

**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** )

**COMMENTS OF THE CITY OF LOS  
ANGELES  
REGARDING HIGH SPEED ACCESS  
TO THE INTERNET**

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## **A. INTRODUCTION**

The City of Los Angeles ("Los Angeles") is a local franchising authority pursuant to the Cable Communications Act ("Cable Act"), 47 USC 522(9) and exercises its authority to franchise cable operators pursuant to Section 541(a)(1) of the Act. (47 USC 541(a)(1)). It has approximately four million residents of which 600,000 are subscribers to cable television. The Los Angeles area consists of fourteen franchise areas with five cable operators. It has franchised cable since the late 1970's and early 1980's, approximately twenty years of franchising experience. Los Angeles is very concerned with respect to the interests of its residents who subscribe to cable television. It has conducted numerous public hearings over the years in order to determine what is in the public interest and to assess community needs. Currently, as part of a citywide cable renewal process scheduled for completion by August, 2002, Los Angeles is conducting extensive public hearings in all fifteen council districts to determine the quality of service, consumer satisfaction, and the current community needs. Los Angeles believes very strongly in cable modem service and its provision over an open access regulatory framework. It is in the public interest and meets a very important need of the citizenry. Open access provides a fast, convenient way to meet a congressional goal of the Cable Act -- to assure a wide diversity of information sources and services (47 USC 521(4)). The very foundation of an educated, democratic and free society.

## **B. SUMMARY**

Open access may be defined in several ways. Los Angeles believes it should consist of non-discriminatory access for all Internet Service Providers (ISPs) on terms and conditions that are no less favorable than those offered to the cable operator's affiliated ISP. Such a policy promotes several important Cable Act purposes promulgated by Congress. An open access policy would encourage growth of cable systems and assure that they are responsive to the needs and interests of the community (47 USC 521(2)); establish guidelines for Federal, State, and local authority

(47 USC 521(3)); assure the widest possible diversity of information sources and services to the public (47 USC 521(4)) and promote competition in cable communications without an undue burden on cable systems, (47 USC 521(6)).

The Commission adopted a Notice of Inquiry (“NOI”) on September 28, 2000 to seek comment on High Speed Access to the Internet. This proceeding was conceived in large part because of the absence of any clear national regulatory scheme for Internet access via the cable modem platform. The Commission heretofore has adopted a forbearance policy; relying on a market based approach to cable modem service. That policy has failed miserably. Cable operators that provide cable modem service have restricted access to all but their own affiliated Internet Service Providers (“ISPs”) or have imposed anti-competitive tying arrangements. Because of this, local franchise authorities commenced their own attempt to regulate cable modem service. Unfortunately, the federal courts that considered this issue have all consistently overruled local attempts to regulate cable modem service. Also, unfortunately, the courts were not consistent with their decisions and chaos and confusion is the result. The Federal Trade Commission (“FTC”) understands the serious threat to competition that a market based approach to cable modem service provides. It is attempting to open access for cable modem service through its authority to approve telecommunications company mergers, such as the proposed AOL/Time Warner merger. The Commission should follow the lead of the FTC and exercise its regulatory authority to open access over the cable modem platform. The Commission has jurisdiction over all interstate communications, including the high speed service offered by such providers. (NOI, para. 3, at p 2; See also footnote 5). As discussed below, the Commission has ancillary jurisdiction which provides authority to adopt an open access regulatory scheme for cable modem service. A national policy for cable modem service could be implemented which would minimize intrusion into cable operators management, encourage growth of cable systems, meet the needs of the community, promote competition over the cable modem platform and assure the widest possible

diversity of information sources and services.

### **C. COMMENTS**

#### **1. Responsibilities of the Commission**

The Commission is responsible for the execution and enforcement of the Communications Act of 1934, as amended (“The 1934 Act”) and for promulgating rules to achieve that goal. (See 47 USC 151 et seq.) The NOI is directed at the “issues surrounding high speed access to the Internet provided to subscribers over [a] cable infrastructure, [the] so-called “cable modem services”. (NOI, paragraph 1, at page 1.) One of the central issues surrounding the high speed access controversy is the desirability of requiring cable operators to provide non-discriminatory access to non-affiliated ISPs under the same terms and conditions as an affiliated ISP via the cable modem platform. Proponents of such access -- of which Los Angeles is one--refer to it as “open access,” and opponents refer to it as “forced access”. The Commission, for purposes of the NOI, refers to it in a bifurcated manner as cable modem service and the cable modem platform. (NOI, Id., also see footnote 1.) The Commission seeks input, among other things, to determine the proper classification and regulatory treatment of both. (Id.)

The Commission recognizes that one of the objectives of the 1934 Act is to promote widespread and rapid deployment of high speed services while also preserving and promoting the vibrant and competitive free market that exists for the Internet. (NOI, Id., para. 2, at pages 1-2). The Commission also asserts that it is “particularly important to develop a national legal and policy framework in light of recent federal court opinions that have classified cable modem service in varying manners.” (Id.) The Commission also references the goals set forth in section 706 and other provisions of the Telecommunications Act of 1996 (“The 1996 Act”). (Id.)

Los Angeles does not dispute or disagree with the Commission's objectives and goals referenced above. However, particular deference must be paid to the Cable Communications Act, 47 USC 521 et seq., (hereinafter "Title VI" or the "Cable Act"), since the central issue at hand is raised with respect to cable modem services and the cable modem platform provided by cable television operators. Indeed, the text and the issue(s) referenced in the NOI use such terms because they are associated with cable operators and cable communications under the Cable Act. The Commission may wish to refer to the terms cable modem service and cable modem platform "without intending to prejudge any of the classification questions presented herein". (Id., at page 1, footnote 1.) It is difficult not to, because such terms best describe the service and facilities in question. As the Commission acknowledges with respect to the cable modem platform, "cable modem technologies rely on the basic cable television network architecture but with upgrades and enhancements to support high speed services". (Id.) The terms directly, more closely and more correctly refer to cable services regulated under the provisions of Title VI. Make no mistake, it is cable subscribers and cable operators who will be most affected by the outcome of this NOI and any rulemaking that may be subsequently opened. No matter what the ultimate conclusions reached by the Commission may be, it will be the cable subscriber that will either have access to multiple ISPs under a open access regulatory framework or restricted access if the Commission decides otherwise. And, it will be the cable operator that will use its cable television network architecture to either permit open access or to restrict such access to non-affiliated ISPs.

## **2. The First Amendment Implications**

The Commission must consider the purposes of the Cable Act; the legislation adopted by Congress to regulate the cable industry. The Cable Act states the Commission's mandate and its statutory responsibility unambiguously in Section

521. (See purposes of Cable Act, 47 USC 521, (1)-(6)). The NOI references in some fashion purposes (1), (2), (3) and (6). Purpose (5) refers to renewals and is not relevant to this NOI. However, conspicuously absent is any reference in the entire text of the NOI to purpose (4) which states in full:

“(4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;” Id. (Emphasis Added.)

The legislative intent of the cable act was accurately discussed in Rollins v. Cablevue, Inc. v. Saienni Enterprises, 633 F. Supp. 1315, 1318-1319. In that case the court stated:

“The above statements of legislative intent demonstrate two predominant objectives of the Cable Act: . . . to insure that the public receives the widest possible diversity of information services and sources, in a manner which is responsive to the needs and interests of the local communities.” (Id.)

Thus far, the Commission has neglected purpose (4) in its consideration of the open access issue and in its policy to forbear regulation. It appears, unfortunately, the Commission has lost sight of that very precious First Amendment duty it is required to promote. Purpose (4) must be part of the Commission’s deliberations in this NOI regarding cable modem service and the cable modem platform. The Commission recognizes a duty to achieve Congressional policy goals: “We also seek input on the extent necessary to benefit consumers . . . or otherwise achieve policy goals that Congress . . . may identify”, (Id. NOI, para. 14, at page 7) but fails to address this important one. Therefore an important question to be posed, and one begging for an answer is - which regulatory scheme will provide the widest possible diversity of information sources and services to the public (hereafter referred

to as “widespread diversity of information”), an important First Amendment consideration. The answer is cable modem services provided over a cable modem platform with a requirement of non-discriminatory open access. It cannot reasonably be gainsaid that increasing the number of ISP’s over the cable modem platform will increase the number of voices the cable subscriber will hear. Judge Middlebrooks recognized this as part of his First Amendment deliberations:

“This increased speed will provide for a range of enhanced services and, in all likelihood will change the way consumers communicate, shop, educate, and entertain. It is estimated that approximately two million Americans presently have access to broadband technology. By 2008, that number is predicted to reach 78 million. See Staff Report to William E. Kenard, Chairman, Federal Communication Commission on Industry Monitoring Sessions convened by Cable Services Bureau, October, 1999 Broadband Today, at 9”. (Comcast Cablevision v. Broward County, Florida, U.S. Dist. Ct., So. Dist. of Florida, Case No. 99-5934-Civ., mimeo at p. 3.)

Each ISP that provides proprietary information, in addition to an Internet connection with its plethora of information sources, will increase widespread diversity of information consistent with the Cable Act and the First Amendment. The Commission has a duty and it has the authority under the 1934 Act, through its ancillary jurisdiction, to impose an open access requirement for cable operators that offer cable modem services. That authority has been well recognized and analyzed in many United States Supreme Court decisions. See for example, United States v. Southwestern Cable, 392 U.S. 157, 158, (ancillary jurisdiction for “duplication rule”); United States v. Midwest Video I, 406 U.S. 649, (ancillary jurisdiction for “origination rule”), and United States v. Midwest Video II, 440 U.S. 689, (ancillary jurisdiction denied for “PEG access

channels”).

A prominent example of access successfully imposed on cable operators are the “must carry rules and leased access rules” promulgated in the Cable Television Consumers Protection Act of 1992. The policy behind such access rules, among other things, is to promote widespread diversity of information. See Turner Broadcasting System v. FCC, 512 U.S. 622. Prior to codification, such access was mandated by the Commission through its ancillary jurisdiction. See Quincy Cable T.V. v. FCC, 768 F.2d 1434, 1438-1443. The above, demonstrates the Commission has the authority to impose cable modem service access requirements through its ancillary jurisdiction over interstate telecommunications. The question to be answered is - does the Commission have the desire to use its authority for this purpose? Without a single reference in the NOI regarding widespread diversity of information, it appears that it does not. The chaos that exists is crying for resolution and for a national policy regarding cable modem service. The Commission would do a great disservice to purpose (4) by failing to act and instead adopting an unfettered market based approach.

### **3. Inconsistent Judicial Decisions**

Several federal courts that have considered the issue have classified cable service in varying ways. (NOI, para. 3, at page 2; see citations in footnote 3.) These inconsistent decisions have caused confusion that requires Commission action in the form of a cohesive national policy for cable modem service. A common factor in the court cases is a local franchising authority’s attempt to mandate open access through a local ordinance. At this time, the Courts have held that local government does not have such authority. The Commission, however, has statutory authority over cable communications with a duty to promote the widest possible diversity of information. The courts would find no problem with the Commission mandating open

access through its ancillary jurisdiction.

The decision in Broward County, is important because it recognized the First Amendment issue which appears to have been overlooked in other cases. The Court, found the local ordinance unconstitutional because it impinged on the cable operator's First Amendment rights. (Broward County, mimeo at p. 26.) However, absent from the discussion in Broward County is any discussion of the ISP's First Amendment rights. Clearly, ISPs that provide proprietary content, such as news, advertising, video streaming, etc., are editorializing like other First Amendment speakers. They are no less a First Amendment speaker than cable operators. (See City of Los Angeles v. Preferred Communications, 476 U.S. 488, cable; Grosjean v. American Press Co., 297 U.S. 250, newspapers; Turner Broadcasting System v. Federal Communications Commission, 512 U.S. 622, radio and broadcast television.

Insert Internet Service Providers in place of cable in the following quotation and you will not sense much of a difference, if any.

“We do think that the activities in which respondent allegedly seeks to engage plainly implicate First Amendment interests. Respondent alleges: ‘The business of cable television [Internet Service Providers], like that of newspapers and magazines, is to provide its subscribers with a mixture of news, information and entertainment. As do newspapers, cable television companies [Internet Service Providers] use a portion of their available space to reprint (or retransmit) the communications of others, while at the same time providing some original content.’ App. 3a. Thus, through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, respondent seeks to communicate

messages on a wide variety of topics and in a wide variety of formats.” (Preferred Communications, at p. 494).

The First Amendment rights of ISPs should be considered in the mix of the First Amendment deliberations that the Commission is duty bound to review when it implements the Cable Act. Their First Amendment rights must be balanced with cable operator’s First Amendment rights, and the public’s First Amendment right to a wide diversity of information sources. A compelling First Amendment argument exists for ensuring that non affiliated ISPs are provided with nondiscriminatory access to the cable modem platform. Otherwise, cable operators, as gatekeepers to the cable modem platform, will be in a position to restrict the free flow of ideas to the public in contravention to purpose (4) of the Cable Act.

#### **4. Cable Modem Service is Cable Service**

The Commission seeks comment on whether cable modem service is a cable service regulated by Title VI. (NOI, para. 16, at page 7.) Of particular interest to the Commission, is whether the amendment to the definition of cable service by the 1996 Act adding the terms “or use” indicate an intent by Congress to include cable modem service and the cable modem platform in the definition of cable service. (Id., at pp. 7-8.) The answer to both questions is clearly yes.

Under the Cable Act, cable service is defined:

As the “ (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 service.” 47 U.S.C. § 522(6) (Emphasis Added.)

The addition of the words “or use” indicates that interactive services provided via a cable system are cable services. The legislative history makes it clear that Congress intended the amendment to reflect the evolution of cable to include interactive services such as game channels and information services made available to subscribers by the cable operator. S. Conf. Rep. No. 230, 104th Cong., 2d Sess. (1996). The relevant part of the conference report states:

“The conferees intend the amendment to include interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services.” H.R. Rep. No. 104-458, at 169 (1966) (Conference Report.)

The Conference Report does not distinguish between an affiliated or an unaffiliated ISP. Thus, Internet access over the cable modem platform is a cable service no matter who provides it.

The NOI seeks comment on whether cable modem service is a telecommunications service subject to Title II regulation. (See NOI, para. 18, at page 8.) That issue was spawned from the mischief and confusion created by AT&T Corp. v. City of Portland, 216 F.3d 871 (9th Cir. 2000). The Ninth Circuit analysis of cable modem service and its conclusion that it is a telecommunications service is flawed. It analogized cable modem service with dial-up Internet service to reach its erroneous conclusion that cable modem service is a telecommunications service subject to Title II regulation. The Portland case concluded that Internet service was comprised of two distinct services. The first is a telecommunications service provided by the telephone company that carries the subscriber’s signal to the ISP instantaneously and without alteration. The second is the content the subscriber receives from the ISP and it is an information service. (See discussion in Portland at pp. 877-878.) The Ninth Circuit

then concluded, without factual support, that this dual service analysis also applies to cable modem service which it incorrectly called a telecommunications service.

However, cable modem service does not involve a dial-up element. Its connection is made through the cable modem platform and does not use a telecommunications facility. Therefore, it is not a telecommunications service. If you follow the Portland line of reasoning, you would also have to conclude that other Internet delivery systems are also telecommunications services. Conceptually, under Portland, the transmission link from a wireless system and the transmission link from a Satellite system would also be telecommunications services subject to Title II. The 1934 Act, however, regulates the delivery systems differently; telephone is Title II, wireless and Satellite are Title III and cable is Title VI. Each Internet delivery system should be regulated under its respective policy and rules assigned by Congress in the 1934 Act.

Finally, the Ninth Circuit, also incorrectly, found that cable Internet access is not cable service because the application of the cable television regulatory scheme to cable broadband Internet access would lead to “absurd results.” (Id. at p. 877.) The Ninth Circuit determined that it is irrational to apply cable television regulations to cable Internet Service such as channel set-asides, channel designation for unaffiliated programmers and must-carry requirements. (Id.) What the Ninth Circuit fails to realize is that such requirements apply to cable systems and cable operators not cable services. The only “absurd results” are those that flow from the Ninth Circuit’s convoluted analysis.

##### **5. Cable Modem Service Is An “Other Programming Service”**

Cable modem service is an “other programming service” under the Cable

Act which requires subscriber interaction for its selection or use. (47 USC 522(14)). Some argue that because cable modem service is not subscribed to by all cable consumers it is not provided generally as defined in the Cable Act. (Id.) Ordering cable modem service is akin to ordering HBO or some other premium channel provided generally to all cable subscribers. Not all cable subscribers choose HBO, or for that matter any premium services. Does that mean HBO or other premium channels are not an “other programming service”? Of course not, and just because all cable subscribers don’t choose cable modem service does not mean that cable modem service is not an other programming service.

Without a cable operator providing this programming service over its cable modem platform, a cable subscriber would have to seek service from a different delivery system. A cable subscriber could ask its telephone company to provide dial-up or DSL, or seek service from wireless or satellite companies and invoke regulation from a separate part of the 1934 Act. Upon provision of Internet service by a delivery system other than the cable modem platform, Title VI no longer becomes relevant. This simple, obvious observation should end the complex, tedious debate on what to call cable modem service. The Commission should call it exactly what it is - “another programming service” provided over the cable modem platform and regulated by Title VI. It is cable service.

As previously mentioned, several courts, in addition to the Ninth Circuit in Portland, have considered the issue of open access and whether it is a cable service under Title VI. They classified this service in varying ways; In Henrico County, Va., the federal district court correctly concluded that it is a cable service. (See MediaOne Group, Inc. v. Henrico County, 97 F. Supp. 2d 712, 714 (E.D. Va. 2000), appeal pending, 4th Circuit No. 00-1680.) Broward County did not directly call it a cable service, but the discussion in that case suggests the Court believed it was an “other programming service,” and therefore a cable service.

“In its cable franchise area Media One offers . . . “Roadrunner” as a programming option available . . . for an extra charge (as are other programming options such as HBO or certain movie channels).” (Broward County, mimeo at pp 8-9.)

Gulf Power v. The Federal Communications Commission, 208 F. 2d 1263, (11th Circuit 2000), not an open access case, said it wasn’t a cable service nor a telecommunications service but instead an information service. Interestingly, in this case the Commission did not assert that Internet service was a telecommunications service because:

“The FCC, however, did not raise that argument before us. Nor could it have because the FCC has specifically said that the Internet is not a telecommunications service. See Report and Order, 13 F.C.C.R. at 6795 (“The Universal Service Order concluded that Internet service is not the provision of a telecommunications service under the 1996 Act.”); In Re Fed-State Joint Bd. on Universal Serv., 12 F.C.C.R. 87 ¶ 69 (1996) (“Internet service does not meet the statutory definition of a “telecommunications service.””). Accordingly, there is no statutory basis for the FCC to regulate the Internet as a telecommunications service under the 1996 Act.” (Gulf Power, at p 1277.)

The Commission has gone on record explaining what it thinks are examples of telecommunications services:

“The FCC has given the following examples of telecommunications services: cellular telephone and paging services; mobile radio services; operator services; PCS (personal

communications services); access to interexchange service; special access; wide area telephone service (WATS); toll-free service; 900 service; MTS; private line; telex; telegraph; video services; satellite services; and resale services. In re Fed-State Joint Bd. on Universal Serv. 12 F.C.C.R. 8776 ¶ 780 (1997). Even if this list is not exhaustive, all of these examples are materially different from the Internet.” Gulf Power, footnote 33 at pp 1277-1278.

Los Angeles agrees with the above and it does not see any reason for the Commission to change its view now. The Commission clearly has studied the issue thoroughly and has concluded that Internet service is not a telecommunications service. Several full blown Commission proceeding, referenced above, with substantial evidence presented have been litigated. Absent some remarkable new evidence in this proceeding, it seems the Commission would be acting arbitrarily and capriciously to reverse its prior decision that Internet service does not meet the statutory definition of telecommunications service.

The cable industry considers cable modem service a cable service. For example, in Portland, AT&T, the largest cable company in the country, stipulated at the district court level, that it was a cable service. Yet, inexplicably, the Ninth Circuit without factual evidence in the record or urging by the parties decided it was a telecommunications service. That case and its reasoning should not be followed, especially in light of the above referenced Commission proceedings.

The telephone industry supports the classification of cable modem service as a telecommunications service for obvious reasons. Dial up and DSL Internet service are regulated under Title II of the Act and as such are required to provide open access. (See 47 USC 201(a) and 47 USC 251(a)(1).) They want cable to be treated in an equal fashion. Cable modem service is clearly a cable service under the Cable Act.

However, if the Commission erroneously decides to classify it as a telecommunication service under Title II, open access must be required. To do otherwise, would impose an unwarranted advantage upon the cable industry and would be vulnerable to a certain legal challenge.

## **6. Congressional Intent Under the Internet Tax Freedom Act**

The Internet Tax Freedom Act (“ITFA”) Pub. L. No. 105-277, Title XI, 112 Stat. 2681-719 (1998) demonstrates that Congress considers cable modem service to be a cable service. The ITFA was enacted to provide a three year moratorium on the ability of state or local government to impose a tax on Internet access after October 1, 1998. See ITFA, section 1101(a). The ITFA defines a tax in section 1104(8)(A) and expressly exempts cable modem service in 1104(8)(B), Section 1104(8) states in full:

“(A) Tax -- In general. -- The term “tax” means -- (i) any charge imposed by any governmental entity for the purpose of generating revenues for governmental purposes, and is not a fee imposed for a specific privilege, service, or benefit conferred; or (ii) the imposition on a seller of an obligation to collect and to remit to a governmental entity any sales or use tax imposed on a buyer by a governmental entity.

“(B) Exception -- Such term [i.e. a tax] does not include any franchise fee or similar fee imposed by a state or local franchising authority, pursuant to section 622 or 653 of the Communications Act of 1934 (47 U.S.C. 542, 573), or any other fee related to obligations or telecommunications carriers under the Communications Act of 1934 (47 U.S.C. 151 et. seq.).

The ITFA applies only to Internet service. The 11048(B) exemption

applies to “a franchise fee” imposed by a local franchising authority, pursuant to the Cable Act, 47 U.S. 542. The only Internet service provided by cable operators subject to the franchise fee requirement of section 542 is cable modem service. This is further intent that Congress considers that cable modem service is a cable service. If Congress did not believe that cable modem service was a cable service, it would not have expressly exempted from the ITFA a franchise fee which is applied to cable service. By acknowledging that the definition of tax does not include a franchise fee, such as a cable franchise fee imposed on cable modem service, Congress acknowledges that cable modern service is a cable service. Accordingly, local government may impose a franchise fee up to five percent on cable modem service. Otherwise, there is no logical need for the express exception contained in section 1104(8)(B).

Furthermore, as noted above, the ITFA was designed to preclude state and local government from imposing a fee or tax directly on Internet companies for the provision of such service to the public. A franchise fee is imposed directly on cable operators not the Internet service provider. (See Cable Act, 47 USC 542(a).) A franchise fee is not a tax but a charge against gross revenues from cable operations for use of the public rights-of-way. (City of Dallas v. The Federal Communications Commission, 165 F3d 341, 347 (5th Cir. 1999)). Gross income from cable operations includes all income sources of the cable operator, including cable modem service. Congress recognized the difference between a tax imposed directly on Internet service. It prudently codified this distinction in the ITFA to prevent confusion and to permit local government discretion to charge a franchise fee. Otherwise, cable operators could challenge the inclusion of revenues from cable modem service in gross revenues for franchise fees calculations, alleging that such revenues are a tax on Internet access.

Interestingly, cable operators are now challenging the inclusion of cable modem service in gross receipts calculations for franchise fee purposes. However,

those that are doing so or that are considering such action are alleging it is a telecommunications service pursuant to the Portland case. (See “Communications Daily”, Nov. 21, 2000, Cox Cable discontinuing franchise fee payments; AT&T studying the issue.)

## **7. Anti-competitive Considerations**

The Commission is duty bound to promote competition in the telecommunications market place (47 USC 521(6)) and it acknowledges so in the NOI (See para. 3 at p. 2). Without open access, a cable operator will engage in anti-competitive practices, such as unlawful tying arrangements. The FCC believes that since Internet service may be delivered by “multiple forms of increasing bandwidth”, such as Dial-up, DSL, wireless and satellite, unregulated cable modem service is not a threat to competition (NOI, para. 4 at p. 2, note 6). However, with regard to cable communications it must focus its scrutiny more narrowly. Such an analysis would uncover the anti-competitive aspects of cable modem service over the cable modem platform. A cable operator, under current conditions, can provide cable modem service and limit access to only an affiliated ISP. That subscriber then has to accept that choice or migrate to a different delivery system. A cable subscriber may have the freedom to migrate to other delivery systems if necessary. However, with a cable system already installed in a subscriber’s home, it is less likely that subscribers will go through the expense, time and inconvenience of shifting their Internet services to another form of delivery. The ease of merely calling one’s cable operator to add the cable modem service puts cable operators in the dominant position wherever they provide such service. This truism, coupled with the fact that DSL continues to be unavailable for most residential subscribers, leaves the cable operator as the only broadband provider of Internet service in most residential areas.

Some cable operators currently provide access to multiple ISPs and therefore claim open access is already available. However, in those instances the subscriber must pay an additional charge in order to access other ISPs. (See Portland and Henrico) In other words, you must pay for the affiliated ISP (whether you use that ISP or not). Such an arrangement is a classic monopolistic tying arrangement that provides the affiliated ISP with a significant pricing advantage. Moreover, subscribers that refuse to pay for the Internet service twice will simply pay for and only use the affiliate. Such a consequence is an unlawful elimination of competition. The Federal Trade Commission (“FTC”) has become sensitive to this problem and at this time is the only federal agency promoting open access requirements. It is considering the imposition of some form of open access as a condition to the approval of the AOL/Time Warner merger. (Washington Post, “FTC, AOL Remain apart on Merger”, Oct. 14, 2000, at p. EOI.)

Like the FTC, the Commission should also take the necessary steps to ensure fair competition over the cable modem platform. An open access requirement would eliminate such tying arrangements and would promote competition under the Cable Act. (See 47 USC 521(6)). As required by the Cable Act, a regulatory policy of non-discriminatory open access would also assure that cable systems are responsive to the needs and interests of the local community. (See 47 USC 521(2)). Subscribers don’t want to seek alternative delivery systems in order to access multiple ISPs, which is what they must do under a market based approach to Internet Service. Switching delivery systems costs money, takes time and is inconvenient.

The Commission should adopt a policy that ensures non-affiliated ISPs are provided access under the same terms and conditions as the affiliated ISP. The Commission need not specify how or what type of technology must be used to achieve open access. Nor does it need to regulate the quality of service or the price the cable operator charges. Nor need the Commission dictate what content, if any, the cable

operator can require from unaffiliated ISP's, (the First Amendment concern of the court in Broward County). All of these decisions could be left to the cable operator and its contract negotiations with various ISPs that wish a First Amendment platform in a particular cable franchise area.

An open access requirement by the Commission would impose a minimal intrusion into cable modem service. Moreover, it has the very desirable end of promoting an important First Amendment concern - a wide diversity of information sources and services to the public. Further, non-discriminatory open access recognizes the First Amendment Rights of ISPs similar to those of others that provide content such as movies, advertising, news and games.

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#### **D. CONCLUSION**

The Commission has the responsibility to pay deference to the Cable Act because cable modem service through the cable modem platform uniquely effects cable subscribers and cable operators. A central issue of the NOI is more related to Title VI, than to Title II or Title III. We are concerned with a cable service. Cable Modem service has serious First Amendment Implications. Widespread diversity of

information sources and services is a major purpose of the Cable Act. ISPs, have First Amendment Rights just like Cable Operators. Cable Modem service is other programming service under the Cable Act. The Internet Tax Freedom Act provides additional Congressional intent that cable modem service is a cable service. An Open access regulatory framework that permits non affiliated ISP access over the cable modem platform upon the same terms and conditions as affiliated ISP is the best regulatory framework. It promotes widespread diversity of information, promotes competition over the cable modem platform, precludes unlawful tying arrangements and is clearly in the public interest. The Commission should open a rulemaking forthwith to develop rules for the implementation of open access on a non-discriminatory basis for non-affiliated ISPs.

Respectfully submitted,

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