

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

In The Matter of)	
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Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities)	GN Docket No. 00-185
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**COMMENTS OF
THE ASSOCIATION OF COMMUNICATIONS ENTERPRISES**

The Association of Communications Enterprises (“ASCENT”), formerly the Telecommunications Resellers Association (“TRA”),¹ through undersigned counsel, hereby submits its comments in response to the *Notice of Inquiry*, FCC 00-355, released September 28, 2000, in the captioned proceeding (“*NOI*”). The *NOI* addresses “issues surrounding high-speed access to the Internet provided to subscribers over cable infrastructure, so-called ‘cable modem services’,” seeking comment on the “regulatory treatment, if any [that] should be accorded to cable mode service and the cable modem platform used in providing this service.”² Broadband access provided over the

¹ The Telecommunications Resellers Association recently changed its name to the Association of Communications Enterprises in order to better reflect its more diversified membership and mission. No longer strictly comprised of carriers providing telecommunications services solely through resale, TRA’s membership has expanded in recent years not only to include both facilities-based and non-facilities-based service providers of interexchange, international, local, and wireless services, but providers of an increasingly wide variety of advanced and Internet-based services. The name change to ASCENT is intended to reflect the Association’s continued orientation toward the entrepreneurial enterprises that constitute its core constituency, while recognizing the evolving nature of both the communications industry and the Association’s membership.

² NOI, GN Docket No. 00-185, FCC 00-355, ¶ 1 (Sept. 28, 2000).

facilities of a cable television system (“CATV”) is, in ASCENT’s view, a telecommunications service fully subject to the requirements of Title II of the Communications Act of 1934, as amended (“Act”).³

Accordingly, ASCENT urges the Commission to initiate expeditiously a rulemaking proceeding to promulgate rules pursuant to which CATV system operators would be required to make their broadband transmission facilities and services available to competitive providers upon reasonable demand.

I. CATV-Based Broadband Access is a Telecommunications Service

³ 47 U.S.C. § 201, *et seq.*

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.”⁴ A “telecommunications service” is defined by the Act as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”⁵ It is beyond dispute that CATV system operators when providing subscribers to their cable modem service with access to the Internet and electronic mail capability are transmitting “information of the user’s choosing without change in the form or content of the information as sent or received.” And CATV system operators are providing cable modem service “for a fee” to a class of users made up of all of their subscribers and potential subscribers within their respective service areas – *i.e.*, “a class of users” that constitutes “the public” within those areas. As the United States Court of Appeals for the Ninth Circuit declared, a CATV system operator that “provides its subscribers Internet transmission over its cable broadband facility, . . . is providing a telecommunications service as defined in the Communications Act.”⁶ Indeed, the Court characterized cable broadband facilities as a “pipeline” indistinguishable from “telephone lines” for definitional purposes under the Act.⁷ As couched by the Court:

To satisfy consumer demand for broadband Internet access, cable television operators have replaced coaxial wires with fiber-optic cable, telephone companies have initiated high-frequency digital subscriber line (“DSL”) service over standard twisted-pair copper wires, fixed wireless providers have upgraded their microwave transmission capacities, satellite providers have launched global two-way networks,

⁴ 47 U.S.C. § 153(43).

⁵ 47 U.S.C. § 153(46).

⁶ AT&T Corp. v. City of Portland, 216 F.3d 871, 878 (9th Cir. 2000).

⁷ Id.

and researchers have explored the use of quantum communications methods.⁸

Moreover, as the Court further noted, subscribers using cable modem service can “‘click-through’ to other free Web portal sites, and may access other Internet service providers.”⁹

The Act makes clear that a “telecommunications service” is not defined by the nature of the facilities used to provide it; indeed, a service otherwise encompassed within the definition of a “telecommunications service” is such “regardless of the facilities used.”¹⁰ And as the Commission has declared, it is the mandate of Congress that “the classification of a provider should not depend on the type of facilities used.”¹¹ As the Commission has explained, a “telecommunications service

⁸ Id. at 874.

⁹ Id.

¹⁰ 47 U.S.C. § 153(46).

¹¹ Federal-State Joint Board on Universal Service, 13 FCC Rcd. 11830, ¶ 59 (1998).

is a telecommunications service regardless of whether it is provided using wireline, wireless, cable, satellite, or some other infrastructure.”¹²

¹²

Id.

It is equally clear that CATV-based broadband access is neither a “cable service” or an “information service” under the Act. 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.”¹³ As the Commission has recognized, “Internet access service provides consumers with a varied array of services” beyond mere “video programming,” including “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,” and hence, does not fit within the definition of video programming.¹⁴ Nor does CATV-based broadband access fit within the other components of the definition of “cable service” because it is not limited to “information that a cable operator makes available to all subscribers generally” – the statutory definition of “other programming service”¹⁵ – and because the “subscriber interaction” associated with such service is not limited to that “required for the selection or use of . . . video programming or other programming service.”¹⁶ A consumer using CATV-based broadband access will have access to a host of

¹³ 47 U.S.C. § 522(6).

¹⁴ Internet Ventures, Inc. Internet On-Ramp, Inc., 15 FCC Rcd 3247, ¶¶ 12 - 14 (2000) (“Video programming is defined by the statute in terms of comparability to programming provided by a television broadcast station . . . Internet access service . . . is not limited to the provision of such programming.”).

¹⁵ 47 U.S.C. § 522(14).

¹⁶ 47 U.S.C. § 522(6). The U.S. District Court for the Eastern District of Virginia appeared to base its conclusion that cable modem service constitutes a “cable service” upon a far broader universe of subscriber interaction. Its conclusion thus deviates from the express language of the Act. Media One Group, Inc. v. County of Henrico, Virginia, 97 F.Supp.2d 712, 714 (E.D.Va.

information not made available to subscribers generally and will engage in interaction in, for example, sending and receiving electronic mail transmissions, undertaking and reviewing the results of Internet searches, and engaging in ecommerce transactions.¹⁷ As the United States Court of Appeals for the Ninth Circuit explained, “[t]he essence of cable service . . . is one-way transmission of programming to subscribers generally.”¹⁸ “Internet access,” the Court continued, “is not one-way

2000).

¹⁷ The mere inclusion of the words “or use” in Section 522(6) by Congress in the Telecommunications Act of 1996 does not require treatment of CATV-based broadband access as a cable service. The statutory definition of a “cable service” still contemplates that the referenced “use” will be of “video programming or other programming service.” 47 U.S.C. § 522(6). As the U.S. Court of Appeals for the Eleventh Circuit noted in declining to read any more meaning into the introduction of the words “or use” in Section 522(6), “[i]f Congress by the addition of these two words meant to expand the scope of the ‘cable service’ definition from its traditional video base to include all interactive services, video and non-video, it would have said so . . . we cannot read this minor change to effectuate a major statutory shift.” Gulf Power Company v. FCC, 208 F.3d 1263, 1277 (11th Cir. 2000) Moreover, as the Commission has recognized, Congress went out of its way to emphasize that the inclusion of the words “or use” was “not intended to affect Federal or State regulation of telecommunications service offered through cable facilities.” Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 104-458, 104th Cong., 2nd Sess. 169 (1996).

¹⁸ AT&T Corp. v. City of Portland, 216 F.3d 871 at 876. See also Gulf Power Company v. FCC, 208 F.3d 1263 at 1276 (“[T]he FCC has no authority under that Act to regulate Internet service providers.” The Commission may “regulate the rates for cable service and telecommunications service: the Internet service is neither.”).

and general, but interactive and individual beyond the ‘subscriber interaction’ contemplated by the statute.”¹⁹

And as noted above, neither does CATV-based broadband access constitute an “information service” under the Act. The Act defines an “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information service via telecommunications.”²⁰ As the United States Court of Appeals for the Ninth Circuit recognized, cable modem service consists of “two elements: a ‘pipeline’ (cable broadband instead of telephone lines), and the Internet service transmitted through the pipeline.”²¹

To the extent that a CATV system operator provides the “pipeline” – *i.e.*, provides “subscribers Internet transmission over . . . cable broadband facilit[ies]” – “it is providing a telecommunications service as defined in the Communications Act.”²² The Commission acknowledged as much in determining to treat the Internet access utilizing DSL service as two

¹⁹ Id. (“Accessing Web pages, navigating the Web’s hypertext links, corresponding via e-mail, and participating in live chat groups involve two-way communication and information exchange unmatched by the act of electing to receive a one-way transmission of cable or pay-per-view television programming. And unlike transmission of a cable television signal, communication with a Web site involves a series of connections involving two-way information exchange and storage, even when a user view seemingly static content.”). Because a CATV system operator providing CATV-based broadband access is providing a telecommunications service, rather than a cable service, the prohibition of Section 621(c) of the Act against the regulation of a cable system as a common carrier “by reason of providing any cable service” is not implicated by the regulation of cable modem . 47 U.S.C. § 621(c).

²⁰ 47 U.S.C. § 153(20).

²¹ AT&T Corp. v. City of Portland, 216 F.3d 871 at 878.

²² Id.

“separate” services – “the first service is a telecommunications service (*e.g.*, the enhanced xDSL-enabled transmission path), and the second service is an information service.”²³

As the United States Court of Appeals for the Ninth Circuit also correctly noted, “the definition of cable broadband as a telecommunications service coheres with the overall structure of the Communications Act as amended by the Telecommunications Act of 1996, and the FCC’s existing regulatory regime.”²⁴ With respect to the former, the Court correctly notes that “[a]mong its broad reforms, the Telecommunications Act of 1996 enacted a competitive principle embodied by the dual duties of nondiscrimination and interconnection,” and reasoned that “[t]ogether, these provisions mandate a network architecture that prioritizes consumer choice” which “[a]s applied to the Internet, . . . [constitutes] ‘open access’.”²⁵ As to the latter, the Commission has repeatedly emphasized the pro-competitive thrust of its policies, both before and after the enactment of the

²³ Deployment of Wireline Services Offering Advanced Telecommunications Capability (Memorandum Opinion and Order), 13 FCC Rcd. 24011, ¶ 15 (1998), *recon. pending, petition for review filed U S WEST Communications, Inc. v. FCC*, Case No. 98-1410 (D.C.Cir. April 5, 1999), *on remand* 15 FCC Rcd. 385 (1999), *petition for review filed MCI WorldCom, Inc. v. FCC*, Case No.00-1002 (D.C.Cir. Jan. 3, 2000). More recently, the Commission affirmed this distinction, noting that “the information service is provisioned by the ISP ‘via telecommunications’ including interexchange communications although the Internet service itself is an ‘information service’ under section 3(2) of the Act, rather than a telecommunications service.” Deployment of Wireline Services Offering Advanced Telecommunications Capability (Order on Remand), 15 FCC Rcd. 385, ¶ 34 (1999), *petition for review filed MCI WorldCom, Inc. v. FCC*, Case No.00-1002 (D.C.Cir. Jan. 3, 2000).

²⁴ Id. at 879.

²⁵ Id.

Telecommunications Act of 1996.²⁶ Moreover, treatment of CATV-based broadband access as a telecommunications service is consistent with the objectives articulated by the Commission when it first created a dichotomy between basic and enhanced services. As the Commission declared in its Computer II decision:

[A]n essential thrust of the proceeding has been to provide a mechanism whereby non-discriminatory access can be had to basic transmission services by all enhanced service providers. Because enhanced services are dependent upon the common carrier offering of basic services, a basic service is the building block upon which advanced services are offered. Thus those carriers that own common carrier transmission facilities and provide enhanced services, but are not subject to the separate subsidiary requirement, must acquire transmission capacity pursuant to the same prices, terms, and conditions reflected in their tariffs when their own facilities are utilized. Other offerors of enhanced services would likewise be able to use such a carrier's facilities under the same terms and conditions.²⁷

²⁶ See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Third Report and Order), 15 FCC Rcd. 3696, ¶ 5 (1999), *recon. pending, petition for review filed United States Telecom Association v. FCC*, Case No. 00-1015 (D.C.Cir. January 15, 2000); Deployment of Wireline Services Offering Advanced Telecommunications Capability (Order on Reconsideration), CC Docket No. 98-147, FCC 00-297, ¶¶ 8 - 13 (August 10, 2000).

²⁷ Amendment of Sections 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384 (1980), *recon.* 84 F.C.C.2d 50 (1980), *further recon.* 88 F.C.C.2d 512 (1981), *aff'd sub nom. Computer and Communications Industry Association v. FCC*, 693 F.2d 198 (D.C.Cir. 1984), *cert denied sub nom. Louisiana Public Service Commission v. FCC*, 461 U.S. 938 (1983), *further recon.* FCC 84-190 (released May 4, 1984).

Finally, as a telecommunications service used to provide broadband Internet access, cable modem service can properly be classified as either a local exchange or exchange access service. In its *Order on Remand* in its Advanced Services Rulemaking, the Commission reaffirmed its prior determination that xDSL-based advanced services constitute either telephone exchange or exchange access service and, therefore, are fully subject to the requirements of Section 251 of the Act.²⁸ The analysis used by the Commission in so characterizing xDSL-based advanced services applies with equal force to any other telecommunication service used to provide broadband services, telephone exchange service and exchange access not being limited to circuit-switching technology or voice service, but rather being tied to use and geographic considerations.²⁹ Thus, like xDSL-based advanced services, cable modem services, even though they require the user to “designate the ISP or third party to whom his or her high-speed data transmissions are directed,” nonetheless “provide end users with the type of intercommunicating capability envisioned by [the] section 3(47)(A) [definition of ‘telephone exchange service’],” because once on the network, the user may “rearrange the service to communicate with any other subscriber located on that network,” and, accordingly, constitute local exchange service.³⁰ And, like xDSL-based advanced services, cable modem services may, under the Commission’s view of exchange access, constitute such service because they provide

²⁸ Deployment of Wireline Services Offering Advanced Telecommunications Capability (Order on Remand), 15 FCC Rcd. 385 at ¶¶ 15 - 45.

²⁹ Id. (“[T]he term ‘telephone exchange service’ encompasses voice and data services. . . . [T]he statutory language does not support a conclusion that only services that employ circuit-switching technology constitute telephone exchange service within the meaning of the Act. . . . [T]he concept of exchange is based on geography and regulation, not equipment.”).

³⁰ Id. at ¶ 24. Likewise, as a technological matter, a cable modem subscriber would be able to “with relative ease, designate that his or her traffic be directed to a different ISP or third party” unless blocked from doing so by a CATV system operator. Id. at ¶ 24. Obviously, a CATV system operator cannot determine its regulatory status simply by preventing customer choice.

for the completion from a subscriber's location to a destination in another exchange using toll service purchased from an Internet backbone provider -- *i.e.*, an interexchange carrier.³¹

II. Title II Defines the Scope of the Regulatory Obligations of Providers of CATV-Based Broadband Access

As providers of telecommunications services, CATV system operators providing CATV-based broadband access are subject to the full panoply of Title II regulation. A “telecommunications carrier” is defined by the Act as “any provider of telecommunications services.”³² The Act further provides that “[a] telecommunications carrier shall be treated as a common carrier . . . to the extent that it is engaged in providing telecommunications services.”³³ And it is to telecommunications carriers that the requirements of Title II apply. Indeed, the Act expressly contemplates that CATV system operators will provide telecommunications services and removes that activity from regulation under Title VI of the Act so as to avoid dual regulatory regimes.³⁴ As the U.S. Court of Appeals for the Ninth Circuit declared, “the principle of telecommunications common carriage governs cable broadband as it does other means of Internet transmission such as telephone service and DSL.”³⁵

³¹ Id. at ¶ 36. Critically, the Commission has determined that the term “station” in the Section 3(48) definition of “station” encompasses “any device used by an end-user to receive and terminate telecommunications,” reasoning that any other interpretation would “be at odds with . . . [the Act’s] ‘technology neutral’ objectives.” Id. at ¶ 40.

³² 47 U.S.C. § 153(44).

³³ Id. Thus the statute contemplates that an entity such as a CATV system operator may provide a variety of services, some subject to Title II regulation and others not so subject. *See also* 47 U.S.C. § 541(b)(3).

³⁴ 47 U.S.C. § 541(b)(3)(A).

³⁵ AT&T Corp. v. City of Portland, 216 F.3d 871 at 879.

Under Title II, providers of CATV-based broadband access are required, as “telecommunications carriers,” to “interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.”³⁶ They are further required, as “common carriers,”³⁷ to furnish service “upon reasonable request therefor,” and to do so pursuant to “charges, practices, classifications, and regulations” which are “just and reasonable.”³⁸ And under Section 202, they may not “make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services,” “make or give any undue or unreasonable preference or advantage to any particular person, class of person, or locality or . . . subject any particular person, class of person, or locality to any undue or unreasonable prejudice or disadvantage.”³⁹

As providers of local exchange service and/or exchange access, providers of CATV-based broadband access are further subject to additional “duties.” In particular, such providers may not “prohibit . . . [or] impose unreasonable or discriminatory conditions or limitations on the resale of . . . telecommunications services.”⁴⁰ As the Commission has recognized, resale of advanced services is an essential element of a competitive advanced services market, enabling competitors to

³⁶ 47 U.S.C. § 251(a).

³⁷ CATV system operators offer their menu of services generally to all consumers within their service areas. Cable modem service is a component of this overall service offering, limited, like xDSL-based advanced services, only by technological constraints.

³⁸ 47 U.S.C. § 201.

³⁹ 47 U.S.C. § 202.

⁴⁰ 47 U.S.C. § 251(b)(1).

enter “the advanced services market by providing to consumers the same quality service offerings” provided by entities that control physical access to consumers.⁴¹

⁴¹ Deployment of Wireline Services Offering Advanced Telecommunications Capability (Second Report and Order), 14 FCC Rcd. 19237, ¶ 20 (1999), *pet. for rev. filed Association of Communications Enterprises v. FCC*, Case No. 00-1144 (D.C. Cir. filed April 5, 2000).

In short, providers of CATV-based broadband access have an obligation to provide for physical network interconnection and to make their services available for resale upon reasonable request. And they are required to do so without discrimination and upon reasonable rates, terms and conditions. They are also required to step up to other common carrier responsibilities such as contributions to universal service. Current application of these rules to other providers of advanced services, such as xDSL-based advanced services, should provide the blueprint for application of the rules to providers of CATV-based broadband access. CATV system operators providing telecommunications services should be treated no differently than other providers of such services.⁴²

Applying this construct, “open access” should, as the Commission has suggested, provide both for the right to “(i) purchase transmission capability; and (ii) access the customer directly from the incumbent cable operator.”⁴³ ASCENT agrees with the OpenNet Coalition that this access should be as unfettered as possible, designed to facilitate “the ability of consumers to choose the Internet service provider of their choice” by providing competitors with the “ability to purchase, on a nondiscriminatory basis, the use of ‘last mile’ communications facilities to reach consumers.”⁴⁴ Any thing short of such ready access would allow CATV system operators to hinder competition. This is particularly true of the proposal that open access should be achieved “through negotiated

⁴² A measure of guidance in creating an open access regime could be drawn from the open access initiatives undertaken by the Canadian Radio-Television and Telecommunications Commission. *See, e.g., Regulation under the Telecommunication Act of Cable Carriers’ Access Services*, CRTC 99-8 (July 6, 1999).

⁴³ NOI, GN Docket No. 00-185, FCC 00-355 at ¶ 27.

⁴⁴ Id. at ¶ 28. That open access is technically and operationally feasible is demonstrated by the various pilot programs initiated by larger CATV system operators. *See, e.g., “AT&T Begins Cable Technical Test,” Washington Internet Daily* (Nov. 2, 2000).

commercial agreements between cable operators and ISPs operating in a free market.”⁴⁵ It is also true, albeit to a lesser degree, to a regime in which “an affiliated or preferred ISP [would] manage[] the network.”⁴⁶

⁴⁵ Id.

⁴⁶ Id. at ¶ 30.

To paraphrase the Commission, “negotiations [between CATV system operators and unaffiliated entities desiring access to the afore-referenced last mile] are not analogous to traditional commercial negotiations in which each party owns or controls something the other party desires.”⁴⁷ The unaffiliated entity seeking such last-mile access would “come[] to the table with little or nothing the . . . [CATV system operator would] need[] or want[].”⁴⁸ Rather, CATV system operators would be asked “to make available their facilities and services to requesting . . . [entities] that intend to compete directly with the . . . [CATV system operator] for its customers.”⁴⁹ “The inequality of bargaining power” in such a circumstance, the Commission has long recognized, “militates in favor of rules that have the effect of equalizing bargaining power.”⁵⁰

With respect to identification of “an affiliated or preferred ISP to manage[] the network,” ASCENT submits that the Commission has repeatedly stressed the need to create structures in which affiliated and non-affiliated entities are treated alike. Thus, for example, the Commission has declared in the context of the provision of advanced services by incumbent local exchange carriers (“LECs”) that “[b]ecause the merged firm’s own separate affiliate will use the same processes as competitors, wait in line for collocation space, buy the same inputs used to provide advanced services, and pay an equivalent price for facilities and services, the condition [that the

⁴⁷ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499, ¶ 55 (1996), *recon.* 11 FCC Rcd. 13042 (1996), *further recon.* 11 FCC Rcd. 19738 (1996), *further recon.*, 12 FCC Rcd. 12460 (1997), *aff’d/vacated in part sub. nom. Iowa Util. Bd v. FCC*, 120 F.3d 753 (1997), *writ of mandamus issued* 135 F.3d 535 (8th Cir. 1998), *aff’d/vacated in part sub. nom. AT&T Corp., et al. v. Iowa Utilities Board*, 525 U.S. 366 (1999).

⁴⁸ Id. at ¶ 15.

⁴⁹ Id. at ¶ 55.

incumbent LEC provide advanced services exclusively through a separate affiliate] should ensure a level playing field.”⁵¹ Requiring equality of treatment of affiliated and unaffiliated entities, the Commission continued would “ensure that competing providers of advanced services receive effective nondiscriminatory access to the facilities and services . . . that are necessary to provide advanced services” which in turn will “greatly accelerate competition in the advanced services market.”⁵²

⁵⁰ Id.

⁵¹ Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, CC Docket No. 98-184, FCC 00-221, ¶ 261 (June 16, 2000).

⁵² Id. at ¶¶ 261 - 62.

III. The Commission Should Act to Ensure Open Access

Open access in the context of CATV-based broadband access, in ASCENT's view, is not only a desirable, but an essential, policy goal. As the Commission has repeatedly found, consumers benefit from choice driven by competition.⁵³ Open access will facilitate the competitive provision of Internet-based services and, hence, enhance consumer choice. When but a single entity has access to scarce facilities and, thus, is in a position to impede the competitive provision of service, consumers are denied the price and service competition and innovation that might otherwise flourish if those scarce facilities were opened up to multiple providers. Moreover, small businesses are denied a meaningful opportunity to compete by exclusive control by a single entity of essential facilities. Congress has directed the Commission to drive the availability of "advanced telecommunications and information technologies and services to all Americans *by opening all telecommunications markets to competition.*"⁵⁴ Congress further mandated that the Commission act to increase the participation in the telecommunications industry by small businesses.⁵⁵

Just as the Commission has aggressively endeavored to wedge open local telephone markets and facilitate the competitive provision of xDSL-based advanced services, so too should it now act decisively in promoting competition in the CATV-based broadband environment. Commission efforts to blunt market power should be no less aggressive when directed at CATV system operators providing cable modem service than when targeted at incumbent LECs controlling the network facilities necessary to provide xDSL-based advanced services.

⁵³ See, e.g., Deployment of Wireline Services Offering Advanced Telecommunications Capability (Third Report and Order), 14 FCC Rcd.20,912, ¶¶ 1 - 6 (1999), *pet. for rev. filed United States Tel. Assoc. v. FCC*, No. 00-1012 (D.C.Cir. Jan. 18, 2000).

⁵⁴ Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 104-458, 104th Cong., 2nd Sess. 1.

⁵⁵ 47 U.S.C. § 257.

As the Commission has recently found, CATV system operators control the lion's share of the residential and small business advanced services market. Indeed, cable modem technology accounts for nearly 80 percent of the advanced services provided to this market segment.⁵⁶ Tellingly, "96% of high-speed lines over cable modem technology are sold and billed directly to end-user customers, as opposed to another provider or retailer, and . . . 100% of these lines are delivered solely over facilities owned by the reporting provider."⁵⁷ These characteristics, of course, define a classic "bottleneck" structure, which requires no less effort to open than the local telephone network.

The benefits to residential and small business consumers that open access to CATV-based broadband transmission facilities and services would generate are manifest. Multiple providers generate price competition not only in the form of lower prices, but in the development of innovative service packages as well. Service bundles in a single provider environment generally redound to the benefit of the provider through forced purchase of additional services by consumers; service bundles in a competitive environment benefit consumers as multiple providers seek to enhance the attractiveness of their respective service offerings. The presence of multiple providers also generates service innovation and diversity, which in the Internet environment can manifest itself, among other ways, in greater site diversity or enhanced content. Enhanced service quality also is a byproduct of diverse sources of service, as are more user friendly service terms and conditions, such as shorter duration commitments. And, of course, open access would lessen opportunities for abusive caching practices which would allow a single provider to prefer favored advertisers or providers by strategically manipulating transmission priorities and speeds.

⁵⁶ Deployment of Advanced Telecommunications Capability (Second Report), 14 FCC Rcd.19237 at ¶ 71.

⁵⁷ Id. at ¶ 98.

Achievement of these ends is best sought through Commission enforcement of Title II requirements, not through a “hands-off” policy, whether in the form of a so-called “market-based approach” or exercise of forbearance authority. The Commission cannot, and should not, refrain from imposition of its full Title II authority in the form of a meaningful open access mandate. To this end, the Commission should expeditiously initiate a rulemaking proceeding with the stated intent of promulgating rules and regulations designed to implement an open access policy with respect to CATV-based broadband facilities and services.

IV. Conclusion

By reason of the foregoing, the Association of Communications Enterprises urges the Commission to expeditiously initiate a rulemaking proceeding to promulgate rules pursuant to which CATV system operators would be required to make their broadband transmission facilities and services available to competitive providers upon reasonable demand.

Respectfully submitted,

**ASSOCIATION OF COMMUNICATIONS
ENTERPRISES**

By: _____

Charles C. Hunter
Catherine M. Hannan
HUNTER COMMUNICATIONS LAW GROUP
1620 I Street, N.W.
Suite 701
Washington, D.C. 20006
(202) 293-2500

Its Attorneys