and ISP services, whether affiliated with the cable company or not. Given the costs and reduced investment and innovation that would result from

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<sup>20</sup> See Besen & Ferrell, *Choosing How To Compete: Strategies and Tactics in Standardization*, 8 J. Econ. Persp. 117, 122-23 (1994); Katz & Shapiro, *Systems Competition and Network Effects*, 8 J. Econ. Persp. 93, 103 (1994). As Katz and Shapiro explain, this is related to the idea that a monopolist will license its technology to a competitor where the consumer is concerned about monopolist exploitation in later periods (such as in repair or other after markets). See also Joseph Farrell & Nancy Gallini, *Second-Sourcing as a Commitment: Monopoly Incentives To Attract Competition*, 103 Q.J. Econ. 673, 674 & n.4 (1988); Carmen Matutes & Pierre Regibeau, *A Selective Review of the Economics of Standardization*, 12 Eur. J. Pol. Econ. 183, 190 (1996).

<sup>21</sup> Compare Farrell & Gallini, 103 Q.J. Econ. at 674 (proving that monopolist will license new technology to competitors at low prices in order to make commitment to consumers that must incur set-up costs and therefore fear exploitation by a monopolist).

forced access,<sup>22</sup> the presence of market pressures toward openness should be enough to foreclose regulation. But there is an additional reason to think that open access regulation will impose particularly high costs in the context of high-speed Internet access services provided by cable operators.

33. The process of upgrading cable systems has been, and will continue to be, both technically difficult and expensive. Open access regulation injects the government into the process of system design and price regulation, dampening the cable operator's incentives to proceed with this work.<sup>23</sup> In this regard, for the reasons set forth in the Ordoover/Willig Declaration and Reply Declaration,<sup>24</sup> cable operators stand in a different position than do the incumbent local exchange carriers with regard to the copper loops necessary to provide DSL service.

#### **IV. CABLE OPERATORS WILL NOT RESTRICT ACCESS IN ORDER TO "PROTECT" TRADITIONAL VIDEO**

34. Some advocates of open access regulations suggest that cable companies will restrict customer access to content and services in order to protect the revenues that they currently earn from traditional video programming – both through the fees that they charge unaffiliated programmers and through their vertically-integrated programming networks.<sup>25</sup> Open access advocates find particularly telling the asserted restriction that some cable ISPs have placed on subscribers using their connections to access high-quality streaming video.<sup>26</sup>

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<sup>22</sup> See AT&T Comments at 66-85; Ordoover/Willig Decl. at ¶¶ 21-24.

<sup>23</sup> See generally W. Kip Viscusi, *The Economics of Regulation and Antitrust* 7 (2d ed. 1995).

<sup>24</sup> See Ordoover/Willig Decl. ¶¶ 39-46; Reply Declaration of Janusz A. Ordoover and Robert D. Willig, Section IV.

<sup>25</sup> See, e.g., Association for Maximum Service Television at 1-10; CenturyTel at 5; Circuit City at 4-5; OpenNet at 8-11, 20-21; Verizon Communications at 34; WorldCom at 2-4, 7.

<sup>26</sup> See, e.g., OpenNet at 8-11; Big Planet at 11, 14.

35. In one of my recent articles, I address these claims and conclude that they have no merit.<sup>27</sup> Cable operators will not have an incentive to foreclose customer access even to those services that might mean that those customers will watch less traditional video.<sup>28</sup> The first of these asserted effects -- that cable operators will limit high-speed Internet services in order to protect the fees that they earn from unaffiliated programmers -- is especially unrealistic. It presumes that cable operators will not be permitted to charge consumers fees for Internet access that compensate for the lost fees from traditional programmers. The worry that consumers will substitute Internet use for time spent watching traditional video assumes, of course, that consumers desire Internet use more highly. If this is the case, however, cable operators should be able to charge fees that more than compensate for any losses.

36. The second fear, that cable operators will act to protect the revenues earned by their affiliated video programming operations, is similarly deficient. Again, cable system revenues from traditional video programming will only decrease if consumers “switch” from traditional video to cable Internet services.

37. In this scenario, however, cable operators will have no greater desire to protect their affiliated programming companies than to protect unaffiliated programmers unless cable companies are earning unique monopoly profits in the programming market. There is, however, no reason to believe that the cable operators are deriving unique monopoly profits from traditional video programming, such that they will be unable to recover their lost profits through charges for streaming video. The Commission has reported that the percentage of video programmers affiliated with cable companies has declined in recent years.<sup>29</sup> AT&T’s recently announced spin-

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<sup>27</sup> See Speta, 71 Colo. L. Rev. at 1000-10.

<sup>28</sup> As a threshold matter, these commenters ignore the fact that AT&T’s initial video streaming limitations were designed to manage bandwidth usage and prevent network congestion. See AT&T Reply Comments, Section 2B.

<sup>29</sup> See *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixth Annual Report, CB Docket No. 99-230 ¶ 179 (rel. Jan. 14, 2000).

off of Liberty Media will further reduce the level of vertical integration between video programmers and cable operators.<sup>30</sup>

38. If cable operators are not earning unique monopoly profits from traditional video, then they have no incentive to refuse to provide consumers the type of service (high-speed Internet access) that it is hypothesized consumers desire more. In doing so, cable operators will maximize their profits by offering consumers what they want; there will be no incentive to “protect” traditional video revenues from revenues derived from new services.

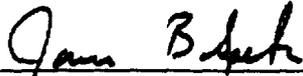
## V. CONCLUSION

39. The case for open access regulation has not been made. There has been no showing that cable companies will have persistent market power in a hypothesized market for high-speed Internet access services. More importantly, consumer demand for high-speed Internet access will depend upon, and will strongly increase with, the availability of a wide variety of content, applications, and services to be accessed. As a result, there will be strong market forces pushing cable modem service providers to commit to open access. These market forces will exist even where there are only a small number of high-speed Internet access providers. Because regulation inevitably imposes costs on market participants, costs likely to be high in a nascent industry such as the broadband Internet, the Commission should decline to adopt mandatory open access regulations in the absence of market failure.

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<sup>30</sup> See AT&T News Release, *AT&T Announces Plan To Spin Off Liberty Media*, Nov. 15, 2000, available at <http://www.att.com/press/item/0,1354,3482,00.html>.

I declare under the penalty of perjury that the foregoing is true and correct.

  
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James B. Speta

Dated: January 10, 2001

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