

# THE VERTICAL DIMENSION OF CABLE OPEN ACCESS

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## INTRODUCTION

The debate over whether the owners of broadband internet access systems should be required to provide open access has, to date, largely focused on a single issue: whether cable television companies will use their control over transmission to disadvantage unaffiliated internet service providers (“ISPs”) and unaffiliated content providers. The debate has focused on cable companies because cable companies currently lead the market in providing broadband internet access and because cable companies are not subject to the unbundling rules applicable to monopolistic local telephone companies. AT&T and other cable companies currently require their customers to purchase internet services through an affiliated ISP. Although AT&T and others permit a subscriber to access all of the content available on the internet, open access advocates contend that cable companies are forcing customers to “pay twice” and are endangering open and free competition in the internet. Moreover, cable companies currently have in place certain use restrictions, such as limits on broadcast-quality streaming video, that open access advocates claim are unnecessary and anticompetitive.

The argument has centered almost exclusively on two issues: whether cable companies will, for a relevant time, have market power in a market for the delivery of high speed internet access, and whether the cable companies’ requirements that customers purchase service through an affiliated ISP

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hurts internet competition. The first issue is contingent upon technology and the economic viability of competing platforms. Various conclusions are possible, although the Federal Communications Commission ("FCC") has concluded that multiple platforms are likely in the near future.<sup>1</sup> The second question requires an analysis of the parties' incentives. Nevertheless, most of the debate over open access rules has quickly conflated the assumed market power of cable companies over distribution with the cable companies' incentives to impede competition in related markets. In other words, most advocates of open access rules first conclude that cable companies will have market power over transmission, at least for some relevant period, and then assert that cable companies will inevitably use their control over transmission to disadvantage unaffiliated ISPs and content providers.

In a previous paper, I noted that the *incentive* to impede competition cannot simply be inferred from the *ability* to impede competition.<sup>2</sup> To do so accepts the now largely discredited "monopoly leveraging" hypothesis. In general, monopolists will not try to limit competition in markets for complementary goods and services, for to do so would simply diminish demand for—and reduce profits from—the monopoly good. Moreover, I argued that even monopoly owners of broadband transmission platforms will have strong incentives to provide open access, because demand for broadband transmission will be strongly responsive to the variety of content and services available over the platform. Broadband platform owners will recognize that a competitive content supply market will maximize their own profits from transmission.

This paper discusses a different aspect of the open access debate. The foregoing analysis considers the possibility that a broadband platform owner would seek to extend that monopoly

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1. See, e.g., Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, 14 F.C.C.R. 2398, 2423 ¶ 48 (1999) [hereinafter Deployment Inquiry]; Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee, 14 F.C.C.R. 3160 (1999) [hereinafter AT&T/TCI Order].

2. See generally James B. Speta, *Handicapping the Race for the Last Mile?: A Critique of Open Access Rules for Broadband Platforms*, 17 YALE J. ON REG. 39 (2000).

into ISP or content markets. The open access debate, however, focuses on cable companies, and focusing specifically on cable companies highlights a potential complication. In particular, the foregoing analysis makes it appear as if cable companies are only in the business of providing internet access. The reality, of course, is that cable companies' current core business is the distribution of video, and the largest cable companies are substantially vertically integrated into programming. That is, cable companies have significant ownership interests in many programs distributed on their systems. But internet access over cable television wires almost assuredly is—or will be soon—a substitute for the traditional video programming on cable television. This fact has led some open access advocates to argue that the cable companies will impede the distribution of certain internet services such as streaming video, because those services would threaten the cable companies' revenues on the programming side. Conceived in this manner, a cable television company's attempt to restrict access to its systems by limiting the services that unaffiliated ISPs or other content providers can offer might be an attempt at monopoly maintenance and not at monopoly leveraging. In other words, the cable television provider's incentive to protect programming and advertising revenues might make restrictive behavior rational.

The fear that cable companies will provide less than true open access in order to protect their traditional programming revenues, while vigorously stated, ultimately seems to be unfounded. Although the video programming market is concentrated and a significant investment is required to start a new cable programming network, no true barriers to entry exist in that market. Cable companies, therefore, do not have supra-normal profits in programming that they would try to protect. Although FCC rules do limit the number of channels that a cable system may dedicate to affiliated programmers, there is no evidence that cable companies currently discriminate against their video programming competitors to the detriment of consumers. There is no reason to believe they would discriminate against the new video programmers that might be available with internet access.

To develop the argument that mandating open access is unnecessary to prevent monopoly leveraging or monopoly maintenance by cable companies, this paper proceeds as follows. Part I provides some brief background on the open access

debate, including the current arguments on either side. As much of the debate has occurred in court and agency filings, and in unpublished white papers, a brief review of the arguments seems profitable. Part II examines cable systems' vertical integration with video programming interests as well as cable systems' revenues from such programming and from advertising. It also discusses current statutory and regulatory limits on cable vertical integration. That Part also evaluates how such interests might alter a cable system's incentives to provide open access to ISPs and other content providers. Cable has not been shown to earn, and therefore should not seek to protect, supranormal profits in the programming market. Therefore, the significant integration of cable systems and cable programmers does not require open access rules for cable internet access. Part III concludes with some observations on the real issues at stake in the open access debate, namely, the development and maintenance of direct customer relationships and an effort to radically revise the established model of cable television programming.

#### I. THE STATE OF THE CABLE OPEN ACCESS DEBATE

Based on fears that recently completed and proposed cable mergers will create opportunities and incentives for anticompetitive behavior, a significant number of interest groups, several academics, and a few politicians have called for mandatory open access rules to govern cable providers' internet access services. The FCC refused to condition the merger of AT&T and TCI on such rules, and its chairman has publicly stated on numerous occasions that he believes such rules to be inappropriate—or at least premature. On the other hand, several municipalities did impose open access requirements as a condition of that merger. Moreover, in the wake of the announced AT&T/MediaOne and AOL/Time-Warner mergers, the calls for mandatory open access have increased. Several academics have written working papers, or filed comments with the FCC, calling for open access requirements. This section briefly reviews the current state of the cable open access debate and the arguments being made on each side.

As a threshold matter, it is important to describe accurately what is, and what is not, currently at issue in the debate over cable open access.<sup>3</sup> First, AT&T and other significant cable operators require consumers purchasing internet access over their systems to purchase that service from an affiliated ISP, such as @Home or Roadrunner. The cable companies currently do not sell “transport” to other ISPs such that a customer may purchase cable internet access from an unaffiliated ISP. Second, AT&T and other cable companies impose some limits on certain services. For example, @Home currently forbids a subscriber from receiving more than 10 minutes of broadcast quality video, from hosting web pages, and from reselling the service.<sup>4</sup> Third, the cable companies permit customers to reach all other content providers on the internet. Thus, a cable customer desiring to view Yahoo’s content or to purchase AOL’s content may do so simply by entering the appropriate address for Yahoo or AOL. Moreover, a cable customer may modify his or her browser so that another ISP or content provider is that customer’s “first screen,” and he or she is never confronted with @Home or Roadrunner at all.<sup>5</sup>

Both AT&T and Time Warner/AOL recently have made commitments to provide service to unaffiliated ISPs. AT&T has committed to negotiating access agreements with unaffiliated ISPs that would provide, upon the 2002 expiration of the exclusive contracts with @Home, comparable functionality as well as the opportunity to market directly to AT&T internet customers.<sup>6</sup> AOL and Time Warner have similarly committed to negotiating nondiscriminatory access terms for unaffiliated

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3. This paper sets to one side issues relating to the unbundling and open access rules imposed on telephone companies’ provision of high speed internet access—the law of which is much more settled. See generally *id.* at 61–75.

4. See @Home Service Acceptable Use Policy (last modified Sept. 21, 1999) <<http://www.home.com/support/aup>>.

5. See AT&T/TCI Order, *supra* note 1, at 3206 ¶ 95 (quoting AT&T’s statement: “TCI customers subscribing to AOL . . . do not have to ‘go through’ @Home or view any @Home-provided content or screens. In fact, if they so desire, customers will be able to remove the @Home icon from their desktop completely. This will continue to be the case after the merger.”).

6. See Kara Swisher et al., *AT&T’s Access Plan Draws a Mixed Reaction*, WALL ST. J., Dec. 7, 1999, at B6; David N. Baker et al., *Letter to FCC Chairman William Kennard* (Dec. 6, 1999), available at <<http://www.att.com/press/item/0,1354,2331,00.html>>.

ISPs should their merger be approved.<sup>7</sup> Most open access advocates have argued that these commitments are inadequate because AT&T and AOL have not offered specific, significant discounts to other parties wishing to resell transport on these systems or because the commitments will not become effective until current exclusive contracts expire.<sup>8</sup>

### A. *Current Cable Open Access Rules*

No provision of the Communications Act specifically requires cable providers to offer or provide open access to internet services, and no rule of the FCC imposes any such requirement. In fact, the issue seems to have been placed into public debate, if not to have been first born, upon the announcement of the AT&T/TCI merger. Prior to the merger, of course, there was relatively little internet access over cable television systems,<sup>9</sup> and, where internet access was offered, there was no open access. TCI and many other cable systems had an exclusive arrangement with @Home to provide ISP services in conjunction with internet access offered over those systems, and Roadrunner had an exclusive arrangement with Time-Warner and other cable systems for ISP service on those systems. To the extent that other cable systems offered internet access, they too tended to offer internet access together with an exclusive ISP.

The AT&T/TCI merger, however, was premised on AT&T using its financial and technical resources to upgrade TCI systems to provide internet access and telephony at a much faster pace.<sup>10</sup> So it was no surprise that open access quickly became

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7. See Kathy Chen & Nick Wingfield, *Time Warner, AOL Vow To Give Rivals Access*, WALL ST. J., Mar. 1, 2000, at B8; *Memorandum of Understanding Between Time Warner, Inc. and America Online, Inc. Regarding Open Access Business Practices* (last modified Feb. 29, 2000) <<http://mediaweb.aol.com/media/>>.

8. See Marcy Gordon, *Skeptics Watching Merger*, SALT LAKE TRIB., Mar. 2, 2000, at C6.

9. In its decision approving the AT&T/TCI merger, the FCC estimated that at least 350,000 residential customers were purchasing internet access over cable television facilities at about the time the merger was announced. See AT&T/TCI Order, *supra* note 1, at 3196-97 ¶ 73.

10. See, e.g., John Greenwald, *AT&T's Power Shake*, TIME, July 6, 1998, at 12; Ronald Rosenberg, *AT&T Leading Telecom Pack; Bidding War Boosts Firm in Convergence Race*, BOSTON GLOBE, May 6, 1999, at C1; Jim Davis, *TCI Deal May Speed PC-TV Marriage* (last modified June 24, 1998) <<http://www.news.com/News/Item/0,4,23528,00.html>>.

an important issue. Several parties petitioned the FCC to condition the merger on such rules<sup>11</sup>; others argued that the issue properly rested with municipal franchising authorities and that states and local governments should impose such rules.<sup>12</sup> In general, these parties argued customers should have a choice of ISPs for cable-based internet access. They argued that customers forced to buy @Home would have to “pay twice” if they wanted another ISP service.<sup>13</sup> These parties feared AT&T would take steps to degrade or prohibit customers’ access to content provided by unaffiliated companies.<sup>14</sup> AT&T responded that it would permit customers to “click through” to any desired content available on the internet—each customer could receive any content that he or she wished.<sup>15</sup> AT&T also contended that mandatory open access rules would diminish its incentives to upgrade the cable systems to provide internet access or local telephony.<sup>16</sup>

The FCC refused to condition the merger on open access conditions. Parties to that proceeding had argued for three different types of open access conditions: requirements that AT&T provide access to its wires to other multichannel video programming distributors (“MVPDs”), requirements that AT&T

11. See, e.g., *Comments of America Online, Inc., Joint Applications of AT&T Corporation and Tele-Communications, Inc. for Transfer of Control to AT&T of Licenses and Authorizations Held by TCI and Its Affiliates or Subsidiaries* (last modified Oct. 29, 1998) <[http://gullfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6005542356](http://gullfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6005542356)> [hereinafter *AOL Comments*].

12. See, e.g., *States May Join Open Access Debate* (visited July 21, 1999) <<http://www.cnet.com/new/0-1004-200-345196.html/>>.

13. See *AOL Comments*, *supra* note 11, at 15 (“In order to receive access to advanced Internet services, consumers will be forced to continue to pay for @Home’s complete, self-described ‘value-added’ online service . . .”).

14. See *id.* at 14 (“TCI has substantial power over last-mile broadband data transport service for the Internet marketplace. It is TCI’s control over this essential input that has both motivated and enabled it to discriminate against independent providers of video-enabled Internet service and in favor of its own affiliated companies.”) (citations omitted).

15. See *AT&T and TCI’s Joint Reply to Comments and Joint Opposition to Petitions to Deny or to Impose Conditions, Joint Application of AT&T Corp. and Tele-Communications, Inc. for Transfer of Control to AT&T of Licenses and Authorizations Held by TCI and its Affiliates or Subsidiaries*, at 28 (Nov. 13, 1998) available at <[http://gullfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6005543597](http://gullfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6005543597)>.

16. See *id.* at 49 (“[T]he adoption of the proposed regulations would impose burdens on the merged AT&T-TCI and threats of protracted proceedings and rate regulation that would impair their incentive and ability to undertake rapidly the investments required to upgrade TCI’s cable facilities.”).

provide access to other telecommunications companies, and requirements that AT&T provide access to other ISPs.<sup>17</sup> The FCC denied the requests for access conditions in favor of MVPDs, because cable systems are not common carrier systems, and AT&T could not, under the Cable Act, be required to provide wire access to other MVPDs.<sup>18</sup> The FCC agreed that AT&T, to the extent it provided telecommunications service,<sup>19</sup> would be subject to the interconnection and other requirements applicable to any local exchange carrier ("LEC"),<sup>20</sup> but the FCC found no basis to conclude that AT&T would "replace" any existing incumbent local exchange carrier such that it should be subjected to the more onerous interconnection and unbundling duties applicable to the monopoly telephone companies.<sup>21</sup>

The FCC also refused to condition the merger on a requirement that AT&T provide open access to other ISPs. Both as a threshold matter and in response to arguments for open access, the FCC concluded, as it had on prior occasions,<sup>22</sup> that multiple providers of broadband internet access were likely to compete in the residential market in the near future.<sup>23</sup> The FCC also concluded that open access requirements could slow down the upgrade of cable and other facilities for broadband deployment by dampening both AT&T's incentives and com-

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17. A few parties suggested that AT&T be required, as a condition of the merger, to carry digital television signals. The FCC rejected that request. See AT&T/TCI Order, *supra* note 1, at 3183 ¶ 43.

18. See *id.* at 3176 ¶ 29 ("We continue to recognize and adhere to the distinctions Congress drew between cable and common carrier regulation. Under present law, neither cable operators nor common carriers providing cable service, other than on a common carrier basis, are subject to common carrier regulations under Title II of the Communications Act." (citing 47 U.S.C. § 571(a)-(b) (Supp. III 1997))). In the AT&T/TCI Order, the FCC made clear that AT&T would be required to provide competing MVPDs access to its inside wire in order to increase competition among MVPDs. See Telecommunications Services Inside Wiring, 13 F.C.C.R. 3659 (1997). Several parties had petitioned for judicial review of the rules to which the FCC referred, and the FCC requested that the case be held in abeyance pending its resolution of various petitions for reconsideration.

19. Under the Act and the FCC's current rules, internet access and similar services are considered "information services," not "telecommunications." See generally 47 U.S.C. § 153(46) (Supp. III 1997); Speta, *supra* note 2, at 62-75.

20. See 47 U.S.C. § 251(a)-(b) (Supp. III 1997); see also AT&T/TCI Order, *supra* note 1, at 3190 ¶ 56.

21. See 47 U.S.C. § 251(c); see also *id.* § 251(h) (setting out requirements for FCC declaring a new entrant to have replaced an ILEC and to be subjected to section 251(c)'s requirements); AT&T/TCI Order, *supra* note 1, at 3190 ¶ 57.

22. See Deployment Inquiry, *supra* note 1.

23. See AT&T/TCI Order, *supra* note 1, at 3192, 3197, 3206 ¶¶ 62, 74, 94.

petitor's incentives.<sup>24</sup> Finally, the FCC placed significant reliance on AT&T's representation that a customer could always "click through" @Home to any content on the internet and could, in fact, configure his or her system so that @Home was not even the "first screen" on the customer's computer.

Although it refused to require open access as a condition of the merger, the FCC promised that it would monitor AT&T's activities, as well as the development of the broadband access market, to determine whether such regulations would be necessary in the future.<sup>25</sup> Subsequently, FCC Chairman William E. Kennard sponsored the negotiations leading to AT&T's commitment to provide open access.<sup>26</sup> Nevertheless, Chairman Kennard also has stated on several occasions that cable systems should not be subject to open access conditions at this stage in their deployment and that the FCC is committed to fostering the deployment of multiple broadband systems.<sup>27</sup> The FCC's Cable Services Bureau has further issued a staff report reaching the same conclusions.<sup>28</sup>

In contrast to the FCC's current decision not to impose open access, several municipalities have made such rules, by conditioning TCI's transfer of its franchise to AT&T upon an open access condition, or simply by making open access a requirement of a cable television franchise. Portland, Oregon acted first to pass ordinances at both the city and county levels requiring that AT&T/TCI "provide nondiscriminatory access to [its] cable modem platform for providers of internet and on-line services" as a condition of transfer of TCI's franchise to AT&T.<sup>29</sup> AT&T declined to accept the condition; Portland then

24. See *id.* at 3206 ¶ 94.

25. See *id.* at 3207 ¶ 96.

26. See generally Baker et al., *supra* note 6.

27. See William E. Kennard, *Broadband Cable: Next Steps* (last modified Dec. 16, 1999) <<http://www.fcc.gov/Speeches/Kennard/spwek944.html>>; William E. Kennard, *Consumer Choice Through Competition* (last modified Sept. 17, 1999) <<http://www.fcc.gov/Speeches/Kennard/spwek931.html>>; William E. Kennard, *The Road Not Taken: Building a Broadband Future for America* (last modified June 15, 1999) <<http://www.fcc.gov/Speeches/Kennard/spwek921.html>>.

28. See Deborah A. Lathan, *Broadband Today: A Staff Report to William E. Kennard, Chairman Federal Communications Commission on Industry Monitoring Sessions Convened by Cable Services Bureau* (1999), available at <<http://www.fcc.gov/Bureaus/Cable/Reports/broadbandtoday.pdf>>.

29. *A Resolution Consenting to a Change in Control of the TCI Cable Franchises (West Multnomah County, Hayden Island) to AT&T with Conditions*, RESOLUTION NO. 98-208 BEFORE THE BOARD OF COUNTY COMMISSIONERS FOR

denied the transfer of the franchise, and AT&T sued to have the condition declared unlawful. The District Court decided against AT&T.<sup>30</sup> The case is on appeal to the Ninth Circuit. In the court of appeals, the FCC filed a brief largely supporting AT&T.<sup>31</sup>

Several other municipalities similarly have imposed access conditions on the transfer of licenses from TCI to AT&T or from MediaOne to AT&T.<sup>32</sup> Others have considered such conditions, but refused to impose them.<sup>33</sup>

Attempts to require open access have been proceeding on other fronts as well. In November 1999, GTE sued AT&T/TCI under the antitrust laws, claiming that failure to provide open access constituted illegal tying, exclusionary dealing, and other

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MULTNOMAH COUNTY, OREGON (Dec. 16, 1998); see also *Change in Control of TCI Cable Franchises (West Portland, Hayden Island) to AT&T Corporation*, ORDINANCE NO. 172955 (Dec. 17, 1998) (photocopy on file with author). The model for these nearly identical ordinances, a resolution by the Mount Hood Cable Regulatory Commission, is available at <<http://www.mhrc.org/CurrentIssues/res98-12.htm>>.

30. See *AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146, 1156 (D. Or. 1999).

31. See *Amicus Curiae Brief of the FCC*, *AT&T Corp. v. City of Portland*, (9th Cir. 1999) (No. 99-35604), available at <<http://www.techlawjournal.com/courts/portland/19990816fcc.htm>>. The FCC's brief, while concluding that Portland's open access requirement should be struck down, simply argues that open access conditions are a matter for federal regulators. The FCC does not take a position on the more difficult issues, such as whether internet access provided by cable operators is "cable service" under the 1996 Act. This reticence is understandable, for if such services are "cable service," then the FCC likely would be forbidden from applying open access rules should it later desire to do so. See *infra* notes 53-55 and accompanying text.

32. See Reuters, *AT&T Sues Fla. County Over Net Access* (last modified July 26, 1999) <<http://www.zdnet.com/filters/printerfriendly/0,6061,2302910-00.html>> (describing Broward County, Florida's open access requirement); Sherman Friedman, *AT&T & MediaOne Sue to Block Cable System Forced Access* (last modified Jan. 21, 2000) <<http://www.newsbytes.com/pubNews/00/142542.html>> (describing Henrico County, Virginia open access rules); Patricia Fusco, *Pittsburgh Approves Open Access Provision* (last modified Dec. 28, 1999) <[http://www.internetnews.com/isp-news/article/0,1087,8\\_269221,00.html](http://www.internetnews.com/isp-news/article/0,1087,8_269221,00.html)> (adopting a most-favored nations provisions by requiring open access in Pittsburgh if AT&T offers open access on any other system).

33. See Patricia Fusco, *Miami Votes No on Open Access* (last modified Oct. 20, 1999) <[http://www.internetnews.com/isp-news/article/0,1087,8\\_221881,00.html](http://www.internetnews.com/isp-news/article/0,1087,8_221881,00.html)>; Corey Grice, *Seattle Approves AT&T-TCI Merger Deal* (last modified Feb. 16, 1999) <<http://news.cnet.com/news/0-1004-202-338749.html>> (enacting ordinance that codifies AT&T's "click through" commitment).

offenses.<sup>34</sup> Furthermore, Representative Bob Boucher and others have introduced bills to require open access to cable facilities.<sup>35</sup>

Finally, also in contrast to the FCC's decision not to regulate, Canadian telecommunications regulators have imposed open access requirements on the internet services provided by Canadian cable television companies. In 1998, the Canadian Radio and Telecommunications Commission ("CRTC") ordered all Canadian cable companies to provide open access to unaffiliated ISPs and to adjust tariff rates for the necessary services to do so.<sup>36</sup> The CRTC has now ordered cable companies to set wholesale prices twenty-five percent below retail prices for unaffiliated ISPs to purchase transport.<sup>37</sup>

### B. *The Shape of the Current Arguments*

Consumer groups and some academics, some of whom are paid consultants and some of whom are not, have joined the ISP industry in arguing for open access. To date, most of this argument has taken place either through filings before the courts and the FCC or in unpublished working papers. This section, therefore, discusses some of the major arguments concerning open access to cable systems. Essentially, the arguments center around three major issues. First, the parties dispute whether the Communications Act forbids the states, local governments, and even the FCC from imposing open access conditions. Second, the parties dispute whether open access

34. See *Complaint*, GTE Internetworking, Inc. v. Tele-Communications, Inc. (filed E.D. Pa., Oct. 27, 1999) (last modified Oct. 25, 1999) <<http://www.gte.com/AboutGTE/NewsCenter/Perspectives/COMPLAINT.PDF>>.

35. See Internet Growth and Development Act, H.R. 1685, 106th Cong. (1999); see also Internet Freedom Act, H.R. 1686, 106th Cong. (1999) (providing for similar open access requirements); Consumer and Community Choice in Access Act, H.R. 2637, 106th Cong. (1999).

36. See *Telecom Decision CRTC 98-9, Regulation Under the Telecommunications Act of Certain Telecommunications Services Offered by 'Broadcast Carriers'* (July 9, 1998), available at <<http://www.crtc.gc.ca/archive/Decisions/1998/DT98-9.htm>>; *Telecom Decision CRTC 99-8, Regulation Under the Telecommunications Act of Cable Carriers' Access Services* (July 6, 1999), available at <[http://www.crtc.gc.ca/ENG/TELECOM/DECISION/1999/D998\\_1.txt](http://www.crtc.gc.ca/ENG/TELECOM/DECISION/1999/D998_1.txt)>.

37. See *Telecom Decision CRTC 99-11, Application Concerning Access by Internet Service Providers to Incumbent Cable Carriers' Telecommunications Facilities* (Sept. 14, 1999) <<http://www.crtc.gc.ca/archive/Decisions/1999/DT99-11.htm>>.

conditions will reduce or eliminate incentives for cable operators to upgrade systems and to deploy internet access technologies at all. Third, the parties dispute whether open access conditions are necessary to eliminate anticompetitive actions by cable companies with respect to other ISPs or internet content providers. Because my agenda is to extend the last category to a new set of arguments, and because I have previously written about some of these questions,<sup>38</sup> I will only briefly sketch the the first and second arguments.

In this discussion, I assume that cable companies will have monopoly power over the provision of broadband internet access. As noted, the FCC has not been willing to agree that cable will be the only provider of such services, and various surveys of emerging technologies suggest that both wireline and wireless services will compete with cable-provided high-speed internet access.<sup>39</sup> Nevertheless, the assumption that cable companies will have monopolies brings the issue of their ability and incentive to impede competition into the highest relief. If cable companies are monopolies but nevertheless do not have the incentives to impede competition in ISP and content markets, then the case against open access rules will have been most starkly made.

I believe that under current law, neither the FCC nor municipalities have the authority to require open access to cable systems. Similarly, I think that open access conditions could decrease the cable operators' incentives to deploy cable systems. Finally, I believe that the best analysis to date fails to establish that cable operators will have incentives to act anti-

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38. See generally Speta, *supra* note 2.

39. See P. William Bane & Stephen P. Bradley, *The Light at the End of the Pipe*, SCI. AM., Oct. 1999, at 110; *Broadband Access Copper Technologies*, IEEE COMM. MAG., May 1999, at 58; Walter Y. Chen, *The Development and Standardization of Asymmetrical Digital Subscriber Line*, IEEE COMM. MAG., May 1999, at 68; David D. Clark, *High Speed Data Races Home*, SCI. AM., Oct. 1999, at 94; *Economical, Secure Broadband Access: Isn't it Time?*, IEEE COMM. MAG., Nov. 1998, at 97-121; George T. Hawley, *DSL: Broadband by Phone*, SCI. AM., Oct. 1999, at 102; Timothy C. Kwok, *Residential Broadband Architecture over ADSL and G.Lite (G.992.2): PPP over ATM*, IEEE COMM. MAG., May 1999, at 84; Milo Medin & Jay Rolls, *The Internet via Cable*, SCI. AM., Oct. 1999, at 100; Robert P. Norcross, *Satellites: The Strategic High Ground*, SCI. AM., Oct. 1999, at 106; Paul W. Shumate, Jr., *The Broadest Broadband*, SCI. AM., Oct. 1999, at 104; John Skorro, *LMDS: Broadband Wireless Access*, SCI. AM., Oct. 1999, at 108; *Wireless Technologies: A Special Report*, SCI. AM., Apr. 1998, at 69-96; Glenn Zorpette, *A New Fat Pipe*, SCI. AM., Apr. 1998, at 34.

competitively in their provision of internet services. In Part II, I evaluate the neglected part of this debate—the interaction between cable operators' interests in programming and advertising and their provision of internet services.

My conclusions that open access rules are not desirable derives, to a significant degree, from certain premises about regulation. In particular, regulation should be justified by a theory of market failure or need for consumer protection that has a basis in economic theory. This is *not* an antiregulation stance, for it is consistent with both light-handed regulations such as disclosure requirements and more comprehensive regulatory regimes such as price controls to correct for instances of monopoly. But it does start from a premise that the costs of regulation are such that proponents of a regulation must articulate a coherent and economically rational theory about the need for that regulation. In my view, proponents of cable open access rules have not yet done that.

### 1. Legal Authority to Impose Open Access.

Although the matter is not free from doubt, the Communications Act seems to prohibit the imposition of open access requirements on cable companies.<sup>40</sup> Because only local governments have imposed open access rules, their legal authority to do so under the Communications Act has been hotly disputed. The Communications Act's provisions dividing regulatory authority between the FCC on the one hand, and state and local regulators on the other, appears not to reflect any consistent theory regarding the appropriate locus of regulatory power over cable.<sup>41</sup> Nevertheless, as a general matter, Congress seems to have provided for federal regulation of the technical aspects of cable services as well as the significant issues of

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40. I do not address here the issue of whether Congress could, consistent with constitutional constraints, amend the Communications Act to require cable companies to provide open access. Several such bills have been proposed. *See, e.g.*, the bills listed *supra* note 35. Cable companies would likely contend that such rules violate the First Amendment and the Takings Clause. *See Turner Broadcasting Co. v. FCC*, 512 U.S. 622, 684 (1994) (subjecting must-carry rules to intermediate scrutiny under First Amendment); *id.* at 684 (O'Connor, J., concurring in part and dissenting in part) (suggesting that must-carry rules may constitute a taking).

41. *See generally* JOHN THORNE ET AL., FEDERAL BROADBAND LAW § 3.3.2(v) (1995).

market structure, while preserving for the states and localities authority to set limited franchise conditions protecting local interests, such as coverage of local issues and preservation of rights of way.<sup>42</sup> Moreover, Congress has made clear that cable services are to be regulated on a different model from telecommunications carriers: the statute removes from both state and federal regulators the power to impose "common carrier" regulations on cable services.

The Act includes two provisions that bear on state and local authority to require cable open access, and at least the first of these seems to bar local open access rules. First, the Act provides that "a franchising authority may not require a cable operator to provide any telecommunications service . . . as a condition" of the franchise.<sup>43</sup> An open access requirement does just that, for it requires a cable company essentially to sell transport over its wires to any ISP or other content provider that wishes to sell internet access services. In other words, an open access rule requires cable companies to unbundle their high-speed transport service from their ISP services and to make the high-speed transport available for purchase by unaffiliated ISPs and their customers. Under the Act, the unbundled high-speed transport would be the provision of simple "transmission," which is how the Act defines "telecommunications."<sup>44</sup> The FCC has made a similar distinction between internet access services offered by telecommunications carriers and the underlying access services offered by telecommunications carriers to ISPs. On the one hand, the FCC has consistently held that the internet access service sold by ISPs is not a telecommunications service, but rather an information service.<sup>45</sup> On the other hand, the agency also has held that trans-

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42. *See id.*; *see also* 47 U.S.C. §§ 541-548 (Supp. III 1997).

43. 47 § 541(b)(3)(D).

44. *See id.* § 153(46) (defining "telecommunications service" as "the offering of telecommunications for a fee directly to the public"); *id.* § 153(43) (defining "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received").

45. *See* Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 F.C.C.R. 24011, 24030 ¶ 36 (1998), *remand pending*, *US WEST Communications, Inc. v. FCC*, No. 98-1410 (D.C. Cir. Aug. 25, 1999) [hereinafter *Wireline Deployment*]; *Independent Data Communications Manufacturers Association, Inc. Petition for a Declaratory Ruling that AT&T's InterSpan Frame Relay Service Is a Basic Service*, 10 F.C.C.R. 13,717, 13,722-23 (1995).

port provided by a telecommunications carrier that enables another carrier or an ISP to offer internet access is itself telecommunications within the meaning of the Act.<sup>46</sup>

Second, the Act forbids states and municipalities from regulating the “transmission technology” that a cable operator uses.<sup>47</sup> AT&T has argued that municipalities may not require open access, as that would amount to a municipality determining the appropriate “transmission technology.” This argument seems untenable, for the plain language of the provision does not bar a service requirement, and an open access rule such as the one passed in Portland neither directly nor indirectly specifies the technology that must be employed to provide the service. Nevertheless, certain open access advocates have argued that the rules must specify that the cable operators provide certain types of interconnection, collocation, and hosting.<sup>48</sup> Some of these rules do come close to specifying particular technologies and might run afoul of this section.

Two other provisions of the Act bear on both federal and state imposition of open access requirements, and these seem to bar open access regulation as well. Each of these turns on characterizing cable operator-provided internet access as a “cable service” under the Act. I believe cable operator-provided internet access is a cable service, although the issue is not free from doubt, and, to date, the FCC has not offered its view on the matter. The Act defines a “cable service” as either “video programming” or “other programming service,” together with the “subscriber interaction” required for “selection or use” of the programming.<sup>49</sup> “Other programming service” is “information that a cable operator makes available to all subscribers generally.”<sup>50</sup> I have written elsewhere that internet access should be considered an “other programming service,” because the service and content are made generally available to all subscribers. Internet access would, therefore, be a “cable serv-

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46. See *Wireline Deployment*, *supra* note 45, at 24,030–31.

47. See 47 U.S.C. § 544(e) (Supp. III 1997) (“No State or franchising authority may prohibit, condition, or restrict a cable system’s use of . . . any transmission technology.”).

48. See, e.g., Consumers Union et al., *Who Do You Trust?* 27–28 (Feb. 2000), available at <<http://www.consumerfed.org/internetaccess/trust.pdf>>.

49. See 47 U.S.C. § 522(6) (Supp. III 1997).

50. *Id.* § 522(14).

ice.”<sup>51</sup> This is the only interpretation consistent with Congress’s 1996 addition of the words “or use” to the definition of “cable services” and also comporting with the legislative history.<sup>52</sup>

If internet access provided by cable operators is a “cable service,” then the Communications Act prohibits open access regulations. The argument proceeds as follows: First, the Act provides that a “cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.”<sup>53</sup> This provision reflects the traditional regulatory division between telephone and telegraph carriers, which were regulated as common carriers under Title II of the Communications Act, and broadcasters, which were not. Admittedly, a simple open access rule does not introduce the full panoply of common carrier regulation, for it does not explicitly regulate prices or require the tariffing of rates. Nevertheless, an open access requirement both requires the cable system to interconnect with all other ISPs and content providers and to carry their services on a nondiscriminatory basis. Service upon request and nondiscrimination rules are the heart of common carrier regulation.<sup>54</sup> In fact, prior to the 1984 Cable Act, the Supreme Court had rejected the FCC’s attempt to require cable operators to dedicate four channels to particular, unaffiliated programmers. The Court held these regulations impermissible, because they imposed “common-carrier obligations” on cable companies, and the FCC’s sole jurisdiction to regulate cable companies at the time derived from its authority over broadcasting.<sup>55</sup>

The District Judge in *AT&T Corp. v. City of Portland* rejected the claim that the prohibition on common carrier regulation in section 541(c) of the Communications Act preempted

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51. See Speta, *supra* note 2, at 71–75.

52. The contrary argument would note that certain ISP services offered together with internet access, such as e-mail and chat rooms, are not “generally available to all subscribers” and that internet access is dominated by such limited availability services. However, a “cable service” includes not only the “other programming service” but also the user interaction required “to use” the service. This language clearly sweeps in services that are offered to all subscribers but are used by each subscriber to generate unique content such as electronic mail.

53. 47 U.S.C. § 541(c) (Supp. III 1997).

54. See generally Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1361 (1999).

55. See *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701–02 (1979).

Portland's open access requirement. Noting the absence of explicit price regulation and tariff-filing requirements, the court held that an open access rule is simply economic regulation and is most analogous to a decree entered in an antitrust case brought against an "essential facility."<sup>56</sup> This distinction does not seem to hold, for it ignores that interconnection and non-discrimination are the heart of common carrier regulation.<sup>57</sup> It also ignores that the "essential facilities" doctrine has the same genesis as common carrier regulation: the imposition of rules requiring both legal and factual monopolies to provide service to all comers at reasonable prices.<sup>58</sup> The statute certainly is meant to prohibit a certain type of regulation, and placing an alternative label on the regulation does not alter the substance of that regulation.

Moreover, the possibility that even a simple open access rule would not include at least implicit price regulation is untenable. Open access rules are premised on the belief—erroneous as I see it<sup>59</sup>—that cable companies will be motivated to deny access to unaffiliated ISPs and content providers. Open access rules, therefore, must explicitly or implicitly foreclose the possibility that cable companies would seek to comply with the rules simply by setting access prices so high that no company could afford to purchase access. Thus, open access rules require cable companies to charge unaffiliated companies no more than they charge affiliated companies. But these dual requirements of nonprohibitive and nondiscriminatory pricing are the essence of common carriage's requirements of just, reasonable, and nondiscriminatory rates.

Second, the Act provides that "[a]ny Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided" by the Act.<sup>60</sup> Again, assuming that internet access is properly characterized as cable service, this would

56. See *AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146, 1150 (D. Or. 1999).

57. See *Kearney & Merrill*, *supra* note 54, at 1361.

58. The seminal common carrier case is *Munn v. Illinois*, 94 U.S. 113 (1876), in which the Supreme Court traced the common law history of common carrier regulation and noted that such regulation was based in large part on the existence of either legal or factual monopoly. See *id.* at 126–31.

59. See *supra* note 2 and accompanying text.

60. 47 U.S.C. § 544(f)(1) (Supp. III 1997).

seem to prohibit open access requirements, unless regulation is saved by some other specific provision. An open access rule certainly is a requirement regarding the "provision" of cable services. The *Portland* court held that the open access rule did not violate the provision because it was "content neutral,"<sup>61</sup> but that ignores the first part of the statute which denies to regulators any general authority to regulate the "provision" of cable services. The District Court also held that section 533(d) was the specific authorization necessary because that section permits a "State or franchising authority" to prohibit the ownership of a cable system "in circumstances in which the State or franchising authority determines that the acquisition of such a cable system may eliminate or reduce competition in the delivery of cable service in such jurisdiction."<sup>62</sup> But this language neither trumps section 541(c)'s prohibition on common carrier regulation—section 533(d)(2) is worded only as an exception to section 533's general prohibition on state-created cross-ownership rules—nor does it apply to the AT&T/TCI transaction, because AT&T's acquisition of TCI did not change TCI's relationship with the @Home service.

In sum, the Communications Act seems to preclude open access rules, regardless of whether those rules were to be adopted by federal, state, or local regulators. Congress could change the Act—making the issue a constitutional one—or I could be wrong about the Act.<sup>63</sup> Accordingly, the balance of this paper considers whether such rules are wise as a policy matter.

## 2. Effects on Incentives to Upgrade

Apart from disputing regulators' legal authority to impose open access rules, cable companies have argued that open access rules will diminish their incentives to invest in the upgrades necessary to provide internet access and other interactive services in the first instance. Some cable companies initially argued that open access was not technologically feasi-

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61. See *City of Portland*, 43 F. Supp. 2d at 1153.

62. 47 U.S.C. § 533(d)(2).

63. The only court ruling is, of course, to the contrary. See also Marcus Maher, Comment, *Cable Internet Unbundling: Local Leadership in the Deployment of High Speed Access*, 52 FED. COMM. L.J. 211, 238 (1999) (concluding that local governments have authority under the Communications Act to require cable open access).

ble, but those arguments have largely been dropped. Rather, cable companies argue that their business plans for providing internet access depend upon the service being sold as an individual service—ISP and access together—and that open access rules would inject too much uncertainty into their returns, such that upgrades of many cable systems would be put in jeopardy.<sup>64</sup>

In response, open access advocates argue that cable companies have no economic choice but to upgrade, even if their returns on systems with open access will be less than on systems without open access.<sup>65</sup> These parties note that AT&T and others have paid huge prices for cable systems and that these payments can only be recovered by generating additional revenues. Such additional revenues are only possible through internet access and digital television services, and cable companies therefore will upgrade, even if returns are not as great as initially anticipated.<sup>66</sup> These parties also argue that cable companies could have no settled expectation of a closed-access regime, because the dominant model of telecommunications over the past twenty years, dating at least from the breakup of the Bell System,<sup>67</sup> has been increasing levels of required open access.<sup>68</sup> This last claim is contestable. Since 1984, the Communications Act—and before 1984, the FCC—explicitly provided that cable operators were not subject to common carrier obligations or general access requirements.<sup>69</sup> Moreover, even ISPs providing access over telephone company wires are not

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64. See *supra* note 16 and accompanying text.

65. See, e.g., Holman W. Jenkins Jr., *And for His Next Trick, Dodging a Thousand Arrows*, WALL ST. J., May 5, 1999, at A23 (“AT&T can’t afford to stop the upgrade after spending \$102 billion to acquire TCI and MediaOne.”); Henry M. Shooshan III et al., *MaCable.com: Closed v. Open Models for the Broadband Internet* 10 (OpenNet Coalition Working Paper, Oct. 15, 1999).

66. See, e.g., OpenNet Coalition, *FAQs About AT&T’s Acquisition of MediaOne, Open Access, and the Public Interest* (last modified Sept. 17, 1999) <<http://www.opennetcoalition.org/news/FAQSpdf.pdf>>.

67. See generally *United States v. Western Elec. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff’d mem.*, 460 U.S. 1001 (1984).

68. See, e.g., Francois Bar et al., *Defending the Internet Revolution in the Broadband Era: When Doing Nothing Is Doing Harm* (Aug. 1999) <<http://brie.berkeley.edu/~briewww/pubs/wp/wp137.html>>; Shooshan et al., *supra* note 65, at 11–16.

69. See *supra* notes 53–55 and accompanying text.

subject to interconnection or unbundling rules, although the telephone companies are subject to such rules.<sup>70</sup>

I have suggested, in comments filed with the Senate Commerce Committee,<sup>71</sup> comments filed with the FCC,<sup>72</sup> and in a recent article,<sup>73</sup> that open access rules are unnecessary because cable companies will find it in their economic interest to provide open access. In particular, I posit that the demand for broadband internet access will be characterized by indirect network externalities, in which consumer demand for internet access will significantly increase with a wider variety of services available over the broadband platform. Moreover, a cable company that attempts to provide all of the services itself will not be able to commit to, or simply to provide, as great a variety of services as an open, competitive market would. For this reason, a cable company will have a strong economic incentive to provide access to unaffiliated content providers.<sup>74</sup> In making this argument, I point to, among other things, AOL, CompuServe, and Prodigy, all of which began as closed systems but had to open up when the world wide web became the "greatest generator of content."<sup>75</sup> In a recent white paper, Jeffrey MacKie-Mason of the University of Michigan School of Information Sciences has similarly written that cable companies will not slow their roll-out of internet services because "open" internet services will actually increase consumer demand for internet services over cable.<sup>76</sup>

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70. See Speta, *supra* note 2, at 66-67.

71. See James B. Speta, *Comments Filed in Connection with the Senate Commerce Committee's April 13, 1999, Hearings on Open Access for Internet Service Providers* (last modified Apr. 13, 1999) <<http://www.senate.gov/~commerce/hearings/0414spe.pdf>>.

72. The comments were filed in the FCC's proceeding to evaluate the AT&T/MediaOne merger. See Applications for Consent to the Transfer of Control of Licenses MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee (filed Dec. 19, 1999) (CS No. 99-251).

73. See generally Speta, *supra* note 2.

74. See *id.* at 76.

75. See Jiri Weiss, *Online Services Take the Web for a Spin*, PC WORLD, Nov. 1995, at 54 (quoting Karen Burka of SIMBA Information); see also Jack Egan, *Online Goes Big Time: The Commercial Services Are Beating the Web by Joining It*, US NEWS & WORLD REP., Nov. 20, 1995, at 104; Ross Laver, *High-Tech Dinosaurs?*, MACLEAN'S, Nov. 11, 1996, at 50; Mick O'Leary, *AOL versus the Web for Consumer Research*, DATABASE (N.K.A. E-CONTENT), Apr./May 1998, at 79.

76. See Jeffrey K. MacKie-Mason, *Investment in Cable Broadband Infrastructure: Open Access Is Not an Obstacle* 2-3 (last modified Nov. 5, 1999) <<http://www-personal.umich.edu/~jmm/papers/broadband.pdf>>.

My argument—and MacKie-Mason’s—is contingent upon cable companies being able to charge unaffiliated ISPs and other content providers the full monopoly price for interconnection and access. Some open access advocates deny an intent to regulate the price that cable companies may charge.<sup>77</sup> Currently, cable services are essentially exempt from price regulation.<sup>78</sup> Other open access advocates, however, explicitly call for price regulation.<sup>79</sup> If the price is unregulated, then cable companies should experience increased profits with open access. If the price they may charge for access is limited, however, then cable companies may in fact experience decreased profits, and price controls could well affect a cable operator’s willingness to provide new, upgraded services.

### 3. Arguments About Anticompetitive Actions in ISP Markets

The most consistent theme of those seeking open access rules is that cable companies will use their ownership of cable systems to impede competition in the market for ISP services or in the market for content services more generally. The most basic of these arguments is that the cable companies are forcing customers to purchase a service the customers do not wish to buy—namely, the cable companies’ affiliated ISP service. In other words, cable companies, even if they permit subscribers to reach all of the internet, are forcing consumers who want a different ISP to “pay twice.” A more textured version of this argument states that, in the absence of open access rules, cable companies will provide discriminatory interconnection or discriminatory limits on the types of services permitted on their systems, favoring only affiliated ISPs and content providers.

For example, Francois Bar and others have argued that “[w]hoever owns the network, absent competitive or regulatory

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77. This was the position AOL took in its filings with the FCC urging an open access condition on AT&T. See *AOL Comments*, *supra* note 11. AOL’s current position, following its announced merger with Time Warner, opposes mandatory open access rules. See *supra* note 7 and accompanying text.

78. The Telecommunications Act of 1996 repealed all rate regulation of cable television services, save rate regulation of the “basic tier”—essentially broadcast channels—of cable service. See 47 U.S.C. § 543 (Supp. III 1997); THOMAS G. KRATTENMAKER, *TELECOMMUNICATIONS LAW AND POLICY* 534 (2d ed. 1998).

79. See *Consumers Union et al.*, *supra* note 48, at 33–34.

constraints, will also logically try to extend its infrastructure ownership into control of the services and content it carries.”<sup>80</sup> The Consumer Federation of America (“CFA”) is similarly unequivocal: “The facilities market, which will always be vulnerable to abuse of market power, should not be allowed to undermine the competitiveness or creativity of the content market.”<sup>81</sup> The OpenNet coalition asserts that “[c]ustomers who want choice are forced to pay for two ISPs—the one they want and the one owned by or affiliated with the cable company.”<sup>82</sup>

The difficulty with each of these arguments is that they are simply versions of “monopoly leverage” arguments—arguments that an entity with monopoly power in one market will use that monopoly, in a manner such as tying or exclusive dealing, to extend that monopoly into other, related markets. “Monopoly leverage” usually makes no sense. A company that seeks to “extend its monopoly” into markets for complementary goods or services will effectively raise the price for its own good, thus hurting demand. In general, it will not be profit-maximizing for a firm to engage in leveraging. Moreover, even in circumstances in which it is rational for a firm to engage in leveraging—due to severe economies of scale in the secondary market, for example—consumers generally are not injured, and may be better off, as a result of that behavior.<sup>83</sup>

A more nuanced version of the monopoly leverage argument was advanced by Professors Mark Lemley and Larry Lessig in comments filed with the FCC in connection with the AT&T/MediaOne merger proceeding. Lemley and Lessig argued that permitting cable companies to act as gatekeepers to the internet by requiring purchase of the cable company’s ISP

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80. Bar et al., *supra* note 68.

81. Consumer Federation of America, *Keeping the Information Superhighway Open for the 21st Century* 3 (Dec. 1999), available at <<http://www.consumerfed.org/internetaccess/keeping1299.pdf>>.

82. Shooshan, *supra* note 65, at 7; see Consumer Federation of America, *supra* note 81, at 7 (“Consumers would have to pay the full price for AT&T’s affiliated Internet service, even though they do not use it. By charging full price, even when only transmission capacity is used, the customers of the unaffiliated ISP are forced to pay twice, subsidizing AT&T’s content provider.” (citations omitted)).

83. See ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 366–74 (1978); RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 173, 198–201 (1976) (describing relation to vertical mergers); Herbert Hovenkamp, *Tying Arrangements and Class Actions*, 36 VAND. L. REV. 213, 260 (1983).

service will retard innovation in the internet. In particular, they argued that the fundamental advance made by the internet was to provide a network that was "neutral" with respect to the applications and content developed by the users located at the ends of the network. "The architecture [of closed access] thus represents a significant change from the existing End-to-End design for a crucial segment of the residential internet market."<sup>84</sup> Open access rules, therefore, were necessary to prevent cable companies from restricting innovation by creating roadblocks within the network.

Lemley and Lessig's argument still fails to identify a basis for regulation resting either on a theory of market failure or the need for consumer protection. Lemley and Lessig, and other open access advocates, surely are correct that cable companies *could* use their position as gatekeepers to the internet to harm other ISPs and content providers. What is missing is any explanation of *why* cable companies would want to do so. The ability to act anticompetitively must be married with an incentive to do so. As I have shown, economic theory holds that a monopolist—which, by definition, would have the ability to impede competition in adjacent markets—generally will have no incentive to do so.

Professors Lemley and Lessig, and others, draw an equivalence between certain anticompetitive behavior by the integrated Bell System and what they expect will be the anticompetitive behavior by AT&T following its acquisitions of TCI and MediaOne.<sup>85</sup> Essentially, Lemley and Lessig seem to believe that relevant features of AT&T that existed when AT&T was part of the Bell Operating Companies will be recreated if AT&T acquires MediaOne and other cable television systems. The Bell System's behavior, it is contended, provides an empirical example that disproves the economic theory advanced earlier.

But the story of the Bell System's behavior is much more complex than the open access advocates describe. The Bell

84. Written Ex Parte of Professor Mark A. Lemley and Professor Lawrence Lessig, In the Matter of Application for Consent to the Transfer of Control of Licenses MediaOne Group, Inc. to AT&T Corp. (filed Nov. 10, 1999) (CS No. 99-251), available at <<http://cyber.law.harvard.edu/works/lessig/MB.html>> [hereinafter Lemley & Lessig].

85. See *id.* ¶¶ 25–28, 41; see also, e.g., Bar et al., *supra* note 68; Shooshan et al., *supra* note 65.

System's anticompetitive behavior—or, perhaps more accurately, the behavior challenged by the government, including that anticompetitive behavior which sought to delay certain innovations—can be traced in large part to the manner in which the Bell System was regulated. Particular regulations gave the Bell System the incentive to behave anticompetitively and in particular to seek to extend its monopoly over the telephone network to related markets for equipment and other services. Of course, cable companies are not subject to any of those incentive-distorting regulations.

First, in the 1960s, when AT&T is alleged to have delayed the then-nascent internet, AT&T was forbidden from entering computer communications. Under the 1956 Consent Decree, AT&T could not enter any business “other than the provision of common carrier communications services.”<sup>86</sup> This restriction could only alter AT&T's incentives. While AT&T could have had the incentive to encourage new uses of its network, it had instead the incentive to impede any innovations that threatened the common carrier business. This incentive was exaggerated, given that AT&T could not participate in any new markets that might be developed outside of common carrier communications services.<sup>87</sup>

Second, the integrated Bell System was subject to price regulation in its principal services, which gave it the incentive to seek to control related markets in an attempt to recover lost

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86. *United States v. Western Elec. Co.*, 1956 Trade Cas. (CCH) ¶ 68,246 (D.N.J. 1956) (§ v); see *United States v. Western Elec. Co.*, 552 F. Supp. 131, 138 (D.D.C. 1982).

87. See Jordan Jay Hillman, *Telecommunications Deregulation: The Martyrdom of the Regulated Monopolist*, 79 NW. U. L. REV. 1183, 1186 (1985).

If AT&T were to be confronted in its regulated markets with increasing competition, rigid pricing constraints and continuing obligations in support of universal service, perhaps relief was to be found in non-regulated markets. However, there were none; the terms of its 1956 antitrust consent decree barred AT&T's entry into non-regulated markets. Of particular significance was Bell's inability to provide the various data processing and retrieval services needed for the burgeoning integration of telecommunications and computer technologies. Given these circumstances, AT&T initially mounted a vigorous defense of its integrated system. Its zeal in that defense undoubtedly led it to the thin ice/deep water zone of the antitrust pond.

*Id.* (citations omitted); see also PETER TEMIN, *THE FALL OF THE BELL SYSTEM: A STUDY IN PRICES AND POLITICS* 165 (1987) (discussing pressures put on AT&T by the 1956 Consent Decree).

monopoly rents. Lemley and Lessig relate that AT&T attempted to limit the attachments to the network, thereby monopolizing the market for equipment and eliminating the opportunities for innovation at the “ends” of the network.<sup>88</sup> But AT&T’s incentives were entirely a result of the price regulation of its communications services.

Price regulation changes a monopolist’s incentives, for under price regulation, a monopolist cannot earn its entire monopoly profit in the regulated market. A price-regulated monopolist, therefore, does have the incentive to seek to leverage its monopoly power into other markets, to gather for itself rents not permitted in the primary market.<sup>89</sup>

Third, the integrated Bell System was subject to universal service obligations and to government-mandated cross-subsidies so that certain services—mainly residential access—would be provided below cost. As a result, the Bell System provided other services, which were often complementary goods or services, at above-cost prices in order to recover its total costs of service.<sup>90</sup> As such, the Bell System had exaggerated incentives to protect from competition those above-cost services it was forced to rely upon in order to recover its total costs of service.<sup>91</sup>

In this regard, the litigation against the Bell System—which resulted in equal access rules—and the historical open access requirements applicable to local telephone monopolists stand in sharp contrast. The Bell System was, and local telephone monopolists are, subject to price control of the

88. See Lemley & Lessig, *supra* note 84, ¶ 25.

89. See IX PHILLIP AREEDA & DONALD F. TURNER, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 1712d (1991); BORK, *supra* note 83, at 376; POSNER, *supra* note 83, at 174 n.8; Hovenkamp, *supra* note 83, at 232–35.

90. See generally Richard A. Posner, *Taxation by Regulation*, 2 *BELL J. ECON. AND MGMT. SCI.* 22 (1971).

91. See generally William A. Brock & David S. Evans, *Creamskimming*, in *BREAKING UP BELL: ESSAYS ON INDUSTRIAL ORGANIZATION AND REGULATION* 61, 64–69 (1983); Gerald R. Faulhaber, *Cross-Subsidization: Pricing in Public Enterprises*, 65 *AM. ECON. REV.* 966, 974 (1975). The Bell System was also subject overwhelmingly to rate-of-return regulation. That particular form of price regulation can create incentives not to innovate, although it can also create incentives to over-invest in capital, which may increase innovation. While the exact effect of rate-of-return regulation on innovation is an empirical question subject to dispute in particular industries, there can be no question that it does distort incentives. See generally W. KIP VISCUSI ET AL., *ECONOMICS OF REGULATION AND ANTITRUST* 378–91 (2d ed. 1995).

monopoly service. Because they are not recovering the full monopoly rent available from that service, Bell did, and the ILECs do, have the incentive to seek to recover that rent in other markets by leveraging their monopolies in local telecommunications.

By contrast, cable television generally, and cable internet access specifically, are not price regulated. Cable systems therefore do not have that particular motivation to seek to leverage their monopoly over distribution to ISPs or other content services. Open access advocates have advanced only one other possible reason that cable companies might retard certain internet services—protection of their traditional cable programming. That argument serves as the focus of the next Part of this paper.

## II. VERTICAL INTEGRATION OF CABLE SYSTEMS

This Part considers a new group of arguments for cable open access rules that focus on cable's status as the leading provider of video programming and the possibility that internet services might compete with cable's traditional video programming. If cable companies do stand to lose programming or advertising revenues from the development of streaming video or other services on the internet, then that prospective loss might give them some incentive to restrict the kinds of services that are available over the internet, and hence to impede open access—or so some advocates of open access have contended. This is different from a classic monopoly leveraging argument because it does not argue that a monopolist will seek to *extend* a monopoly from one market to new markets. Rather, it is a “monopoly maintenance” argument: the monopolist seeks to use its power against the development of a related market in which the goods or services are potential substitutes for the good in the market in which the monopolist has monopoly power. Translated into the terms of the current debate, it probably does not make sense for a cable monopolist to try to extend its monopoly to internet services in order to capture “additional” monopoly profits. It might, however, make sense for a cable monopolist to block the development of internet services that would reduce the cable monopolist's monopoly power over video programming. In fact, as noted above,

@Home's current policy is to restrict "broadcast quality" video downloads to ten minutes.

This Part considers this argument seriously. First, it describes the extent of integration between cable television companies and program developers and the extent to which cable television companies earn revenues in the programming and advertising markets. It also describes the current rules limiting vertical integration of cable companies and programmers. Second, it considers whether this vertical integration gives cable companies the incentive to restrict the development or delivery of internet streaming or other content that would likely compete with traditional video.

#### A. *The Extent of Cable Company Vertical Integration*

Cable companies are the dominant providers of video services. As of June 1999, sixty-seven percent of all television households subscribed to cable television service.<sup>92</sup> Cable companies served eighty-two percent of all households purchasing a multichannel video programming service, although growth in direct broadcast satellite and other services caused that number to fall from eighty-five percent in the previous year.<sup>93</sup> Moreover, the cable industry has experienced substantial consolidation, with ninety percent of all cable subscribers being served by one of the top seven cable companies.<sup>94</sup> The FCC has found very little competition from overbuilders—companies that lay a second set of cable wires—and that each household generally must choose among broadcast-only service, one cable company, and one satellite service.<sup>95</sup>

92. See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming ¶ 20 (FCC No. 99-418, Jan. 14, 2000) (CS No. 99-230) (6th annual report) [hereinafter Annual Assessment].

93. See *id.* ¶¶ 5, 8.

94. See *id.* ¶ 16. This number will presumably fall to six should the merger between AT&T and MediaOne be completed.

95. See *id.* ¶¶ 44–50, 140. Prior to the November 1999 passage of the Satellite Home Viewer Act, Pub. L. No. 106-113, 1999 U.S.C.A.N. (113 Stat.) 1501, direct broadcast satellite ("DBS") systems were largely forbidden to rebroadcast local broadcast stations, and this restriction greatly reduced DBS's ability to compete with cable. See Annual Assessment, *supra* note 92, ¶ 74. Following the passage of the Act, several DBS providers immediately began to offer local broadcast channels. See *id.*

Significant vertical integration exists between cable companies and video programming suppliers. According to the FCC's latest statistics, thirty-seven percent of all national programming networks—104 of 283 total—were vertically integrated with a cable company (meaning that a cable company controlled five percent or more of the programmer's equity).<sup>96</sup> This is a slight decrease from 1997 and 1998, when vertically integrated programming networks were thirty-nine and forty percent of all programmers, respectively. As of 1999, AT&T had ownership interests in eighteen percent of programming networks (a figure that will increase to twenty-two percent if the merger with MediaOne is approved); Time Warner and Cox Communications each had ownership interests in eight percent; and CableVision had an interest in four percent of all networks.<sup>97</sup> Viewed from the opposite perspective, eight of the top twenty video programming networks were affiliated with a cable company.<sup>98</sup> Cable companies also derive significant revenues from advertising. In 1999, cable networks earned \$8.7 billion in national advertising revenues.<sup>99</sup> Cable companies also directly earned approximately \$2.5 billion from the sale of local spot advertising.<sup>100</sup>

The Communications Act and FCC regulations currently limit vertical integration of cable television systems operators and video programmers. Pursuant to the Act, the FCC "prescribe[d] rules and regulations establishing reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest."<sup>101</sup> The legislative history of this section, which was part of the 1992 Cable Act,<sup>102</sup> reveals that Congress was concerned that vertically integrated cable companies might refuse to carry unaffiliated programmers—decreasing competi-

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96. See Annual Assessment, *supra* note 92, ¶ 179.

97. See *id.* ¶ 180.

98. See *id.* ¶ 181.

99. See Cabletelevision Advertising Bureau, *National Cable Network Advertising Revenues Increased by \$2 Billion in 1999, CAB Estimates* (visited Mar. 20, 2000) <<http://www.cabletvadbureau.com/00News/010300news.htm>>.

100. See Cabletelevision Advertising Bureau, *Advertising Revenues Will Top \$10 Billion in 1999* (visited Mar. 20, 2000) <<http://www.cabletvadbureau.com/99Facts/facts02.htm>>.

101. 47 U.S.C. § 533(f)(1)(B) (Supp. III 1997).

102. See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

tion in the video programming market<sup>103</sup>—but also believed that vertical integration could have strong benefits for program development.<sup>104</sup> The FCC's rules reflected these dual concerns. Cable operators are therefore forbidden to devote more than forty percent of their channel capacity to affiliated programmers (again, essentially a programmer, five percent or more of which, is owned by the cable company).<sup>105</sup> These limits apply to all cable systems, up to the first seventy-five channels available on the system, and until a cable system is subject to effective competition.<sup>106</sup> The Act also provides that cable companies must not discriminate against unaffiliated programmers in the selection, terms, or conditions of carriage.<sup>107</sup>

Vertical integration of programmers and cable companies is also regulated at the programming level. The Act generally requires programmers affiliated with cable companies to provide their programs on nondiscriminatory terms to competing video providers such as direct broadcast satellite companies.<sup>108</sup>

103. See H.R. REP. NO. 102-628, at 43 (1992); S. REP. NO. 102-92, at 25 (1991) *reprinted in* 1992 U.S.C.C.A.N. 1133, 1158 (“[T]he Committee received testimony that vertical integration gives cable operators the incentive and ability to favor their affiliated programming services.”).

104. See H.R. REP. NO. 102-628, at 41; S. REP. NO. 102-92, at 27. In adopting its rules implementing this section, the FCC enumerated the benefits of vertical integration:

First, MSO investment has produced a wealth of high quality cable programming services. Many of the most popular cable programming services were initiated or sustained with the help of MSO investment. Second, vertical integration between cable operators and video programming services appears to produce efficiencies in the distribution, marketing, and purchase of programming. Third, vertical integration can reduce programming costs, which in turn may reduce subscriber fees and cable rates. Fourth, vertical integration may in certain circumstances foster investment in more innovative and riskier programming service.

Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, 8 F.C.C.R. 8565, 8594-95 ¶ 68 (1993) (2d report and order) (citation omitted).

105. See *id.* at 8593-96 ¶¶ 68-71.

106. See *id.* at 8601-03 ¶¶ 83-88.

107. See 47 U.S.C. § 534 (Supp. III 1997).

108. See *id.* See generally Nicholas W. Allard, *The 1992 Cable Act: Just the Beginning*, 15 HASTINGS COMM. & ENT L.J. 305, 311-33 (1993) (discussing this section and its legislative genesis); David Waterman, *Vertical Integration and Program Access in the Cable Television Industry*, 47 FED. COMM. L.J. 511 (1995) (discussing 1992 Cable Act and demonstrating that exclusive contracts between cable companies and unaffiliated programmers can also create exclusionary barriers to entry by other program distributors).

Here, Congress's concern was directed at monopoly maintenance—that cable companies would deny to other transmission competitors, such as satellite services, the programming necessary for those platforms to become viable competitors to cable systems.<sup>109</sup> The Act forbids discriminatory practices in the provision of programming by affiliated cable programmers, and the FCC's rules create a presumption against any exclusive contract between almost all video programmers and cable companies.<sup>110</sup>

*B. The Implications of Vertical Integration for Open Access*

The vertical integration of cable television systems with programmers is arguably the missing incentive for cable companies to discriminate against unaffiliated ISPs and internet content providers—at least to the extent those providers offer services in competition with traditional video. Professors Lemley and Lessig have put it this way: “Broadband is a potential competitor to traditional cable video services. Traditional cable providers might well view this competition as a long-term threat to their business model.”<sup>111</sup> The CFA is unequivocal: “The private regulation of broadband access imposes restrictions to ensure that broadband internet services will not undermine the cable TV monopoly.”<sup>112</sup> One private analyst has argued that cable operators' opposition to open access rules and restrictions on streaming video are designed to limit competition to cable video.<sup>113</sup> In fact, both the CFA and Lemley and

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109. See S. REP. NO. 102-92, at 26, reprinted in 1992 U.S.C.C.A.N. at 1159; Allard, *supra* note 108, at 311–33; James W. Olson & Lawrence J. Spiwak, *Can Short-Term Limits on Strategic Vertical Restraints Improve Long-Term Cable Industry Market Performance?*, 13 CARDOZO ARTS & ENT. L.J. 283, 292–95 (1995).

110. See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, 8 F.C.C.R. at 3386–87 ¶¶ 66–67 (1993) (1st report and order).

111. Lemley & Lessig, *supra* note 84, ¶ 58.

112. Consumer Federation of America, *Creating Open Access to the Broadband Internet*, 20 (Dec. 1999), available at <<http://www.consumerfed.org/internetaccess/creatingopen201299.pdf>>.

113. See Scott C. Cleland, *Is the Internet Cable's Friend or Foe Long-Term*, in LEGG MASON PRECURSOR RESEARCH (Apr. 19, 1999); Scott C. Cleland, *Cable's Ignored Future—How Technology Promotes Competition to Cable*, in LEGG MASON PRECURSOR RESEARCH (Dec. 9, 1999).

Lessig have equated cable operators' actions in this regard to Microsoft's attempts to foreclose competition by Netscape in internet browsers.<sup>114</sup>

I believe that these arguments fail, however, because they do not suggest any reason the cable companies would seek to protect video programming revenues instead of seeking new revenues from internet service. Even if cable internet users begin to watch internet video instead of traditional cable programs, cable companies still earn money through the subscription fees charged for cable internet service and through the access charges they will impose on ISPs and content providers. If at least some consumers desire streaming video more than they desire traditional cable television,<sup>115</sup> then cable companies will provide that service in order to maximize their profits. Cable companies would only frustrate consumer desires for internet content services if cable companies had monopoly power over the production of video programming, other than as a derivative from their monopoly over the means of distributing video programming (i.e., the wires). Without such a showing, it makes no more sense to assume that cable companies would seek to maintain whatever position they have in the video programming market than to assume they would seek to leverage into some other market, because cable operators would not have supranormal profits in programming that they would be seeking to defend. If cable companies provide services that at least some consumers desire more than traditional video, then cable companies will increase their total profits because consumer demand for the good on which the cable companies do earn a monopoly profit—the wires—will increase.

It is likely that cable companies do not have any unique market power in the video programming market and hence do not earn monopoly profits. The FCC's recent report notes that the percentage of video programmers affiliated with cable companies has declined in recent years.<sup>116</sup> The report also notes that twelve of the top twenty networks, in terms of subscribers, are not affiliated with a cable operator.<sup>117</sup> Bruce Owen has

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114. See Lemley & Lessig, *supra* note 84, at 22; Consumer Federation of America, *supra* note 81, at 20–22; see also Maher, *supra* note 63, at 223–24 (1999).

115. This must be the assumption of these cable open access advocates, or the asserted preclusion would not be of significant concern.

116. See Annual Assessment, *supra* note 92, ¶ 179.

117. See *id.* ¶ 181.

similarly concluded that there are relatively low barriers to entry into the video programming market.<sup>118</sup> Companies cannot earn monopoly profits in markets to which there are no barriers to entry.<sup>119</sup>

This view is consistent with the Cable Act's program access rules and with the antitrust theories advanced against Microsoft—two analogies that advocates of open access often call upon for support. The Cable Act requires video programmers affiliated with cable companies to provide their programming to other distribution platforms, because it is competition with the wires that cable companies might seek to impede through their control over video programming. That is, cable companies might seek to deny to satellites or wireless cable the most popular programs, thus impeding development of these alternate distribution channels and maintaining cable's wire-based monopoly.<sup>120</sup> But this analogy does not apply to cable companies' alleged actions to limit internet content, for all of that content is being provided over the cable system's own wires.<sup>121</sup> In fact, quite the opposite incentive prevails. To the extent that cable limits subscribers' access to services that subscribers desire, cable operators simply increase the incentive for consumers to seek, and companies to develop, alternatives to the cable companies' wires.

Similarly, the Microsoft case is best understood as an attempt by Microsoft to maintain its monopoly in operating sys-

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118. See BRUCE M. OWEN & STEVEN S. WILDMAN, VIDEO ECONOMICS 222 (1992) ("The factors of production used to create these [programming] networks consist of talent and communication hardware, both of which are available for rent in highly organized markets where these factors have many other uses."); see also Robert W. Crandall, *Competition and Regulation in the US Video Market*, 21 TELECOMM. POL'Y 649, 658 (1997) (suggesting that programming can be easily developed by companies not affiliated with cable companies).

119. See generally VISCUSI ET AL., *supra* note 91, at 158. Concededly, significant scale economies might constitute a barrier to entry, and video programming might exhibit scale economies. See *id.* at 160. However, the significant presence of unaffiliated programmers suggests a reasonably competitive market.

120. See *supra* note 109 and accompanying text.

121. One econometric study has shown a correlation between vertical integration and exclusion of unaffiliated pay programming networks. See David Waterman & Andrew A. Weiss, *The Effects of Vertical Integration Between Cable Television Systems and Pay Cable Networks*, 72 J. ECONOMETRICS 357, 391-92 (1996). However, the study appears not to have controlled for system capacity constraints (which would alter a cable company's incentives but which do not apply to internet services) and was conducted using data from a time in which cable companies were price regulated. See *id.*

tems. Microsoft did not attempt to stop Netscape because Microsoft wanted to monopolize the browser market as well as the operating system market; rather, Microsoft engaged in tying, exclusive dealing, and other anticompetitive conduct—or so the complaint and the District Court's findings to date suggest—because it perceived that a browser, together with the Java programming language, could provide a product that was a direct substitute for the Windows operating system itself.<sup>122</sup> The analogy, in other words, would work to show that a cable company might use its control over programming to impede the development of alternatives to its wires—as is the focus of the program access rules. But the analogy does not support a claim that a cable company would have the incentive to protect internet programming. Essentially, the claim that cable companies would restrict consumers to programs that consumers desire less is logically and economically suspect.

AT&T will have no equivalent incentives to restrict innovation in internet services. AT&T's monopoly power—if any—will be in physical means of delivery of broadband content. In other words, AT&T's monopoly power would derive from its ownership of the wires. It is inconceivable that any development in ISP services—such as content, protocols, or other internet services—would be a threat to AT&T's monopoly ownership of the wires. The equivalence to the Microsoft case would come only if AT&T had the ability to restrict the development of digital subscriber line services, wireless services, satellite services, or some other potential competitor to cable systems for delivery of broadband content.

### III. THE REAL STAKES

The absence of an economic incentive to foreclose unaffiliated ISPs suggests that something different must be at stake in the fight over open access, and I think that it is. In part, it may be simply an attempt by ISPs to ensure lower cost access by using the regulatory process to garner prices below those that the cable company would otherwise charge.<sup>123</sup> More significantly, however, the fight seems centered on two more fun-

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122. See James B. Speta, *Tying, Essential Facilities, and Network Externalities: A Comment on Piriano*, 93 NW. U. L. REV. 1277, 1282 (1999).

123. See Speta, *supra* note 2, at 90.

damental issues: the marriage of content and carriage on the one hand, and the attempt to garner direct customer relationships on the other.

Some open access advocates have made clear that their fundamental objection to cable mergers and to the current cable companies' policies is the control that those companies could have over programming and information. Fearing consolidation of media outlets generally, the CFA suggests that any vertical integration of content and transmission providers is detrimental to an open marketplace of ideas.<sup>124</sup> Congress considered such arguments in debating the 1992 Cable Act, however, and rejected these arguments as working too radical a change on media regulation generally.<sup>125</sup> Congress also noted that vertical integration has the potential to, and in fact had seemed to, increase the development of programming.<sup>126</sup>

Aside from the radical separation of carriage and content, it seems to me that the most significant issue driving the open access debate is the desire by all parties to develop direct customer relationships. The cable companies fear that if they are required to unbundle transport from content, they will lose their direct relationship with the customer, at least as to the emerging advanced services thought to be most important for the future. On the other hand, unaffiliated ISPs currently enjoy an exclusive relationship with customers with respect to internet access, because a customer subscribes to telephone service independently and does not pay the telephone company separately for internet access. These ISPs fear that the cable companies will have a significant marketing advantage if every customer, even customers who want to buy other content, must

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124. See Consumer Federation of America, *supra* note 112.

CFA has always preferred a prohibition on the vertical integration of distribution facilities and programming—on the ownership of conduit and content. Once the law allows vertical integration between ownership of facilities and production of content, the problem of discrimination becomes highly complex because all layers of social order come into play.

We never want the weak competition in facilities to undermine the vigorous competition in content.

*Id.* at 4–5.

125. See S. REP. NO. 102-92, at 27 (1992), *reprinted in* 1992 U.S.C.C.A.N. at 1133, 1160 (noting proposal to ban vertical integration and writing that “[w]hile this approach has appeal, it would result in a fundamental restructuring of the cable industry and the way it does business”).

126. See *supra* notes 101–07 and accompanying text.

also have a relationship with the cable company with respect to internet access service. Again, the CFA specifically has criticized AT&T's open access commitments because the CFA perceives that the commitment does not clearly provide a route by which unaffiliated ISPs may own the exclusive customer relationship. "AT&T has *not* offered to negotiate the terms and conditions of a commercial relationship with independent ISPs in which it provides for the transport of data from customers to that ISP. . . . AT&T retains the primary relationship with every customer."<sup>127</sup>

This is a significant issue and probably is the motivation for the push for open access. But the marketing advantage conferred by cable's ownership of the wires does not strike me as a sufficient justification for open access. It does not suggest the possibility of consumer abuse. In fact, this sort of argument strikes me as no different from the discredited monopoly leveraging argument. Cable may be able to market to its customers, but it will not, in the long run, be able to injure consumers by increasing its monopoly profits. Cable's competitors might be at a disadvantage, but consumers will not be harmed. Antitrust's well-worn phrase—that the laws care about "competition not competitors"—says that injury to market participants is what vigorous competition is about and, if consumers are not hurt, there is no basis for regulation.

## CONCLUSION

Thus, the vertical dimension—the integration of cable systems with video programming interests—provides no more reason to suggest that cable companies ultimately will find it in their interest to restrict customers' access to services they want: unrestricted access to internet content. Instead, cable companies' restrictions to date probably reflect an early-mover issue, where vertical integration helped develop the new services that cable sought to provide—broadband internet access customized for their platforms. The principal long-term effect of the cable companies' current model will likely be that the cable companies will insist on providing internet access to customers directly, rather than wholesaling transport to other parties that will then sell the service at retail to subscribers.

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127. Consumer Federation of America, *supra* note 112, at 31.

Alternatively, cable companies might encourage unaffiliated ISPs to market cable internet service, so long as the cable company's brands are used and the cable company can market new services to the customers. This is only an attempt by the cable companies to maintain direct customer relationships and possibly to use those relationships to market other service bundles such as telecommunications. Such customer relationships alone, however, are not inherently anticompetitive and do not alone provide sufficient justification for government-mandated open access.

As I stated at the outset, one's perspective on the cable open access debate hinges to a significant degree on regulatory philosophy. I do not believe that the advocates of such mandatory rules have offered a reason consistent with economic theory to believe that cable companies will seek to deny access to unaffiliated content providers. Monopoly leveraging theory has been largely discredited, and no reason has been offered to believe the cable company's monopoly over its wires presents a special case. In particular, I have argued that a cable company's provision of traditional video services does not, alone, provide a reason to think that cable companies would refuse to provide access to internet video to the extent technologically feasible, if that is indeed what consumers demand. To overcome the threshold burden, advocates of regulation need to offer a specific reason to believe cable companies are earning monopoly profits in programming markets separate from the profits they earn due to their monopoly over their wires. The available evidence, while certainly limited, does not support such a theory. If there were a theory, or evidence suggesting an economic incentive for cable companies to resist access by unaffiliated ISPs, then a debate over the costs and benefits of open access regulations would be appropriate. However, in the absence of even this threshold showing, and with the certain costs of government regulation (even if they are, as open access advocates contend, minimal in this context), mandatory government open access rules cannot be justified.