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

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In the Matter of)
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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

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REPLY COMMENTS OF CIRCUIT CITY STORES, INC.

CIRCUIT CITY STORES, INC.

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REPLY COMMENTS OF CIRCUIT CITY STORES, INC.

Circuit City Stores, Inc. ("Circuit City") respectfully submits this reply to the comments filed in response to the Federal Communications Commission ("FCC" or "Commission") August 7, 1988 Notice of Inquiry ("Notice") in the above-captioned proceeding.

I. Introduction

Both the volume and the content of the comments filed in response to the Commission's Notice in this proceeding reveal the need for carefully-adopted policies that will permit competitive service providers to offer all Americans competitive advanced telecommunications services. As broadband products and services develop and become more widely available, the absolute necessity that a full range of consumer choice emerge in the market for these products and services becomes ever more apparent.

Those respondents that read Section 706 to foreclose any regulatory action by the Commission miss Congress' underlying goal in enacting the provision: to encourage the development of advanced telecommunications capability to all Americans. The plain language of the statute, in fact, empowers the Commission to utilize a variety of deregulatory and, if

necessary, regulatory methods to ensure the removal of impediments to the development of advanced services.

Congress chose as its goals in enacting the Telecommunications Act of 1996 (“the 1996 Act”) both deregulation and competition.¹ To the extent that those principles at some point clash, however, the goal of achieving an open, competitive market for telecommunications products and services should prevail. To ensure the provision of developing telecommunications and information technologies to all Americans, the overarching goal should therefore be an open broadband network to which an unlimited number of service providers are afforded access. To achieve this, the Commission should utilize the regulatory tools at its disposal to eliminate anti-competitive practices by facility-controlling incumbents and the bottlenecks those practices create. As Qwest Communications Corporation explained in its comments, “[I]ncumbents do not need—and clearly should not be granted—a monopoly in advanced last-mile telecommunications capability or deregulated status in order to invest in advanced services.”²

The comments directed to the provision of Internet-based services provided over cable systems, in particular, demonstrate the need to ensure that any policies the Commission adopts or does not adopt will not deny American consumers access to the latest broadband products and services. The necessary expansion of coaxial cable systems into HFC networks will encourage the widespread availability of broadband Internet-based services and can be accomplished only by opening access to those networks to entrants other than incumbent cable monopolists. In this regard, America Online correctly urged the Commission

To take every opportunity available to it to ensure that the public interest benefits of cable broadband networks are indeed realized. In particular, the Commission should move, at every opportunity, to take steps necessary to ensure that cable operators providing broadband access to an affiliated ISPs make such access available to unaffiliated ISPs on a reasonable and non-

¹ See The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (purpose of the Act is to “promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers”).

² Comments of Qwest Communications Corporation at 20 (hereinafter “Qwest Comments”).

discriminatory basis.³

The widely divergent positions entered by the many respondents to the Commission's Notice make clear that the once-settled regulatory distinctions made amongst various telecommunications and information services must be re-examined. The Commission should not be swayed by arguments that it should keep intact traditional regulatory classifications, a course of action that will surely result in little more than maintaining longstanding strongholds over facilities essential to the competitive provision of broadband products. Such a result will neither promote competition nor carry out of the Congressional mandate of Section 706.

II. Section 706 Contains No Bar To Regulatory Action

There is simply no support for the claim by the various cable respondents that Section 706 does not empower the Commission to adopt regulations affecting the deployment of advanced telecommunications services. Time Warner, for instance, makes the extraordinary claim that the Commission may not intervene in the advanced services market place unless it can first demonstrate that advanced services are not being deployed in a "reasonable and timely fashion."⁴ Similarly, NCTA, MediaOne, and Cablevision Systems argue that Section 706 provides no authority for the Commission to regulate the deployment and provision of broadband services.

To the contrary, the plain text of the provision both recognizes the Commission's regulatory authority over advanced telecommunications capability and instructs the Commission to encourage the deployment of that capability through the use of "price cap regulation, regulatory forbearance, measures that promote competition. . . , or other regulating methods."⁵ The statute separately requires the Commission to make inquiry into the availability of advanced telecommunications capability and, if the deployment of that capability is not being achieved in a

³ Comments of America Online, Inc. at 10 (hereinafter "AOL Comments").

⁴ Comments of Time Warner, Inc. at 2; *See also* Comments of Cablevision Systems Corporation at 5 (hereinafter "Cablevision Comments").

⁵ 47 U.S.C. § 157 (a).

“reasonable and timely fashion,” to take immediate action to accelerate deployment of advanced services.⁶ Congress’ directive to take “immediate action” (should the Commission’s inquiry into advanced telecommunications capability reveal the need) in no way diminishes the directive, in the previous provision, to “encourage the deployment on a reasonable and timely basis” of advanced capability by utilizing the various tools at the Commission’s disposal. Accordingly, the cable respondents’ suggestion that Section 706 prevents the Commission from taking action to encourage the advancement of broadband services cannot be supported by the statute.

In this regard, Circuit City urges the Commission to examine and adopt policies necessary to relieve and prevent bottlenecks that foreclose competitive access to broadband network services. More specifically, the Commission should adopt market-opening regulations to govern cable operators holding exclusive control over the delivery of broadband cable network services, including the Internet-based services provided by ISPs. Yet, as noted by AOL, the Commission’s authority to regulate network infrastructure differs from its obligation to resist regulating the Internet itself.⁷ Circuit City recognizes this distinction and supports the Commission’s forbearance in the regulation of the Internet as a medium. Rather, the Commission should focus its regulation on ensuring 1) the availability of non-discriminatory access to the cable facilities upon which Internet access relies and 2) that access to those facilities is easy to use, extensively available, high-speed, and always connected. Requiring cable operators to unbundle their networks and provide access to unaffiliated ISPs will not dampen the openness and innovation that characterizes the Internet as a telecommunications medium, but rather will ensure that continued innovation is not hampered by a monopoly chokehold over broadband access to the Internet.

The language of Section 706 is indeed directed to removing barriers to competition and to the rapid development of advanced services. Yet the Commission is clearly empowered by the

⁶ 47 U.S.C. § 157 (b).

⁷ See AOL Comments at 3-4.

provision to adopt policies that will ensure that the broadband products it is tasked with encouraging are, in fact, being offered competitively in a market characterized by a number of competing participants.

III. Cable Operators Are Incumbents In The Market For Broadband Internet Services Provided Over Cable System Plant

It is not premature, as NCTA argues, to suggest that the cable industry could establish a bottleneck in broadband plant that would prevent customers from gaining access to ISPs. Indeed, as argued by Bell Atlantic, cable operators—which have exclusive control over an entire communications network—can already be termed incumbents in the market for broadband Internet service provided over cable networks.⁸ Nor is it premature, as argued by Comcast, to develop a regulatory model for the provision of these services. In this regard, just as the Commission is addressing the provision of data services by local exchange carriers in the Section 706 rulemaking, it should also institute a rulemaking proceeding to address the regulation of cable entities providing broadband Internet services via their cable systems.

Although various respondents make the point that there are many entrants in the markets for advanced telecommunications services and capability, it is important to note that cable operators are the *only entities* controlling the market for Internet-based services delivered over cable systems.⁹ Cable operators control the physical access necessary for widespread deployment of broadband Internet services provided via cable modems, *i.e.*, coaxial cable plant and the expanding HFC plant.¹⁰ In this regard, Circuit City is in agreement with Bell Atlantic that cable operators have become incumbent providers of high-speed broadband services. As

⁸ See Comments of Bell Atlantic at 5-8.

⁹ This is recognized, for instance, in the response of BellSouth, which notes that although no single entity has captured critical market share, “[i]n the mass market for advanced access services, cable modems have secured an early lead as the transmission medium of choice for many consumers.” Comments of BellSouth Corporation at 31-32. Implicit in this, of course, is the fact that cable operators control entirely consumers’ access to the Internet via cable modem.

¹⁰ Cable operators may also have increasing control over logical access to data services in the form of proprietary embedded operating systems and software for those systems.

such, cable entities providing Internet-based services over their systems should be subject, to some degree, to the common carrier requirements of Title II in the same manner as are incumbents in telephony markets. The alternative scenario, in which cable operators remain unregulated in the broadband HFC environment, will serve only to increase cable's market power because operators will be given free reign to discriminate and deny access to ISPs. As a result, consumers will be offered less choice, and the widespread deployment of advanced services will be thwarted.

As incumbent providers of services over the cable networks, cable operators control what may be termed the "essential network hardware and software facilities" that provide access to broadband Internet-based products and services. No viable, alternative facility exists for competitive ISPs to provide a similar access network, and it would be prohibitively expensive and impossible for competitive ISPs to construct their own network access facilities. To permit incumbent cable monopolists to exploit their market power and deny others access to their broadband capacity would constitute a market failure. Without requiring regulated, competitive access to cable networks, there can be no ISP entry into the broadband, cable-based market for Internet services. On the other hand, competition in the cable-Internet platform will end cable's chokehold on Internet services provided via cable modem, and widespread, competitive access to broadband networks and services will become a reality.

An additional concern in this arena focuses on currently-evolving digital interfaces to consumer products (*e.g.*, 1394 and UltraATA/66), which must remain fully open to content providers. With the guarantee of openness, the control capability of the cable access network can present an open system that is able to offer navigation capabilities for the services of content providers. These essential navigation capabilities, which can be available within a television or Internet environment, cannot be made available without an interface that is fully open to content providers of all types.

Furthermore, it is by no means clear that Congress amended the 1996 Act to provide for the regulation of cable operators providing Internet services as “cable” entities rather than “telecommunications carriers,” as respondents such as AT&T suggest. Rather, as discussed in Circuit City’s comments, the Internet services being provided by cable operators are, in fact, telecommunications services that should be subject to Title II. The disparate treatment of cable operators and other entities, such as telcos, that provide nearly identical Internet services over their own transmission facilities not only screams of regulatory asymmetry, but also is fundamentally unfair. Such reliance on standby, traditional regulatory classifications will not only result in prohibitive economic costs and competitive losses, but also deny consumers access to broadband products and services.

In the market for Internet-based services delivered over cable systems, cable operators are currently the only participant. If the Commission requires these cable operators to provide non-discriminatory access to their networks, then unaffiliated ISPs will enter the market for these services, and competition will emerge. The continuation of cable’s monopoly over these services, however, will ensure only that consumers will be presented with fewer choices in their provider of advanced services. As noted by MindSpring and others, this result could force consumers to maintain two ISPs in order to receive their desired services or result in consumers being offered only one broadband provider of Internet service.¹¹ Permitting multiple, competing access providers to utilize cable networks, however, will provide consumers with a broader range of choice of broadband products and services, lower the cost of those products and services, and permit the true encouragement of advanced telecommunications capability.

IV. Regulation Of Cable Operators As Title II Carriers Will In No Way Discourage Investment In Broadband Cable Networks

The extensive attention directed to the provision of Internet-based services over cable

¹¹ See e.g., MindSpring Comments at 20.

systems in the responses to the Commission's Notice reveals the fallacy of arguments that any regulation will deter investment in these services. For instance, BellSouth declares that "[b]y far, the fastest spreading broadband technology today is cable;"¹² MediaOne reports that by the end of 1998, it will offer 2.5 million households advanced services consisting of Internet access provided over its cable system;¹³ and Cablevision Systems recounts its investment of "tens of millions of dollars in Internet-specific infrastructure and equipment."¹⁴

Accompanying these accounts of the explosive growth of Internet services provided via cable modems are the self-interested assertions that any regulation of cable providers will have the effect of deterring and inhibiting innovation and investment in these services. For instance, AT&T argues that any attempts by the Commission to "curb monopoly power" would dampen investment in the provision of broadband access services.¹⁵ Similarly, Cablevision Systems argues that any new regulatory burden placed on cable operators "would *dramatically* inhibit" both investment and the deployment of advanced services, and Ameritech claims that unbundling and resale requirements would discourage "the development and proliferation of advanced telecommunications services."¹⁶

Yet these claims cannot be justified on any level, for the enormous consumer demand for cable modems and Internet services provided over cable—demonstrated in part by the comments in this proceeding—will ensure that the necessary broadband information networks are constructed and that innovation in the provision of these services continues. As the growth of the Internet continues to expand, consumers will demand higher-speed access to multimedia networks and, as a result, investment in broadband infrastructure, such as HFC cable plant, will necessarily accelerate. In its comments, Qwest anticipates the arguments that deregulated

¹² BellSouth Comments at 19.

¹³ Comments of MediaOne Group, Inc. at 2-3.

¹⁴ Cablevision Comments at 4.

¹⁵ Comments of AT&T Corporation at 40.

¹⁶ Cablevision Comments at 6; Comments of Ameritech at 9.

treatment of incumbents will ensure more rapid investment in broadband networks and puts them to rest easily, noting that incumbents “will invest if and when it is economically justifiable to do so (or if they need to respond to competition.)”¹⁷

Neither demand nor investment in infrastructure will be dampened by the requirement that cable operators provide access to their networks to unaffiliated ISPs. Rather, the resultant competition will require entrants to continue to innovate and invest in order to reach customers and offer them competitive products. As noted by MindSpring, if the broadband loop is competitive, then operators will voluntarily build broadband networks quickly and make those facilities as open as possible.¹⁸ Furthermore, by selling non-discriminatory access to competitive ISPs, cable operators will be able to recoup a portion of the cost of their network build-outs. This will create incentives for further infrastructure build-out, not deter cable operators from investing in their networks.

The cable industry is in exclusive control of an entire communications network. It is only without the entrance of additional market participants that cable operators will be without sufficient resources to exploit innovative opportunities with respect to each and every component of the broadband network. The regulation of cable operators providing Internet services under Title II, however, will permit the resale to competitive ISPs of capacity on cable’s networks, thereby providing cable with more resources to further innovation and development of the network.

IV. Conclusion

Circuit City supports the Commission’s commitment to market forces to ensure the rapid deployment of advanced telecommunications capability. Yet, as demonstrated herein, the necessity that all customers have competitive access to broadband products and services requires

¹⁷ Qwest Comments at 20.

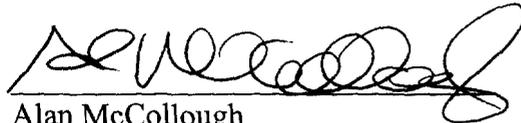
¹⁸ MindSpring Comments at 22.

the Commission to intervene in this area to ensure that networks and markets remain open to competitive providers of these products and services.

Furthermore, Circuit City agrees with commenters such as BellSouth and Time Warner that urge the Commission to continue its efforts in this proceeding by undertaking a further examination and analysis of broadband telecommunications capabilities, particularly with regard to Internet-based services provided over cable systems. The volume of coverage afforded to cable Internet services and cable modems itself demonstrates that need. The Commission should not be persuaded by the respondents who urge it to look the other way and permit the cable monopoly to continue in the broadband environment. Rather, the Commission should seek to ensure the rapid deployment of advanced services by breaking cable's stronghold over broadband networks and opening those networks to competition and consumer choice.

Respectfully submitted,

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