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

In the Matter of	)	
	)	
Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities	)	GN Docket No. 00-185
	)	
Internet Over Cable Declaratory Ruling	)	
	)	
Appropriate Regulatory Treatment for Broadband Access To the Internet Over Cable Facilities	)	CS Docket No. 02-52

COMMENTS OF AT&T CORP.

Mark C. Rosenblum
Lawrence J. Lafaro
Stephen C. Garavito
AT&T Corp.
Room 1135L2
295 North Maple Avenue
Basking Ridge, N.J. 07920

Douglas Garrett
James H. Bolin Jr.
AT&T Broadband LLC
188 Inverness Drive West
Englewood, CO 80112

David W. Carpenter
Sidley Austin Brown & Wood
One Bank One Plaza
Chicago, Illinois 60602

David L. Lawson
Daniel Meron
Stephen B. Kinnaird
C. Frederick Beckner
Jennifer Rubin
Sidley Austin Brown & Wood L.L.P.
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 736-8000

Attorneys for AT&T Corp.

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Pursuant to Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, the Commission's Declaratory Order and Notice of Proposed Rulemaking of March 15, 2002, in the above matters,[1] and the Commission's Public Notice of April 19, 2002 (DA 02-909), AT&T Corp. ("AT&T") submits these comments.

INTRODUCTION AND SUMMARY

In its *Declaratory Ruling* in this proceeding, the Commission determined that cable Internet services are neither cable services nor telecommunications services, but are information services subject to the Commission's interstate jurisdiction.[2] The Commission now seeks comment on the implications of that holding. In particular, the *Notice* asks (i) whether the Commission should itself regulate the access of Internet service providers ("ISPs") to cable facilities, and (ii) whether it should preempt state and local regulation of cable Internet services.[3] The Commission should, as it has on many occasions in the past, affirmatively choose not to

[1] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling & Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, ¶ 38 (2002) ("*Declaratory Ruling*" or "*Notice*")

[2] *Id.* ¶ 7.

regulate ISP access to cable facilities on the basis that market forces will far better guarantee efficient, customer-friendly arrangements between cable operators and ISPs (and, indeed, are already doing so). Moreover, the Commission can, and should, declare that state and local authorities cannot impose various forms of arbitrary and anticompetitive assessments and regulations that threaten the continued growth and development of interstate cable Internet services.

The *Notice* marks at least the sixth time in the past four years that the Commission has addressed the question whether "forced access" regulation is necessary to create an environment in which cable-based Internet customers may choose among multiple ISPs. The Commission has repeatedly (and wisely) chosen not to impose such regulation and has instead properly continued to rely upon market forces to encourage the development of the technologies, equipment, systems, and operational processes required to enable cable ISP choice. Recent developments confirm the soundness of that approach.

When the previous comment cycle was concluded nearly 18 months ago, most large cable operators were providing cable Internet services pursuant to contracts that prohibited them from offering multiple ISP access. Nonetheless, recognizing the obvious benefits of workable customer choice, these cable operators were already beginning to lay the technical, operational and economic groundwork for a multiple ISP environment with, among other things, technical trials and discussions with ISPs, equipment manufacturers and software developers.[4] These were ambitious undertakings – the technical and operational challenges associated with any approach to multiple-ISP access over cable were (and continue to be) myriad and daunting.

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[3] *Id*. ¶¶ 72-112.

[4] *Id.* ¶¶ 26-28.

That is because cable networks, unlike common carrier telephone networks, were never designed to provide such services. Rather, cable systems were "designed to send the same content, a package of video channels, in an analog signal format to all subscribers uniformly."[5] Two-way communications capabilities were added later, but that did not change the fundamental architecture of cable systems, which are designed and operated not for point-to-point raw transmission of customers' content, but for the delivery of finished services selected through the exercise of editorial discretion and managed by the cable operator.[6] From the outset, therefore, cable Internet services were self-provided by cable operators (generally using inputs purchased from a single supplier of Internet connectivity). The equipment, systems, and business models needed to support a shift to multiple ISPs simply did not exist,[7] nor was (or is) there a uniform view among ISPs on whether or how each envisioned or desired the ability to reach customers over cable lines. And although many ideas for accomplishing multiple ISP access had been advanced, none had been tested for economic or technical viability.

Accordingly, the Commission's past determinations have, of necessity, always been based upon predictive judgments that cable companies will continue to act on their strong incentives to take cost-effective steps to develop multiple ISP arrangements and, ultimately, to reach the commercially practical deals with unaffiliated ISPs that economics and technology permit. That was a reasonable assumption, because, unlike the Bell Operating Companies ("Bells") and other incumbent local telephone companies, cable companies have no dial-up services or lucrative second line and T1 sales to protect and thus have unqualified incentives to promote their broadband services and to find viable ways to accommodate unaffiliated ISPs so as

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[5] *Id.* ¶ 12.

[6] *Id.* ¶¶ 63-68.

[7] *Id.* ¶¶ 12-13, 21-25.

to attract as many broadband Internet customers as possible (and thereby to generate the revenues necessary to cover the high fixed costs of network upgrades). Also, unlike the Bells, cable companies now face substantial and growing competitive pressures, as virtually all cable subscribers can (and many now do) select alternative suppliers (notably DBS providers) for video programming, underscoring the incentives of cable companies to add attractive new services and features to retain customers.

Those predictive judgments have now been proven correct in the marketplace. As exclusivity provisions have terminated and technical trials have been conducted, each of the major multiple systems operators ("MSOs") has, as predicted, moved aggressively to reach agreements with unaffiliated ISPs. A number of ISPs are already providing cable Internet services under these commercially-negotiated agreements, and announcements of multiple ISP deployments in additional markets are becoming increasingly common. For its part, AT&T has entered into agreements with EarthLink and two smaller ISPs, is negotiating with a number of others, and expects that EarthLink (followed by others) will soon be providing Internet services over AT&T cable systems. This, too, stands in stark contrast to the Bells, which continue to do everything in their power to create a hostile environment for unaffiliated broadband ISPs (and now urge the Commission in other proceedings greatly to augment that power).

Although these numerous and diverse commercial arrangements confirm that cable operators and ISPs have every incentive to find ways to make multiple ISP access over cable work, they also confirm the great uncertainty about which types of arrangements will ultimately prove most effective. In noting the broad market shift whereby cable operators are now promoting consumer access to multiple ISPs, the Commission has recognized that "the multiple-ISP environment requires a re-thinking of many technical, operational, and financial issues including implementations of routing techniques to accommodate multiple ISPs, Quality of Service, and the compensation, billing, and customer service arrangements between the cable operator and the ISPs."[8] All of these concerns, the Commission recognized, "center around the difficulties of trying to modify a service designed to be provisioned by a single cable modem service provider to allow the provisioning of cable modem service by multiple service providers."[9]

Given the lack of actual commercial experience and the diversity of needs and preferences among ISPs, the existing agreements between cable operators and ISPs have, not surprisingly, taken a number of different approaches to these issues, and it is likely that as early efforts produce additional learning, still other approaches will develop. In this environment, forced access regulation is not just unnecessary – it would be disastrous. Any attempt at "one-size-fits-all" cable regulation would put an end to the vibrant commercial experimentation that is necessary to develop the most efficient solutions to providing multiple ISP access over cable and would prevent or impair the implementation of "case by case" access arrangements tailored to meet the particular needs or requests of individual ISPs.[10]

In these circumstances, there is no legal or policy basis for forced access regulation. Here, it is important to note that the Commission's regulatory authority is at its most tenuous when the Commission purports to act under the "ancillary" jurisdiction of Title I, and there is no serious argument that forced access regulation is "imperative" in order to allow the Commission "to perform with appropriate effectiveness" its other responsibilities under the Communications

[8] *Id.* ¶ 29 (footnotes omitted).

[9] *Id.*

[10] AT&T's comments address (and the term "forced access" is used herein to refer to) cable Internet access regulation of any form. *See id.* ¶ 74.

Act. Moreover, any forced access regulation would have to survive the exacting First Amendment scrutiny that accompanies any regulation of cable operators' carriage decisions. Such regulation could only be justified by "substantial evidence" both that the harms it seeks to prevent or redress "are real, not conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[11] Neither is possible. Cable operators are unquestionably acting on their incentives to provide ISP choice even in the absence of regulation. But only experience will tell what types of arrangements will ultimately prove most effective, and thus government intervention – which would necessarily be uninformed – could only discourage and delay the widespread deployment of effective multiple ISP access (and, indeed, the further development of cable Internet service itself).

Furthermore, and contrary to the suggestions in the *Notice* (¶¶ 73, 77-78), nothing that the Commission does here should have any impact on the very different rules that should emerge from the ongoing wireline broadband proceeding. Regulatory parity demands that a consistent analytical framework be applied and that the resulting regulations reflect the key differences between telephone and cable networks. For that reason, there is no inconsistency in reaching the correct regulatory conclusions here (*i.e.*, no forced access regulation) and in the wireline broadband docket (*i.e.*, maintaining existing requirements that the Bells provide nondiscriminatory access to both carriers and ISPs). Regulation of cable Internet services is unwarranted because cable operators have clear incentives to maximize usage of broadband services and to reach commercially reasonable deals with any ISPs that might improve the customer experience. By contrast, continued regulation of wireline broadband services is

[11] *Turner Broadcasting Sys., Inc.* v. *FCC*, 512 U.S. 622, 664, 666 (1994) (*Turner I*).

necessary because the Bells have substantial market power and are strongly influenced by the reality that broadband services compete with their legacy monopolies.

In short, it is now more clear than ever that the *status quo* of "vigilant restraint" is the only appropriate response to pleas for cable forced access regulation.

The Commission should, however, take immediate action in this proceeding to address a significant threat to a vibrant, multiple-ISP cable Internet environment: state and local assessments and regulations that create barriers to entry and impair the growth of efficient multiple ISP access. At least four categories of state and local laws and regulations are inconsistent with Title VI and thus should be declared to be preempted and superseded: (1) franchising authority regulations imposing open access requirements on cable Internet access; (2) state and local laws assessing franchise fees on cable modem service; (3) local franchising authorities' regulation of the terms and conditions for cable Internet services; and (4) state and local laws restricting a cable provider's right to collect or disclose its customers' personally identifiable information to market its services. But even if Title VI did not itself preempt these state and local laws (as it clearly does), preemption of these state and local laws would be imperative for the Commission to exercise its Title VI authority effectively, and thus the Commission could and should exercise its Title I ancillary authority to do so.

Finally, the Commission should also exercise its jurisdiction to resolve potential claims that the Commission's declaratory ruling that cable Internet services are information services, but not cable services, means that cable operators violated the Act by including in their rates the full cable Internet service franchise fee amounts assessed by and paid to local franchising authorities. This issue is of nationwide import and thus is precisely the kind of franchise fee dispute over which the Commission has traditionally exercised its statutory jurisdiction over the inclusion of franchise fees in cable operator rates. The Commission should rule that cable operators have no liability under Title VI because the statute allows operators to charge subscribers all franchise fees actually assessed by (and paid to) a franchising authority and not refunded by that entity (regardless of whether it is later determined that the franchise fees were assessed in error). In the alternative, the Commission should rule that its declaration that cable Internet services are not cable services has prospective effect only.

ARGUMENT

I. FEDERAL FORCED ACCESS REGULATION OF CABLE WOULD BE BOTH UNSOUND AND UNLAWFUL.

A. Developments In The Past Eighteen Months Have Confirmed That The Market Is Working And That Cable Forced Access Is Entirely Unnecessary And Would Be Profoundly Counterproductive.

The Commission has repeatedly concluded that "forced access" regulation is unnecessary to encourage high speed cable Internet services that provide consumers with a choice of ISPs.[12]

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[12] *See generally Inquiry Concerning the Deployment of Adv. Telecomm. Capability to All Americans in a Reasonable & Timely Fashion*, CC Docket No. 98-146, Third Report, 17 FCC Rcd. 2844 (2002) ("*Third Section 706 Report*"); *Inquiry Concerning the Deployment of Adv. Telecomm. Capability to All Americans in a Reasonable and Timely Fashion*, CC Docket No. 98-146, Second Report, 15 FCC Rcd. 20913 (2000) ("*Second Section 706 Report*"); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 99-251, Mem. Op. & Order, 15 FCC Rcd 9816 (2000) ("*AT&T-MediaOne Merger Order*"); *Inquiry Concerning the Deployment of Adv. Telecomm. Capability to All Americans Pursuant to Section 706 of the Telecomms. Act of 1996*, CC Docket No. 98-146, Report, 14 FCC Rcd. 2398 (1999) ("*First Section 706 Report*"); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 98-178, Mem. Op. & Order, 14 FCC Rcd. 3160 (1999) ("*AT&T-TCI Merger Order*"). The *AOL-Time Warner Merger Order* is not to the contrary. The Commission made clear that its order did not "portend any specific policy determinations" but was based on the "unique" facts of that merger. *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Time Warner, Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee*, Mem. Op. & Order, 16 FCC Rcd. 6547, ¶¶ 54-55, 58 (2001) ("*AOL-Time Warner Merger Order*"). In particular, the Commission found that AOL Time Warner would have a "*unique* concentration of assets (vast narrowband membership and the product that created it, access to Time Warner cable systems, and extensive Time Warner

Recent developments confirm beyond doubt that the Commission should continue to maintain that consistently held policy.

Developing and deploying cable Internet service was an extraordinarily risky and costly enterprise. To attract the necessary investment and expertise, cable operators agreed to limited term exclusivity provisions that generally precluded multiple ISP access. Those exclusivity rights have only recently terminated. Nonetheless, recognizing the benefits of providing customers a choice of ISPs, most cable companies had already begun the difficult and intensive tasks of laying the technical, operational and economic groundwork for a multiple ISP environment.[13] AT&T, in particular, was an early convert to the now widespread belief that economically and technically viable multiple ISP access would benefit both cable companies and consumers. As explained in AT&T's earlier comments in this proceeding, for example, AT&T conducted a $20 million multiple ISP trial in Boulder, Colorado from November 2000 to August 2001 in anticipation of being able to offer ISP choice after June 2002.[14]

Contractual limits, however, were not the only roadblock to multiple ISP access over cable. As the *Declaratory Order* recognizes, cable operators faced a number of daunting technical and operational hurdles to providing customers access to multiple ISPs.[15] These unique difficulties arise in large part from the nature of cable systems, which were not engineered

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content assets)." *Id.* ¶ 54 (emphasis added); *see also id.* ¶ 55 ("this merger would place AOL Time Warner in a unique position").

[13] Although these contracts prohibited cable companies' from contracting with multiple ISPs, they did not prohibit technical trials to study the feasibility of offering ISP choice. And at all times, cable modem customers were free to "click through" to any Internet content or ISP without viewing even the cable operator's "home page."

[14] AT&T NOI Reply at 11-15.

[15] *Declaratory Order* ¶ 15.

according to the "common carrier" model that guided the development of telephone networks.[16] Indeed, cable systems were initially designed to provide only "one-way" communications – *i.e.*, the delivery of video programming selected by the cable operator to the subscriber.[17] Subsequently, cable operators developed and deployed technology that permitted "two-way" communications on cable facilities.[18] But even with these advances, cable systems remain fundamentally different from traditional wireline telephone networks. In particular, cable systems are engineered from the ground up to deliver services selected by the cable operator, through the exercise of its editorial discretion.

At the time that comments were last filed in this proceeding, there was an emerging consensus about a general approach that could be used to provide multiple ISP access (*i.e.*, source-based routing), but the specific means of implementing that technology in a commercial setting remained highly uncertain and untested.[19] Thus, there were no developed standards or technologies for providing operation support systems to support ordering, billing, maintenance, and other essential functions.[20] Nor was it well understood how cable operators could provide Internet address assignment in a multiple ISP environment or manage the network in order to prevent congestion and ensure robust service.[21] Myriad network security, customer care, and other issues, for which there were no easy answers, remained unresolved.[22]

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[16] Declaration of Susan Marshall ¶ 3 (attached as Ex. A) ("Marshall Dec.").

[17] *Id.* ¶ 12.

[18] *Id.* ¶¶ 12-14.

[19] *See* AT&T NOI Comments at 56-61; *see also* Excite@Home at 11-12 (detailing challenges associated with accommodating multiple service providers on cable networks); NCTA at 69-76 (highlighting technical and operational issues associated with multiple ISP access).

[20] *Declaratory Ruling* ¶ 15.

[21] *Id.*

[22] *Id.*

Again, these technical difficulties stemmed from the fact that cable networks were (and are) very different from telephone networks, which were designed and have always been operated for point-to-point common carriage and which use the same common carrier facilities for high-speed Internet as for basic telecommunications services. In contrast, entirely new facilities, systems and capabilities, unnecessary to provide core video programming services, needed to be developed in order to provide cable modem service.[23]

For these reasons, there was no consensus in the last round of comments as to how, in fact, ISP choice could best be accomplished on cable systems. To the contrary, the comments proposed widely varying (and largely undefined and unworkable) proposals – so much so that the Commission was "struck by the complexity of the proposals for multiple ISP access advocated by some commenters."[24] For example, some commenters, recognizing that there was no defined technical standard for open access, argued that independent private sector bodies should be created to "act as gatekeepers to establish and administer interconnection tariffs and standards."[25] Others called on the Commission itself to take the lead in developing standards on a host of technical issues, including privacy,[26] confidentiality,[27] service quality,[28] operational support systems,[29] the bundling and unbundling of services,[30] and content.[31] Nor was there any

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[23] Marshall Dec. ¶ 4.

[24] *See Notice* ¶ 88 n.317.

[25] National Association of Towns and Townships ("NATT") NOI Comments at 11-12; *see also* Rodopi NOI Comments at 5, 9-10; Center for Democracy & Technology at 19.

[26] *See* Consumers Union NOI Comments at 21, 27-28**.**

[27] *See, e.g.,* Big Planet NOI Comments at 14; EarthLink NOI Comments at 54.

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

[29] *See* EarthLink NOI Comments at 54.

[30] *See* CompTel NOI Comments at i, 6, 32-33; Big Planet NOI Comments at 14; Rodopi NOI Comments at 12.

agreement as to what "forced access" would mean in connection with such critical operational issues as the speed at which cable operators provide access to ISPs, timely notification of any new network or operational interface, firewalls, protocol masking, and routing delays.[32] Some argued that cable operators should be required to vary terms in order to accommodate the specific needs of the ISP seeking access depending upon its size, location, and business model;[33] others warned of the purported dangers of such prioritization or variation of treatment by cable operators.[34] These conflicting comments clearly illustrated that a forced access regime would be unworkable and would quickly expand to encompass regulation of Internet services themselves.[35]

Two things were clear from the existing record established in 2000-2001. First, the record showed that government mandated open access was unnecessary because cable operators have strong incentives to find workable solutions to multiple ISP access.[36] Cable modem services are cable's first Internet offering. Thus, in contrast to incumbent LECs that have second line and ISDN/T1 revenues to protect from cannibalization, increasing broadband deployment

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

[32] *See, e.g.,* EarthLink NOI Comments at 52; Rodopi NOI Comments at 12; Consumers Union NOI Comments at 21; CWA NOI Comments at 5.

[33] *See* OpenNet NOI Comments at 20.

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

[35] *See* Millennium Digital Media at 3-4; Competitive Policy Institute at 7. *Cf.* Assoc. for Maximum Service Television ("AMST") at 1; Assoc. of Public Television Stations at 4. Some commenters even expressly urged the Commission to regulate caching, content, and video-streaming – issues that affect the Internet as a whole and not simply cable operators. Others suggested that new services and functionalities that have not yet even been developed should nevertheless be subjected – in advance – to an access mandate. *See, e.g.,* EarthLink at 24; Consumers Union at 21, 24.

[36] *See* AT&T NOI Comments at 36-48; AT&T NOI Reply at 5-10; Ordover-Willig NOI Reply Dec. ¶ 45.

and revenues is unambiguously positive for cable operators. Accordingly, cable operators have strong incentives to offer ISP choice because this can increase the overall value of their offering and gives them a greater opportunity to recover their massive upgrade investments. Indeed, the incentive for cable companies to offer choice is particularly strong because most potential cable modem subscribers are currently narrowband subscribers that have the ability to chose any ISP that they want.[37]

Second, it could not have been clearer that the costs of grafting a forced access scheme onto cable systems that have never been subjected to such regulation would be enormous, particularly in the face of great uncertainty about how multiple ISP access could be deployed on cable in an efficient manner that improved, rather than degraded, the consumer experience. As Professors Ordover and Willig explained, given the enormously difficult technical and economic issues inherent in "forced access," no one-size-fits-all regulation can be expected to achieve commercially reasonable access.[38]

In the past, those two facts – the cable companies' strong pro-competitive incentives and the high cost of regulation in this specific context – have convinced the Commission that forced access regulation of cable was not in the public interest.[39] The Commission properly (and correctly) assumed that in light of these facts, cable companies would act expeditiously to solve the technical impediments to open access and work cooperatively with ISPs to reach

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[37] *See* Marshall Dec. ¶ 7.

[38] Ordover-Willig Cable NOI Reply Dec. ¶¶ 27-29. *See also* Progress and Freedom Foundation NOI Comments at 11-12; TIA NOI Comments at 24; AT&T documented in detail in its prior comments the enormous costs of forced access, even in the absence of recent voluntary efforts by cable companies to provide their subscribers choice of ISP. *See* AT&T NOI Comments at 66-85; AT&T NOI Reply Comments at 26-28. AT&T will not needlessly repeat these arguments here.

[39] *See AT&T-MediaOne Merger Order* ¶¶ 122-128; *AT&T-TCI Merger Order* ¶¶ 93-96.

commercially reasonable terms for access. Now, however, there is no longer any reason merely to *assume* that this will happen – for it is already happening today.

"The cable modem service marketplace has changed significantly."[40] There is now overwhelming market proof that cable company incentives to develop workable multiple ISP arrangements exist and are quite strong and, indeed, that cable operators have embraced the multiple ISP environment and are moving with all deliberate speed to implement that environment.[41] As the Commission recognized, AT&T, Comcast, and other cable operators have "all embarked on a multiple-ISP approach to offering cable-modem service."[42] In the current environment, therefore, there is simply no multiple ISP "problem." An active multiple ISP environment on cable is rapidly emerging through voluntary, commercial arrangements.[43]

AT&T is moving quickly to begin rolling out Broadband Choice in the third quarter of 2002.[44] After completing both phases of its Boulder technical trial and, upon the demise of Excite@Home, building a robust cable modem network specifically designed to accommodate multiple ISP access, AT&T reached an agreement with EarthLink in March 2002. Pursuant to that agreement, EarthLink will shortly offer Internet services over AT&T's Boston and Seattle systems.[45] In April 2002, AT&T Broadband signed a similar deal with NET1Plus, a regional ISP

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[40] *Notice* ¶ 83.

[41] *See id.* ¶ 84 ("We ask the commenters to refresh the record on these points."); *id.* ¶ 89 ("What lessons, if any, do trials and current commercial offerings of multiple ISP access reveal about the costs and benefits of multiple ISP access.").

[42] *Declaratory Order* ¶ 26.

[43] Relatedly, cable companies continue to provide their Internet subscribers unfettered "click through" access to unaffiliated ISPs and/or content.

[44] Marshall Dec. ¶ 14.

[45] *See* EarthLink, Inc., Press Release, *AT&T Broadband And EarthLink Forge ISP Choice Agreement* (March 12, 2002) ("*EarthLink Agreement Press Release*"); Marshall Dec. ¶ 14.

that will provide Internet access over the AT&T Broadband network in Massachusetts.[46] And in early May, AT&T Broadband reached an agreement with Internet Central, a Seattle-based ISP that will provide Internet access in the greater-Seattle area.[47] AT&T is also actively negotiating with other ISPs and hopes to offer consumers additional choices in the future.

Other cable operators are moving in the same direction. United Online (the combination of Juno and NetZero) has entered into an agreement with Comcast to provide Internet access service to Comcast's customers in Indianapolis and Nashville, and United is apparently already providing service pursuant to that contract.[48] Similarly, Cox has conducted an open access trial with EarthLink and AOL in Arkansas in order to "continue to add value to our high-speed product and expose more consumers to the benefits of broadband."[49]

Although AOL Time Warner's unique position as the dominant ISP led the FTC to impose certain multiple ISP requirements as a condition of merger approval, AOL Time Warner's multiple ISP experience is also instructive. Before its merger with AOL, Time Warner terminated its exclusive agreement with Road Runner so that it could offer multiple-ISP access earlier than if it had waited for the agreement to expire.[50] As of March 2002, AOL Time Warner was offering customers in its 24 largest markets a choice of three national ISP services.[51] And, from March 2002 to date, AOL Time Warner has added nine additional markets in seven

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[46] Marshall Dec. ¶ 15.

[47] *Id.* ¶ 15.

[48] Jim Barthold, *Comcast cuts 'open access' deal with NetZero and Juno*, TelephonyOnline.com (Feb. 26, 2002); http://www.comcast.com/PressRoom/viewrelease.asp?pressid=130.

[49] http://www.cox.com/PressRoom/Cox%20AOL%20Earthlink%20Trial.asp?LocalSys=Corporate&dName=In+Your+Area.

[50] *See Declaratory Order* ¶ 26 n.116.

[51] *See id*.

states.[52] The company recently reported that its broadband subscriber additions increased 20 to 25 percent in initial launch markets as a result of the marketing efforts of unaffiliated ISPs.[53]

The existence of these diverse commercial arrangements both confirms that there is no need for forced access regulation and that any attempt to dictate the terms of access would undermine, rather than advance, the goal of effective, customer-friendly ISP choice. Although much has been accomplished in the last 18 months, there still remains much uncertainty about the best means (from an operational and technical standpoint) for providing subscribers with a choice of ISPs.[54] The varying initial attempts of cable companies and ISPs to implement multiple ISP access must be real-world tested for reliability, "scalability," and economic viability.[55] As Ms. Marshall explains, for example, the trials and commercial experience so far have demonstrated that multiple-ISP access is technically feasible over a hybrid-fiber coaxial network and that the provisioning models developed by AT&T and other companies appear

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[52] *See* EarthLink, Inc., Press Release, *EarthLink Launches High-Speed Internet Service In The Desert Cities Over Time Warner Cable* (Apr. 15, 2002) (Palm Desert, CA); EarthLink, Inc., Press Release, *EarthLink Launches High-Speed Internet Service In San Diego Over Time Warner Cable* (Apr. 8, 2002) (San Diego, CA); EarthLink, Inc., Press Release, *EarthLink Launches High-Speed Internet Service In Detroit Over Time Warner Cable* (May 13, 2002) (Detroit, MI); EarthLink, Inc., Press Release, *EarthLink Launches High-Speed Internet Service In Minneapolis Over Time Warner Cable* (May 6, 2002) (Minneapolis, MN); EarthLink, Inc., Press Release, *EarthLink Launches High-Speed Internet Service In Lincoln, NE Over Time Warner Cable* (March 18, 2002) (Lincoln, NE); EarthLink, Inc., Press Release, *EarthLink Launches High-Speed Internet Service In The Memphis Area Over Time Warner Cable* (June 3, 2002) (Memphis, TN); EarthLink, Inc., Press Release, *EarthLink Launches High-Speed Internet Service In Austin Over Time Warner Cable* (March 4, 2002) (Austin, TX); EarthLink, Inc., Press Release, *EarthLink Launches High-Speed Internet Service In The Waco Area Over Time Warner Cable* (Mar. 25, 2002) (Waco, TX); EarthLink, Inc., Press Release, *EarthLink Launches High-Speed Internet Service In Green Bay Over Time Warner Cable* (May 20, 2002) (Green Bay, WI).

[53] *See Time Warner Cable Touts Multi-ISP Upside*, (May 1, 2002), Cable Datacom News (available at: http://www.cabledatacomnews.com/may02/may02-3.html).

[54] *Declaratory Order* ¶ 15.

[55] *Id*. ¶ 15.

viable.[56] But early efforts (such as AT&T's Boulder trial) have been intensely manual and prohibitively expensive, and additional, experience-based development will be required.[57] For instance, there are still many questions to be answered concerning installation, maintenance of customer data and records, billing, customer service, operation of call centers, "trouble ticketing" for various system components (*e.g.*, modems, routers, etc), assignment of IP addresses, and the operation of various other system components (*e.g.*, regional data centers). These are just a few of the hundreds of issues that still must be confronted, and although the trials and limited commercial experience to date have provided valuable insights, they have underscored that these issues cannot be effectively resolved all at once or through uniform national approaches, but must be addressed thoughtfully and deliberatively in commercial settings.

Just as importantly, multiple ISP access business models are nascent and emerging. There is a broad spectrum of ways in which multiple ISP access can – and is – being provided. In some arrangements, for example, the ISP may provide certain facilities and equipment necessary to provide the finished retail Internet service and also be responsible for marketing and billing the retail service. At the other end of the spectrum, the ISP may provide none of its own facilities, and the cable operator may be involved in the marketing and billing of the retail service. The arrangements entered into to date show this variability, and it remains to be seen which business models will ultimately prove best. Indeed, for that reason, it appears that many of the agreements currently being entered into are limited in their scope and duration, confirming that both cable operators and ISPs want to have flexibility to modify their arrangements as they gain more experience in the new multiple ISP environment.

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[56] *See* Marshall Dec. ¶¶ 10, 18.

[57] *See id*. ¶ 11.

In light of the huge resources and efforts being devoted to customer choice, it is inevitable that viable business models will emerge. But that can only happen if cable companies and ISPs retain the flexibility to modify their arrangements in response to actual commercial experience. Conversely, imposing forced access now would threaten this experimentation. Given that there is clearly no "single best" approach to multiple ISP access over cable today, the Commission would have to pick a standard that ultimately could prove unsuitable (or at least sub-optimal). Thus, forced access regulation would, as the *Notice* recognizes, inevitably force the Commission to resolve on a case-by-case basis disputes about precisely how such access would have to be implemented.[58]

In sum, nothing has changed that calls into question the Commission's prior orders rejecting cable forced access as unsound public policy. To the contrary, the strides made by cable companies in providing multiple-ISP access confirm the Commission's common sense prediction that cable companies have powerful incentives to give their customers a choice of ISPs. Forced access regulation threatens to stop this progress dead in its tracks, replacing successful commercial negotiations and experimentation with endless bickering over inflexible government-mandated terms of access.

B. On This Record, Forced Access Would Be Unlawful.

Because there is no clear need for forced access regulation to foster ISP choice over cable, there is also no legal basis for any such regulation.

First, the Commission's Title I authority extends only to matters "reasonably ancillary to the effective performance of the Commission's various responsibilities."[59] As the courts have consistently recognized, as a pre-condition to the exercise of "ancillary jurisdiction" under Title

[58] *Notice* ¶ 88.

I, the Commission must show that the regulation in question is "imperative" in order to allow the Commission "to perform with appropriate effectiveness" its other responsibilities under the Communications Act.[60] Thus, in *Southwestern Cable*, the Supreme Court upheld the Commission's exercise of limited jurisdiction over cable operators (prior to enactment of Title VI of the Communications Act) under Title I because failure to regulate cable operators could "jeopord[ize]" the Commission's core responsibilities under Title III to ensure "the orderly development of an appropriate system of broadcasting."[61]

Here, forced access simply cannot be characterized as "imperative" in order to prevent "interference" with one of the Commission's "core responsibilities." Even assuming that promotion of customer choice of an ISP falls within the Commission's "core responsibilities" under the Act, "forced access" regulation plainly is not necessary to prevent interference with that objective. To the contrary, as explained above, the major cable operators have moved aggressively to reach agreements with unaffiliated ISPs. A number of ISPs are already providing cable Internet services under these commercially-negotiated agreements, and announcements of multiple ISP deployments in additional markets are becoming increasingly common. Any attempt at a "one-size-fits-all" forced access regulation would put an end to the vibrant commercial experimentation that is necessary to develop the most efficient solutions to providing multiple ISP access over cable. In short, the essential predicate to Title I-based forced access

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[59] *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

[60] *Southwestern Cable*, 392 U.S. at 173. *See also FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) ("*Midwest II*") (holding that common carrier requirements imposed upon cable broadcasters cannot be justified simply because the proposed rules may promote statutory objectives).

[61] *Southwestern Cable* at 175, 177; *see also Midwest II* at 702 ("regulation was imperative" in *Southwestern Cable* "to prevent interference with the Commission's work in the broadcasting area.").

regulation of cable companies – the "imperative" need to protect fulfillment of a core statutory responsibility – is missing.[62]

Second, the First Amendment independently precludes this type of regulation as a response to conjectural problems. As the Supreme Court held in *Turner Broadcasting System, Inc.* v. *FCC*, "[t]here can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."[63] For reasons already detailed in court opinions and earlier comments in this proceeding, any requirement forcing cable operators to provide access to competing ISPs is subject to heightened scrutiny that a forced access requirement would clearly fail.[64]

Under intermediate scrutiny, a speech regulation will only be upheld if it furthers an important governmental interest that is unrelated to the suppression of free expression and does not burden substantially more speech than necessary.[65] To date, proponents of forced access have claimed there is an important governmental interest in protecting competing ISPs, and ensuring that consumers have access to a range of Internet service and content.[66] But it is not enough that the government's interests are important in the abstract. The government must

[62] This stands in stark contrast to the Bell's high-speed Internet services. The Bells have Title II obligations to provide high-speed transport to ISPs (and others) on a common carrier basis. But even if the Bells were successful in evading those Title II requirements, access regulation would be appropriate under Title I because it would be "imperative" to ensure "realization of some of the Commission's most important goals," *Southwestern Cable*, 392 U.S. at 175. – *i.e.*, the prying open of monopoly voice and data markets.

[63] 512 U.S. 622, 636 (1994) ("*Turner I*").

[64] *See*, *e.g.*, *Comcast Cablevision of Broward County* v. *Broward County*, 124 F. Supp. 2d 685, 697 (S.D. Fla. 2000). *See also* Raymond Shih Ray Ku, *Open Internet Access and Freedom of Speech: A First Amendment Catch 22*, 75 Tul. L. Rev. 87, 116-17 (2000).

[65] *See United States* v. *O'Brien*, 391 U.S. 367, 377 (1968); *see also Turner I*, 512 U.S. at 662.

[66] *See* Ku, *Open Internet Access*, 75 Tul. L. Rev. at 118.

present "substantial evidence" that the harms it seeks to prevent or redress "are real, not conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[67]

Here, proponents of forced access regulation have not, and cannot, produce "substantial evidence" that such regulation is necessary to protect competing ISPs or to ensure access to a range of services and content. As noted, absent any regulation by the Commission, cable companies have invested enormous sums to provide multiple-ISP access voluntarily. This is fully consistent with basic economics, which (correctly) predicts that cable companies would have strong incentives to reach agreements with unaffiliated ISPs in order to maximize the attractiveness of their cable modem offerings. As the Commission's former Chairman testified before Congress: the Commission has "declined to create a new regulatory regime to address what was only a *theoretical* problem."[68] There is even less basis today for a finding that the harms sought to be addressed by forced access are real, not conjectural, and that forced access would alleviate those harms in a direct and material way.[69]

Several recent decisions confirm the First Amendment barriers to cable forced access regulation. In *Time Warner Entertainment Co.* v. *FCC*, the D.C. Circuit struck down the

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[67] *Id*. at 664, 666.

[68] *See Internet Deregulation; Web Information Privacy: Hearing on H.R. 1686 and H.R. 1685 Before the House Comm. on the Judiciary*, 106th Cong. (July 18, 2000) (statement of William Kennard, Chairman, FCC) (emphasis added).

[69] *See Broward*, 124 F. Supp.2d at 685 (concluding that "the harm [a forced-access requirement] is purported to address appears to be non-existent."); *see also* Ku, *Open Internet Access*, 75 Tul. L. Rev. at 119. Even if the government's interest were real, forced access would still burden substantially more speech than necessary because the government could further its interests by offering subsidies to ISPs, opening up government-owned technology to ISPs, or barring cable operators from denying click-through access to ISPs. *See id.* at 123 n. 262.

Commission's vertical and horizontal concentration limits on cable operators.[70] Applying intermediate scrutiny, the court held that the Commission had not presented "substantial evidence" to support its numerical limits and that the limits were based upon "mere conjecture."[71] Similarly, the Commission has rejected recent efforts to infringe on free speech, tentatively concluding that mandatory simultaneous carriage of both a television station's digital and analog signals burdens cable operators' First Amendment rights substantially more than is necessary to further the government's interests.[72] In reaching this conclusion, the Commission found that supporters of the measure had not built a substantial record of the harm broadcasters would suffer without it and of the burden it would impose on cable operators.[73] Accordingly, the Commission requested that proponents present "specific empirical information" to support their position. The Commission also requested information on whether cable operators are voluntarily carrying digital signals, noting that "[i]f broadcasters are being carried by agreement, then they may not be harmed in the absence of a digital carriage requirement."[74]

Both decisions underscore the substantial evidentiary showing required to pass heightened First Amendment scrutiny. The Commission may not act upon "mere conjecture" about market conditions, and it must build a substantial record of the harm sought to be cured and of the burden that would be imposed on cable operators. As detailed here and in prior comments, no such record exists, or, given the marketplace realities, could be compiled, with regard to forced access.

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[70] 240 F.3d 1126 (D.C. Cir. 2001).

[71] *Id*. at 1130, 1137-38.

[72] *See First Report and Order and Further Notice of Proposed Rulemaking, Carriage of Digital Television Broadcast Signals*, FCC 01-22, 2001 WL 69391 (2001) ("Digital TV First Report").

[73] *Id.* at ¶ 12.

[74] *Id*. at 115.

C. The Commission's Decisions In This Proceeding Should Not Dictate, Or Be Dictated By, The Necessarily Different Decisions Reached In The *Wireline Broadband Proceeding.*

The Commission seeks comment on whether its "decisions" in this proceeding "impact, or [are] impacted by, the conclusions we make in our *Wireline Broadband NPRM* proceeding."[75] The short answer is that there is no way in which a proper Commission decision to continue to refrain from imposing forced access upon cable operators would, legally or logically, require the Commission to lift existing regulations imposed on the Bells that are required by the Telecommunications Act of 1996 and by the Commission's *Computer Inquiries* rules.[76]

Identical treatment of cable modem and wireline broadband facilities is flatly inconsistent with the Commission's goal of "an analytical approach that is, to the extent possible, consistent across multiple platforms."[77] Contrary to the Bells' simplistic "regulatory parity" drumbeat, an analytically consistent approach does not entail parallel regulation where conditions differ.[78] And there plainly are key distinctions between cable and local telephone networks and services that require different regulations.[79]

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[75] *Notice* ¶ 93.

[76] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry) – Phase I*, Report & Order, 104 FCC Rcd. 958 (1986) ("*Computer III*"), *recon.*, 2 FCC Rcd. 3035 (1987) (*"Phase I Recon. Order*"), *recon.*, 3 FCC Rcd. 1135 (1988) ("*Phase I Further Recon. Order*"), *recon.*, 4 FCC Rcd. 5927 (1989) ("*Phase I & II Second Further Recon. Order*"), *vacated sub nom.*, *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) ("*California I*").

[77] *Id.* ¶ 73.

[78] *See Public Service Company of Oklahoma Request for Declaratory Ruling, Declaratory Ruling*, 3 FCC Rcd. 2327, ¶ 21 (1988) ("Public Service Company") (services provided over private utility network did not have to be subject to the same regulatory regime as Bell local services just because the services were substitutable and competitive).

[79] *See*, *e.g.*, *Appropriate Framework For Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, FCC 02-42, 17 FCC Rcd. 3019 at ¶ 7 (2002) ("legal, market, or technological distinctions may *require* different regulatory requirements between platforms").

First, and most critically, there are important market distinctions. It is well recognized that access regulation can only be legitimate where the regulatee has anti-competitive incentives (and the accompanying ability) to deny access on commercially reasonable terms. The Bells, because they have legacy services to protect, have such incentives; cable companies do not. As detailed in the *Wireline Broadband* proceeding, the Bells (and other incumbent LECs) earn hefty returns on a number of existing services – such as second and T1 lines – for which DSL-based services substitute.[80] For that reason, the Bells have engaged in relentless campaigns to create a hostile environment for broadband ISPs and to deny customers broadband ISP choice. Although the Bells initially offered standalone DSL-based services that would permit customers to buy DSL transport and then select from one of several independent ISPs, they have, for the most part, withdrawn those offers and now only market at retail integrated DSL-based internet access services.[81] Similarly, the record in the *Wireline Broadband* proceeding demonstrates that the Bells have largely driven their DSL transport competitors out of business, and that the Bells' own wholesale DSL offerings are designed to prevent competition from unaffiliated ISPs rather than maximize demand for broadband facilities.[82]

In stark contrast, greater subscribership is unambiguously good for cable companies. Cable companies had no pre-existing Internet offerings. Thus, increased cable modem service sales mean a greater return on the enormous fixed investments cable companies made to upgrade their networks – with no offsetting loss of revenues from legacy services.[83] As the considerable

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[80] AT&T Wireline Broadband Comments at 65-66; Willig Wireline Broadband Dec. ¶¶ 32-34, 101.

[81] AT&T Wireline Broadband Comments at 77; Willig Wireline Broadband Dec. ¶ 105.

[82] AT&T Wireline Broadband Comments at 42-46, 49; Willig Wireline Broadband Dec. ¶¶ 49-50.

[83] *See* Willig Wireline Broadband Dec. ¶¶ 102-04.

efforts undertaken by cable companies to open their networks to unaffiliated ISPs show, cable companies are strong believers that ISP choice will attract more consumers to cable Internet – both because some customers prefer particular ISPs and because enlisting additional ISPs means other companies are promoting and marketing cable Internet services.[84]

Second, there are important technical differences between cable companies and incumbent LECs. The Bells' networks were designed for and have always been operated for point-to-point common carrier communications, and the Bells have for decades been required to provide equal and nondiscriminatory access to all consumers, interexchange carriers and ISPs. The systems, processes, and rules for accomplishing that in a commercially viable manner are well established.

Indeed, even the DSL technology itself is mature and developed in a multiple-ISP environment. DSL-based services are not materially different from older "pair gain" technologies and have long been provided on a common carrier basis over the very same wires as voice and other traditional common carrier services.[85] The longstanding *Computer Inquiries* unbundling and nondiscrimination requirements therefore do not create technological or operational risks for the Bells, but instead merely ensure that they do not exploit their market positions to skew the provision or pricing of services or to discriminate against any customers (wholesale or retail). Thus, continuing the *status quo* and requiring the Bells to offer DSL services, like their other services, on a common carrier basis raises no possible network or service reliability/viability concerns.

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[84] *See* Marshall Dec. ¶¶ 7, 17.

[85] *See* Declaration of Richard A. Chandler, CC Docket No. 02-33, at ¶¶ 24-36 (attached to Comments of AT&T, filed May 3, 2002) ("Chandler Wireline Broadband Dec.").

In contrast, there are no established systems, processes or rules that could support forced access regulation of cable. To the contrary, as explained above, the commercial experimentation necessary to determine the most efficient arrangements is only just underway, and no one can predict which approaches will ultimately prove viable at scale in a commercial environment. In these circumstances, forced access regulation would present very real network and service reliability concerns. Therefore, it cannot be assumed that regulatory measures appropriate for a mature common-carriage technology like DSL can be replicated in the cable environment where solutions to the complex problems of multiple-ISP access are still being worked out.[86]

Third, there are important legal differences between cable companies and incumbent LECs. Congress in Title VI specifically rejected a common carrier approach. In stark contrast, Title II specifically requires that incumbent LECs provide competitors unbundled access to their networks in order to introduce competition into monopoly local voice markets.[87] As the Supreme Court has just held, the "provisions of the Telecommunications Act . . . were intended to *eliminate the monopolies* enjoyed by the inheritors of [the Bell System's] local franchises; this objective was considered both *an end in itself* and an important step toward the Act's other goals of boosting competition in broader markets and revising the mandate to provide universal service."[88]

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[86] The Commission has recognized in previous proceedings that concerns of network and service reliability may militate against common carriage. For example, the Commission has classified the sale of hybrid microwave/fiber service provided over a utility network as a private carriage service. In reaching this conclusion, the Commission noted "that a private carrier would not be able, as a matter of practice, to hold itself out without jeopardizing the system reliability and operational security essential to effective microwave communications." *Public Service Company of Oklahoma*, 3 FCC Rcd. 2327.

[87] *See* 47 U.S.C. §§ 251, 252.

[88] *Verizon Communications, Inc., v. FCC*, 122 S.Ct. 1646, 1654 (2002) (emphasis added).

New entrant competitors need access to broadband-capable Bell loops in order to compete in the local voice markets in which the Bells retain clear market power (and, in most areas, face no significant competition at all). By definition, absent access to such loops, competitive LECs will be foreclosed altogether from competing for the increasing number of customers that want voice and data services over a single line.[89] There simply is no cable analog to the Bells' enduring voice monopolies. Unlike the Bells, cable operators face vigorous competition in all of the businesses in which they compete, including their provision of core video programming services.[90] There are thus clear justifications for the very different legal regimes Congress established under Titles II and VI, respectively.

In short, any principled application of the same analytical framework necessarily demands different treatment of cable and telephone-delivered broadband services. Recognizing as much, the Bells urge a results-oriented version of "regulatory parity" that ignores these differences on the theory that the Bells will be unable to compete unless they are regulated like cable companies.

But it is clear that the Bells want only the benefits and none of the burdens of cable regulation. Cable systems are subject to a host of substantial regulatory burdens that the Bells do not face. Cable companies must comply with local franchising requirements and pay billions of

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[89] AT&T Wireline Broadband Comments at 78-79; Willig Wireline Broadband Dec. ¶¶ 42-45. Denying competitive LECs access to the high-frequency portion of Bell loops would also directly impede voice competition, because, as AT&T showed, voice services can be provided over the high frequency portion of the loop. *See* AT&T Wireline Broadband Comments at 78-79.

[90] Driven by DBS, MVPDs already serve approximately 23 percent of multichannel video consumers nationwide, and the non-cable share of MVPD business continues to grow at a yearly rate of nearly 20 percent. *See* Paul Kagan Assocs., *Media Index Database*, Kagan Media Money, at 11 (June 26, 2001) ("*Kagan Media Database*"). Moreover, facilities-based DBS providers have the ability and capacity to serve virtually every cable subscriber in the United States, and they are aggressively winning market share, mainly by luring away former cable subscribers.

dollars in annual franchise fees.[91] They often must build and donate "institutional networks" to franchising authorities; they are subject to "must-carry," PEG, and other regulations – and, unlike the Bells' network sharing obligations, these cable sharing obligations are uncompensated.[92]

In any event, it is simply false that the Bells cannot compete if cable and Bell services are subject to different regulation justified by different circumstances. In this regard, the evidence is overwhelming that "regulatory burdens" have not kept the Bells from competing effectively. After sitting on DSL technology for decades, the Bells have enjoyed great success when and where they decide to compete in earnest. In 2001 alone, DSL-based services posted record gains, with Verizon reporting subscription increases of 122 percent, Qwest announcing an increase of 77 percent, and SBC reporting gains of 69 percent.[93] Overall, "U.S. DSL lines totaled 4.4 million at the end of year [2001]."[94] Growth in 2002 has also been remarkable. SBC added 183,000 subscribers during the first quarter of the year, and analysts expect Verizon and BellSouth to add 150,000 and 125,000 subscribers, respectively.[95] As one commentator has noted, "the proliferation of DSL in the telecom industry has seen one of the fastest technology adoption rates ever recorded."[96]

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[91] *See* Roll Call, July 23, 2001 (statement of Rep. John Conyers and Chris Cannon); *see also* Comments of AT&T, *Request for Comments Deployment of Broadband Networks and Advanced Telecommunications*, Docket No. 011109273-1273-01 (National Telecommunications and Information Administration, Department of Commerce) (Dec. 19, 2001).

[92] *See* 47 U.S.C. §§ 531-32, 534-36.

[93] *See* News Release, *Qwest Communications Reports Fourth Quarter, Year End 2001 Results, Jan. 29, 2002*; News Release, SBC Reports Fourth-Quarter Earnings (Jan. 24, 2002).

[94] Communications Daily (Feb. 13, 2002).

[95] *See* Margaret Kane, *SBC Connects With DSL Subscribers*, CNET News.com (April 18, 2002).

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

As a result of this rapid growth, DSL dominates the market for providing broadband services to business. Although cable operators serve some small businesses located within or near their largely residential footprints, most small and medium-sized businesses purchase broadband access over incumbent LEC facilities.[97] Large businesses also rely predominantly on incumbent LECs for the provision of high-speed data services.[98] Indeed, analysts estimate that businesses account for only five percent of cable broadband subscribers today and that this number will only increase to about ten percent by 2005.[99]

Because of its late start and the high prices charged by the Bells, DSL lagged somewhat behind cable modem service in some residential broadband segments.[100] But cable systems capable of providing cable modem service tend to be located in more densely populated areas, and in a substantial area of the country, homes have access to DSL service but not to cable modem service.[101] And, as noted above, the Bells' residential DSL gains in the past two years have been phenomenal.

In sum, there is no legitimate basis for the Commission to veer from the regulatory course mandated by the relevant law, economics and facts in this proceeding merely because the very different law, economics and facts mandate different conclusions in other proceedings. Cable forced access regulation is clearly inappropriate under a consistent market power framework.

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[97] *See* Willig Wireline Broadband Dec. ¶ 24.

[98] *See id*. ¶ 25.

[99] *See id*. ¶¶ 24, 53.

[100] As of March 31, 2002, cable operators served 66 percent of the U.S. residential broadband market. *See Cable Modem Market Stats & Projections* (May 30, 2002), Cable Datacom News (available at http://www.cabledatacomnews.com/cmic/cmic16.html). But see California Wireline Broadband Comments at 34-35 (stating that "in California the incumbent LECs remain the dominant provider of broadband services to residential and small commercial users").

[101] *See id*.; Willig Wireline Broadband Dec. ¶ 31.

The evidence shows that cable companies have unmitigated incentives to increase broadband deployment and revenues by deploying broadband services broadly and pricing those services competitively, and to enter into wholesale arrangements with unaffiliated ISPs, in order to attract customers away from wireline-based services (broadband and narrowband). The Bells, on the other hand, have repeatedly shown that they are not interested in deploying efficient levels of broadband facilities, pricing those facilities competitively, or allowing their customers to reach an ISP of their choosing.

II. THE COMMISSION SHOULD PREEMPT STATE AND LOCAL REGULATIONS THAT IMPOSE FORCED ACCESS OBLIGATIONS ON CABLE PROVIDERS, THAT IMPOSE FRANCHISE FEES OR REQUIREMENTS ON CABLE INTERNET SERVICE, OR THAT OTHERWISE CONFLICT WITH THE ACT AND THE COMMISSION'S REGULATORY POLICIES.

The Commission should act now to prevent the imposition of State and local regulation that would "result[] in inconsistent requirements affecting cable modem service" and that would "discourage cable modem service deployment across political boundaries."[102] As detailed below, the Commission has clear preemption authority that it should exercise over two specific kinds of state and local regulation. First, certain kinds of state or local regulation of cable Internet service run afoul of specific provisions of Title VI; the Commission should declare that such regulations transgress Title VI and are preempted by the Act. Second, other state or local regulation would frustrate the Act by imposing inconsistent obligations on cable providers regarding the technical design, business arrangements, or other aspects of the provision of this interstate service, or would create entry barriers to the deployment of cable Internet service, and

[102] *Notice* ¶ 97.

the Commission should exercise its authority under Title I of the Act to preempt such laws and regulations.[103]

A. The Commission Should Declare That State and Local Regulations That Conflict With The Terms Of Title VI Are Preempted.

Congress enacted Title VI to the Communications Act in 1984 "to establish a national policy concerning cable communications" and to "minimize unnecessary regulation that would impose an undue economic burden on cable systems."[104] "Congress sanctioned in relevant respects the regulatory scheme that the [FCC] had been following since 1974," during which period the Commission broadly preempted state and local regulation of cable operations.[105] In the Cable Act, Congress reaffirmed cable companies' exemption from "common carrier" regulations,[106] and limited local power to regulate services provided over cable systems.[107]

Under Title VI, local franchising bodies retain authority only over certain limited aspects of cable operations. Local authorities may, for example, establish "construction schedules and other construction-related requirements,"[108] determine whether a new operator has the "financial, technical, or legal qualifications to provide cable service,"[109] and where otherwise "consistent" with the Act, "establish requirements for facilities and equipment," but not "for video programming or other information services."[110]

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[103] The preemptive effect of a Commission ruling in this context is straightforward – substantive rules embodied in federal regulations or orders with the force and effect of law have the same preemptive force as federal statutes. *New York* v. *FCC*, 486 U.S. 57, 66-67 (1988).

[104] 47 U.S.C. §§ 521(1), (6).

[105] *New York*, 486 U.S. at 66-67.

[106] 47 U.S.C. § 541(c).

[107] *See*, *e.g.*, *id.* § 541(b)(3)(D).

[108] *Id.* § 552(a)(2).

[109] *Id.* § 541(a)(4)(C).

[110] *Id.* §§ 544(a) & (b).

Consistent with its goal of ensuring a "national policy" concerning cable communications, Congress declared in the Cable Act that "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with the Act shall be deemed to be preempted and superseded."[111] This "express pre-emption clause . . . necessarily contains the best evidence of Congress' pre-emptive intent."[112] At least four categories of state and local laws and regulations are "inconsistent with the Act" and thus should be "be preempted and superseded": (1) franchising authority regulations imposing forced access requirements on cable Internet service; (2) state and local laws assessing franchise fees or requirements on cable modem service; (3) local franchising authority regulation of the terms and conditions for the cable Internet service; and (4) state and local laws restricting a cable provider's right to collect or disclose its customers' personally identifiable information to market its services.

1. The Commission Should Declare That Title VI Preempts Franchising Authority Regulations That Impose Multiple ISP Access Requirements On Cable Modem Service.

In *MediaOne Group, Inc.* v. *County of Henrico*,[113] the Fourth Circuit accepted the statutory interpretation put forth by the Commission as *amicus curiae* and held that multiple ISP access requirements for cable internet services run afoul of section 621(b)(3)(D) of the Act.[114] Section 621(b)(3)(D) states that "a franchising authority may not require a cable operator to provide any telecommunications service or facilities . . . as a condition of the initial grant of a franchise, franchise renewal, or a transfer of a franchise." The court held that forcing a cable

[111] *See* 47 U.S.C. § 556(c).

[112] *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993).

[113] 257 F.3d 356 (4th Cir. 2001).

[114] 47 U.S.C. § 541(b)(3)(D).

company to provide access to multiple ISPs violated section 621(b)(3)(D) because it was a requirement that the service "provide . . . telecommunications . . . facilities,"[115] and was therefore preempted.

The *MediaOne* court did not decide if cable internet service was a cable service, a telecommunications service, or an information service – and the result in the case did not depend on any such designation. As the court pointed out, regardless of whether cable internet services are telecommunications services (as they quite clearly are not), they undoubtedly use "telecommunication facilities."[116] As a result, the *MediaOne* court correctly ruled, cable Internet services are covered by the protections of section 621(b)(3)(D).

The Commission should reaffirm the position that it took as *amicus curiae* in *MediaOne* and rule that section 641(b)(3)(D) preempts any franchise requirements regarding internet access service.[117] Indeed, in ruling in this proceeding that cable modem service is an "information service," but not a "cable" or a "telecommunications" service, the Commission came to the same conclusion as the *MediaOne* court on the distinction between "telecommunications services" and "telecommunications facilities."[118] The Commission noted that the Act "distinguishes 'telecommunications' from 'telecommunications service,'" and that "all information services require the use of telecommunications to connect customers to the computers."[119] It found that

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[115] *MediaOne*, 257 F.3d at 364.

[116] *MediaOne,* 257 F.3d at 364.

[117] Amicus Curiae Brief of the Federal Communications Commission at 20, *MediaOne Group* v. *County of Henrico*, No. 00-1680(L) (4th Cir. filed Aug. 9, 2000), at 18-20 ("FCC *MediaOne Amicus* Brief").

[118] *Declaratory Ruling* ¶¶ 40-41.

[119] *Id.* at ¶ 40.

while cable Internet service does not offer "*telecommunications service* to the end user," it does use "*telecommunications* to provide end users with cable modem service."[120]

The Commission's ruling that cable-based information services use telecommunications facilities necessarily leads to the same conclusion reached by the Court of Appeals in *MediaOne* – that multiple ISP access requirements are foreclosed by section 641(b)(3)(D). Permitting such requirements to exist would allow franchising authorities to force cable internet providers to "provide . . . telecommunications . . . facilities" for use by third parties.[121] That result is squarely foreclosed by the language of the Communications Act – and must be rejected.

Moreover, any open access regulations that might be imposed by franchising authorities also are preempted by section 624 of the Act. Subsection (a) of section 624 provides that franchising authorities "may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this title."[122] Subsection (b), in turn, provides that both franchise proposals and proposals for renewals submitted after 1984 "may establish requirements for facilities and equipment," but "may not … establish requirements for video programming *or other information services*," except for subscriber notice requirements regarding changes in programming, channel position, and channel assignment, and requirements imposed on obscene or constitutionally unprotected cable services.[123] Thus, state and local open access regulations directly conflict with both sections 641(b)(3)(D) and 624(a) and (b). For these reasons, the Commission should declare that any franchising authority requirement purporting to impose open access obligations on cable modem services is preempted.

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[120] *Id.* at ¶ 41 (emphasis added).

[121] *Id.*

[122] 47 U.S.C. § 544(a).

[123] *Id.* § 544(d)(1).

2. The Commission Should Declare That Title VI Preempts Any Attempt By States Or Localities To Impose Franchise Fees On Cable Modem Service Or Requirements Of Additional Franchises On Cable Operators Offering That Service.

The Commission's ruling that cable modem service is not a cable service likewise establishes that attempts by franchising authorities to impose franchise fees based on revenues derived from cable modem services, or to require cable operators to secure a separate franchise in order to provide such services, are preempted by Title VI.

As amended by Congress in 1996,[124] the Cable Act expressly provides that "[f]or any 12-month period, the franchise fees *paid by a cable operator with respect to any cable system* shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system *to provide cable services*."[125] Under this provision, the only franchise fees that can lawfully be imposed on "a cable operator with respect to any cable system" are fees tied to revenues from "cable services." No additional franchise fees can be imposed on a cable operator for the provision of different services, and no franchise fee can be based on revenues from services that are not "cable services" under the Act. Given the Commission's recent ruling that cable Internet service is an "information service," and not a "cable service," the revenues cable Internet services generate may no longer be subjected to franchise fees.

Congress prohibited franchising authorities from imposing franchise fees based on revenues generated by non-cable services in order to encourage cable operators to offer new and varied services over their systems. The legislative history of the amendment is explicit on this point: "This amendment makes clear that the franchise fee provision is not intended to reach

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[124] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified as 47 U.S.C. § 151 *et seq.*.

revenues that a cable operator derives for providing new telecommunications services over its system, but only the operator's cable-related activities."[126] Congress thus made clear that localities may not charge cable operators twice for their provision of services: once through their existing franchise fees on cable services and then again for using existing access to rights-of-ways to provide new and innovative services. Rather, Congress intended cable operators to have incentives to use systems already in place to innovate and compete in the development of services for the benefit of the public.

The Supreme Court recently made this same point in an analogous context. In affirming the Commission and rejecting the claim that section 224 of the Act bars a cable operator that exercises its cable-based right to secure utility pole attachments from diversifying into Internet access services, the Court rejected the utility respondents' view that "if a cable company attempts to innovate at all and provide anything other than pure television, it loses the protection of the Pole Attachments Act and subjects itself to monopoly pricing."[127] The Court found that such an interpretation "would defeat Congress' general instruction to the FCC to encourage the deployment of broadband Internet capability and, if necessary, to accelerate deployment of such capability by removing barriers to infrastructure investment."[128] Thus, it held that "providing commingled services" did not cost the cable system the access rights secured to it by the Act through its provision of cable services.[129] Similarly, cable operators do not lose the benefit of the

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[125] 47 U.S.C. § 542(b) (emphasis added).

[126] Telecommunications Act of 1996, H.R. Conf. Rep. 104-458, at 64 (1996).

[127] *National Cable Television Ass'n* v. *Gulf Power, Inc.*, 534 U.S. 327, 122 S. Ct. 782, 789 (2002).

[128] *Id.* (citing Pub. L. 104-104, VII, 706(a), (b), and (c)(1), 110 Stat. 153, codified as 47 U.S.C. 157 (1994 ed., Supp. V)).

[129] *Id.*

5% "cable services" fee cap simply because they expand their service offerings beyond cable services.

Certain local authorities have sought to avoid the franchise-fee limitations, and the restrictions of Title VI generally, by insisting that cable operators must secure a separate franchise (and pay separate franchise fees) to provide any service that is not a cable service. In the *Notice*, the Commission tentatively rejected the municipalities' position, stating that "Title VI does not provide a basis for a local franchising authority to impose an additional franchise on a cable operator that provides cable modem service," and that "[o]nce a cable operator has obtained a franchise for [a cable] system, our information service classification should not affect the right of cable operators to access rights-of-way as necessary to provide cable modem service or to use their previously franchised systems to provide cable modem service."[130] The Commission's tentative conclusion is correct, because Title VI clearly prohibits the imposition of separate franchising obligations on cable operators based on the services they provide.

First, section 621(a)(2) of the Act provides that "any franchise shall be construed to authorize the construction of a cable system over public rights-of-way," without limitation on the service to be provided.[131] Thus, "cable operators are permitted under the provisions of Title VI to provide any mixture of cable and non-cable service they choose."[132]

Furthermore, as discussed above, section 624 prohibits franchising authorities from regulating "the services, facilities or equipment provided by a cable operator" except as consistent with the express provisions of Title VI.[133] This prohibition by its plain terms extends

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[130] *Notice* ¶ 102.

[131] 47 U.S.C. § 542(a)(2).

[132] H. Rep. 98-934, at 44 (1984).

[133] 47 U.S.C. § 544(a).

to all services provided over the cable system, not just cable services. Moreover, as discussed above, section 624 explicitly bars the imposition of franchise requirements for "information services," which includes cable modem services.[134] The municipalities' position – that Congress intended the formalistic distinction that franchising authorities cannot regulate information services provided over a cable system under a franchise granted under Title VI, but such authorities would have a free hand to impose separate franchises on the cable operator regulating those same services – is absurd. The municipalities' position is also inconsistent with other provisions of Title VI that authorize certain very narrow regulation of information services in the Title VI franchise.[135] Title VI is the exclusive basis for any franchise requirement to be imposed on a cable operator. The cable operator that has been granted such a franchise may provide any service it wishes, and Congress has strictly delimited the power of franchising authorities to regulate services (and in particular information services) provided over that system.

The Commission has also sought comment on "whether providing additional services over upgraded cable facilities imposes additional burdens on the public rights of way such that the existing franchise process is inadequate," and whether such burdens are legally relevant.[136] Any claim of burden would not be legally relevant because the Title VI provisions discussed above are unqualified, and make no exception for alleviation of putative right-of-way burdens. Regardless, even if the unambiguous statutory language could be disregarded, permitting franchising authorities to impose additional franchise fees based on the incremental revenues generated by cable modem service could not be justified as a means of compensating localities for use of their rights-of-way. A cable provider does not impose any incremental burden on state

[134] *Id.* § 544(b)(1).

[135] *Id.* § 544(d)(1), (h).

[136] *Notice* ¶ 102.

and local rights-of-way simply by sending additional electrons through existing cable facilities that traverse existing rights-of-way.

Indeed, any such independent franchising requirement would run afoul of the First Amendment. As noted above, the provision of cable modem service, over which the cable operator exercises substantial editorial discretion, is constitutionally protected speech. A flat ban on the provision of such speech without the grant of a separate franchise (and payment of separate, no doubt substantial, franchise fees) clearly restricts speech. The traditional justification for such restrictive municipal franchise requirements as a precondition of engaging in protected speech (such as cable programming), is utterly absent when the provision of the service places no burden on the right of way, and no such independent franchising requirement (or accompanying franchise fee) on information services could withstand any form of First Amendment scrutiny.[137] Separate franchise requirements and franchise fees for cable modem services are clearly unlawful under both Title VI and the First Amendment.

3. The Commission Should Declare That Title VI Preempts Franchising Authority Regulation Of The Rates, Terms and Conditions Of Cable Internet Services.

Section 624 of the Cable Act expressly preempts a franchising authority from attempting to impose requirements relating to the terms and conditions by which a cable operator provides cable Internet services.

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[137] *See City of Los Angeles v. Preferred Comms., Inc.*, 476 U.S. 488, 495 (1986) (validity of franchise restrictions depends on "the present uses of the public utility poles and rights-of-way and how respondent proposes to install and maintain its facilities on them"); *Preferred Comms., Inc. v. City of Los Angeles*, 13 F.3d 1327 (9th Cir. 1984) (accepting that physical scarcity of right of way and public disruption from construction were governmental interests, but finding them insufficient to justify restrictive franchise requirement); *Century Federal, Inc. v. City of Palo Alto*, 710 F. Supp. 1559 (N.D. Cal. 1988) (franchise fee violates First Amendment where the municipality charged the cable operators more than other utilities for comparable use of the right of way).

Section 624(a) provides that franchising authorities "may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this title."[138] Subsection (b) further provides that franchise proposals, and proposals for renewals, after 1984 "may establish requirements for facilities and equipment," but "*may not* . . . establish requirements for video programming *or other information services*," except for subscriber notice requirements regarding changes in programming, channel position, and channel assignment, and requirements imposed on obscene or constitutionally unprotected cable services.[139] Cable modem service is an "information service." Attempts by a franchising authority to regulate the speed, rates, or other aspects of that service are thus prohibited by section 624, because those regulations would "establish requirements for [] information services."[140]

4. The Commission Should Declare That Title VI Preempts State And Local Laws Restricting A Cable Operator's Right To Use Customers' Personally Identifiable Information To Conduct Legitimate Business Activities Related To Services Provided By The Cable Operator.

The Commission should likewise declare that state and local laws which restrict a cable provider's right to collect, use, or disclose its customers' personally identifiable information in conducting business activities related to the operator's provision of cable modem services are preempted by section 631 of the Act.

Section 631 of the Communications Act of 1934, as amended, addresses the protection of subscriber privacy in the provision of cable services or other services.[141] The term "other service" includes "any wire or radio communications service provided using any of the facilities

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[138] 47 U.S.C. § 544(a).

[139] *Id.* § 544(d)(1).

[140] *Id.* § 544(b).

[141] *See* 47 U.S.C. § 551(a)(1).

of a cable operator that are used in the provision of cable service."[142] AT&T therefore agrees with the Commission's tentative conclusion that cable modem service can be categorized as an "other service."[143] In fact, as the Commission noted, at least one court has already ruled that Internet service provided via a cable system is an "other service" within the meaning of section 631.[144]

Although section 631 generally prohibits cable providers from collecting, or disclosing to third parties, information that can personally identify individual subscribers without their prior written consent,[145] Congress expressly granted cable providers the right to "use the cable system to collect such information in order to obtain information necessary to render a cable service or other service,"[146] and to "disclose such information" to third parties if the disclosure is "necessary to render, or conduct a legitimate business activity related to, a cable service or other service provided by the cable operator to the subscriber."[147] It cannot reasonably be disputed that market research relating to, and marketing of, cable Internet services is a "legitimate business activity related to" the provision of an "other service provided by the cable operator." Thus, for example, section 631 expressly grants cable providers the right to collect a customer's personally identifiable information necessary to render cable services to the customer, and then to use that information in marketing services to the customer, without obtaining the customer's consent.

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[142] *See id.* § 551(a)(2)(B).

[143] *See Notice*, ¶112.

[144] *See id.*, ¶111 (*citing Application of the United States of America for an Order Pursuant to 18 U.S.C. § 2703(D)*, 157 F. Supp. 2d 286, 291 (S.D.N.Y. 2001)).

[145] 47 U.S.C. § 631(b)(1), (c)(1).

[146] *Id.* § 631(b)(2).

[147] *Id.* § 631(c)(2).

State or local rules prohibiting or restricting a cable provider from exercising these rights are preempted by section 631, which permits states or franchising authorities to enact or enforce laws "for the protection of subscriber privacy" only if those laws are "consistent with this section." An example of such an impermissible law is the privacy ordinance recently enacted in Seattle. That ordinance expressly deems market research and marketing of services or products to be non-cable related purposes.[148] The only personally identifiable information that the Seattle ordinance permits to be disclosed for those purposes are the names and addresses of a cable provider's subscribers,[149] and even then only by complying with onerous disclosure requirements: namely, at least 30 days prior to making such a disclosure (which has already been the subject of opt-out consent, and which does not disclose viewing habits or transactions), the operator must inform the subscriber and the city authority of the information to be disclosed and to whom, and provide the subscriber with an opportunity to opt-out. This opt-out opportunity must be implemented by either a self-addressed postage pre-paid postcard, a box to be checked on the subscriber's monthly bill, a toll-free number, or another method previously approved by the city authority. The same notice must be provided 45 days after a disclosure, and this notice must contain a further opt-out opportunity for future such disclosures.[150]

The Commission should declare that the Seattle ordinance, and other state and local laws that similarly add onerous disclosure and reporting requirements or limitations, are preempted by the Cable Act. Congress expressly authorized cable providers to disclose personally identifiable information where necessary to market their services or to conduct other legitimate business

[148] *See* SMC § 21.60.820(F)(1).

[149] *See id.* § 21.60.820(F)(3)(a).

[150] *See id.*

activity relating to those services. Laws such as the Seattle ordinance deprive cable providers of that federal right.

B. The Commission Should Exercise Its Title I Authority To Preempt Any Remaining State And Local Laws Which Impose Forced Access Requirements Or Franchise Fees On Cable Modem Service.

There can be no question that the Commission has Title I authority to preempt state and local regulation of cable modem services. In the 1970s, prior to the enactment of Title VI, the Commission began to free cable system operators from conflicting local regulations. Although the Commission left it to local authorities to grant franchises to cable operators and to oversee "such local incidents of cable operations as delineating franchise areas, regulating the construction of cable facilities, and maintaining rights of way," the Commission – affirmed by the courts – asserted "exclusive jurisdiction over all operational aspects of cable communication."[151]

The Commission took this approach because "only federal preemption of state and local regulation can assure cable systems the breathing space necessary to expand vigorously and provide a diverse range of program offerings to potential cable subscribers in all parts of the country."[152] Part of the impetus for the Commission's retention of exclusive jurisdiction over

[151] *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 702 (1984); *New York State Comm'n on Cable TV* v. *FCC*, 749 F.2d 804, 809 (D.C. Cir. 1984) ("The Commission … created a 'deliberately structured dualism whereby local governments would be responsible for selecting franchises, pursuant to minimum standards established by the Commission, while the Commission retained exclusive jurisdiction over all operational aspects of cable communication, including technical standards and signal carriage.") (quoting *Cable Television Report and Order*, 36 FCC .2d 143, 207 (1972)).

[152] *Capital Cities Cable*, 467 U.S. at 708.

operational and signal issues was to promote the expansion of cable systems into new services (including information services).[153]

The courts have recognized the Commission's preemptive authority. In affirming the Commission's *Computer II* decision,[154] the D.C. Circuit held that Commission preemption of state regulation of customer premises equipment ("CPE") was justified because federal objectives of a competitive interstate market in CPE use would be thwarted by "state tariffing of [intrastate] CPE" use.[155] Even though the Act did not explicitly authorize regulation of state tariffing of intrastate CPE use, "when state regulation of intrastate equipment or facilities would interfere with achievement of a federal regulatory goal, the Commission's jurisdiction is paramount."[156]

The Commission should exercise its Title I authority to preempt two categories of state and local laws relating to cable modem service. *First*, the Commission should preempt any *state*

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[153] *See*, *e.g.*, *Notice of Inquiry in Docket 18397*, 15 FCC .2d 417 (1968); *Cable Television Report and Order*, 36 FCC 2d 143, 190 (1972); *Clarification of Cable Television Rules*, 46 FCC .2d 175, 199-200 (1974); *Duplicative and Excessive Over-Regulation-CATV*, 54 FCC .2d 855 (1975).

[154] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 FCC .2d 384 (1980) ("*Computer II*"), *recon.*, 84 FCC .2d 50 (1980) ("*Computer II Reconsideration Order*), *recon.*, 88 FCC .2d 512 (1981), *aff'd sub nom.*, *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982). Although the Commission affirmed its jurisdiction to regulate information services, it declined to adopt a comprehensive regulatory scheme in *Computer II*. *See Computer II*, 77 FCC .2d at 433.

[155] *Computer and Communications Industry* v. *FCC*, 693 F.2d 198, 215 (D.C. Cir. 1982) ("*CCIA*"); *see also Capital Cities Cable*, 704 (1984) (forbidding state regulation of distant broadcast signals, in light of federal deregulation, because "the full accomplishment of such objectives would be jeopardized if state and local authorities were now permitted to restrict substantially the ability of cable operators to provide these diverse services to their subscribers"); *New York State Comm'n on Cable TV*, 749 F.2d at 812 (discussing cases upholding FCC preemption of state regulation where the Commission chose to rely on market forces); *Brookhaven Cable TV* v. *Kelly*, 573 F.2d 765 (2d Cir. 1978) (preemption of state price regulation of pay-cable upheld even though the FCC did not regulate pay cable prices).

[156] *CCIA*, 693 F.2d at 215.

forced access regulation. Any attempt by states to impose their own varying regulations of the terms of ISP access and cable facilities would necessarily frustrate federal policy and burden the development of this critical Internet service. As the *Notice* observes (¶¶ 14-15), in contrast to accessing the high-frequency portion of a Bell's loop, there are multiple different technical and operational ways that a cable operator could provide access to competing ISPs. And, as explained above, there is no commercial experience or broad consensus on how that can best be accomplished.[157]

Second, the Commission should exercise its Title I authority to preempt state and local attempts to impose additional franchise requirements on cable operators that offer cable modem service or franchise fees calculated on the basis of revenues from cable Internet service (to the extent that the Commission does not find such laws to be preempted under Title VI, as they clearly are). One of the most persistent dangers to the optimal development of cable systems has been the tendency of franchising authorities to view cable systems as "a convenient revenue-producing enterprise."[158] These dangers have not abated.

Many municipalities now see an opportunity to siphon off the revenues from new information services that cable operators generate, even though there is no incremental burden on the locality from the cable operator's provision of this additional service. Moreover, such incremental fees prejudice cable systems in their competition with local telephone incumbents,

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[157] *Notice* ¶ 97 ("We would be concerned if a patchwork of State and local regulations beyond matters of purely local concern resulted in inconsistent requirements affecting cable modem service, the technical design of the cable modem service facilities, or business arrangements that discouraged cable modem service deployment across political boundaries"). Finally, here too, the direct statutory prohibition on any local franchising requirement "that has the purpose or effect of prohibiting, limiting, restricting or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof," 47 U.S.C. § 541(b)(3)(B), would further support a Commission decision to forbid analogous state and local restrictions on cable modem service. *Texas Rural Legal Aid* v. *Legal Serv. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991).

who often do not pay any franchise fee,[159] as well as satellite-based and wireless Internet services, which never do so. This type of local, discriminatory plundering threatens "the orderly development of [cable] technology into the national communications structure," and is the kind of detrimental interference that has always drawn preemptive action from the Commission.[160] Thus, even if section 624 did not directly preempt such fees, the Commission would have (and should exercise) ancillary authority to do so under Title I.[161]

III. THE COMMISSION SHOULD DECLARE THAT CABLE OPERATORS DID NOT ACT UNLAWFULLY IN PASSING ON TO SUBSCRIBERS FRANCHISE FEES ACTUALLY ASSESSED TO AND PAID BY THE OPERATORS ON ACCOUNT OF THEIR PROVISION OF CABLE MODEM SERVICE.

The Commission has also sought comment on whether it should exercise its authority under Section 622 of the Act to resolve disputes over whether cable operators charged unlawful rates in passing through franchise fees for cable internet access services on the good-faith assumption that such services were "cable services" on which franchise fees were paid.[162]

Prior to the Commission's declaratory ruling, cable operators were typically required by franchising authorities to pay these fees, often on pain of having their franchise revoked. And

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[158] *Applications for Certificate of Compliance*, 66 F.C.C.2d 380, 391-92 (date).

[159] 47 U.S.C. § 253.

[160] *Duplicative and Excessive Over-Regulation-CATV*, 54 FCC .2d 855, 863 (1975).

[161] It is notable that Congress expressly forbade franchising authorities from demanding separate franchises (and thus separate franchise fees) if a cable operator provides telecommunications services. 47 U.S.C. § 541(b)(3)(A). That direct statutory prohibition would support any Commission decision to impose a similar prohibition on franchise requirements tethered to information services like cable modem service. *See Texas Rural Legal Aid*, 940 F.2d at 694 ("a congressional prohibition of a particular conduct may actually support the view that the administrative entity can exercise its authority to eliminate a similar danger."); *Mobile Communications*, 77 F.3d 1399, 1404-05 (D.C. Cir. 1996) (maxim of *expressio unius* "'has little force in the administrative setting,'" where agency has authority to act upon issues that Congress has not directly resolved).

[162] *Notice* ¶ 107.

because the issue of the proper regulatory classification of cable modem service is complex,[163] "cable operators and local franchising authorities believed in good faith that cable modem service was a 'cable service' for which franchise fees could be collected."[164] As a result, they "could not have been expected to predict that the Commission would classify cable modem service as other than a cable service."[165] Indeed, many cable operators (including AT&T), acting on the good-faith understanding that cable modem service was a "cable service" – and the unambiguous demands of local franchising authorities that franchise fee requirements included revenues from that service – paid 5 percent of their revenues from cable Internet services to franchising authorities as franchise fees, and accordingly passed through those fees to subscribers pursuant to 47 U.S.C. § 542(c).

However, it has been suggested that the Commission's recent rulings that cable Internet services are not cable services means that cable operators must refund all amounts that they collected from customers to pay the franchising authority assessments (and pay other fees and "damages") – notwithstanding that those franchising authorities have *not* returned those payments to the cable operators. The Commission should declare that cable operators who included in their rates franchise fees for cable modem service that were actually assessed by and paid to franchising authorities did not violate the Act.

The question of whether cable rates include unlawful charges for franchise fees arises under federal law and is clearly within the Commission's Title VI authority.[166] As the D.C.

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[163] *Id.* (quoting *MediaOne Group, Inc.* v. *County of Henrico*, 257 F.3d 356, 365 (4th Cir. 2001)).

[164] *Id.*

[165] *Id.*

[166] *See* 47 U.S.C. §§ 542(f), 543(b), (c) (1994) (regulating franchise fees); 47 C.F.R. § 76.922(a) (2001) (setting the maximum rate per subscriber for a tier of regulated programming to a

Circuit has squarely held, even though "the franchise fee provision does not contain an explicit delegation of regulatory authority . . . [b]ecause the provision establishes a *uniform federal standard* for franchise fees, and because the provision has been incorporated into the Communications Act, it is clear . . . that the *ultimate* responsibility for ensuring a 'national policy' with respect to franchise fees lies with the federal agency responsible for administering the Communications Act."[167]

The Commission typically exercises such jurisdiction when the dispute involves matters that directly impinge on a "national policy concerning cable communications" and call upon the Commission's expertise.[168] Such a national policy concern exists when the matter "potentially affects cable operators nationwide." [169]

The Commission should exercise its jurisdiction over this matter because it directly impinges on national policies and requires the Commission's expertise. This is not a localized dispute about the legality of one franchising authority's franchise fee. Rather, this issue "affects cable operators nationwide,"[170] because franchise fee assessments on cable modem service and

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permitted per channel charge, multiplied by the number of channels, plus a charge for franchise fees).

[167] *ACLU* v. *FCC*, 823 F.2d 1554, 1574 (D.C. Cir. 1987) (emphases in original).

[168] *Amendment of Cable Communications Policy Act of 1984*, 104 F.C.C.2d 386, ¶ 18 (1986) (memorandum opinion and order); *ACLU v. FCC*, 823 F.2d 1554, 1574 (D.C. Cir. 1987) ("The Commission will exercise its jurisdiction only where the dispute directly impinges on a national policy concerning cable communications and implicates the agency's expertise."); *Franchise Fee "Pass Through" and Dallas v. FCC*, 13 FCC Rcd. 4566, ¶ 12 (1998) (memorandum opinion and order) (holding that a "national policy concerning cable communications" was impinged when cable operators relied on the Commission's gross revenues methodology that was later reversed by the Fifth Circuit).

[169] *Time Warner Entertainment/Advance-Newhouse Partnership and the City of Orlando*, Mem. Op. & Order, 14 FCC Rcd. 7678, ¶ 12 (1999) (exercising jurisdiction over a dispute whether a franchising authority could assess franchise fees for revenues billed but not collected).

[170] *TWE/Advance-Newhouse Order* ¶ 12.

pass-throughs were ubiquitous (or nearly so) across the country. As the Commission recognized, "the fees in question were collected pursuant to section 622 and . . . our classification decision will alter, on a national scale, the regulatory treatment of cable modem service."[171] The Commission should assume jurisdiction to ensure a uniform national solution, rather than potentially leave this issue to the courts in the various states.[172] Permitting customers' claims to go to the courts could result in divergent rulings, which in turn would cause inequities among different customers who are similarly situated under federal law, and would impose needless litigation costs on cable operators who may face multiple suits in the many jurisdictions in which they operate.

On the merits, the Commission should declare that cable operators have no liability for refunds so long as they did not bill subscribers for franchise fees not actually paid to the franchising authority. Section 622 permits the cable operator to "designate that portion of a subscriber's bill attributable to the franchise fee as a separate item on the bill," and to identify as a line item "[t]he amount of the total bill *assessed as a franchise fee* and the identity of the franchising authority to which the fee *is paid*."[173] If a cable operator has billed the subscriber only for franchise fees it actually paid (even if it is later determined that such fees were not lawfully assessed), the cable operator has not violated the Act or the Commission's

[171] *Notice* ¶ 107.

[172] At least one complaint already has already been filed. *Bova* v. *Cox Communications, Inc.*, Civil Action No. 7:01 CV 00090 (W.D. Va. 2001) (seeking recovery of franchise fees collected on cable modem service in a class action lawsuit). This class has already been certified. *Bova* v. *Cox Communications, Inc.*, 2001 WL 1654708, 5 (W.D. Va. 2001).

[173] 47 U.S.C. § 542(c)(1), (f) (emphasis added). The Commission's regulations simply state that the maximum rate chargeable by cable operators shall include franchise fees. 47 C.F.R. § 76.922(a), (f)(1)(ii) & (5) (2001).

regulations.[174] This is a particularly reasonable construction of section 622 given that cable operators who paid franchise fees to franchising authorities based on a good faith belief that cable modem services were cable services were not unjustly enriched by passing those costs on to subscribers. If the franchising authority later returns any overpayments of franchise fees, at the request of the operator or of subscribers, or on its own volition, only then would the operator be obliged to reduce subscriber rates accordingly.[175]

In any event, and in order to avoid an inequitable result, the Commission should exercise its discretion to conclude that its declaratory ruling that cable modem services are information services should be given prospective effect only.[176] "It is well established that an agency may adopt prospective rules of general effect through either rulemaking or adjudication; the choice of method rests within the discretion of the agency."[177] Thus, "an agency in adjudication [may] declin[e] in subsequent cases to apply a new rule retroactively if equitable or statutory considerations militate against it."[178]

Regardless of whether the *Declaratory Order* is deemed an adjudication or a rulemaking, this is clearly a case in which the Commission should exercise its discretion to give solely

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[174] "Section 623 permits a cable operator to pass through, as an external cost, the total franchise fee … in its regulated rates." *City of Pasadena*, 16 FCC Rcd. 18,192 ¶ 23 (Oct. 4, 2001).

[175] Indeed, cable operators have an express statutory obligation to "pass through to subscribers the amount of any decrease in a franchise fee." *Id.* § 542(e); *Franchise Fee "Pass Through" and Dallas* v. *FCC*, 13 FCC Rcd. 4566, ¶ 5 (1998) ("Cable operators are also required to adjust subscriber charges to reflect any decrease in the franchise fee obligation.") (*citing* 47 U.S.C. § 542(e)).

[176] *See Chisholm* v. *FCC*, 538 U.S. 349, 365 (1976).

[177] *Grocery Mfrs. of Amer., Inc.* v. *Gerace*, 755 F.2d 993, 1001 (2d Cir. 1985); *see also NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (holding that an agency was "not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the [agency]'s discretion").

[178] *Retail, Wholesale & Dept. Store Union* v. *NLRB*, 466 F.2d 380, 391 (D.C. Cir. 1972).

prospective effect to its conclusion that cable modem services are "information services." In fact, courts refuse to apply a rule retroactively where, as here, "to apply the new rule to past conduct or prior events would work a 'manifest injustice.'"[179] Under the D.C. Circuit's *Retail, Wholesale* test, the question of whether retroactivity is impermissible depends on:

> (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.[180]

Here, as the Commission itself has acknowledged, "until the release of the Commission's declaratory ruling to the contrary, cable operators and local franchising authorities believed in good faith that cable modem service was a 'cable service' for which franchise fees could be collected."[181] Thus, the Commission's ruling that cable modem service was an "information service" was both an "issue of first impression" and "an abrupt departure from well-established practice." Given the fact that, as the Commission noted, "cable operators and local franchising authorities could not have been expected to predict that the Commission would classify cable modem service as other than a cable service,"[182] it is unsurprising that many cable operators (including AT&T) did, in fact, rely upon the reasonable understanding that cable Internet service was a "cable service" and, accordingly, collected and paid franchise fees on their cable modem service to franchising authorities. And, given the looming threat of litigation relating to the

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[179] *Clark-Cowlitz Joint Operating Agency* v. *FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (quoting *Thorpe* v. *Housing Auth. of the City of Durham*, 393 U.S. 268, 282 (1969)).

[180] *See Retail, Wholesale* at 390.

[181] *Notice* ¶ 107.

[182] *Id*.

franchise fees paid in reliance on that good faith understanding of cable Internet service, retroactive application of the newly adopted definition would clearly and unjustifiably create an enormous burden on cable operators. As such, both equity and precedent require that the ruling that cable services are "information services" be applied solely on a prospective basis.

IV. TO THE EXTENT THAT CABLE MODEM SERVICE MAY BE SUBJECT TO TELECOMMUNICATIONS SERVICE CLASSIFICATION IN THE NINTH CIRCUIT, THE COMMISSION SHOULD FORBEAR FROM APPLYING EACH PROVISION OF TITLE II OR COMMON CARRIER REGULATION.

Because the Ninth Circuit suggested in dicta that cable modem service is a telecommunications service,[183] the Commission has asked for comment on whether it should forbear from applying each provision of Title II or common carrier regulations to cable modem service. The answer is yes. Under the Telecommunications Act of 1996, the Commission "shall forbear" from applying any regulation to a telecommunications carrier or telecommunications service if it determines that (i) enforcement is not necessary to ensure "just and reasonable" nondiscriminatory charges, (ii) enforcement is not necessary for the protection of consumers, and (iii) forbearance from applying the regulation is consistent with the public interest.[184] This provision not only gives the Commission "broad authority to forbear" from applying a regulation,[185] but requires the Commission to forbear when it determines that regulation is unnecessary.

To the extent that cable modem service is classified as a telecommunications service in the Ninth Circuit, forbearance of Title II regulation is clearly required. As discussed above, multiple ISP access is rapidly developing in the absence of regulation, and cable operators have

[183] *AT&T* v. *City of Portland*, 216 F.3d 871 (9th Cir. 2000).

[184] *See* 47 U.S.C. 160(a).

[185] *See City of Portland*, 216 F.3d at 879 (noting that if the FCC chooses to forbear from Title II regulation, the court will not "impinge on [the FCC's] authority").

strong and obvious incentives to promote multiple ISP access. For that reason, Title II regulation is not necessary to ensure just and reasonable charges or to protect consumers. Moreover, inflexible government intervention would only undermine the pro-competitive commercial experimentation that will ensure optimal solutions to the many technical and operational issues raised by multiple ISP access over cable. Thus, common carrier regulation of cable is neither needed nor in the public interest. Indeed, the Commission has already recognized as much in tentatively concluding "that enforcement of Title II provisions and common carrier regulation is not necessary for the protection of consumers or to ensure that rates are just and reasonable and not unjustly or unreasonably discriminatory."[186]

Finally, forbearance from Title II regulation would ensure that there is a uniform national policy with respect to cable modem service. Although the Ninth Circuit stated that cable modem service is a telecommunications service, the Commission has concluded that it is not. And as noted in the *Notice* (¶ 95), "[t]he Commission has a long history of classifying information services as Title I services and thus not subject to the obligations and requirements imposed on services subject to Title II." In most parts of the country, then, cable modem service will be treated as an information service not subject to Title II regulation.[187] To ensure that this policy is uniform across the country, the Commission should forbear from Title II regulation even in those areas, such as the Ninth Circuit, where cable modem service has been classified as a telecommunications service.

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[186] *Notice* at ¶ 95. *See also id.* ("forbearance would be in the public interest because cable modem service is still in its early stages; supply and demand are still evolving; and several rival networks providing residential high-speed Internet access are still developing").

[187] *See id.*

CONCLUSION

For the foregoing reasons, the Commission should again decline to impose cable forced access regulation but should affirmatively preempt state and local regulation of cable Internet services as described above.

Respectfully submitted:

/S/ David L. Lawson

Mark C. Rosenblum
Lawrence J. Lafaro
Stephen C. Garavito
AT&T Corp.
Room 1135L2
295 North Maple Avenue
Basking Ridge, N.J. 07920

Douglas Garrett
James Bolin
AT&T Broadband LLC
188 Inverness Drive West
Englewood, CO 80112

David W. Carpenter
Sidley Austin Brown & Wood
One Bank One Plaza
Chicago, Illinois 60602

David L. Lawson
Daniel Meron
Stephen B. Kinnaird
C. Frederick Beckner
Jennifer Rubin
Sidley Austin Brown & Wood L.L.P.
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 736-8000

Attorneys for AT&T Corp.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Comments of AT&T Corp. was served, by the noted methods, the 17th day of June, 2002, on the following:

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
By Electronic Filing

Sarah Whitesell
Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 3-C488
Washington, D.C. 20554
swhitese@fcc.gov
By E-Mail

Qualex Corporation
Portals II
Federal Communications Commission
445 12th Street, S.W.
Room CY-B402
Washington, D.C. 20554
qualexint@aol.com
By E-Mail

Linda Senecal
Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 2-C438
Washington, D.C. 20554
lsenecal@fcc.gov
By E-Mail

Steve Garner
Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 4-C468
Washington, D.C. 20554
sgarner@fcc.gov
By E-Mail

/S/ Thomas Healy
Thomas Healy