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July 18, 2002

Ex parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ***AT&T/Comcast License Transfer Application,* MB Docket No. 02-70**

Dear Ms. Dortch:

On April 29, 2002, SBC Communications Inc. ("SBC") filed comments in the above-referenced docket establishing that the proposed AT&T/Comcast merger threatens competition in several markets. Among other things, SBC explained that the merger would permit AT&T to extend its anticompetitive restrictions on the distribution of Headend In The Sky, or "HITS," programming to Comcast service areas. SBC also explained that the merger threatens competition in the market for video programming distribution, as well as in the residential market for broadband Internet access, particularly in light of the pervasive regulatory restrictions on the Applicants' chief rivals, incumbent LEC DSL providers. In their reply comments filed May 21, 2002, AT&T and Comcast attempted to cast doubt on these showings. As discussed below, however, the Applicants' contentions regarding HITS misstate the availability of the services at issue and their importance to small MVPDs, their discussion of video programming distribution is largely nonresponsive, and their position regarding broadband Internet access is fatally undermined by comments that AT&T itself recently filed with this Commission.

I. The Applicants Misstate the Significance of AT&T's Anticompetitive Restrictions on the Distribution of HITS Programming.

AT&T generally offers a video aggregation service, known as HITS, that can dramatically lower the capital costs of start-up and relatively small MVPDs that seek to

compete with the dominant cable incumbents. SBC's comments noted that AT&T does not provide this service to overbuilders in AT&T's service areas.[1] SBC further explained that the merger threatened to make this anticompetitive situation worse, by providing AT&T with the incentive and ability to extend its exclusionary practice to the Comcast service areas.[2]

In response, the Applicants do not dispute that AT&T blocks the distribution of HITS to overbuilders in AT&T's service areas. Instead, they contend that they cannot restrict such distribution elsewhere. In particular, they stress that WSNet – which distributes HITS to small MVPDs – is contractually permitted to sell HITS service to overbuilders anywhere outside of AT&T's service area.[3] But Applicants have provided no information to suggest that this contractual right is somehow inviolable. Indeed, as far as the information in the record is concerned, this so-called "right" could disappear by way of contract amendment the day after the merger closes. Moreover, even if it remains in place, this "right" expires in June 2006.[4] Accordingly, even if an MVPD were to sign up for service today, the best it could hope for is a four-year commitment. That time period is already far too short to provide the stability of content needed to justify starting a new service in competition with a dominant cable incumbent,[5] and, absent action by the Commission, it will only get shorter.

The Applicants also contend that restrictions on WSNet's distribution of HITS are beside the point, because SBC and other MVPDs could obtain HITS service, or a comparable substitute, from alternative suppliers.[6] But the primary outlet they identify – the National Cable Television Cooperative – provides service only to franchised cable operators,[7] not (for example) to SMATV or other types of non-franchised MVPDs.[8] And

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[1] *See* SBC Comments at 13-14.

[2] *See id.*

[3] *See* AT&T/Comcast Reply at 59.

[4] *See* AT&T/Comcast's Braden Decl. ¶ 23 (AT&T/Comcast Reply App. 2).

[5] *Cf.* AT&T/Comcast Reply at 49 (emphasizing that "cable carriage deals are long-term contracts"); *see also* AT&T/Comcast's Ordover Decl. ¶ 20 (AT&T/Comcast Reply App. 5).

[6] *See* AT&T/Comcast Reply at 59, 61.

[7] *See* NCTC, *How Do I Join?* ("to join the NCTC, a company must be engaged in the business of providing television reception or service to the public, primarily by means of a cable television system consistent with the definition of a 'cable television system' in section 602 of the 1984 Cable Act"), *at* http://www.cabletvcoop.org/everyone/Prospect/Join.htm (visited June 25, 2002); *see also* NCTC, *What is the NCTC?* (NCTC "is proud to say that its members operate more than half the franchised cable systems throughout the United States"), *at* http://www.cabletvcoop.org/everyone/Prospect/What_Is.htm (visited June 25, 2002).

[8] Because SMATV operators typically are not "cable operators" of "cable systems" as defined in the 1984 Cable Act, they need not be franchised by local authorities. *See* Memorandum Opinion and

AT&T and Comcast's reliance on other distributors of programming – in particular, TVN and OlympuSAT – is equally unavailing. Both distribute limited amounts of programming designed to supplement a broader programming package.[9] Neither provides the basic programming that makes up the backbone of an MVPD's line-up, and thus neither is a viable substitute for HITS.

The Applicants further attempt to minimize the significance of HITS by claiming that the service is purchased by MVPDs serving less than a quarter of all digital MVPD subscribers.[10] But that misses the point entirely. HITS services are needed by *small* MVPDs that cannot justify the capital costs of constructing their own digitally enabled headends. The large MSOs – whose subscribers make up the vast bulk of digital MVPD subscribers nationwide – are far less likely to need HITS services in the first place. Nor do the DBS providers, which transmit directly from satellites to homes, need HITS. Thus, the fact that HITS service is received by nearly a quarter of digital MVPD subscribers – far from demonstrating its minimal importance – only confirms its value to small MVPDs.

Finally, AT&T and Comcast posit that, in all events, HITS service is not even particularly useful to start-up MVPDs, because they can obtain multiple channels of digitally formatted programming elsewhere.[11] But, as SBC has already explained, this so-called alternative increases the up-front capital costs of a new MVPD by approximately $500,000. The Applicants criticize this figure as unsupported,[12] but they do not suggest it is excessive. In fact, it is conservative. This estimate is based on SBC's consideration of programming solutions at a new real estate development in Mission Bay, California. It represents the difference between the up-front capital investment that SBC

Order, *Entertainment Connections, Inc.*, 13 FCC Rcd 14277, 14302-03, ¶¶ 53-55 (1998), *aff'd*, *City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999). NCTC does confirm what SBC noted in its comments – that purchasing HITS service through an entity that aggregates demand can be critically important: "Currently, NCTC member companies save an average of $4 to $8 per subscriber on programming costs alone. The savings vary from member to member depending on size, channels offered and the amount of participation." NCTC, *How Much Can I Save?*, *at* http://www.cabletvcoop.org/everyone/Prospect/Save.htm (visited June 25, 2002).

[9] TVN offers some video-on-demand, near-video-on-demand, direct response programming, and other miscellaneous programming services, but does not offer basic cable programming (such as CNN, ESPN, MSNBC, and USA) or premium video programming (such as HBO and Showtime). *See* TVN, *Products and Services*, *at* http://www.tvn.com (visited June 25, 2002). For its part, OlympuSAT bills itself as a "niche" programmer, with offerings such as the B-Mania Channel; TV Warehouse; Cine Latino; and TV Chile. *See* http://www.olympusat.com/networks/index.html (visited June 25, 2002).

[10] AT&T/Comcast Reply at 60.

[11] *See id.* at 60-61.

[12] *See id.*

estimated would be needed for headend facilities if SBC were to employ a HITS solution, on the one hand, and the up-front investment that would be needed if SBC were to gather multiple channels of video programming from several different satellites and digitize that programming itself, on the other. And, on further investigation, SBC now believes the investment imbalance may be even greater than initially estimated – perhaps as high as $1 million. In any event, the figure is plainly significant enough to adversely affect MVPD competition in AT&T and Comcast's service areas. The Commission should take steps to ensure that it does not.[13]

II. The Applicants' Discussion of Video Programming Distribution Is Largely Nonresponsive to the Claims Raised By SBC.

SBC's comments explained that a combined AT&T/Comcast could adversely affect the market for video distribution by, among other things, raising the costs of rival distribution platforms. The combined company's leverage would allow it to drive down the prices it pays for programming, leaving programming suppliers to recoup the lost revenue from other MVPD providers. That, in turn, will result in higher costs for other distribution platforms, rendering them less capable of competing with the dominant cable incumbents.[14] The Applicants' reply comments do not directly address this theory, though their defense of the merger in some respects appears to be an attempt to call into question certain aspects of it. Those attempts, however, are largely nonresponsive, and in all events fail to address the relevant concerns.[15]

The Applicants do not dispute that they expect to pay less for programming after the merger than either of them does today. Indeed, they trumpet this fact – describing it as an unmitigated benefit of the merger – as representing in large part savings of transaction and negotiation costs.[16] It is difficult to see how the elimination of such costs

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[13] As SBC explained in its comments, one obvious step would be to require divestiture of HITS. *See* SBC Comments at 32-33. In that regard, we note that AT&T recently took steps to further integrate HITS into its corporate structure. *See* AT&T News Release, *AT&T Broadband Consolidates AT&T's Headend in the Sky (HITS) with its AT&T Digital Media Centers Division* (May 6, 2002), *at* http://www.att.com/news/item/0,1847,10412,00.html.

[14] *See* SBC Comments at 12-13; SBC's Gertner Decl. ¶¶ 24-26 (SBC Comments Attach. A).

[15] Applicants claim that, as with respect to the impact of the merger on video distribution generally, "[t]he fundamental fact about this merger is that AT&T Broadband and Comcast are not direct competitors in any relevant geographic or product markets." AT&T/Comcast Reply at 30. Of course, the merger between SBC and Ameritech presented similar circumstances, yet that did not stop AT&T from claiming that it should be denied because, in its view, it "would enhance the Applicants' ability to leverage [market] power into related markets." Petition of AT&T Corp. to Deny Applications at iv, CC Docket No. 98-141 (FCC filed Oct. 15, 1998).

[16] *See* AT&T/Comcast's Pick Decl. ¶ 21 (AT&T/Comcast Application App. 9); *see also* AT&T/Comcast Reply at 39-41.

related solely to programming acquisition could save the combined company up to $450 million every year[17] – especially since, as the Applicants repeatedly emphasize, programming deals have terms as long as 15 years.[18] But in any case, even if true, the assertion does not undermine the key point, which is that, whatever the reason, large cable operators pay lower prices for programming on a per-subscriber basis. And, of course, a combined AT&T Comcast would be by far the largest cable operator the country has ever seen.

The Applicants also do not dispute that the combined company would, if possible, "pay[] less than its proportionate share" of programmers' costs.[19] Rather, they explain that they *also* have an incentive to make sure that they do not save *too* much, and thereby threaten the survival of any high-quality programming.[20] That is so, the theory goes, because the viability and quality of programming is more important to big MVPDs than it is to small ones, so the bigger the MVPD, the less likely it is to "free ride" on other distributors. Independent programmers themselves, of course, are less than sanguine about trusting their ability to survive to the beneficence of vast, vertically integrated media conglomerates such as a combined AT&T/Comcast.[21] And, in any case, the difficulty with Applicants' theory is that it is contrary to fact (not to mention the Applicants' own predictions). Again, big MVPDs pay *less* for programming than small ones.[22] If, as the Applicants appear to claim, the large cable operators were the ones without the leverage, presumably the smaller ones would know it, and be able to act upon it. But that is not the way it works in reality.

The Applicants also claim that, in all events, any discounts the merged company is able to extract from programmers are really just an effort to eliminate programming suppliers' "monopoly rents."[23] But they provide no evidence to suggest that such

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[17] *See* AT&T/Comcast's Pick Decl. ¶ 21.

[18] AT&T/Comcast Reply at 49 (emphasizing that "cable carriage deals are long-term contracts"); AT&T/Comcast's Ordover Decl. ¶ 20 ("Typically, programming is provided to a cable operator pursuant to a long-term contract, usually lasting between five and ten years, with one or more five-year renewal options, although it is not uncommon to observe contracts as long as fifteen years.").

[19] AT&T/Comcast Reply at 35.

[20] *Id.* at 36 n.103.

[21] *See, e.g.*, Letter of Charles W. Fries, The Caucus For Television Producers, Writers & Directors, to Michael K. Powell, Chairman, FCC, at 1 (June 7, 2002) ("the growing concentration of [media] ownership" will have a "potentially catastrophic" impact "upon the creators of content and, ultimately, upon the quality and diversity of that which will be seen by the American viewing public.").

[22] The academic literature – some of which Applicants themselves rely upon, *see* AT&T/Comcast's Ordover Decl. ¶ 20 n.8 – is largely agreed on that point. *See* SBC's Gertner Decl. ¶ 39.

[23] AT&T/Comcast Reply at 38.

"monopoly rents" exist in the first place. The only support they provide is a citation to the declaration of Dr. Robert Gertner, filed on behalf of SBC.[24] The cited portion of that declaration, however, hardly amounts to the "concession" described by the Applicants. Rather, it explains that, while some content producers "*may*" be able to absorb the impact of decreased payments from a combined AT&T/Comcast, others of them – particularly those "barely earning enough to cover [their] fixed costs" – are likely to "negotiate higher prices with other distributors."[25] And that, of course, is precisely the point: the higher prices negotiated by programmers will increase the other distributors' costs, limit their ability to compete with a combined AT&T/Comcast, and "risk[] negative effects" on consumers.[26]

At bottom, the Applicants defend the merger on the basic theory that, whatever incentives the merged company will have to foist programming costs onto its rivals, it cannot act on them because of the strength of DBS.[27] But, for one thing, the market share in video distribution that the cable incumbents have lost to DBS is comparable to the voice share that SBC's incumbent LECs have lost to CLECs,[28] yet AT&T continues to proclaim that SBC possesses a "bottleneck" in the local exchange.[29] Moreover, the cable incumbents continue to show significant subscribership growth, even while their price increases outpace the rate of inflation.[30] DBS is thus hardly the competitive constraint the Applicants make it out to be. Indeed, the Applicants' focus on DBS only underscores the competitive concerns raised by the combined entity's ability to extract substantial discounts from programming suppliers, and thereby gain a competitive advantage over other distribution platforms. If the consequence of "reaching" for a lower programming

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[24] *See id.* at 38 & n.106 (citing SBC's Gertner Decl. ¶¶ 25-27).

[25] SBC's Gertner Decl. ¶¶ 25-26.

[26] *Id.* ¶ 27.

[27] *E.g.*, AT&T/Comcast Reply at 37.

[28] *Compare* Eighth Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 1244, 1247, ¶ 5 (2002) ("*Eighth Video Competition Report*") (estimating cable video programming market share of 78%) *with* Comments of SBC Communications Inc., Attach B. at 1-2, CC Docket Nos. 01-338, 96-98 & 98-142 (FCC filed Apr. 5, 2002) ("*SBC Triennial Review Comments*") (estimating CLEC line share in SBC regions between 14.8% and 18.6%).

[29] *See, e.g.*, Comments of AT&T Corp. at 40-41, CC Docket Nos. 02-33, 95-20, & 98-10 (FCC filed May 3, 2002).

[30] *See Eighth Video Competition Report*, 17 FCC Rcd at 1247, ¶ 7 (noting that cable MVPDs continue to experience significant subscriber growth); *McCain Asks for GAO Study on Rising Cable Rates*, TR Daily, Apr. 16, 2002 ("'There are two signs of spring in Washington: the arrival of . . . the cherry blossoms, and the release of the FCC report that cable rates have risen during the previous year. . . . Consumers have a right to know why cable rates continue to climb faster than the rate of inflation.'") (quoting Senator John McCain).

price is to raise the price to rivals, then a combined AT&T/Comcast will be more willing to undertake any risks associated with such tactics than it would be in the absence of such rivals. In any case, merely pointing to the existence of DBS is not enough to satisfy the Applicants' burden of "convinc[ing]" the Commission that the merger will "enhance competition."[31]

III. The Applicants' Position on Open Access and Regulatory Parity is Undermined by AT&T's Own Comments in Related Proceedings.

Like many other submissions in this proceeding, SBC's comments explained that the proposed merger threatens to cement the cable platform's dominance of the residential broadband market, particularly in light of the regulatory straitjacket in which the Applicants' chief competitors, incumbent LEC DSL providers, are forced to operate.[32] SBC further explained that this threat could be substantially mitigated by freeing SBC and other incumbent LECs to compete with the merging parties on an equal footing, and that, failing that, the Commission should impose access conditions on a combined AT&T/Comcast that mirror those imposed on its nondominant incumbent LEC competitors.[33]

The Applicants' reply comments largely ignore these contentions, on the theory that a merger proceeding is an inappropriate forum in which to address them. In their view, questions regarding access to the cable platform are "more properly addressed in the Commission's ongoing proceedings" regarding broadband regulation generally.[34] But this position is exactly contrary to the position AT&T has taken in those same "ongoing proceedings." In comments filed just last month in response to the *Cable Broadband NPRM*,[35] AT&T repeatedly cites the Commission's *AT&T/MediaOne* and *AT&T/TCI* merger orders as definitively holding that open access to the cable platform is "not in the public interest."[36] AT&T cannot have it both ways. If the FCC's review of AT&T's

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[31] Memorandum Opinion and Order, *Applications of Ameritech Corp. Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control*, 14 FCC Rcd 14712, 14738, ¶ 49 (1999).

[32] *See* SBC Comments at 15-22.

[33] *See id.* at 33-40.

[34] AT&T/Comcast Reply at 92.

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

[36] Comments of AT&T Corp. at 8 n.12, GN Docket No. 00-185 & CS Docket No. 02-52 (FCC filed June 17, 2002) ("*AT&T Cable Open Access Comments*") (citing Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, 15 FCC Rcd 9816 (2000), and

mergers with MediaOne and TCI were appropriate fora in which to rule upon the question of open access – and AT&T plainly believes they were – then so too is the Commission's review of AT&T's merger with Comcast.

To the extent the Applicants' reply comments engage the question of open access, moreover, their position is fatally undermined by the comments AT&T recently filed in response to the *Wireline Broadband NPRM.*[37] In particular, while the Applicants point to their purported "incentives" to provide access to multiple ISPs,[38] AT&T's *Wireline Broadband* comments make unmistakably clear that it fully intends to continue to bar most ISPs from gaining meaningful access. Thus, AT&T expressly concedes that cable transmission facilities are *not* a "meaningful alternative[]" for "ISPs seeking to offer broadband services today,"[39] and it derides the prospect that this will change as mere "speculation about what may come."[40] Indeed, AT&T candidly states that, because ISPs "rarely have alternative[s]" to ILEC networks, "*[f]ew could be expected to survive*" without government-mandated access.[41] That statement is particularly striking in light of the fact that, as the Commission has found, the dominant cable incumbents possess by far the "most widely subscribed to technology," with close to 70% of the residential market.[42] The access requirement that AT&T advocates for the Bell companies would provide ISPs with access only to what is left over – *i.e.*, less than one-third of the market. If, as AT&T contends, ISPs need mandatory access to such a limited number of

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Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to A&T Corp., Transferee*, 14 FCC Rcd 3160 (1999)); *id.* at 13 & n.39 (same); *see also id.* at 2 (contending that the Commission "has addressed the question" of open access for cable "six[] time[s] in the past four years").

[37] Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 2999 (2002).

[38] AT&T/Comcast Reply at 93.

[39] Comments of AT&T Corp. at iii, CC Docket Nos. 02-33, 95-20, & 98-10 (FCC filed May 3, 2002) ("*AT&T Wireline Open Access Comments*"); *see id.* at 49 ("In the vast majority of cases, independent ISPs simply do not have any way of providing integrated broadband Internet access services without access to the Bells' last mile facilities.").

[40] *Id.* at 9

[41] *Id.* at 3 (emphasis added).

[42] *Cable Open Access NPRM*, 17 FCC Rcd at 4802-03, ¶ 9; *see* Jonathan R. Laing, *Ready to Charge*, Barron's, May 20, 2002 ("[C]able is clobbering the Bells . . . in the race to wire U.S. homes with Internet connections. In fact, cable modems are maintaining their 2-to-1 edge over the phone industry's DSL (digital subscriber lines)."). Even the Applicants' own source stresses that "cable added almost twice as many subscribers [in the past year] as the major residential DSL providers." Press Release, Leitchman Research Group, *Leading Broadband Internet Providers Reach Nearly 12 Million Subscribers in the U.S.* (May 3, 2002) (cited in AT&T/Comcast Reply at 75), *at* http://www.leichtmanresearch.com/press/0503release.html.

consumers in order "to survive," it can only be because AT&T and the other cable incumbents intend to continue to seal off access to the lion's share of the market.

More generally, AT&T's *Wireline Broadband* comments also betray a fundamental lack of confidence in market-based solutions to the question of open access, in direct conflict with the position Applicants have taken here. Thus, for example, where AT&T once claimed that it is "universally accepted" as a fundamental economic truth that open-access obligations come at the cost of stifling facilities investment,[43] it now claims that a deregulatory environment for broadband services "would *not* serve to accelerate broadband investment."[44] Where it once argued that "[c]ompetition and marketplace forces will quite simply yield procompetitive and pro-consumer outcomes far more effectively than could any regulatory requirements,"[45] AT&T now believes that Commission-mandated pricing for broadband access "provide[s] for full compensation at risk-adjusted, competitive market levels."[46] And where it once claimed that "[c]ompetition in the nascent broadband Internet services business" dictated a "framework" in which regulators decline to "interfere with market mechanisms and dictate the terms and conditions" of access,[47] AT&T now claims that government intervention is necessary to ensure that ISPs "receive [broadband] service at reasonable and nondiscriminatory rates."[48]

To be sure, AT&T attempts to restrict its pro-regulatory stance to the Bell companies' broadband offerings, and to preserve for cable operators alone the right to operate free from what it describes as the "chaos and waste" of open access regulation.[49] But the distinctions it draws are transparently self-serving. AT&T claims, for example, that Bell companies, and not cable companies, have incentives to delay broadband deployment to protect revenues from other services.[50] But it is the cable companies, not the ILECs, that put in place restrictions on the use of streaming video in order to protect their video distribution revenues,[51] and whose "first reaction" to consumers' demand for

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[43] Comments of AT&T Corp., GN Docket No. 00-185, at 42, 68-69 (FCC filed Dec. 1, 2000) ("*AT&T Open Access NOI Comments*").

[44] *AT&T Wireline Open Access NOI Comments* at 10.

[45] *AT&T Open Access NOI Comments* at 2.

[46] *AT&T Wireline Open Access Comments* at 10.

[47] *AT&T Open Access NOI Comments* at 42.

[48] *AT&T Wireline Open Access Comments* at 26.

[49] *AT&T Open Access NOI Comments* at 80.

[50] *See AT&T Wireline Open Access Comments* at 10; *id.* at 65.

[51] *See, e.g.*, K. Kleiner, *The Enemies of Innovation*, National Journal (Apr. 7, 2002) (some cable companies "limit[ed] the amount of streaming video customers can watch (in theory because of

broadband Internet access "[wa]s to protect their legacy network."[52] AT&T also justifies disparate regulation on the ground that incumbent LECs "raised their DSL prices" in the last year,[53] even though cable modem prices have risen faster.[54] AT&T further claims that Bell companies should be regulated differently because, in its view, customers want their broadband delivered over the same "line" that delivers their voice.[55] But AT&T's foray into the cable business was predicated on a very different view – *i.e.*, that customers wanted a *video*/data bundle[56] – and in fact that is proving to be the most popular choice among consumers.[57] Finally, and perhaps most absurdly, AT&T claims that it is entitled to special treatment for its broadband services because its *cable* services are regulated differently than incumbent LEC *voice* services.[58] It is black-letter law, however, that services are classified based on their nature, not who happens to provide them, or what else they happen to provide.[59] AT&T concedes that broadband Internet access is an "information service" regardless of the type of facilities that are used to provide it.[60] Coupled with the undeniable fact that cable possesses the dominant share of the residential broadband Internet access market, that concession mandates a uniform broadband regulatory framework that applies equally to all providers.

The simple fact is that, in the broadband Internet access arena, cable companies and ILECs provide the same service. They should be subject to the same rules. And, as

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bandwidth considerations, but perhaps also because streaming video could be a direct threat to their TV business)"); *see also* G. Arlen, *Suddenly, Streaming Slows Down*, Broadband Week (Mar. 5, 2002) (noting that "restrictions on streaming" can "mean a better price for the core video network").

[52] Richard P. Cole, *Sinking or Swimming With Streaming Video*, CableWorld, Dec. 11, 2000, at 14, 15 (quoting Chairman of Excite@Home, then owned in large part by cable incumbent AT&T), *at* http://www.enjoyweb.com/news/pdf/cableworld.pdf.

[53] *AT&T Wireline Open Access Comments* at 10; *see id.* at 68.

[54] *See* Rachel Konrad, *Modem Owners Pay More for AT&T*, Cnet News.com, May 28, 2002 ("[C]able broadband Internet prices rose 12 percent in 2001. . . . Consumer DSL prices rose 10 percent during the same time frame."), *at* http://news.com.com/2100-1033-923512.html; *see also id.* (noting that AT&T recently imposed a $7 per month price increase on its modem-owning customers).

[55] *AT&T Cable Open Access NOI Comments* at 27.

[56] *See, e.g.*, AT&T-MediaOne Merger Prospectus Registration Statement, Schedule S-4, at II-5 (SEC filed Aug. 27, 1999) ("[T]he combined company's ability to offer customers 'one-stop shopping' for all of their video entertainment, information, Internet and communication needs will be a significant advantage to AT&T following the merger.").

[57] *See, e.g.*, Jason B. Bazinet, J.P. Morgan Securities Inc., *Industry Analysis: The Cable Industry* 42 (Nov. 2, 2001).

[58] *See AT&T Wireline Open Access Comments* at 73-74.

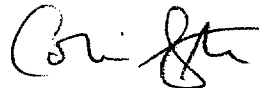
[59] *See, e.g.*, *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 768 (6th Cir. 1995).

[60] *See AT&T Wireline Open Access Comments* at 12.

its own words demonstrate, AT&T cannot escape that basic proposition. Indeed, even AT&T's effort to play both sides of the fence can be explained in its own words: proponents of open-access regulation, it has argued, are "more interested in hampering" their competitors' "ability to compete" than in fostering consumer choice.[61] AT&T's regulatory gamesmanship is a misguided attempt to preserve for itself an artificial regulatory advantage that has no basis in law or policy. Cable is already widely viewed as "invincible," and is expected to "remain the leading access platform within the consumer market."[62] There is simply no reason for this Commission to continue to give AT&T and the other dominant cable incumbents an artificial edge on their DSL-based competitors. The Commission should instead hold the merger in abeyance until it concludes its pending broadband-related rulemakings, and finally puts in place a "minimal regulatory environment" that is "consistent . . . across platforms."[63] Failing that, the Commission should use this proceeding to level the broadband playing field.

Questions regarding this letter can be directed to my attention.

Yours truly,



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[61] *AT&T Cable Open Access NOI Comments* at 78.

[62] *See* Imran Khan, Yankee Group, *Residential Broadband: Cable Modem Remains King*, 7, 8 (2002).

[63] *Wireline Broadband NPRM*, 17 FCC Rcd at 3001-02, ¶¶ 5, 7.