

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Inquiry Concerning High-Speed)	GEN Docket No. 00-185
Access to the Internet Over)	
Cable and Other Facilities)	

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INTRODUCTION AND SUMMARY

Although the Commission's Notice of Inquiry asks a range of questions on the state of broadband competition, the basic marketplace facts are not subject to dispute. Cable operators are the market leaders, controlling "over 70% of residential high-speed data subscribers nationwide."¹ Local telephone companies are therefore not incumbents in the residential broadband market; they are new entrants, deploying Digital Subscriber Line service in an effort to erode the "strong presence among residential subscribers" that cable providers "are likely to" retain "in the future."²

Despite cable operators' clear and continuing dominance of the residential broadband market, the Commission has left cable operators free from regulation, while, at the same time, expanding the regulatory burdens imposed on local telephone companies offering DSL. The Commission has permitted cable operators to bundle their broadband access service exclusively with the service of an affiliated ISP, while requiring ILECs to sell DSL service to all ISPs at nondiscriminatory prices memorialized in federally filed tariffs. Likewise, the Commission has permitted cable operators to maintain complete control over their broadband network facilities, while requiring ILECs to share the loop's high-frequency spectrum with competing DSL providers. Cable operators have thus -- as a result of the Commission's express decision to maintain this regulatory disparity -- been able to perpetuate their position as the dominant provider of residential broadband service by exercising unfettered control over the lion's share of broadband customers and revenues.

¹ *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, Second Report, CC Docket No. 98-146, at ¶ 190 (Aug. 21, 2000) (hereafter "Second Advanced Services Report").

² *Id.*

Consumers have suffered as a result of the Commission's decision to penalize new entrants in the residential broadband access market, particularly in geographic markets where network upgrade costs are high. ILEC investment in DSL has been slowed because regulatory compliance costs have sapped dollars that could otherwise have been spent on network upgrades. Further, because the Commission's actions have given cable operators a cost and revenue advantage over DSL providers, this regulatory disparity has made DSL investments relatively less profitable and therefore less likely to be made in marginal markets.

The Commission's decision to confer a competitive advantage on the dominant providers of residential broadband access has no justification in law or policy. In writing the 1996 Act, Congress anticipated that different technologies would compete to provide "broadband telecommunications capability," and required the Commission to regulate broadband services "without regard to [the] transmission media or technology" used to deliver them.³ The Act defines residential broadband access -- whether provided by a local telephone company or a cable operator -- as a telecommunications service subject to "common carrier" regulation.⁴ As a result, the Act requires both cable operators and DSL providers to make their services available to all ISPs on nondiscriminatory terms, and to price those services according to federally filed tariffs. The Commission has authority to forbear from enforcing these requirements against cable operators, but, if it does so, it must also forbear from enforcing the same obligations against ILECs offering DSL.

The Commission has repeatedly found that the residential broadband access market is competitive, identifying "a large number of actual participants and potential entrants" and

³ Section 706 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 153, § 706(c)(1), reproduced in the notes following 47 U.S.C. § 157.

⁴ 47 U.S.C. §153(44).

concluding that the “preconditions for monopoly appear absent.”⁵ Further, the Commission has found that regulation is required only if consumers are unable to “choose among various alternative broadband access providers” -- in other words, if residential broadband access providers are able to exercise market power.⁶ This rationale for regulation cannot, in any way, apply with greater force to ILECs offering DSL than it does to market-leading cable operators.

The Commission therefore has no basis for continuing to impose more stringent regulatory requirements on ILECs than on cable operators. Given the Commission’s conclusion that the residential broadband access market is competitive, it should revisit its decision to require ILECs to unbundle the loop’s high-frequency spectrum and forbear from enforcing pricing or tariffing regulations on broadband access providers, allowing such providers to strike their own commercially negotiated deals with unaffiliated ISPs. The Commission could, if it concludes that competitive conditions do not justify complete deregulation of the residential broadband access market, continue to require that such services be sold to ISPs on nondiscriminatory terms, with those terms set by the marketplace and not by regulators. What the Commission cannot do -- indeed, is prohibited from doing by the Communications Act, the Administrative Procedure Act, and the Constitution -- is continue to enforce common carrier regulation and line sharing obligations against ILECs, while forbearing from regulating the dominant providers of residential broadband access.

⁵ See, e.g., *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, Report, CC Docket No. 98-146, 14 FCC Rcd 2398, at ¶ 48 (Feb. 2, 1999) (hereafter “First Advanced Services Report”).

⁶ *In re Applications for Consent to Transfer Control of MediaOne to AT&T*, Memorandum Opinion and Order, CS Docket No. 99-251, 15 FCC Rcd 9816, at ¶ 116 (June 6, 2000) (hereafter “AT&T-MediaOne Order”).

I. ALTHOUGH CABLE OPERATORS DOMINATE THE RESIDENTIAL BROADBAND ACCESS MARKET, THE COMMISSION HAS GRANTED THEM A SIGNIFICANT COMPETITIVE ADVANTAGE THAT HAS UNDERMINED INVESTMENT IN COMPETING TECHNOLOGIES AND INJURED CONSUMERS.

According to the most recent available data, cable operators serve more than 70% of all residential broadband customers, offering these customers high-speed local access bundled with the service of an affiliated ISP.⁷ The Commission has predicted that cable operators will continue to serve the majority of residential broadband customers at least until 2004, and industry analysts have suggested that their lead will last even longer.⁸

Local telephone companies are the primary entrants in the residential broadband access market seeking to challenge the dominant market position held by cable operators. Where both DSL service and cable-delivered broadband service are available, consumers see the two as close substitutes that compete with one another on price, speed, and quality of service. Nevertheless, at the end of 1999, all DSL providers combined served only “about 11% of the total high-speed access subscribers.”⁹ Both cable operators and local telephone companies must make substantial

⁷ See Reuters, *Cable Industry Adds 690,000 Cable Modem Customers*, Nov. 13, 2000 (available at http://dailynews.yahoo.com/h/nm/20001113/en/television-modems_1.html); TeleChoice, *DSL Deployment Summary*, Nov. 13, 2000 (available at http://www.xdsl.com/content/resources/deployment_info.asp); see also Second Advanced Services Report ¶ 190. According to data released by the Commission on October 31, 2000, cable operators control 70% of all “residential and small business high-speed lines” -- a total that understates cable operators’ share of the residential market by including a class of business customers largely served by DSL. Industry Analysis Division, Common Carrier Bureau, *High-Speed Services for Internet Access: Subscribership as of June 30, 2000*, at Table 3 (Oct. 2000).

⁸ See Second Advanced Services Report ¶ 189 (“Many analysts expect that over the next five years, cable modem subscriptions will continue to increase dramatically, reaching an average estimate of 15.2 million subscribers by year-end 2004.”); *id.* ¶ 191 (“Many analysts predict that, over the next five years, residential DSL subscription will grow to 13 million.”); see also Jupiter Research, Press Release, *More than One in Three U.S. Households Will Connect Via Broadband in 2005* (available at <http://www.jup.com/company/pressrelease.jsp?doc=pr001101>) (in 2005, cable operators will serve 48% of broadband households, while DSL providers will serve 41%).

⁹ Second Advanced Services Report ¶ 191.

improvements to their networks to provide residential broadband access. As the Commission recognized, upgrading a cable “system for high-speed Internet service typically requires installation of equipment that enables the transmission of digital data packets: routers, switches, and a cable modem termination system.”¹⁰ Likewise, local telephone companies must add “electronics to the telephone line” to support DSL service and must build regional networks to aggregate data traffic collected from widely dispersed central offices.¹¹ Cable operators are far ahead of ILECs in upgrading their networks to provide broadband services. As the Commission concluded, “DSL equipment is currently installed in approximately 27% of the nation’s central offices,” “contrasted with cable having 52% of its plant currently upgraded.”¹² Cable-delivered broadband access is therefore available to roughly twice as many households as DSL service.¹³

The Commission has recognized that “traditional telephone” networks “are not ideally suited for broadband.”¹⁴ Specifically, the Commission has found that “variations in legacy outside plant conditions can limit access to certain end-users even in upgraded areas.”¹⁵ For example, DSL service presently cannot reach customers whose loops exceed 18,000 feet or are routed through a Digital Loop Carrier.¹⁶ Further, “in contrast to an upgraded cable network,

¹⁰ *Id.* ¶ 31.

¹¹ *Id.* ¶ 35.

¹² *Id.* ¶ 196.

¹³ *See id.* ¶ 187 (“by year-end 1999, upgraded cable plant, capable of providing service to cable modems, was available to 52% (50.3 million) of the country’s 96.6 million homes passed by cable”); *id.* ¶ 195 (“analysts estimate that 25% of US households fall within the distance limits of a central office from which DSL is now being offered”).

¹⁴ First Advanced Services Report ¶ 46.

¹⁵ Second Advanced Services Report ¶ 31.

¹⁶ *See id.* ¶¶ 38, 40.

which can offer upgraded service to all homes it passes, LECs must ‘condition’ each end-user’s line by removing” “devices that were used to enhance the quality of voice traffic over the copper.”¹⁷

Given these facts -- all repeatedly recognized by the Commission -- it is apparent that cable operators do not need to be subsidized at the expense of new entrants to compete in the residential broadband access market. Although both cable operators and local telephone companies use transmission capability latent in their networks as one minor component of broadband access service, cable operators control more than 70% of all broadband customers, have double the amount of their networks upgraded to provide broadband service, and face lower upgrade costs and fewer network limitations when seeking to reach residential customers.

Nevertheless, over and above these existing competitive advantages, the Commission has conferred on cable operators a significant regulatory advantage that further raises the costs faced by local telephone companies seeking to offer DSL. The Commission has left cable operators free from *all* regulation related to their provision of broadband services. Cable operators have therefore been free to bundle their broadband access service exclusively with the service of an affiliated ISP, and have not been required to share any of their broadband network facilities with competitors. The Commission has thus permitted cable operators to capture the full value of their broadband networks and avoid having to share any of that value with access or ISP competitors. The Commission consciously chose to grant cable operators this freedom because it concluded that consumers have a free and competitive choice “among various alternative broadband access providers.”¹⁸

¹⁷ *Id.* ¶ 39.

¹⁸ *AT&T-MediaOne Order* ¶ 116.

Despite the fact that this rationale for regulatory forbearance necessarily applies with greater force to new entrants than to market-leading cable operators, the Commission has imposed a host of regulatory obligations on the broadband services and network facilities of local telephone companies. *First*, the Commission has required ILECs to make their residential broadband access service available to all Internet service providers on nondiscriminatory terms.¹⁹ *Second*, the Commission has subjected DSL services to federal tariffing requirements enforced to ensure that “rates for DSL services are just and reasonable.”²⁰ *Third*, the Commission has required ILECs to unbundle the loop’s high-frequency spectrum, allowing competitors to share ILEC facilities solely for the purpose of providing competing DSL service.²¹

By imposing these regulatory obligations only on ILECs, the Commission has given cable operators a significant cost advantage that has made DSL service less competitive and therefore has slowed the pace of DSL deployment. As an initial matter, ILECs are required to bear heavy costs of regulatory compliance from which cable operators are completely free. As the Cable Services Bureau recognized, the rules required to enforce “Title II ‘non-

¹⁹ See, e.g., *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, CC Docket No. 98-147, at ¶ 21 (Nov. 9, 1999) (“incumbent LECs must continue to comply with their basic common carrier obligations with respect to” DSL services, including “providing such DSL services on reasonable request . . . on . . . nondiscriminatory terms”).

²⁰ *In re GTE Telephone Operating Companies*, Memorandum Opinion and Order, CC Docket No. 98-79, 13 FCC Rcd 22,466 at ¶ 32 (Oct. 30, 1998) (“We have ample authority under the Act to conduct an investigation to determine whether rates for DSL services are just and reasonable.”); see also *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, CC Docket No. 98-147, at ¶ 21 (Nov. 9, 1999).

²¹ See *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Third Report and Order, CC Docket No. 98-147, 14 FCC Rcd 20,912 at ¶ 48 (Dec. 9, 1999) (“a competitor is still impaired if it must provide analog voice service in order to enter the market for voice-compatible xDSL services”).

discriminatory' interconnection and access requirements" against ILECs are "burdensome."²² Further, the Commission has effectively required ILECs to recover their substantial fixed network upgrade costs from a smaller pool of customers. While cable operators are able to earn guaranteed revenues from the sale of broadband access *and* ISP services, ILECs must share both of these revenue streams with competing ISPs and access providers offering services over ILEC facilities. As Kenneth J. Arrow, Gary S. Becker, and Dennis W. Carlton explain in their attached declaration, given the Commission's conclusion that the broadband access market is competitive, "maintaining such a regulatory disparity would be likely to adversely effect consumers."²³

By forcing DSL providers to bear costs from which cable operators are free, the Commission's regulatory disparity "may adversely affect the speed at which local phone companies choose to deploy existing or new services."²⁴ Because the Commission's disparate regulatory requirements increase the costs faced by ILECs offering DSL while, at the same time, reducing their revenues relative to cable operators, DSL service is necessarily less competitive than it otherwise would be against cable-delivered broadband access. As Arrow, Becker and Carlton explain, "the imposition of common carrier and line sharing rules relating to DSL services on phone companies can distort prices faced by consumers as well as suppliers incentives to invest in deploying new technologies and services." The impact of this distortion will be felt with particular force in "sparsely populated and remote locations" where DSL

²² Deborah A. Lathen, *Broadband Today: A Staff Report to William E. Kennard on Industry Monitoring Sessions Convened by the Cable Services Bureau*, October 1999, at 44 (hereafter "*Broadband Today*").

²³ Declaration of Kenneth J. Arrow, Gary S. Becker and Dennis W. Carlton, attached as Appendix A, at ¶ 6 (hereafter "Arrow, Becker & Carlton Declaration").

²⁴ *Id.* ¶ 33.

network upgrade costs are already high due to problems in “legacy outside plant conditions.”²⁵ By making DSL service even less competitive against cable in these areas, the Commission’s regulatory disparity will diminish ILEC “incentives to invest in research and development that may extend the range at which DSL services can be effectively provided.”²⁶

Ultimately, the regulatory disparity enforced by the Commission will “penalize otherwise efficient technologies and firms” and could “contribute to the creation of inefficient dominant technologies.”²⁷ If the Commission, by its actions in the broadband marketplace, makes it clear that new and innovative services deployed by ILECs will routinely be subject to more onerous regulatory requirements than products offered by competitors, it will “discourage future investments in new products and services that make use in part of the local telephone system.”²⁸ Because such investments “are a major source of increases in the economic welfare of consumers over time,”²⁹ consumers would be far better off if the Commission followed the Act’s *explicit* technology-neutral mandate and allowed “competition, not regulation,” to “determine which technologies and services succeed in the marketplace.”³⁰

²⁵ Second Advanced Services Report ¶¶ 31, 38.

²⁶ Arrow, Becker & Carlton Declaration ¶ 33.

²⁷ *Id.* ¶ 34.

²⁸ *Id.*

²⁹ *Id.* ¶ 32.

³⁰ *Id.* ¶ 37.

II. THE ACT DOES NOT PERMIT THE COMMISSION TO CONTINUE REGULATING DSL SERVICE AND CABLE-DELIVERED BROADBAND ACCESS DIFFERENTLY.

A. Cable-Delivered Broadband Access is a Telecommunications Service. Broadband Access Services Delivered Over Telephone and Cable Lines Are Therefore Legally Indistinguishable.

There is no dispute that cable operators rely on “telecommunications” to deliver data to and from broadband customers. The Act defines “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.”³¹ Cable operators unquestionably perform this function for their broadband customers, delivering e-mail, requests for Web pages, and data from Internet sites, back and forth from customers’ homes “without change in the form or content of the information.” Thus, AT&T has conceded that “cable modem services . . . have telecommunications transmission facilities as one of their components.”³²

Given that cable operators themselves agree that they are providing “telecommunications” to residential broadband customers, the Commission need only decide whether cable providers are offering that “telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public.”³³ This question answers itself. Cable operators, like DSL providers, offer telecommunications for a set monthly fee to the “class[] of the public” living in areas served by upgraded systems. Although cable operators also afford customers access to proprietary content, representatives of the cable

³¹ 47 U.S.C. § 153(43).

³² Brief of Appellees MediaOne and AT&T Corp., *MediaOne Group, Inc. v. County of Henrico*, Docket No. 00-1680(L), at 69 (Aug. 3, 2000).

³³ 47 U.S.C. § 153(46).

industry have testified that cable modem customers can completely “bypass” that content and “access AOL, other subscription services, or any website accessible over the public Internet with ‘one click’ of [a] computer mouse.”³⁴ Indeed, AT&T has “committed” to the Commission that it will facilitate “maximum access by its customers to any content of their choosing,”³⁵ and that customers can reach any Internet destination without having to “go through” AT&T’s affiliated ISP or “view any . . . content or screens” provided by that ISP.³⁶ Cable operators are thus offering for a fee to the public a service that transmits “information of the user’s choosing, without change in the form or content of the information as sent and received” “between or among points specified by the user”³⁷ -- in other words, a telecommunications service.

This conclusion is the only one that can be squared with the Act and the Commission’s precedents. The Act is explicit that a telecommunications service is to be defined “regardless of the facilities used,”³⁸ and the Commission itself has recognized “Congress’s direction that the classification of a provider should not depend on the type of facilities used.”³⁹ As the

³⁴ Affidavit of Kenneth M. Dye, General Manager of MediaOne Virginia, in Support of Plaintiffs’ Motion for Summary Judgment on Statutory Preemption and Virginia Law Claims, *MediaOne Group, Inc. v. County of Henrico*, Case No. 3:00CV33, at ¶ 7 (Feb. 18, 2000); see also Julia Angwin, *Cable Alliances Prompt Some Consumers to Pay Twice for Web Access*, WALL ST. J., Nov. 20, 2000, at B1, B4 (recounting stories of @Home and Road Runner customers that purchase the service to reach an *unaffiliated* ISP and “only wanted the Internet connection”).

³⁵ *AT&T/MediaOne Order* ¶ 121.

³⁶ *In re Application for Consent to Transfer Control of TCI to AT&T*, CS Docket No. 98-178, 14 FCC Rcd 3160, at ¶ 95 (Feb. 18, 1999).

³⁷ 47 U.S.C. § 153(43).

³⁸ *Id.* § 153(46).

³⁹ *In re Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket No. 96-45, 13 FCC Rcd 11,830, at ¶ 59 (Apr. 10, 1998).

Commission stated in its Report to Congress, a “telecommunications service is a telecommunications service regardless of whether it is provided using wireline, wireless, cable, satellite, or some other infrastructure.”⁴⁰ Further, the Commission has repeatedly concluded that “xDSL-based advanced services constitute telecommunications services.”⁴¹ Because DSL and cable broadband services are functionally indistinguishable, and because the Act requires the Commission to define and regulate indistinguishable services identically “regardless of the facilities used,” cable-delivered broadband access is *a fortiori* a telecommunications service. As the Ninth Circuit concluded in *AT&T Corp. v. City of Portland*, cable providers, by offering their “subscribers Internet transmission over [a] cable broadband facility,” are “providing a telecommunications service as defined in the Act.”⁴²

In this proceeding, cable operators will undoubtedly attempt to convince the Commission to categorize cable-delivered broadband access as either a “cable service” or an “information service.” The hallmark of both of these statutory categorizations is that such services are beyond the Commission’s jurisdiction to regulate under Title II, even if cable providers are able to secure a complete monopoly in the market for residential broadband access.⁴³ But as the Ninth Circuit

⁴⁰ *Id.*

⁴¹ *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Remand, CC Docket No. 98-147, 15 FCC Rcd 385, at ¶ 9 (Dec. 23, 1999); *see also In re Deployment of Wireline Services Offering*, Memorandum Opinion and Order, CC Docket No. 98-147, 13 FCC Rcd 24,012 at ¶¶ 35-36 (Aug. 7, 1998).

⁴² *AT&T Corp. v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000); *see also id.* (“The Communications Act includes cable broadband transmission as one of the ‘telecommunications services’ a cable operator may provide over its cable system.”).

⁴³ *See* 47 U.S.C. § 541(c) (“Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.”); *City of Portland*, 216 F.3d at 878 (“information services . . . have never been subject to regulation under the Communications Act”).

concluded, cable-delivered broadband access does not fit either within the Act’s definition of a “cable service” or its definition of an “information service.”

The Act defines a “cable service” as “(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.”⁴⁴ Cable-delivered broadband access clearly does not meet the Act’s definition of “video programming,” which encompasses only “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.”⁴⁵ As the Commission has concluded, “Internet access service generally consists of numerous distinct and related elements, such as access to personal, educational, informational, and commercial web sites; the ability to send and receive electronic mail; access to streamed video content; Internet video messaging and conferencing; and a host of other services both realized and forthcoming.”⁴⁶ Broadband Internet access, because it includes a host of services that are in no way “comparable” to traditional video programming, “does not” fit within the definition of “video programming . . . contemplated by . . . the Communications Act.”⁴⁷

Cable-delivered broadband access can therefore qualify as a cable service only if it is *limited* to offering customers an “other programming service” -- a term the Act defines as “information that a cable operator makes available to all subscribers generally”⁴⁸ -- *and* if the

⁴⁴ 47 U.S.C. § 522(6).

⁴⁵ *Id.* § 522(20).

⁴⁶ *In re Internet Ventures, Inc.*, Memorandum Opinion and Order, File No. CSR-5407-L, 15 FCC Rcd 3247, at ¶13 (Feb. 18, 2000).

⁴⁷ *Id.* ¶ 12.

⁴⁸ 47 U.S.C. § 522(14).

“subscriber interaction” involved in broadband access is *limited* to that “required for the selection or use of such . . . other programming service.”⁴⁹ Cable-delivered broadband access fails to meet both of these requirements.

The broadband Internet service offered by cable operators affords customers access to a wide range of information that is decidedly not “available to all subscribers generally.” A cable broadband customer is, for example, able to access e-mail that is written for, and delivered to, that customer alone. Similarly, such a customer is free to create and access a unique home page on a portal, such as Yahoo!, that includes content organized in a format dictated and seen exclusively by that customer. Likewise, a cable broadband customer can establish a specific identity with electronic merchants, such as Amazon.com, and will see unique personalized content when accessing such merchant sites. In these and myriad other ways, cable-delivered broadband access provides each customer exclusive use of personal information that the cable operator does not make available to all of its subscribers.

Moreover, cable broadband customers engage in far more “subscriber interaction” than is necessary to access the information that cable providers do make “available to all subscribers generally.” Such customers can, for example, draft electronic messages addressed to individuals that reach the Internet through non-cable facilities, and can order merchandise that is destined for them alone. Thus, as the Ninth Circuit held, “Internet access is not one-way and general, but interactive and individual beyond the ‘subscriber interaction’ contemplated by the statute. Accessing Web pages, navigating the Web’s hypertext links, corresponding via e-mail, and participating in live chat groups involve two-way communication unmatched by the act of

⁴⁹ *Id.* § 522(6).

electing to receive a one way transmission of cable or pay-per-view television programming.”⁵⁰
The Act’s definition of “cable service” therefore simply “does not fit” broadband access.⁵¹

Nor does cable-delivered broadband access fall within the Act’s definition of an “information service.” The Act defines an “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”⁵² There is no question that cable providers make available an information service *along with* their telecommunications service, and that this information service is delivered “via telecommunications.” But the two services cannot be conflated into one. As the Ninth Circuit again concluded, cable modem service “consists of two elements: a ‘pipeline’ . . . and the Internet service transmitted through that pipeline.”⁵³ To the extent that cable providers make available service from an affiliated or exclusive ISP, “its activities are that of an information service. However, to the extent that” cable operators provide their “subscribers Internet transmission over [a] cable broadband facility,” they are “providing a telecommunications service as defined in the Communications Act.”⁵⁴

The Ninth Circuit’s analysis is confirmed by the Commission’s own precedents. As the Commission concluded when defining DSL as a telecommunications service, an “end-user may

⁵⁰ *City of Portland*, 216 F.3d at 876.

⁵¹ *Id.* At least one cable operator, Cox Communications, agrees with the Ninth Circuit’s conclusion. Cox has reportedly halted its payment of franchise fees to municipal governments on the sale of cable-delivered broadband access because the service does not qualify as a cable service under the Act. *See* United States Telephone Association Press Release, *USTA Calls on Cable Operators to Contribute to USF*, Nov. 29, 2000 (available at <http://www.usta.org/releases/rls00-62.html>).

⁵² 47 U.S.C. § 153(20).

⁵³ *City of Portland*, 216 F.3d at 878.

⁵⁴ *Id.*

utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services separately: the first service is a telecommunications service (*e.g.*, the enhanced xDSL-enabled transmission path), and the second service is an information service, in this case Internet access.”⁵⁵ As explained above, cable operators in general, and AT&T in particular, have committed to configure their cable Internet service in a way that allows customers to completely bypass the content and services offered by their affiliated ISPs. Such customers are only using, in the Commission’s words, a “transparent, unenhanced, transmission path” offered by the cable provider, even though they are compelled to pay for an unwanted information service made available by the cable operator’s affiliated ISP.⁵⁶ Because the Act requires the Commission to define telecommunications services without regard to “the facilities used” to deliver them,⁵⁷ the Commission’s precedents defining DSL as a telecommunications service control its categorization of cable-delivered broadband access under the Act.

⁵⁵ *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, CC Docket No. 98-147, 13 FCC Rcd 24,012 at ¶ 36 (Aug. 7, 1998); *see also In re Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket No. 96-45, 13 FCC Rcd 11,501 at ¶ 15 (Apr. 10, 1998) (“the provision of transmission capacity to Internet access providers . . . is appropriately viewed as ‘telecommunications service’ or ‘telecommunications’ rather than ‘information service’”).

⁵⁶ *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, CC Docket No. 98-147, 13 FCC Rcd 24,012, at ¶ 36 (Aug. 7, 1998).

⁵⁷ 47 U.S.C. §153(46).

B. The Act, Without Any Action by the Commission, Automatically Imposes a Range of Obligations on Cable Providers Offering Residential Broadband Access.

The Act establishes a wide range of default rules that apply to all providers of telecommunications services, regardless of whether those providers are proven to have market power. Section 153 of the Act defines a “telecommunications carrier” as “any provider of telecommunications services,” and provides that a “telecommunications carrier *shall* be treated as a common carrier under the Act only to the extent that it is engaged in providing telecommunications services.”⁵⁸ Further, the Act specifically contemplates that cable operators will “engage[] in the provision of telecommunications services,” and that “the provisions” of Title VI “shall not apply to such cable operator[s] . . . for the provision of telecommunications services.”⁵⁹ Thus, the Act clearly establishes that cable providers, to the extent that they provide a telecommunications service, are subject to regulation as common carriers under Title II of the Act.⁶⁰

The Act automatically imposes on cable providers offering broadband access a number of obligations. *First*, section 251(a) provides that “[e]ach telecommunications carrier has the duty . . . to interconnect directly or indirectly with the facilities and equipment of other

⁵⁸ *Id.* § 153(44) (emphasis added).

⁵⁹ *Id.* § 541(b)(3)(A); *see also id.* § 541(d)(2) (“Nothing in this title shall be construed to affect the authority of any State to regulate any cable operator to the extent that such operator provides any communication service other than cable service, whether offered on a common carrier or private contract basis.”).

⁶⁰ *See City of Portland*, 216 F.2d at 879 (the Act’s “principle of telecommunications common carriage governs cable broadband as it does other means of Internet transmission such as telephone service and DSL”).

telecommunications carriers.” Thus, the Act requires cable operators to interconnect their telecommunications equipment and facilities with the network of any other requesting carrier.⁶¹

Second, section 201(a) of the Act states that it “shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor.” The Act therefore requires cable operators to provide their telecommunications service to any person -- consumer, carrier, or ISP -- that requests it.

Third, section 201(b) of the Act provides that “[a]ll charges, practices, classifications, and regulations for and in connection with [a] communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful.” To ensure compliance with this mandate, cable operators are required to file federal tariffs for their broadband access service and sell that service pursuant only to the terms specified in the tariff. The Commission has “authority under the Act to conduct an investigation to determine whether rates” charged by cable operators for broadband access service “are just and reasonable.”⁶²

Fourth, section 202(a) of the Act states that “[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with [a] communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular

⁶¹ See *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, CC Docket No. 98-147, 13 FCC Rcd 24,012, at ¶ 48 (Aug. 7, 1998) (“the interconnection obligations of section 251(a) . . . apply to . . . packet-switched telecommunications networks and the telecommunications services offered over them”).

⁶² *In re GTE Telephone Operating Companies*, Memorandum Opinion and Order, CC Docket No. 98-79, 13 FCC Rcd 22,466, at ¶ 32 (Oct. 30, 1998).

person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.” The Act therefore requires cable operators to make their broadband transport service available to all ISPs on nondiscriminatory terms.⁶³

Finally, section 251(b) of the Act provides that “[e]ach local exchange carrier” has a “duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.” Because the Act defines a “local exchange carrier” as “any person that is engaged in the provision of . . . exchange access,”⁶⁴ and because the Commission has concluded that broadband access services qualify as exchange access, Commission precedent dictates that cable operators are subject to the same resale obligation imposed on local carriers offering DSL.

Specifically, the Commission has found that DSL providers are offering “exchange access” by transporting “ISP-bound traffic” to and from the homes of residential customers.⁶⁵ The Commission reached this conclusion despite the fact that DSL is not a circuit-switched service and that the concept of an “exchange” has only geographic, and not physical, significance

⁶³ There is no question that cable operators are technically able to comply with this requirement. Both AT&T and Time Warner have committed to the Commission that they will afford their customers some choice among ISPs, although not the level of choice mandated by the Act. Comcast also recently announced that it is initiating a trial to offer the services of a second ISP over its cable network. See *Cory Grice & Ben Haskett, Comcast Opens High-Speed Network to Juno*, CNET NEWS.COM, Nov. 28, 2000 (available at http://yahoo.cnet.com/news/0-1004-200-3898750.html?pt.yfin.cat_fin.txt.ne). Indeed, the Commission has recognized that “at least seven of the eleven largest cable operators are exploring means to offer multiple ISPs access to their cable infrastructure.” *AT&T-MediaOne Order* ¶ 121 n.350. Cable operators have therefore conceded the technical feasibility of offering their telecommunications service to multiple ISPs.

⁶⁴ 47 U.S.C. § 153(26).

⁶⁵ *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Remand, CC Docket No. 98-147, 15 FCC Rcd 385, at ¶ 16 (Dec. 23, 1999).

in terms of how DSL service is provided to customers.⁶⁶ Its basis for reaching this conclusion was general enough to encompass all residential broadband access services, and was not specific in any way to the technology used to deliver DSL or the nature of the network facilities used to provide that service.

The Act defines “exchange access” as “the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.”⁶⁷ “Telephone toll service” is in turn defined as “telephone service between different stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.”⁶⁸ The Commission has concluded that a carrier offering DSL “provides access permitting [an] ISP to complete the transmission from its subscriber’s location to a destination in another exchange using the toll service it typically has purchased from [an] interexchange carrier,” and therefore that such transport is provided for the purpose of “origination or termination of telephone toll service.”⁶⁹ Likewise, cable providers offer a transport service that delivers traffic to an ISP, which the ISP sends to a final destination in another exchange using toll service purchased from an interexchange carrier (*e.g.*, an Internet backbone provider). Cable-delivered broadband transport is therefore indistinguishable from DSL service in that, under the Commission’s reading of the Act, both are equally provided “for the purpose of origination or termination of telephone toll services.”

⁶⁶ *Id.* ¶ 22.

⁶⁷ 47 U.S.C. § 153(16).

⁶⁸ *Id.* § 153(48).

⁶⁹ *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Remand, CC Docket No. 98-147, 15 FCC Rcd 385, at ¶ 36 (Dec. 23, 1999).

Indeed, the Commission’s own precedents foreclose any argument that cable-delivered broadband access falls outside the definition of “exchange access.” The Commission specifically found that the term “telephone service” is not “limited to voice communications,” but is instead broad enough to encompass all “interstate data communications.”⁷⁰ Further, the Commission rejected the notion that a “station” used to deliver telephone toll service is limited to an “ordinary telephone,” concluding that “the term ‘station’ . . . refers to any device used by an end-user to receive and terminate telecommunications.”⁷¹ Because a cable modem or set-top box clearly falls within the broad category of a “device used . . . to receive and terminate telecommunications,” the Commission’s precedents dictate that cable-delivered broadband access is an “exchange access” service. Given this fact, the Act dictates that cable providers offering broadband access are required “not to prohibit, and not to impose unreasonable or discriminatory conditions” on the resale of their service by unaffiliated ISPs and carriers.⁷²

III. SHOULD THE COMMISSION CHOOSE TO FORBEAR FROM ENFORCING COMMON CARRIER REGULATION AGAINST CABLE BROADBAND PROVIDERS, THE ACT AND THE CONSTITUTION REQUIRE THE COMMISSION LIKEWISE TO FORBEAR FROM REGULATING ILEC BROADBAND SERVICES AND NETWORK FACILITIES.

Because the Act automatically regulates cable operators offering broadband access as common carriers, the Commission cannot, as the Notice of Inquiry suggests, continue its current policy of inaction by “find[ing] regulatory intervention to be unnecessary.”⁷³ If the Commission concludes that the market for broadband access is competitive and that regulatory action is

⁷⁰ *Id.* ¶ 41.

⁷¹ *Id.* ¶¶ 39-40.

⁷² 47 U.S.C. § 251(b)(1).

⁷³ *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Notice of Inquiry, GEN Docket No. 00-185, at ¶ 50 (2000).

inappropriate, then the Commission must exercise its forbearance authority under section 10 of the Act and *evenly* eliminate regulatory requirements applicable to both ILECs and cable operators. If, on the other hand, the Commission concludes that broadband transport providers have market power and that continued regulation is justified, the Commission need only let the Act's default requirements take effect with minor elaboration to explain how those requirements would be enforced against cable operators. The Commission cannot, however, forbear from enforcing the Act's common carrier obligations on cable operators and continue to regulate ILECs in a nascent market that cable operators dominate.

A. If the Commission Concludes that the Broadband Access Market is Competitive and Forbears from Regulating Cable Operators, It Must Also Forbear from Regulating ILEC Broadband Services and Network Facilities.

Section 10 of the Act establishes clear guidelines to govern the Commission's forbearance decisions, providing that the Commission "shall forbear from applying any regulation or any provision of this Act" if it determines that: (i) "enforcement of such regulation or provision is not necessary to ensure that the charges, practices, [or] classifications" relating to a telecommunications service "are just and reasonable and are not unjustly or unreasonably discriminatory"; (ii) "enforcement of such regulation or provision is not necessary for the protection of consumers"; and (iii) "forbearance from applying such provision or regulation is consistent with the public interest."⁷⁴ Further, the Act dictates that the Commission, in determining whether forbearance "is consistent with the public interest," "shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among

⁷⁴ 47 U.S.C. § 160(a).

providers of telecommunications services.”⁷⁵ In markets for advanced services, Congress indicated a clear preference for deregulation, requiring the Commission to “encourage the deployment” of advanced services and “remove barriers to infrastructure investment” by “utilizing . . . regulatory forbearance.”⁷⁶

To determine whether forbearance is appropriate in the broadband access market, the Commission need only resolve a single question: Do providers of residential high-speed access control a bottleneck facility? If the answer is no, then the market can be trusted to ensure that charges, practices and classifications in the broadband market are reasonable and nondiscriminatory, and to guarantee that consumers remain free to choose among a wide range of ISPs and other content providers. In such a circumstance, forbearance would be decidedly “in the public interest” because it would eliminate the costs of regulatory compliance and would allow broadband access providers to invest in a climate unclouded by the threat of regulatory intervention.

The Commission has considered the question of whether broadband access providers control a bottleneck facility many times before, and has repeatedly concluded that the market is open and competitive. Most recently, in deciding to sunset the prohibition against incumbent LECs and cable operators owning Local Multipoint Distribution Service spectrum in areas overlapping their service territories, the Commission was called upon to ascertain whether “the broadband market is robust and competitive.”⁷⁷ The Commission’s answer was unequivocal:

⁷⁵ *Id.* § 160(b).

⁷⁶ Section 706 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 153, § 706(a), reproduced in the notes following 47 U.S.C. § 157.

⁷⁷ *In re Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Establish Rules and Policies for Local Multipoint Distribution Service and Fixed Satellite Services*, CC Docket No. 92-297, 15 FCC Rcd 11,857, at ¶ 17 (June 27, 2000).

“The record before us, which shows a continuing increase in consumer broadband choices within and among the various delivery technologies -- xDSL, cable modems, satellite, fixed wireless, and mobile wireless, suggests that no group of firms or technology will likely be able to dominate the provision of broadband services.”⁷⁸ Likewise, in approving the AT&T-MediaOne merger, the Commission found that cable operators, despite a having a commanding share of the residential broadband market, face “significant actual and potential competition from . . . alternative broadband providers.”⁷⁹

These statements are consistent with a long history of Commission findings on the state of competition in the residential broadband access market. In its first Report mandated by section 706 of the Act, the Commission concluded that the “preconditions for monopoly appear absent” in the broadband access market, and that “there are, or likely soon will be, a large number of actual participants and potential entrants.”⁸⁰ As a result, the Commission concluded that it does “not foresee the consumer market for broadband becoming a sustained monopoly or duopoly.”⁸¹ Similarly, in a report to Chairman Kennard, the Cable Services Bureau identified a “nascent residential broadband market containing a number of existing and potential competitors,” with “[c]able, telephone, wireless, and satellite companies . . . rushing to provide broadband services to the home.”⁸² The Bureau ultimately concluded that “competition” will give “consumers . . . a wide selection of broadband features, capabilities, and pricing from which

⁷⁸ *Id.* ¶ 19.

⁷⁹ *AT&T-MediaOne Order* ¶ 116.

⁸⁰ *First Advanced Services Report* ¶ 48.

⁸¹ *Id.* ¶ 52.

⁸² *Broadband Today* at 47.

to choose.”⁸³ The Commission has therefore made it clear, on numerous occasions, that it sees no evidence of a market failure facing customers seeking to purchase residential broadband access.

The Commission never confronted these findings in its decisions imposing common carrier and line sharing obligations on ILECs offering DSL. After concluding that DSL is a telecommunications service, the Commission -- automatically and without any analysis of the state of broadband competition -- required ILECs to sell DSL service on nondiscriminatory terms to all ISPs and subjected DSL service to pricing and tariffing regulation.⁸⁴ Likewise, in its decision imposing line sharing obligations on ILECs, the Commission simply asserted that “line sharing is vital to the development of competition in the advanced services market,” without addressing its repeated conclusion that the broadband access market is *already* competitive.⁸⁵

The Commission cannot continue to ignore the blatant inconsistencies in its decisions to leave cable operators free from regulation on the one hand, and its decisions to regulate ILEC broadband services and network facilities on the other. Telephone lines have no special attributes of bottleneck power in the broadband access market that are not shared to an even greater extent by cable operators. According to the Commission’s own factual findings, cable operators are “likely to remain a strong presence among residential subscribers in the future,” due in significant part to inherent limitations in ILECs’ “legacy outside plant” that impedes

⁸³ *Id.*

⁸⁴ See *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, CC Docket No. 98-147, 13 FCC Rcd 24,012, at ¶¶ 35-36 (Aug. 7, 1998); *In re GTE Telephone Operating Companies*, Memorandum Opinion and Order, CC Docket No. 98-79, 13 FCC Rcd 22,466, at ¶ 32 (Oct. 30, 1998).

⁸⁵ *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Third Report and Order, CC Docket No. 98-147, 14 FCC Rcd 20,912, at ¶ 5 (Dec. 9, 1999).

“access to certain end-users.”⁸⁶ Thus, as Arrow, Becker and Carlton conclude, “[p]otential concerns about creating a dominant technology do not provide a rationale for regulating DSL services.”⁸⁷ “Given the type of ‘intermodal’ competition envisioned by the FCC and projections that DSL will maintain a relatively modest share of broadband Internet subscribers, there can be little concern that phone companies be required to provide DSL service on a tariffed basis or be required to share lines in order to prevent local exchange companies from becoming dominant providers of broadband Internet access services.”⁸⁸

Whatever forbearance the Commission therefore chooses to extend to cable operators, it must grant the same forbearance to ILECs offering DSL. The Commission’s precedents indicate that such forbearance could be structured in one of two ways. *First*, the Commission could maintain a nondiscrimination obligation on *both* cable operators and ILECs but eliminate pricing and tariffing regulation for broadband access services. Such a decision would allow the terms of ISP access to be set by the marketplace, but would ensure that ISPs could not be locked out of the broadband market because they could not reach a deal with access providers. This outcome finds support in the Commission’s *AT&T-MediaOne Order*, which found that “competition and diversity in the emerging broadband Internet arena” would be protected so long as “unaffiliated ISPs are permitted access” to broadband transport facilities, even if only on unregulated terms.⁸⁹

It also finds support in the Commission’s decision to forbear from enforcing pricing and tariffing regulation against wireless carriers. Notwithstanding the fact that, at the time the

⁸⁶ Second Advanced Services Report ¶¶ 31, 190.

⁸⁷ Arrow, Becker & Carlton Declaration ¶ 25.

⁸⁸ *Id.*

⁸⁹ *AT&T-MediaOne Order* ¶ 116.

Commission made its decision to eliminate such regulation, “the cellular services marketplace” was not “fully competitive,” the Commission found that “[c]ompetition, along with the impending advent of additional competitors, leads to reasonable rates.”⁹⁰ The reason is simple: “in a competitive market, market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions set by carriers who lack market power.”⁹¹ Thus, if the Commission reaffirms its conclusion that the broadband access market is competitive, the first set of requirements it should forbear from enforcing against *all* broadband access providers are the Act’s pricing and tariffing regulations.

Second, if the Commission determines that the broadband access market is fully competitive and elects to forbear from enforcing even a nondiscrimination requirement against cable operators, it must likewise forbear from enforcing that requirement against ILECs offering DSL. As the Commission found in the *AT&T-MediaOne Order*, a nondiscrimination requirement is unnecessary so long as “consumers can choose among various alternative broadband access providers.”⁹² This rationale is entirely general in its applicability, justifying forbearance across the board for all broadband access providers. It affords the Commission no

⁹⁰ *In re Implementation of Sections 3(n) and 332 of the Communications Act*, Second Report and Order, GN Docket No. 93-252, 9 FCC Rcd 1411, at ¶ 174 (Mar. 7, 1994).

⁹¹ *Id.* at ¶ 173; *see also In re Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order, CC Docket No. 96-61, 11 FCC Rcd 20,730, at ¶ 42 (Oct. 31, 1996) (“Just as we believe that competition is sufficient to ensure that non-dominant interexchange carriers’ charges for interstate, domestic, interexchange services are just and reasonable, and not unreasonably discriminatory, and to protect consumers, we believe that competitive forces will ensure that non-dominant carriers’ non-price terms and conditions are reasonable.”); *In re Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities*, First Report and Order, CC Docket No. 79-252, 85 FCC 2d 1, at ¶ 88 (Nov. 28, 1980) (“firms lacking market power simply cannot rationally price their services in ways which, or impose terms and conditions which, would contravene Section 201(b) and 202(a) of the Act”).

⁹² *AT&T-MediaOne Order* ¶ 116.

discretion to free cable operators from a nondiscrimination obligation while continuing to impose one on local telephone companies.

In addition, if the Commission concludes that the broadband access market is competitive and that forbearance is appropriate for cable operators, it must revisit its decision to impose line sharing obligations on ILECs. If cable operators do not control a bottleneck broadband access facility, then ILECs, which serve only a small percentage of the market, cannot control such a facility either. Section 251(d)(2) provides that the Commission can require ILECs to unbundle pieces of their network only when their failure to do so will “impair the ability” of an outside carrier “to provide the services that it seeks to offer.”⁹³ If the broadband access market is competitive, then carriers seeking to provide that service, by definition, are able to provide it without relying on unbundled ILEC facilities.⁹⁴ Under these circumstances, line sharing obligations bring no benefit to consumers but, in the words of Arrow, Becker and Carlton, do carry a substantial risk of “discourag[ing] incumbent LECs from deploying their own DSL facilities” and “encourag[ing] investment by inefficient DSL providers.”⁹⁵

⁹³ 47 U.S.C. § 251(d)(2)(B).

⁹⁴ See *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 389 (1999) (“The Commission cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent’s network.”). Competing carriers could continue to provide DSL service over a whole unbundled loop obtained from an ILEC. The Act provides that a carrier can use unbundled network elements to provide any telecommunications service, see 47 U.S.C. § 251(c), and the rationale for the Commission requiring whole loops to be unbundled relates to competition in the local exchange market, not the broadband access market. That rationale is therefore not undermined by a finding that the broadband access market is competitive.

⁹⁵ Arrow, Becker & Carlton Declaration ¶ 33; see also *Iowa Utilities Bd.*, 525 U.S. at 428-29 (Breyer, J., concurring in part and dissenting in part) (“a sharing requirement may diminish the original owner’s incentive to keep up or to improve the property by depriving the owner of the fruits of value-creating investment, research, or labor”); *id.* at 429 (“Nor are any added costs imposed by more extensive unbundling requirements necessarily offset by the added potential for competition. Increased sharing by itself does not automatically mean increased competition. It

B. If the Commission Reverses its Prior Findings and Concludes the Broadband Access Market is Not Competitive, It Need Only Clarify Briefly the Operation of the Act's Default Obligations on Cable Providers.

The Notice of Inquiry observes that “there is no universally accepted definition of ‘open access,’” and asks for comments on “numerous different technological and economic models for what open access might mean.”⁹⁶ Open access is not, however, an esoteric concept in need of precise definition; it is a shorthand phrase that describes a solution addressed to a particular problem -- cable operators’ exclusive control over a transmission facility coupled with their active participation in vertically related markets for information services. The Act itself addresses this problem by requiring that all providers of telecommunications services make those services available on nondiscriminatory terms that are also just and reasonable. If the Commission concludes that broadband access providers do have market power and that forbearance is inappropriate, the proper course is for the Commission simply to apply the common carrier obligations prescribed by Congress to cable operators.

To accomplish this task the Commission need not, as the Notice of Inquiry suggests, “initiate a rulemaking to consider adopting rules, policies, and regulations governing cable modem service or access to the cable modem platform.”⁹⁷ The Commission did not specify the technical details of the “open access” requirement that applies to DSL providers. Instead, it

is in the *unshared*, not in the *shared*, portions of the enterprise that meaningful competition would likely emerge.”).

⁹⁶ *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Notice of Inquiry, GEN Docket No. 00-185, at ¶ 27 (2000).

⁹⁷ *Id.* ¶ 52.

simply declared that DSL-based broadband transport is a telecommunications service and let the Act's default rules take effect.⁹⁸

A similar approach would achieve the Act's objectives here. As GTE demonstrated in the Commission's proceeding reviewing the AT&T-MediaOne merger,⁹⁹ a cable system can readily accommodate multiple ISPs if the operator establishes a set of regional interconnection points through which all ISPs -- including the cable provider's affiliated ISP -- connect to the network. So long as all ISPs connect in the same place and all are free to establish direct customer relationships, nondiscrimination on the ISP side of the interconnection point can be maintained. On the customer-side of the interconnection point, either the cable operator or the operator's affiliated ISP can manage the network, with special client software used to establish a virtual dedicated connection between customers and their chosen ISPs. So long as the firm managing the network employs open and nondiscriminatory routing policies -- something that both regulators and unaffiliated ISPs can police -- the cable operator's affiliated ISP would see its primary avenue for disadvantaging competitors foreclosed.¹⁰⁰

⁹⁸ *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, CC Docket No. 98-147, 13 FCC Rcd 24,012, at ¶¶ 35-36 (Aug. 7, 1998).

⁹⁹ See Declaration of Albert Parisian, Attached as Exhibit D to Petition to Deny of GTE Service Corporation, GTE Internetworking, and GTE Media Ventures, *In re Applications for Consent to Transfer Control of MediaOne to AT&T*, CS Docket No. 99-251 (Aug. 23, 1999); Reply Declaration of Albert Parisian, Attached as Exhibit C to Ex Parte Reply Comments of GTE Service Corporation, GTE Internetworking, and GTE Media Ventures, *In re Applications for Consent to Transfer Control of MediaOne to AT&T*, CS Docket No. 99-251 (Nov. 1, 1999).

¹⁰⁰ See, e.g., Mitch Shapiro, *Bottlenecks, Bundles and Walled Gardens*, FATPIPE, Nov. 2000, at 44 ("Cable's walled-garden strategy also has some key technical components The next generation of the DOCSIS cable modem standard . . . will allow cable operators to monitor and control traffic on their networks down to the packet level.").

The Commission need do no more than establish these basic interconnection and network-management guidelines to solve the vast majority of potential regulatory issues associated with enforcing the Act's common carrier obligations against cable operators. For those few issues that may arise in the implementation, the Act affords aggrieved ISPs a right to file a complaint with the Commission, and the Commission could employ its accelerated docket procedures to resolve such complaints quickly.¹⁰¹ The Commission therefore should not delay for a year or more enforcing the Act's basic mandates in order to address every possible implementation issue in a rulemaking proceeding. If the Commission determines that forbearance is inappropriate and regulation of the broadband access market is required, both consumers and market participants would be better served by the Commission implementing the Act's "duties of nondiscrimination and interconnection" quickly in this proceeding,¹⁰² and leaving any potential interconnection disputes for resolution in subsequent complaint proceedings based on an actual, not conjectural, record.

C. Both the Act and the Constitution Prohibit the Commission from Deregulating Cable Broadband Providers and Refusing to Forbear from Regulating Local Telephone Companies Offering DSL.

The one option *not* open to the Commission in this proceeding is forbearing from regulating cable operators while maintaining common carrier and line sharing obligations on ILECs offering DSL. Any such effort could not be reconciled with the Communications Act, the Administrative Procedure Act, or the Constitution.

The Act is clear that telecommunications services are to be defined and regulated "regardless of the facilities used" and that cable operators are to be regulated under Title II when

¹⁰¹ See 47 U.S.C. § 208.

¹⁰² *City of Portland*, 216 F.3d at 879.

“engaged in the provision of telecommunications services.”¹⁰³ Further, Congress repeatedly expressed its intention that competition between providers of telecommunications services be decided by consumers weighing the relative merits of different technologies, and not by regulators.¹⁰⁴ Congress therefore limited the Commission’s forbearance authority to circumstances when “forbearance will enhance competition among providers of telecommunications services” -- a condition that cannot be satisfied if forbearance is granted asymmetrically. As Arrow, Becker and Carlton explain:

[I]n the presence of competition between technologies, the application of common carrier and line sharing rules to DSL services can penalize otherwise efficient technologies and firms and can result in less efficient firms supplanting more efficient ones. Such regulatory treatment can discourage future investments in new products and services that make use in part of the local phone system. The application of these regulations on phone companies under competitive conditions can result in a reduction in competition and contribute to the creation of inefficient dominant technologies.¹⁰⁵

Because “maintaining such a regulatory disparity would be likely to adversely affect consumers,” asymmetric forbearance in favor of cable operators would squarely violate the Act’s technology-neutral, pro-competition mandate.¹⁰⁶

Beyond the express requirements of the Communications Act, the Administrative Procedure Act and the Fifth Amendment require that the Commission “not treat like cases

¹⁰³ 47 U.S.C. §§ 153(46), 541(b)(3)(A).

¹⁰⁴ *See, e.g.*, 47 U.S.C. § 253(b) (states must regulate telecommunications services “on a competitively neutral basis”); *id.* § 253(c) (rights-of-way must be administered “on a competitively neutral and nondiscriminatory basis”).

¹⁰⁵ Arrow, Becker & Carlton Declaration ¶ 34.

¹⁰⁶ *Id.* ¶ 35.

differently,”¹⁰⁷ and prohibit the Commission from “improperly discriminati[ng] between similarly situated . . . services without a rational basis.”¹⁰⁸ There is no question that cable-delivered broadband access and DSL compete head-to-head in the residential market, and that “consumers view” the services “as performing the same functions.”¹⁰⁹ Further, the only risk the Commission has identified that would justify regulation of the broadband access market is the threat that one set of providers could use their control over a bottleneck facility to “undermine competition and diversity” in markets for broadband information services.¹¹⁰ Judged against this threat, it is impossible that the Commission could rationally conclude that ILECs offering DSL pose a greater risk to competition than cable operators offering broadband access. Cable operators control the largest share of the market by far, have more of their networks upgraded to provide broadband access, and, once upgraded, their networks do not suffer from “legacy . . . conditions” that limit their “access to certain end-users even in upgraded areas.”¹¹¹ ILECs offering DSL therefore have no *ability* greater than that of cable operators to exercise monopoly power in the broadband access market. As Arrow, Becker and Carlton conclude, “[g]iven the much larger share of broadband Internet subscribers accounted for by cable modem providers, potential concerns from preferential vertical relationships could lead to a desire for the

¹⁰⁷ *Freeman Engineering Associates, Inc. v. FCC*, 103 F.3d 169, 178 (D.C. Cir. 1997) (citation and internal quotation marks omitted); *see also, e.g., Soon Hing v. Crowley*, 113 U.S. 703, 709 (1885) (regulators are forbidden from subjecting “persons engaged in the same business . . . to different restrictions” or granting “different privileges” to firms offering a service “under the same conditions”).

¹⁰⁸ *C.F. Communications Corp. v. FCC*, 128 F.3d 735, 740 (D.C. Cir. 1997).

¹⁰⁹ *Id.* at 742.

¹¹⁰ *AT&T-MediaOne Order* ¶ 116.

¹¹¹ Second Advanced Services Report ¶ 31; *see also id.* ¶¶ 190, 196.

imposition of common carrier regulation on cable modem service providers, not DSL providers.”¹¹²

Nor do local telephone companies offering DSL, as compared to cable operators, have any *incentive* to “undermine competition and diversity” among broadband ISPs or content providers. The most innovative broadband applications -- streaming video programming and movies-on-demand -- all compete with the core monopoly product offered by cable operators. Far from seeking to limit competition in this key content market, local telephone companies have an incentive to see it flourish, because broadband services afford ILECs an opportunity to compete, at least to a limited extent, in a market that cable operators presently dominate.¹¹³ Cable operators, on the other hand, have a significant incentive to limit customers’ access to outside broadband content, because consumers’ use of that content siphons away revenues from their core business. The Commission therefore cannot, consistent with the Administrative Procedure Act’s requirement of reasoned decisionmaking, conclude that local telephone companies offering DSL present a greater threat to broadband competition than cable operators. If the Commission elects to forbear from regulating cable operators, the Communications Act,

¹¹² Arrow, Becker & Carlton Declaration ¶ 31.

¹¹³ See *In re Implementation of Section 3 of the Cable Act*, Report on Cable Industry Prices, MM Docket No. 92-266, 15 FCC Rcd 10,927, at ¶ 12 (June 15, 2000) (“relatively few cable operators face effective competition”); *id.* ¶ 49 (“DBS exerts only a modest influence on the demand for cable service”); *In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Sixth Annual Report, CS Docket No. 99-230, 15 FCC Rcd 978, at ¶ 5 (Jan. 14, 2000) (“Cable television is still the dominant technology for delivery of video programming to consumers.”); *id.* ¶ 140 (“The market for the delivery of video programming to households continues to be highly concentrated and characterized by substantial barriers to entry.”); see also Statement of Representative Henry Hyde, Hearing of the House Judiciary Committee on Legislation Dealing With the Internet, July 18, 2000, at 2 (“My constituents have recently seen 10 percent increases in their cable bill. . . . I’m now wondering whether we made a mistake in deregulating this industry.”).

Administrative Procedure Act, and Fifth Amendment require that it forbear from regulating ILEC broadband services and network facilities as well.

Moreover, the First Amendment prohibits the Commission from exercising its forbearance authority in a manner that discriminates against local telephone companies. Internet service providers are speakers, offering their own proprietary content, packaging content from other sources on the Internet, and engaging in commercial speech through advertising and solicitations to participate in electronic commerce. These activities -- which form the basis for competition among ISPs -- are unquestionably protected by the First Amendment. As the Supreme Court held in *Turner Broadcasting v. FCC*, the act of creating “original programming” and “exercising editorial discretion over” the content included in a transmission to the public is “entitled to the protection . . . of the First Amendment.”¹¹⁴ Courts have readily applied this reasoning to broadband ISPs,¹¹⁵ and cable operators themselves have agreed that broadband access providers, by making available service from an affiliated ISP, are exercising “First Amendment rights to provide content and information.”¹¹⁶

¹¹⁴ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636 (1994); see also *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 737 (1996) (“the editorial function itself is an aspect of speech”); *Hurley v. Irish-American Group*, 515 U.S. 557, 570 (1995) (“Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication.”); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (the “choice of material” that goes into a publication “constitute[s] the exercise of editorial control and judgment” protected by the First Amendment).

¹¹⁵ See *Comcast Cablevision, Inc. v. Broward County*, Order Granting Plaintiffs’ Cross-Motions for Summary Judgment and Denying Defendant’s Motion for Summary Judgment, Case No. 99-6934 (S.D. Fla. Nov. 8, 2000).

¹¹⁶ *MediaOne Group, Inc. v. County of Henrico*, Complaint for Declaratory Judgment and Injunction, Case No. 3:00CV33, at ¶ 36 (Jan. 20, 2000).

Were the Commission to decide that broadband access providers have market power and impose common carrier regulation on *both* cable operators and DSL providers, that decision would likely withstand constitutional scrutiny.¹¹⁷ But the First Amendment prohibits the Commission from freeing cable operators from regulation while, at the same time, requiring local telephone companies to make their transport service available on nondiscriminatory terms or share their networks with other carriers seeking to use ILEC facilities exclusively as a platform for their own speech. It is well settled that if a regulation “affecting speech appears underinclusive, *i.e.*, where it singles out some conduct for adverse treatment, and leaves untouched conduct that seems indistinguishable in terms” of the regulation’s “ostensible purpose, the omission” itself is subject to heightened judicial scrutiny.¹¹⁸ For example, in *City of Ladue v. Gilleo*, the Supreme Court invalidated a local government’s prohibition against all residential signs except those falling into certain exempted categories.¹¹⁹ Accepting the City’s assertion that the exemptions were not content-based, the Court nevertheless affirmed the “basic First Amendment principle[]” that “a regulation of speech” may be unconstitutional if it is “impermissibly underinclusive.”¹²⁰ As Justice O’Connor concluded in *Turner Broadcasting*,

¹¹⁷ See, e.g., *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 197 (1997) (upholding requirement that cable operators carry the signals of broadcast stations because “cable operators possess a local monopoly over cable households”); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 391 (1969) (upholding fairness doctrine because broadcasters had a “an unconditional monopoly” over “scarce” spectrum that the “Government ha[d] denied others the right to use”).

¹¹⁸ *News America Publishing, Inc. v. FCC*, 844 F.2d 800, 804-05 (D.C. Cir. 1988).

¹¹⁹ *City of Ladue v. Gilleo*, 512 U.S. 43 (1994).

¹²⁰ *Id.* at 51.

regulations “that single out particular speakers are substantially more dangerous” to First Amendment values, “even when they do not draw explicit content distinctions.”¹²¹

Were the Commission to forbear from regulating cable operators and maintain common carrier and line sharing obligations on ILECs, both the Commission’s reason for continued regulation *and* its reason for distinguishing between cable operators and ILECs would be subject to “intermediate scrutiny.”¹²² Under this standard, a regulation will withstand judicial review only “if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech necessary to further those interests.”¹²³ Any decision to continue discriminatory regulation on ILECs offering DSL would violate the First Amendment unless the Commission could demonstrate that “the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”¹²⁴ Further, the reasons given by the Commission for distinguishing between cable operators and ILECs must “bear [a] meaningful relationship to the particular interest asserted.”¹²⁵ If the rationale given for continuing to regulate ILECs applies with equal or greater force to cable operators exempted from regulation -- in other words, if it “distinguishes among

¹²¹ *Turner Broadcasting*, 512 U.S. at 676 (O’Connor, J., concurring).

¹²² *BellSouth Corp. v. FCC*, 144 F.3d 58, 69 (D.C. Cir. 1998) (“intermediate scrutiny” applies to restrictions on speech that apply exclusively to RBOCs).

¹²³ *Id.* at 69-70 (citation omitted).

¹²⁴ *Turner Broadcasting*, 512 U.S. at 664.

¹²⁵ *Greater New Orleans Broadcasting Ass’n v. United States*, 527 U.S. 173, 193 (1999); *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424 (1993) (assuming that city can ban all news racks, it may not allow racks containing newspapers and ban racks containing handbills because “the distinction bears no relationship whatsoever to the particular interests that the city has asserted”); *Police Department v. Mosley*, 408 U.S. 92, 99 (1972) (“discriminations among pickets must be tailored to serve a substantial governmental interest”).

the indistinct”¹²⁶ -- a reviewing court will readily conclude that the Commission’s “rationale for restricting speech in the first place” lacks “credibility.”¹²⁷

There is no question that a decision by the Commission to forbear from regulating cable operators, while maintaining common carrier and line sharing obligations ILECs, would not meet this exacting standard. The Commission has identified only one rationale for such regulation -- that competition in the *overall* market for broadband access may be insufficient to ensure “competition and diversity in the emerging broadband Internet arena.”¹²⁸ This rationale offers no support for continued regulation of ILECs, which, according to the Commission’s own factual findings, serve a small percentage of the broadband market and face network limitations that preclude them from reaching all residential customers.¹²⁹ Moreover, because the Commission has repeatedly concluded that the broadband access market is open and competitive, continued regulation of ILECs under a theory that they control a bottleneck broadband facility would address a harm that, by the Commission’s own admission, is “merely conjectural.”¹³⁰

Nor could the Commission rely on the Act alone as a reason for continuing to enforce unnecessary regulation against ILEC broadband services and network facilities. Section 10(d) of the Act provides that “the Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that those requirements have been fully

¹²⁶ *Greater New Orleans Broadcasting Ass’n*, 527 U.S. at 195.

¹²⁷ *City of Ladue*, 512 U.S. at 52.

¹²⁸ *AT&T-MediaOne Order* ¶ 116.

¹²⁹ See Second Advanced Services Report ¶¶ 31, 38-40, 190, 195-96.

¹³⁰ *Turner Broadcasting*, 512 U.S. at 664.

implemented.”¹³¹ But Congress is no more free than the Commission to impose restrictions on ILEC speech that violate the First Amendment. If the Commission’s own factual findings dictate that there is no legitimate basis for continuing to regulate the broadband access market, or for imposing more onerous regulatory requirements on ILECs than on market-leading cable operators, then Congress cannot constitutionally mandate that the Commission continue to enforce needless and punitive regulation against ILECs. The Commission is therefore required to construe the Act’s limitation on its forbearance authority narrowly; otherwise, that limitation itself would violate the First Amendment.¹³²

A number of narrowing constructions of section 10(d), or of other provisions of the Act, would readily eliminate this constitutional infirmity. The Commission could, for example, conclude that the requirements of section 251(c) have been fully implemented with respect to broadband services because that market is, according to the Commission’s prior findings, fully open and competitive. Alternatively, the Commission could interpret section 251(c) not to apply to packet-switched services -- an interpretation that would, consistent with the intentions of Congress, focus the Act’s market opening requirements only on those services that the Commission has found to be less than fully competitive. But however the Commission chooses to construe section 10(d), it cannot hide behind the Act to justify an otherwise unconstitutional regulatory regime that continues to treat local telephone companies as “incumbents” in a nascent

¹³¹ 47 U.S.C. § 160(d).

¹³² See, e.g., *Weaver v. United States Information Agency*, 87 F.3d 1429, 1436 (D.C. Cir. 1996) (because a “statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score,” a court will “adopt the government’s” narrowing interpretation in the face of a possible “constitutional infirmity”); *Chamber of Commerce v. FEC*, 69 F.3d 600, 604 (D.C. Cir. 1995) (court will not defer to agency’s interpretation of ambiguous language where that interpretation raises “grave constitutional issues”).

market dominated by a competing technology. Any effort by the Commission to forbear from regulating cable operators while continuing to regulate the broadband services and network facilities of local telephone companies would violate the First Amendment.

CONCLUSION

For the foregoing reasons, the Commission should act quickly and decisively to establish a uniform regulatory policy governing broadband access services delivered over telephone and cable networks.

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