G. THE RISK OF DELAY

1. Delays in Canada

One likely consequence of "open access" is the risk of delay in deploying Adelphia's PowerLink service. Such delay is the natural fallout from unresolved technical issues. None of the forced access proponents advanced a coherent technical solution. Tr. 11/17/99, pp. 110/ln 14–111/ln 8 (Brown); Tr. 11/17/99, p. 113/ln 18-24 (Brown). Therefore, it will take time and resources to solve any engineering problem, and neither is unlimited in the midst of a state-wide upgrade in today's employment market. A similar phenomenon already has been borne out in Canada, where in 1996, the Canadian Radio-Television and Telecommunications Commission required incumbent cable operators to provide non-discriminatory access to unaffiliated ISPs. It took three years for the CRTC to adopt rules requiring incumbent cable operators to file tariffs and establish conditions for interconnection and resale by independent ISPs. Even with this mandate, trials used to determine rate schedules have not started, and are not expected to be completed until next year. Mr. Shapiro was under the misapprehension that the Canadian "solution" had run its course. At least Mr. Brown acknowledged that it has not been fully implemented. Tr. 11/17/99, p.. 115/ln 5-7 (Brown). This type of regulatory delay, and its resulting uncertainty, threatens to slow down the nascent broadband industry and would be inimical to the intent of the 1996 Act. Broadband Today at 45.

2. Litigation

Some of the delay arises as the natural fallout of litigation. In the jurisdictions in which "open access" has been ordered, cable modem deployment has halted and extensive

litigation has ensued.[75] Tr. 11/3/99, pp. 242-243 (Shapiro). Even Mr. Shapiro acknowledged that in the handful of jurisdictions which have ordered forced access, cable modems are not being deployed. Tr. 11/3/99, p. 242/ln 3-9 (Shapiro). The City of Portland has had to put out a request for proposals for alternative providers of the service. Tr. 11/3/99, p. 243/ln 17-18 (Shapiro). MediaOne and the City of Somerville have engaged in litigation over MediaOne's unwillingness to offer cable modem service at all while the City operates under an "open access" order.[76]

3. The Effect Of Cable Modem Delays On The Introduction Of DSL

There is a collateral effect of such delays in the broader market: a consequential delay in DSL roll-out. In *Broadband Today* ,the FCC pointedly notes the possibility that a slow-down in cable modem investment and roll-out will likely lead to a slowdown in DSL investment and roll-out.[77] If the competitive pressure on ILECs lapses, we expect that ILEC deployment of xDSL will slow, and they will return to harvesting their narrowband network.

4. The Effect Of Cable Modem Delays On The Pricing Of DSL

Even if DSL does not slow, its price will be less competitive. Cable modem competition has triggered price competition by DSL providers. For example, GTE announced a new discounted DSL pricing structure, offering its own ISP (GTE.net) for $49.95/ month.[78] US West has lowered its price on selected DSL offerings to $19.95/

[75] *See, e.g., AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146 (D. Ore. 1999) (fully briefed, argued to the Ninth Circuit on Nov. 1, 1999 and awaiting expedited decision); *TCI TKR of South Florida, Inc. v. Broward County, FL*, No. 99-6945 (S.D. Fla. filed July 27, 1999).

[76] *MediaOne Of Ohio, Inc. v. Mayor Of The City Of Somerville*, Docket No. CTV 99-5 (filed 12/3/99).

[77] *Broadband Today* at 34.

[78] *Id.* GTE's discounted pricing structure is 20% lower than its then existing lowest priced DSL service. This discounted DSL pricing is also comparable with cable modem pricing.

month. This special DSL offering will soon be available in more than 40 cities across US West's region.[79] Delays in cable modem introduction will deter these ILECs from the pricing they have pursued.

H. HARM TO ADELPHIA'S BUSINESS

1. Adelphia's Concerns With Protecting The Quality Of The Consumer Experience With Cable Modem Service

An open access condition would effect an expropriation of business opportunity from Adelphia. Adelphia witnesses repeatedly expressed concern that Adelphia be permitted to control the pace of modem marketing and roll out in order to manage and protect the service quality experienced by early adopters. This is critical in the rollout of any new product—especially a product offered by cable operators whose quality of service is often disparaged. Adelphia has every right to protect the quality of its product. Just as a cable operator would seek to avoid running installation promotions if it was not equipped to meet the demand, it will try to tailor its Internet offering (including speed and price specifications) to match plant and personnel sources. As Mr. Judkins put it, "if there was an overwhelming burden and a huge demand, there would be issues that would arise that could conceivably -- may not necessarily be Adelphia's fault, but would in light of that would still make Adelphia look bad in the customers' eyes." Tr. 10/13/99, pp. 259/ln 23 – 260/ln 3 (Judkins). Turning that business over to an unaffiliated third party is forcing a cable operator to surrender its right to manage plant, investment, and operations at a critical stage in industry development. "If it's an ISP who is out there providing the service and there is -- the service from the ISP or the ISP has a problem, it's still going to look bad on Adelphia

[79] *US West Catapults High-Speed Internet Access to Mass Market with Nation's First 'DSL-On-Demand' at $19.95/mo. for Casual Internet Users*, PR Newswire (Sept. 15, 1999).

because it's Adelphia's service that they are using. So, it would put us in a negative light with the customer." Tr. 10/13/99, pp. 259/ln 21-263/ln 6 (Judkins).

2. Adelphia's Concerns With Managing Its Spectrum Usage

An open access condition also compromises Adelphia's plans for its plant and its spectrum. A dedicated dial-up connection, once established, is not affected by the desire of other people to try to utilize the same equipment to send transmission at the same time. By contrast, all cable modem customers are sharing the same cable bandwidth and facility, so that contention is possible among customers. Tr. 11/3/99, p. 257/ln 8-25 (Shapiro). Sullivan pfrub., pp. 2-3. Spectrum is not free on a cable system. Cable operators manage their offering of cable modem services to assure that overall demand for cable modem service will not require taking more and more spectrum from downstream uses, and more spectrum from upstream uses (such as impulse PPV or other interactive services). This spectrum has an opportunity cost. Snowdon pf, p. 29; *see also* Tr. 10/22/99, p. 50 (Snowdon); Tr. 10/12/99, pp. 67-68 (Kent). That cost is one of the factors in play when the cable operator makes business judgments about how to market and grow cable modem service, as opposed to other cable or telecommunications services. Before the first Internet customer was turned on, Adelphia had to raise and invest $38 million in upgrades. Although much physical plant was in place, Adelphia had to design and engineer the system to bring fiber deep into residential "nodes," and to reduce distribution plant "noise" to a level acceptable for upstream data transport. As penetration grows, the system may maintain a single guaranteed upstream speed by reducing node size in order to "reuse" the upstream frequencies from each node; the operator may segment the market, by offering dedicated upstream paths to high volume

users at a higher price, and lower upstream speeds to other customers at a lower price; or the operator may reduce the guaranteed speed of the modem service, depending on its business judgment.

3. Adelphia's Concerns With Managing Growth

This concern was occasionally lampooned at hearing as Adelphia being concerned that it would succeed too well. The point is that, as with any good engineering, Adelphia has engineered its system for a particular rate of growth to account for current and future needs. "We have engineered our network based on a 10 percent growth. It is my fear that if open access would happen, that the number of users would actually grow at a substantial rate, a lot faster than we realized. And what I mean by that is then we would have to go back and re-engineer our network in a much shorter time frame." Tr. 10/13/99, p. 197/ln16-21 (Sullivan). "From an engineering point of view -- I'm worried from an engineering and operations point of view. We have engineered our network for a certain growth. Okay. We have installed the network, for example, we have installed our -- we have installed our network here in Vermont in the last three weeks. Okay. The team that has done that installation is moving to the next system. If we have to come back here and re-engineer based on growth next week, that's going to crush our DOCSIS rollout in all of our other systems." Tr. 10/13/99, p. 198/ln 6-15 (Sullivan).

Attempting to turn Adelphia's spectrum over to third party users without regard to Adelphia's plans, investment, spectrum management, node management, personnel needs, and business strategy is essentially commandeering the business. Yet, the State is not the one that has made the investment in the property it is attempting to "manage."

I. COST OF CAPITAL

1. The FCC Predicts that Forced Access will Harm Cable's Access to Capital

The FCC's recent report on the broadband market explains the impact of suddenly imposing regulation on these business choices.

> Analysts pointed out that mandating "open access" to broadband platforms could have an extremely detrimental effect not only on cable stock valuations, but on other industries as well. If investment in cable systems slows, stock prices could fall and affect build-out capital. This in turn could slow the rollout of DSL by ILECs, as the urgency to beat cable to the consumer marketplace would diminish. There likely would be a ripple effect. Such a slow down, according to the analysts, could dramatically slow the development of Internet advertising, e-commerce, and content. *Broadband Today* at 34.

2. Silicon Valley Predicts that Forced Access will Harm Cable's Access to Capital

Previously, Intel, Compaq, Cisco Systems, IBM, Novel and others told the FCC:

> "Investments in [new high speed data facilities] are very risky and lack any guaranteed return. Government regulation would actually limit the return on investment, and cause investors to be less willing to risk the billions of dollars necessary to build out the networks. Government intervention is particularly misplaced in the case of new broadband networks deployed by entities that lack the market position of traditional telephone companies."[80]

Risk-adverse investors who wish to invest in return-guaranteed utilities do so, with modest returns. Cable is taking on many formidable industries who are also pursuing high-speed data strategies. Investors in cable demand returns commensurate with the risk they are undertaking. The Board cannot provide Adelphia or any other cable operator with a monopoly franchise over all Internet paths to the home, nor can it

[80] Letter from Intel, Compaq, Cisco Systems, IBM, Novel to FCC, October 8, 1998. (Cited in New England Cable Television Associations' Comments On The May 1999 Final Draft Of The Vermont Telecommunications Plan).

require ISP customers to deal with the local cable system as the exclusive provider of Internet in order to assure a return on investment. Under the current competitive situation, mandating ISP access to cable facilities will inexorably chill investment and raise Adelphia' cost of capital. As the investment houses put it to the FCC:

> "Even a hint of regulating the cable network as a common carrier would severely diminish the willingness of investors to finance system upgrades and new facilities. As soon as such threat is seen by the market as a realistic possibility, the uncertainty factor would immediately stall further upgrades and delay rollouts, just as uncertainty over the ultimate level of federally mandated LEC resale rates delayed several cable operators' push to deploy lifeline telephony services."[81]

Dennis Leibowitz, of Donaldson, Lufkin & Jenrette, has added: "I have no doubt that a decision to regulate the [cable] industry under common carrier rules would be catastrophic for equity investors and for the companies abilities to raise public financing."[82] Phyllis Riggins of NationsBank has said that such rules "could cast a significant cloud over the willingness of lenders and investors to provide additional capital to these companies."[83] Thus, the upgrade of cable plant itself would be jeopardized by restructuring high-speed Internet access over cable.[84]

The risk to investment and competition was recently reiterated in the FCC's *Broadband Today*. The Report states that "there was near unanimous agreement among

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[81] *Id.*

[82] Letter from Donaldson, Lufkin & Jenrette, to FCC, October 7, 1998. (Cited in New England Cable Television Associations' Comments On The May 1999 Final Draft Of The Vermont Telecommunications Plan).

[83] (Cited in New England Cable Television Associations' Comments On The May 1999 Final Draft Of The Vermont Telecommunications Plan).

[84] Anything which discourages cable plant upgrades for Internet also postpones the day when consumers have choices in dialtone service providers. Thus, "unbundling" high-speed Internet access will likely have

the cable and investment panelists that government regulation of the terms and conditions of third-party access to cable systems would cast a cloud over investment in both cable and telephony applications."[85] Indeed, the Report quotes one cable ISP official as saying that government-mandated access "puts a shotgun slug through two inches of Excel spreadsheets that [cable companies] use to generate their rate-of-return calculations."[86]

J. THE DEPARTMENT HAS FALLEN PREY TO A REGULATORY GAMBIT BY ADELPHIA'S COMPETITORS

An impartial observer of the industry might step back and recognize the campaign for open access as something far from benign. Competitors to cable, such as Bell Atlantic, have much to gain by disabling or delaying the rollout of a competitive high-speed product. Bell Atlantic and other incumbent local exchange carriers (ILECs) are the beneficiaries of windfall revenues from second residential lines.[87] They stand to lose second line revenues, as well as customers to broadband. Even more important, delaying or handicapping upgrades also delays residential telephony competition. When the national campaign was started by AOL, GTE and other ILECS, these players brought their plea to the Federal Communications Commission. The FCC recognized it for what it was: a request by one facilities-based competitor to handicap another. However well-

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the unintended effect of delaying the deployment of competitive facilities from which residential customers can have a choice in dialtone.

[85] *Broadband Today* at 34.

[86] *Broadband Today* at 34.

[87] *See Bell Atlantic Investor's Reference Guide: Mid-Year 1999*, Aug. 10, 1999 at 23 (visited Nov. 11, 1999) <http://www.bell-atl.com/invest/news/IRG99/2_Telecom.pdf>; *Bell Atlantic Profits Rise 14.3 Percent on Data, Wireless, Cuts*, WASHINGTON TELECOM NEWSWIRE, July 21, 1999; Scott Moritz, *Rapid Internet Access Arriving at a Crawl; Bell Atlantic Dragging Feet, Critics Say*, THE RECORD (Bergen County, NJ), Nov. 8, 1999, at B1: *US West Reports Modest Growth*, COMMUNICATIONS TODAY, Jan. 25, 1999.

intentioned a recommendation for open access might appear when expressed by witnesses who are not agents of these ILECs, they have nonetheless fallen prey to a regulatory gambit by cable's competitors. Delaying and handicapping cable modem service directly benefits ILECs who may continue to harvest their narrow-band lines free from significant wireline competition.

Large ISPs like AOL have similar incentives. Transit and peering arrangements are believed to be discriminatory in favor of larger providers like AOL. When questioned, AOL opposed any regulation of the network. AOL explained that "such disputes are not necessarily indications of market failure or anti-competitive conduct requiring regulatory intervention. To date, they appear to reflect only natural growing pains in a maturing market."[88] AOL praised the growth of the Internet "without statutory or regulatory directives" and warned that regulatory intervention would "limit the parties' flexibility to structure economically efficient relationships and to respond to shifting consumer demands."[89] AOL itself has defended the existing interconnection arrangements as the natural product of the free market. Imposing regulation on cable contracts, while maintaining market based contracts for itself, can only advantage AOL.[90]

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[88] Comments of America Online, Inc., CC Docket 98-146, Sept. 14, 1998, at 13.

[89] *Id.* at 14.

[90] Likewise, Burlington's campaign to commandeer the Adelphia plant may be seen "in the light of a competitor seeking to take advantage of and impose conditions on a rival." Brown Cross p. 89/ln 23 - p. 90/ln 2.

K. THE BOARD MAY NOT IGNORE THE COSTS OF FORCED ACCESS IN A RENEWAL

1. The Cable Act requires the Board to Account for the costs of Forced Access

Congress intended the cable franchise renewal process to serve the overriding purpose of the Cable Act "to encourage investment by the cable operator at time of the initial franchise and during the franchise term" and to "ensure that such investment will not be jeopardized at franchise expiration."[91] Congress also intended that community "wish lists" be constrained by the economic reality: in the words of the Act, "taking into account the cost of meeting those needs." The "costs" of open access have been entirely disregarded by its advocates. Under the law, it cannot be ignored by the State.

2. Forced Access Proponents have Ignored the Costs of their proposals

The Department's theory, and that of the City of Burlington, appears to be that Adelphia would profit from forced access, and it is only ignorant inertia that keeps it intransigent. Such testimony is without any analytic or empirical foundation. Tr. 11/3/99,p. 86/ln 16-17 (Shapiro). ** No market analysis was conducted. No-one opining about Adelphia's likelihood of profit had even bothered to look at Adelphia's books or to quantify the costs of complying with forced access.

> "Q. Now, you asserted in response to Ms. Cadwell's questions that you believe that even with an open requirement, Adelphia's provision of cable modem service would still be profitable; is that right?
>
> A. Yes.
>
> Q. What's the base -- what have you reviewed in making that conclusion? Have you reviewed any Adelphia's books?

[91] 1984 House Report at 72.

A. No, I have not reviewed Adelphia's books.

Q. Do you have any idea what it would cost to Adelphia to implement an open access requirement?

A. I do not."

Brown Cross Tr.. 116/ln 1-12.

It is preposterous to suppose that Adelphia is asleep at the switch. Adelphia is the very company which voluntarily upgraded Vermont's plant to 750MHz hybrid fiber coax, built a fiber ring, and launched CLEC services through its sister company ABS. It is also hard to fathom how Adelphia could be set in its ways after only a few months of offering cable modem service. Brown Cross Tr.. 148/ln 1-11. What has happened is that Adelphia has invested $38 Million in infrastructure in the State, when no-one else would. It has reached and explained a business judgment that offering through PowerLink as presently offered maximizes its ability to offer and expand this competitive product. Yet, it is being second-guessed by those who have invested nothing, who have not bothered to inform themselves of the applicable cost and economics, who seem indifferent that the Internet is experimenting with different economic models, and who are trying to "solve" monopoly abuse problems when there is no monopoly or abuse. Adelphia is competing in a communications marketplace in which its core business is under constant challenge for customer loyalty and its PowerLink business is expected by all observers to be only one of many players. Tr. 11/4/99, p. 63/ln 14-18 (Shapiro) (Q." . . . [D]o they [Adelphia] have a guarantee of success in the market that they will always have these customers and always get that money coming back?" A. "I don't think so.") As the party who has raised and "bet" investment capital in the State, it should be entitled to its business judgment about what strategies to adopt to serve this market and to recover and profit from its investment.

The Board should recall that only 20% of Adelphia's plant has been upgraded to two-way PowerLink. Regulatory over-reaching is not the best method for encouraging investment.

3. PEG Funding Would be Reduced if "Open Access" is Required

One perverse consequence of imposing open access on the theory that cable modem service is telecommunications common carriage, arises from the Cable Act's limit against "franchising" telecommunications. Adelphia's funding proposal for PEG is premised on providing a handsome share of Internet revenue to PEG use, without showing of need. Cable franchise fees may only be assessed, by law, on cable services. At present, the treatment of cable modem service as a cable service provides franchising authorities with a right to collect franchise fees on those revenues.[92] (No other ISP pays such franchise fees to franchising authorities.) If the Board attempted to convert cable modem service into a telecommunication service available for third party use, the result would be a reduction in these cable franchise fees. Section 622 of the Communications Act, after all, only permits franchising authorities to collect a franchise fee of up to five percent of gross revenues derived from the provision of "cable service."[93] If cable modem service is treated as a "telecommunications" offering, no PEG group could share in any of those revenues.

[92] This was Congress's intent. *See* 142 Cong. Rec. H1156 (daily ed. Feb. 1, 1996) (statement of Rep. Dingell) (explaining that the revised definition of cable service strengthens the ability of local governments to collect fees for the use of public right-of-way. For example, the definition of the term cable service has been expanded to include game channels and other interactive services. This will result in additional revenues flowing to the cities in the form of franchise fees.).

[93] 47 U.S.C. § 542(b).

L. FEDERAL POLICY

1. Federal policy is to allow new technologies to grow in an unregulated environment

It has long been a federal policy, now codified in Section 7 of the Communications Act, "to encourage the provision of new technologies and services to the public."[94] The federal government has done so by allowing new technologies to grow in an unregulated environment. Congress has expressed a national policy in Section 230 "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[95] The Administration has adopted the same policy.[96]

2. The FCC Has Rejected Forced Access as Premature

A string of FCC rulings directly on point has rejected forced access. In its February 2, 1999 Report to Congress, the FCC reported that the emergence of inter-modal, facilities-based competition for the delivery of Advanced Services was best served by cautious observation of these competitive battles, not by a premature imposition of forced access on one of the competitors. The FCC formally concluded that the preconditions for monopoly (and government regulation) are not present.

> "We believe it is premature to conclude that there will not be competition in the consumer market for broadband. The preconditions for monopoly appear absent. Today, no competitor had a large embedded base of paying residential consumers. The

[94] 47 U.S.C. § 157(a).

[95] 47 U.S.C. § 230(b)(2).

[96] *U.S. Government Working Group on Electronic Commerce, First Annual Report* (Nov. 30, 1998) ("*E-Commerce Report*") at 25 ("The Administration . . . support[s] open and vigorous competition as the principal means of developing [broadband] infrastructure . . . and seek[s] to encourage competition among various technologies and industry segments in the development and deployment of advanced services.").

> record does not indicate that the consumer market is inherently a natural monopoly. Although the consumer market is in the early stages of development, we see the potential for this market to accommodate different technologies such as DSL, cable modems, utility fiber to the home, satellite and terrestrial radio . . . By the standards of traditional residential telecommunications, there are, or likely will soon be, a large number of actual participants and potential entrants in this market."[97]

The FCC reached a similar conclusion when rejecting forced access in connection with the recent transfer of control of TCI to AT&T.[98]

3. The FCC Has Explained that Regulatory Restraint Is the Best Means for Promoting the Widespread Deployment of Competing Facilities

The Chairman of the FCC has reiterated the basis for this policy. When he rejected the recommendation by the State & Local Government Advisory Committee that the FCC open an investigation on "forced access," he explained to its Chairman that "the increasing deployment of cable modem service by cable operators has prompted local phone companies to speed up their rollout of DSL service" and cut their prices.[99] With "satellite and wireless technologies as promising sources of broadband access . . . [T]hese developments will maximize consumer choice and welfare more effectively and more quickly than government intervention could hope to do."[100]

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[97] *Advanced Services Report* ¶ 48.

[98] *TCI-AT&T Transfer Order* at ¶¶ 94-96.

[99] Letter From FCC Chairman William E. Kennard to Kenneth S. Fellman, Chairman, Local and State Government Advisory Committee (LSGAC), August 10, 1999 (visited Nov. 11, 1999) <http://www.fcc.gov/commissioners/kennard/states.html>.

[100] *Id.*

When the FCC recently declined to require ILECs to "unbundle" Internet capable packet switches and DSLAMs,[101] the Chairman explained its action to the National Association of Telecommunications Officers and Advisors (NATOA).

> "Basically, we told the Bell Companies, 'We want you to get into broadband. We want you to deploy and compete.' We told them that we are not going to require them to unbundle their equipment for rolling out broadband – the DSLAM, the packet-switched network -- because I envision a broadband oasis, where anybody who wants to compete in this broadband marketplace and make the investment to deploy should be able to do so in an unregulated environment or a significantly deregulated environment. Because that is the fastest way we are going to get broadband out to the American public."[102]

He implored the members of NATOA to "resist the urge to regulate" and to give the market a chance.

4. Expert FCC Analysis Corroborates the Basis for Federal Policy

A series of thorough staff papers added still more detail. Internet Over Cable documented how well the FCC's policy of distinguishing competitive technologies from regulated transport services has spurred investment and deployment of competing facilities.[103] In October, 1999, Broadband Today reported the insignificant market share

[101] A Digital Subscriber Line Access Multiplexer (DSLAM) is a network device, usually at a telephone company central office, that receives signals from multiple customer Digital Subscriber Line (DSL) connections and puts the signals on a high-speed backbone line using multiplexing techniques. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 4761 (Mar. 31, 1999) at ¶ 11.

[102] "CONSUMER CHOICE THROUGH COMPETITION," Remarks by FCC Chairman William E. Kennard at the National Association of Telecommunications Officers and Advisors 19th Annual Conference, Sep. 17, 1999 (visited Nov. 8, 1999) <http://www.fcc.gov/commissioners/kennard/speeches.html>.

[103] Barbara Esbin, FCC Office of Plans and Policy, OPP Working Paper No. 30, *Internet Over Cable: Defining the Future in Terms of the Past* (Aug. 1998) (*"Internet Over Cable"*) at 63.

held by cable operators in Internet access,[104] the logistical turmoil which mandatory access orders would involve,[105] and the risk that a slow-down in cable modem investment and roll-out will likely lead to a slowdown in competitive DSL investment and roll-out.[106] The Report confirmed the continuing validity of

> "regulatory restraint to facilitate the rapid deployment of multiple broadband technologies, including cable, DSL, wireless and satellite. Unless and until anti-competitive behavior surfaces, it is preferable to allow market forces to propel cable operators and independent ISPs toward an 'open access' system. Market-based solutions devised by the parties will likely provide a better framework for consumers."[107]

[104] "[T]here are approximately 40 million residential Internet subscribers in North America, approximately one million of whom subscribe to broadband Internet services. It is important to remember that residential broadband Internet subscribers constitute less than 3% of the total Internet subscribers in North America. Although the Bureau expresses no view on whether the residential broadband market is a separate market from the residential narrowband market, a comparison of the numbers between the two is instructive to appreciate the relatively small scale of residential broadband deployment. Even the most optimistic estimates predict that narrowband will still be the dominant subscribed form of Internet access by 2005. One analyst predicted that by 2005, cable will have 34% (23 million subscribers) of the Internet access market, with DSL at 15% (10 million subscribers), and dial-up narrowband at 51%, or 35.7 million households." Deborah A. Lathen, FCC Cable Services Bureau, Staff Report, *Broadband Today* (Oct. 1999) (*"Broadband Today"*) at 32 (Exh. Adelphia 35).

[105] "What was particularly confounding for our participants was the question of where 'open access' should occur. One industry analyst said that 'open access' is decoupling transport from the rest of the Internet, so that cable does not become the 'choke' point. Local government representatives proposed that a local peering arrangement should be made throughout a local high-speed meeting point.

Aside from the technical obstacle of implementation, some of the analysts noted that one of the greatest logistical obstacles to the deployment of distribution systems is the shortage of engineers and the limited infrastructure necessary to physically create and deploy these systems. It was clear that at the time of the Monitoring Sessions, none of the participants had a definitive idea as to how to account for the critical logistical requirements for wide-scale cable broadband deployment."

Broadband Today at 39.

[106] *Id.* at 34.

[107] *Id.* at 43, 46.

This is not one partisan viewpoint by a Democratic chairman. FCC Commissioner Michael Powell (a Republican) has also publicly rejected calls for forced access to cable networks for ISPs. Commissioner Powell recognized that "[m]any consumers will opt for less expensive narrowband service for e-mail and basic applications, rather than paying more for capacity they will not use."[108] Commissioner Powell also recognized that "[c]ontrary to what some suggest, there are a number of viable technologies and service providers in the broadband race, including digital subscriber line ["DSL"], narrowband dial-up connections, integrated services digital network, wireless, satellite and electric utilities."

Commissioner Powell concludes that:

> "Predictive speculation is dangerous enough when practiced by experts steeped in this industry. It is completely foolhardy when practiced by government. . . . For example, if we intervene prematurely to mandate access to cable plant, the harm may be greater to consumers than they would incur if regulators waited until evidence of substantial market power develops. Such intervention could stifle the development of alternative paths to the home that are currently under development and that are attracting investments.

M. VERMONT SHOULD REJECT FORCED ACCESS AS A MATTER OF POLICY

1. Vermont Policy is to Encourage New Technologies Through Reduced Regulation

Both the Board and the Department have already expressed their policy of encouraging the development of competition and technology through reduced regulation. In its February 4, 1999 Order in Docket 5713, Phase II, the Board confirmed its existing policy of "targeted forbearance from exercising regulation." Under that policy, the Board

[108] Remarks of Commissioner Michael K. Powell before the Chicago Chapter of the Federal Communications Bar Association (June 15, 1999) http//:www.fcc.gov/speeches/powell/spmkp902.html.

recognizes that relaxed regulation of new entrants will encourage investment, innovation, and competition, which will ultimately benefit consumers in Vermont. In the Draft VTP, the Department encourages the advancement of the Board's "forbearance" policy. (VTP 3-13). In addition, the Department recommends that the Board "remove legal and economic barriers that prevent competitive entry in all areas of the state. . . ." (VTP 3-13).

Those existing policies should be applied in this case to reject the calls for forced access. As the evidence demonstrates, and as discussed throughout this brief, Adelphia is a new entrant in the Internet access market. Adelphia's PowerLink service has less than 300 customers after over a year of availability. . Judkins Cross Tr. 242-243. And as discussed above, Adelphia faces, and will continue to face, substantial competition from every corner of the Internet access market – dial-up providers, DSL providers, satellite providers, just to name a few. (*See supra* Sections IV(C) & (D)). Just as the Board has found previously, the imposition of forced access regulations on a new entrant, in this case Adelphia, will stifle its incentive to innovate and invest in Internet access service. (*See supra* Sections IV(F), (G) & (I)). The only beneficiaries of that would be Adelphia's competitors, not consumers in Vermont.

2. <u>There is No Record Basis to Impose Forced Access as a Matter of Policy</u>

This Board has authority, under 30 V.S.A. § 231, to condition the issuance of certificates of public good ("CPG") so as to "protect the public good." Even if this authority were not constrained by law (see below), it is clearly in the public good to leave

"forced access" to the market, rather than attempting to regulate the Internet in this early stage.

Vermont has distinctions of which it should be proud. Yet, it remains part of the United States and subject to its policies. The Department's witness was indifferent to these policies and was unwilling to consider their effects on his opinion. "It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." Section 230(b)(2).[109] It is part of a policy choice of government to allow the market, rather than government, to select programming, and to allow the market, rather than government, to select technology. It is part of a policy choice of government to allow facilities based competitors to offer a variety of products over their own facilities, in order to encourage technological innovation. There is a clear national policy not to impose forced access. Mr. Shapiro's opinion is indifferent to these federal policies. Tr. 11/3/99, pp. 285/ln 13 – 289/ln 20 (Shapiro).

The Board does not have an adequate basis to conclude that mandatory Internet unbundling is in the "public good." The arguments advanced in favor of forced access are entirely speculative. They are premised entirely on the remote possibility of Adelphia exercising monopoly power over the Internet access market sometime in the distant future. In contrast, the operational problems inherent to cable systems providing "open access" are current and very real.

[109] As one court put it, "Section 230 was enacted, in part, to maintain the robust nature of Internet communication and accordingly, to keep government interference in the medium to a minimum." *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

3. The Vast Majority of Jurisdictions Have Rejected Forced Access

In the past year, over one thousand five hundred local communities have been asked by AOL, ILECs, or other groups advocating "open access" to impose mandatory ISP access on cable operators. Of those communities, only a handful (three according to Mr. Shapiro) have elected to adopt such requirements. Tr. 11/3/99, pp. 240/ln 9 – 241/ln 21 (Shapiro). As the FCC has catalogued[110] the overwhelming majority of communities – including major markets like Seattle, Denver, Dallas, Miami, Los Angeles – have followed the FCC's approach and declined to adopt forced access requirements. For example, on June 18, 1999, the City of Los Angeles Information Technology Agency issued a report rejecting calls for mandatory access requirements.[111] In October 1999, an expert review panel appointed by Metropolitan King County, Washington advised the County that mandatory access requirements would be premature at this time.[112] On October 19, 1999, the Miami-Dade County Commission voted 10-2 to reject an open-access proposal.[113] On November 3, 1999, voters in Denver, Colorado approved a new 10-year franchise for AT&T that excluded mandatory access requirements for ISPs.[114] On November 8, 1999 the Richmond, Virginia City Council voted 9-0 to reject forced access.[115]

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[110] *LA Report* at 14-15.

[111] *LA Report* at 15.

[112] *Forced Access Requirements Found Premature by King County Expert Review Panel*, PR NEWSWIRE, Oct. 29, 1999.

[113] *Open Access Defeated*, COMMUNICATIONS TODAY, Oct. 20, 1999.

[114] *Voters OK Denver Franchise*, MULTICHANNEL NEWS ONLINE (visited Nov. 3, 1999) <http://www.multichannelnews.com/daily/24d.shtml>.

[115] *See In the States: Weymouth Reverses Stance, Richmond Posts Shutout*, CABLEFAX DAILY p. 1, Nov. 10, 1999. Weymouth, Massachusetts, another participating community in this transfer process, initially

For policy reasons alone, the Board, like the vast majority of franchising authorities, should decline to impose an "open access" condition on Adelphia.

N. THE BOARD SHOULD REJECT FORCED ACCESS AS A MATTER OF LAW

As a matter of law, the Board may not impose an "open access" condition on Adelphia. This is true whether one regards high-speed Internet access as a "cable service" or as a "telecommunications" service. The Board is specifically barred from imposing such a condition, however characterized, as a condition to a cable franchise renewal.

1. Forced Access May not be Imposed on PowerLink as a cable service

a. Cable Service Regulation

It is now widely accepted that cable modem service, (used to provide high-speed Internet access) is a cable service and, therefore, subject to Title VI (the cable television component) of the Communications Act.[116] The 1996 Telecommunications Act modified the existing "cable services" definition to eliminate any doubt that cable services include interactive, enhanced and information services in which subscribers may select and use the content delivered.[117]

The Act clearly provides that "[a]ny franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent

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included a forced access condition in approving the transfer to AT&T, but reversed itself on November 8, 1999 and unconditionally approved the transfer. *Id.*

[116] *Internet Over Cable* at 87.

[117] According to the legislative history, Congress amended the definition of a "cable service" under federal law to "reflect the evolution of video programming toward *interactive* services." Conference Report on S. 652, Telecommunications Act of 1996, H.R. Rep. No. 458 at 167, *reprinted in* 1996 U.S.C.C.A.N. 180 (emphasis added).

consistent with this title."[118] Cable television systems are not subject to generalized common carrier obligations. 47 U.S.C. § 541(c). Congress has nonetheless imposed a substantial set of rules on cable, and the very specificity of these rules undermines any franchising authority right to impose an obligation to provide "access" to ISPs. Congress carved out some specific and limited exceptions to cable operator control over access to the cable system for the provision of services to subscribers, but none of them could authorize a Board condition for ISP access to cable systems.

b. Must Carry

Obviously, ISPs do not qualify as local television broadcasters covered by the must carry statute. 47 U.S.C. §§ 534 -535. Since the FCC first introduced broadcast signal carriage rules in 1972, through the rules adopted pursuant to the 1992 Cable Act, federal law has preempted any local government efforts to regulate access to cable systems by broadcast television stations.[119] Even with respect to the "digital" broadcasts of over-the-air television stations, the FCC has not yet imposed "must carry obligations.

c. Commercial Leased Access

The Department advanced the argument that mandatory ISP access should be authorized under the commercial leased access provisions of the Cable Act. 47 U.S.C. § 532. Much of its argument centered on the proposition that because "video" can be delivered over the Internet, then Adelphia should make leased channels available as commercial leased access. This proposition is based upon an error of fact and of law.

[118] 47 U.S.C. 544(a).

[119] *See, e.g., Clarification of the Cable Television Rules*, 46 F.C.C.2d 175, 178 (1974); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984); *Time Warner Entertainment Co. v. F.C.C.*, 56 F.3d 151, 197-98 (D.C. Cir. 1995)(citations omitted)(subsequent history omitted).

Internet delivered over high-speed cable modems is not "video programming," but it is "cable service." The difference between the two is significant.

Section 612 of the Act was established to address a specific concern: to promote a variety of video programming options on cable. Although Congress recited an interest in promoting a "diversity of information sources," it also expressed the intent to do so in a manner which would assure the growth and development of cable systems. Thus, the Act only requires the leasing of channels, subject to the payment of appropriate fees and negotiation of acceptable terms and conditions, to providers of "video programming."[120] Video programming for leased access purposes is "programming provided by, or generally considered comparable to programming provided by a television broadcast station." 47 U.S.C. §§ 532(b)(5) and 522(2); Tr. 11/3/99, p. 281/ln 2-6 (Shapiro). Broadcasters do not use a reverse path, Tr. 11/3/99, p.278/ln 11-13 (Shapiro), or access the CMTS. Tr. 11/3/99, p. 280/ln 5-9 (Shapiro); Tr. 11/3/99, pp. 280/ln 24 – 281/ln 1(Shapiro). What "data" has ever been included in the vertical blanking interval of broadcast "must carry" stations is specifically exempted from "must carry" obligations by cable. *Digital Data Transmission Within the Video Portion of Television Broadcast Station Transmissions*, FCC 96-274, 11 FCC Rcd 7799, (June 28, 1996); *Amendment of Parts 2, 73, and 76 of the Commission's Rules to Authorize the Offering of Data Transmission Services on the Vertical Blanking Interval by TV Stations*, FCC 84-530, 57 RR 2d 832 at ¶28 (January 24, 1985) ("The Commission is not persuaded that it should reverse its determinations with respect to cable carriage of ancillary services in the teletext and TV aural subcarrier proceedings. Thus we will not require cable systems to

[120] 47 U.S.C. § 532(b)(5) ("Commercial use" defined as "the provision of video programming.").

carry broadcasters' VBI telecommunications services.") *Cf.* Tr. 11/4/99, pp. 54/ln 21-56/ln 10. (Shapiro misinformed). Likewise, Mr. Shapiro wrongly believed that HDTV was a required offering on digital broadcasts. *Cf.* Tr. 11/3/99, p.295/ln 12-17 (Shapiro) *with* 47 CFR §73.624(b).

The Internet offers "multimedia graphics," "information services," and other content with which a customer may "interact, manipulate, and customize" on the screen. This may be seen in the home page of any Internet service provider. One could manipulate a data stream to, for example, receive only stock quotations for securities one owns, or only the weather report for one's zip code. One may "shop" interactively, change the display on the screen, and decide what content, in which order, to view on the PC. The content could be alphanumeric data; video applets; application downloads; and content to be developed.

The FCC defined video programming in 1992,[121] and again in 1993 to exclude such interactive programming, even if that programming may contain video.[122] The very qualities which make Internet content so appealing-- the offering of "multimedia graphics," "information services," and other content with which a customer may "interact, manipulate, and customize" on the screen—removes it from the definition of "video programming." In 1998, the FCC reached a similar conclusion specifically with respect to broadband Internet.[123]

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[121] *In the Matter of Telephone Company - Cable Television Cross-Ownership,*, Second Report and Order, 7 F.C.C.R.. 5781 at 74 (1992).

[122] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation,* 8 F.C.C.R. 5631 at 165-166 (1993).

[123] *Preemption of Local Zoning Regulation of Satellite Earth Stations*, FCC 96-328, 11 F.C.C.R. 19276 at 39, 1996 FCC LEXIS 4267 (1996), *aff'd*, FCC 98-214, 1998 FCC LEXIS 5104 at 59 (September 25, 1998)

Mr. Shapiro could not recall ever checking to see if the Internet qualified under these FCC rulings before he advanced his testimony. Tr. 11/3/99, p. 281/ln 15 (Shapiro).

Even the possibility of "video streaming" in some Internet space would not qualify for carriage, because no Internet service provider could assure that Internet access would be used solely for video streaming. Tr. 11/3/99, p. 283/ln 4-24 (Shapiro) ("it couldn't be segmented, as far as I know"). The C-SPAN site, for example, (Exh. Adelphia 38) goes far beyond the video feed shown on C-SPAN the cable network. It included a program guide, information services, textual information with which the consumer can interact. Tr. 11/3/99, pp. 274/ln 13 – 276/ln 5 (Shapiro). The leased access law does not permit non-video programmers to lease "access" for any purpose except the delivery of video programming to cable subscribers. Moreover, the leased access law does not permit any lessee, video or non-video, to lease upstream channels from the subscriber to the headend.

Further, Section 612 vests control over the terms and conditions of leased access with the cable operator and the FCC, leaves enforcement to the exclusive jurisdiction of the FCC and courts, and specifically prohibits LFAs from adopting obligations in excess of those prescribed by the FCC.[124] There is no room to argue that the Board has authority to require or enforce leased access to cable systems for ISPs.

Mr. Shapiro's testimony argues in favor of forcing Adelphia to provide Internet access service to all ISPs. Shapiro pf., pp. 35-55. The two methods Mr. Shapiro advances for achieving his proposed objective are: (1) forcing Adelphia to make channels available to

[124] On June 1, 1999, an ISP called Internet Ventures, Inc. ("IVI") petitioned the FCC for a ruling that it was entitled to obtain carriage on cable systems pursuant to the Cable Act's Commercial Leased Access rules. *In re Petition of Internet Ventures, Inc.*, CSR-5407-L (filed June 1, 1999). Mr. Shapiro and the Department are participating in that case at the FCC.