

BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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In the Matter of )

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 )

CC Docket No. 98-146

REPLY COMMENTS OF TIME WARNER CABLE

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ATTORNEYS FOR TIME WARNER CABLE

October 8, 1998

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**TABLE OF CONTENTS**

	<b>PAGE</b>
INTRODUCTION AND SUMMARY .....	1
I. The Comments, Though General In Nature, Establish That A Wide Array Of High-Speed Transmission Alternatives Are Or Will Soon Be Available. ....	2
II. The FCC Should Reject Conclusory And Unsupported Arguments That Cable Modem Services Should Be Subject To Title II. ....	4
A. There is no legal basis for the FCC to extend Title II regulation to cable modem services. ....	5
B. There is no policy basis for imposing Title II regulation on cable modem services. ....	6
C. Requests for increased regulation of Internet- related services are contrary to established national policy. ....	7
CONCLUSION .....	9

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**REPLY COMMENTS OF TIME WARNER CABLE**

Time Warner Cable ("TWC") hereby submits its reply comments in response to the Commission's Notice of Inquiry in the above-captioned proceeding.<sup>1</sup>

**INTRODUCTION AND SUMMARY**

The comments in this proceeding demonstrate that many technologies and service providers are or will provide end users and ISPs with high-speed data connectivity. For example, the comments show that cable modem service, ADSL, xDSL and broadband wireless services all promise to provide "last mile" connections. Based on this record, the Commission cannot conclude that advanced services capabilities are not being deployed on a "reasonable and timely" basis.

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<sup>1</sup> See Inquiry Concerning the Deployment of Advanced Telecommunications Capability, CC Docket 98-146, Notice of Inquiry (rel. Aug. 7, 1998) ("Notice of Inquiry").

It follows that arguments made by certain commenters that additional regulation must be imposed on cable modem services cannot be sustained. Nothing in the record compiled in this proceeding justifies governmental intervention into the advanced service marketplace. More importantly, the FCC lacks the statutory authority either to regulate cable modem services as common carrier services, as a few commentors have suggested, or to increase regulatory burdens on any provider of advanced services in this proceeding. Furthermore, the imposition of such additional regulation would reduce or eliminate the cable operators' incentive to invest in the facilities needed to provide those services.

**I. The Comments, Though General In Nature, Establish That A Wide Array Of High-Speed Transmission Alternatives Are Or Will Soon Be Available.**

As explained by the FCC in the Notice of Inquiry, the central purpose of this proceeding is to determine whether advanced services are being deployed on a "reasonable and timely" basis. The Commission stated its goal simply: "our first step is to learn more about the status and broadband capabilities of existing and planned networks."<sup>2</sup>

A broad array of commenters filed in response to the Notice of Inquiry's request for deployment information. Although these comments do not provide the level of detail necessary to determine the level of advanced services deployment, they do

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<sup>2</sup> Id. at ¶ 8.

establish that a multiplicity of high-speed transmission vehicles are being offered and rapidly rolled-out.

Several examples demonstrate the type of useful, though general, information provided. MCI states as follows:

MCI and WorldCom, for example, has a large, strong network and continues to demonstrate its commitment and ability to deploy advanced technology.... Currently, WorldCom is actively providing xDSL service to its customers from fifty-four (54) ILEC central offices.... WorldCom intends to accelerate its movement into dozens of other ILEC central offices over the next year, contingent upon the availability of such things as collocation space and power, and unbundled, xDSL conditioned loops.<sup>3</sup>

U S West states that it is

in the process of deploying [ADSL] services in 226 wire centers in forty-three cities across its fourteen-state service region; as of today, it has deployed ADSL in 215 of these wire centers.<sup>4</sup>

WinStar explains that it is

the largest holder of spectrum in the 38 GHz band in the country, with licenses in forty-eight (48) of the top fifty (50) most populated metropolitan statistical areas in the United States. . . . The high frequency microwave technology employed in WinStar's network offers capabilities equivalent to a fiber optic network, but with several distinct advantages that militate toward the use of wireless services as the preferred method of building future telecommunications infrastructure.<sup>5</sup>

These advantages are cost benefits, speed and ease of buildout, and ubiquity of service.

These commenters' descriptions of their own advanced telecommunications deployment are typical. Though some details

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<sup>3</sup> MCI Comments at 16-18 (footnote omitted).

<sup>4</sup> U S WEST Comments at 8 (footnote omitted).

<sup>5</sup> WinStar Comments at 2-4.

are not included in these descriptions, the comments make clear that high-speed transmissions systems both exist and continue to be developed and deployed.

Thus, on the current state of the record, the FCC cannot conclude that advanced services are not being deployed in a "reasonable and timely" manner. Since such a finding is a prerequisite to further action, none can be taken absent further proceedings.<sup>6</sup>

**II. The FCC Should Reject Conclusory And Unsupported Arguments That Cable Modem Services Should Be Subject To Title II.**

AOL, Circuit City and MindSpring argue that the Commission must impose Title II common carrier regulation on the infant, but growing, cable modem industry. Rather than provide any credible legal support for this proposed fundamental regulatory shift, these commenters simply offer their own unsupported conjecture that high-speed broadband connectivity will likely be the primary Internet access transmission vehicle, hence it should be regulated under Title II now. Such assertions should be rejected because they are unsupported and in any case have no basis in law or policy.

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<sup>6</sup> As set forth in TWC's opening comments, before proceeding, the FCC must, at the very least, conduct a much more detailed and thorough study of the state of the deployment of advanced service. See TWC comments at 5.

**A. There is no legal basis for the FCC to extend Title II regulation to cable modem services.**

AOL argues that "cable operators providing broadband access to an affiliated ISP should make such access available to unaffiliated ISPs on a reasonable and non-discriminatory basis."<sup>7</sup> But AOL offers no analysis as to how the FCC would have the authority to impose such an obligation.

Circuit City similarly fails to offer more than cursory legal analysis to support its aggressive position. Circuit City argues that cable operators' Internet-based services are analogous to common carrier provision of "transmission capacity for the movement of information."<sup>8</sup> Rather than explore the analogy at this time (and its significant limitations) Circuit City implicitly acknowledges that it has not provided a convincing argument by calling for a special rulemaking to more fully consider the issue.

For its part, MindSpring simply asserts its pro-regulatory position with no legal support. Again, such conclusory statements should be dismissed out of hand.

In any event, even if these parties had been more diligent in searching for a legal basis for their claims, they would have found none. The FCC has itself determined that Section 706

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<sup>7</sup> AOL Comments at 10.

<sup>8</sup> Importantly, Circuit City's analogy does not take into account the different offerings of cable modem service by cable operators.

provides it with no new authority.<sup>9</sup> Thus, the bar on FCC regulation of cable services as Title II services<sup>10</sup> is applicable in this context. Moreover, Section 706 addresses only advanced "telecommunications capabilities," a term that cannot possibly encompass cable services. In any event, as TWC and others explained in their comments, the goals of Section 706 can only be achieved through deregulation.<sup>11</sup> For example, the "barriers to infrastructure investment" simply cannot be eliminated, as required by Section 706(a) and (b), through the imposition of burdensome common carrier regulation. The goal of Section 706 is to encourage rapid deployment of advanced services. This goal can only be promoted if regulatory constraints are lifted on current and future providers of advanced services.

**B. There is no policy basis for imposing Title II regulation on cable modem services.**

Those commenters who propose common-carrier type regulation for cable modem service are as weak on policy as they are on the law. Indeed, Section 706 itself establishes the national policy in this area. As discussed above, the statute itself provides that the FCC can take no action unless it is conclusively established that the marketplace, on its own, is not deploying

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<sup>9</sup> See Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, *Memorandum Opinion and Order* at ¶ 69 (rel. Aug. 7, 1998).

<sup>10</sup> See 47 U.S.C. § 541(c) ("Any cable system shall not be subject to regulation as a common carrier by reason of providing any cable service").

<sup>11</sup> See TWC Comments at 8-10.

advanced services sufficiently. This reflects Congress's judgment that government intervention in the absence of a problem carries too great a risk of slowing rather than speeding the deployment of advanced services. Thus, on the record before the Commission now, no steps under Section 706 are permissible. But even if intervention were permissible at this stage, common carrier regulation would be the very worst kind of step to take.

No one yet knows how these new Internet businesses will or should work. Imposition of common carrier-type regulation would not only create disincentives to the creation of new facilities-based competitors, but would also freeze all experimentation and flexibility in creating new and efficient business models. Moreover, common carrier regulation in itself creates no new facilities; it merely forces an inflexible pricing and business model onto existing providers of facilities. Furthermore, the imposition of such a model on cable services -- which not incidentally is directly precluded by the Cable Act itself<sup>12</sup> -- would result in a fundamental change in existing cable regulation. Such a profound change -- if it were to be taken -- is within the province of Congress, not the FCC, as the FCC itself has recognized in this proceeding.<sup>13</sup>

**C. Requests for increased regulation of Internet-related services are contrary to established national policy.**

Congress has appropriately declined to interfere with the dramatic and continuing growth of the Internet -- including

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<sup>12</sup> See footnote 10 supra.

<sup>13</sup> See footnote 9 supra.

Internet provided over cable. In Section 230, Congress stated that "[i]t is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services." Section 706 confirms that "regulatory forbearance" -- rather than regulatory conscription -- is the most likely vehicle for promotion of these services. In addition, the FCC's recent OPP paper on cable modem services finds that Congress concluded that "computer networks, web pages and on-line services comprised a market that was sufficiently competitive that federal regulatory intervention was both unnecessary and undesirable."<sup>14</sup>

In light of Congress' and the FCC's deregulatory posture with respect to Internet-related issues, it would be a drastic departure to conclude that imposition of Title II measures will provide a "solution" where Congress and the FCC have determined that there is no "problem." Unlike the local exchange market which remained nearly 100% in the hands of a single provider in a given market prior to passage of the 1996 Act, the advanced telecommunications services marketplace and the Internet is vibrantly competitive. It would be a terrible mistake for the Commission to impose a nearly identical overlay of detailed, cumbersome federal regulation on these industries and market realities. The FCC should continue to follow Congress' deregulatory mandate, or alternatively, seek additional statutory

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<sup>14</sup> Barbara Esbin, "Internet Over Cable: Defining the Future in Terms of the Past," FCC OPP Working Paper No. 30 at 22.

guidance from Congress once Internet and high-speed data services mature.<sup>15</sup>

### CONCLUSION

The comments submitted in response to the Notice of Inquiry indicate that high-speed services are growing in number and type, thus precluding regulatory intervention by the FCC under Section 706. Arguments seeking extension of the regulatory burdens on the firms taking the risks to deploy these new services, including suggestions to impose Title II regulation on cable modem services, should be dismissed as meritless and antithetical to the goals of this 706 inquiry.

Respectfully submitted,



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<sup>15</sup> Cf. id. at 115-116, 118 ("ultimately, however, the Commission (and perhaps Congress) may need to develop a new regulatory paradigm and language that fits the new global communications medium known as the Internet.").