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December 1, 2000

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

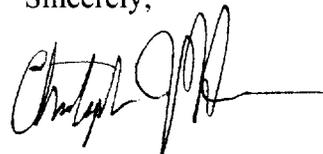
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Re: GN Docket No. 00-185 Notice of Inquiry
Comments of Cablevision Systems Corporation

Dear Ms. Salas:

Please find enclosed an original and four (4) copies of Cablevision Systems Corporation's Comments in the above referenced docket.

Sincerely,



Christopher J. Harvie

Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Inquiry Concerning High-Speed)
Access to the Internet Over)
Cable and Other Facilities)

GEN Docket No. 00-185

COMMENTS OF CABLEVISION SYSTEMS CORPORATION

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

COMMENTS OF CABLEVISION SYSTEMS CORPORATION

Cablevision Systems Corporation (“Cablevision”), by its attorneys, hereby submits these comments in response to the Notice of Inquiry in the above-captioned proceeding.^{1/} Through various subsidiaries and affiliates, Cablevision provides cable television, cable programming, news and entertainment services, telephony and other product and service offerings to subscribers and customers located principally in New York, New Jersey and Connecticut. Cablevision provides high-speed cable modem service through its Optimum OnlineSM and Optimum@HomeTM offerings.^{2/}

INTRODUCTION AND SUMMARY

More than two years ago, the Commission initiated an inquiry into the deployment of high-speed Internet access and other advanced communications services. In that proceeding, the Commission determined that there was “no reason” to grant third-party Internet service providers (ISPs) mandatory access to cable networks in order to offer high-speed services over the cable platform.^{3/}

^{1/} Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Notice of Inquiry, GEN Docket No. 00-185, (rel. Sept. 28, 2000) (“Notice”).

^{2/} References herein to Optimum Online also encompass Optimum@Home.

^{3/} Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such

Since its first Section 706 report, the Commission has reiterated on several occasions its view that a hands-off policy of “vigilant restraint” with respect to broadband services generally -- and access to the cable network platform specifically -- represented the best means of promoting broadband investment, deployment, competition and consumer choice.

By any measure, the hands-off policy adopted by the Commission has been a resounding success. Broadband Internet subscribership has increased exponentially, investment continues to accelerate, and competition from telephone company digital subscriber line (DSL) service and other broadband offerings is intensifying. Indeed, DSL subscribership last year increased at nearly two and one-half times the rate of cable modem service growth. Meanwhile, monthly prices and installation costs for broadband services are either steady or declining.

Cablevision’s own experience with respect to the provision of its Optimum Online cable modem service parallels these positive trends in the broadband Internet market, and underscores the success of the Commission’s policy of regulatory restraint:

- * **Cablevision has been investing heavily in broadband infrastructure**, and will spend over one billion dollars on network upgrades and rebuilds by 2003. As a result of this substantial investment, the number of homes capable of receiving broadband service from Cablevision has more than tripled in the last two years;
- * **Cablevision is making high-speed Internet access available in low-income communities**, as the company’s Optimum Online service is now available to tens of thousands of homes in neighborhoods in Bridgeport, CT, Newark, NJ, Elizabeth, NJ, Brooklyn, and other areas;
- * **Competition is intensifying.** While Optimum Online has enjoyed a substantial increase in subscribership since late 1998, it also faces accelerated competition from several providers of high-speed Internet access, including Verizon, SBC/SNET, and RCN, as well as narrowband service providers;
- * **Monthly access prices for Optimum Online are falling**, with the typical customer paying nearly 15% less per month than in 1998. Prices charged by competitive broadband providers are falling as well;

Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, (rel. February 2, 1999) at ¶ 101 (“First Section 706 Report”).

- * **Cablevision is making it easier and more affordable for consumers to obtain high-speed Internet access**, through its popular self-installation kits, which are available at its retail affiliate, The Wiz; and
- * **New non-commercial educational content focused on local and community interests** is being made available to Optimum Online subscribers, through Cablevision's innovative Power To Learn™ initiative.

The Commission has commenced the instant NOI in order to “ascertain whether our hands-off policy for high-speed services provided by cable operators remains the correct approach . . .”.^{4/} The answer to that fundamental question is an unequivocal yes. There is now a two-year, market-tested track record against which to evaluate the Commission's policy. Both the overall industry trends, and Cablevision's own experience, highlight the tremendous success of the Commission's hands-off approach toward cable modem service, particularly with respect to promoting competition and consumer choice.

While the Notice raises numerous operational and technical issues, the need to confront these complex matters arises only if forced access to cable networks is (i) necessary to promote competition and remedy a demonstrable market failure and (ii) permissible under law. Both of those threshold issues militate against adoption of forced access policies.

First, there is no sound policy basis for imposing forced access. Fundamentally, the forced access debate is about whether the marketplace or the government is best-suited to promote broadband competition and consumer choice. Consumers already have the ability to choose among numerous Internet service providers offering a variety of speeds, price points, features and services. In addition, tens of millions of consumers now have a choice of multiple broadband service providers and technologies, and that number continues to rise rapidly. Like other cable modem customers, Optimum Online subscribers have access to the full panoply of

^{4/} Notice at ¶ 4.

content available from any ISP or Web site. In a recent customer survey, 52% of new Optimum Online customers indicated that they also subscribe to another ISP, thereby demonstrating that the issue of access to multiple ISPs for cable modem subscribers is chiefly a function of ISP pricing decisions and business models.

Second, there is no legal basis for imposing forced access requirements on cable operators. This year, forced access advocates have been rebuffed in three separate Federal court actions. This judicial track record raises serious doubts about the legality of government-mandated access to cable network platforms. Indeed, the legal infirmities of forced access do not depend upon adoption of any particular regulatory label for cable modem service. No matter what regulatory label is attached to cable modem service, there is simply no statutory or regulatory basis for authorizing the drastic step of mandating access to cable network platforms for competing ISPs.

Lastly, the Commission must take great care not to conflate the issues raised by unaffiliated ISP access to cable broadband networks with any issues associated with the provision of interactive television services. The manner in which cable operators select and provide interactive television services implicates a host of complex and unique business and technical issues, as well as core statutory and Constitutional issues. These issues are separate and distinct from the question of whether to grant ISPs access to cable networks in order to offer high-speed Internet service, and are therefore well beyond the scope of this proceeding.

I. THE COMMISSION SHOULD MAINTAIN ITS “HANDS-OFF” POLICY TOWARD CABLE BROADBAND SERVICES

Since first being confronted with the issue in late 1998, the Commission has wisely declined repeated requests to impose forced access requirements on cable operators. In the First Section 706 Report, the Commission declined entreaties to grant ISPs a right of access to cable

broadband networks, noting that the “preconditions for monopoly appear absent” and that “multiple methods of increasing bandwidth are or soon will be made available to a broad range of customers.”^{5/} On several subsequent occasions, the Commission and its staff reiterated the view that forced access requirements were both unnecessary and unwise.^{6/}

The Commission’s assessment of the marketplace could not have been more prescient; its hands-off approach has resulted in a remarkable growth in broadband subscribership and competition. Measured by any yardstick, the Commission’s hands-off policy has been an unqualified success.^{7/}

* **Broadband subscribership has increased exponentially.** Since late 1998, the total number of residential and small business high-speed customers served by cable operators, DSL, satellite, fixed wireless and other broadband providers has increased by over seven hundred percent from 375,000 to 3.1 million.^{8/}

^{5/} First Section 706 Report at ¶ 101; id. at ¶ 48.

^{6/} See Applications for Consent to Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group to AT&T, CS Docket No. 99-251, ¶127; Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee, CS Docket No. 98-178, ¶ 96; Remarks by Michael K. Powell, Before the FCBA (Chicago Chapter), Chicago, IL (June 15, 1999), <http://www.fcc.gov/speeches/Powell/spmkp902.html>; Broadband Today, FCC Cable Services Bureau Staff Report, October 1999 at 44 (noting that “the market is the only force, at this stage, that is sufficiently dynamic and informed to create a competitive broadband marketplace,” and that imposing forced access “would be unsound public policy that could have the unintended effect of impeding the rapid development of this industry”).

^{7/} Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, (rel. Aug. 21, 2000) (“Second Section 706 Report”) (noting that in the broadband and advanced services area, “competition is emerging, rapid buildout of necessary infrastructure continues, and extensive investment is pouring into this segment of the economy”).

^{8/} High-Speed Services for Internet Access: Subscribership as of June 30, 2000, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, October 2000 at 3 and Table 3 (“High-Speed Services Report”).

- * **Investment in broadband infrastructure continues to accelerate.** In the last two years, investment in broadband network infrastructure and equipment from all segments of the communications industry “has increased dramatically, and analysts forecast that this upward trend will continue.”^{9/}
- * **Competition among broadband providers has intensified.** While the number of cable modem subscribers is expected to reach 2.9 million by the end of this year, up from 350,000 in late 1998, the number of DSL subscribers has jumped nearly ten thousand percent, from 25,000 in late 1998 to an anticipated 2.34 million by year-end 2000. Last year, the number of cable modem service subscribers grew by 57 percent while the number of DSL customers jumped 159 percent.^{10/}
- * **Broadband service pricing is highly competitive.** Monthly service prices charged by many broadband providers have held steady or declined over the last year, and consumers continue to benefit from incentives and promotions that lower initial installation costs.^{11/} Monthly broadband service prices are now comparable to, or lower than, the monthly price paid by the typical narrowband service customer utilizing a second line.^{12/} Analysts

^{9/} See Second Section 706 Report, ¶¶ 185, 187-81 (describing aggregate infrastructure investment expenditures of cable operators, incumbent LECs, competitive LECs, wireless, and satellite providers).

^{10/} Compare First Section 706 Report at para. 91, p. 2446; “The Global Internet Primer,” Morgan Stanley Dean Witter (June 2000); see also “Commentary: Challenges faces Net access providers,” CNET News, November 27, 2000, <http://news.cnet.com/news/0-1004-201-3879780-0.html> (estimating that cable modem and DSL providers “has roughly 2 million to 3 million subscribers”). In addition, nearly 65,000 residential and small business subscribers obtain high-speed service from satellite and fixed wireless providers. High-Speed Services Report at Table 3.

^{11/} See, e.g., *DSL v. Cable: The Final Analysis*, at <http://home.cnet.com/internet/0-3763-7-2643122.html?tag=st.int3762-7-2643119.txt.3762-7-2643122> (visited Nov. 30, 2000) (stating that “[b]oth cable and DSL monthly access fees get lower every day”); “SBC Latest Baby Bell to Slash DSL Prices,” CNET News, September 1, 2000, <http://news.cnet.com/news/0-1004-20-2668695.html> (noting that SBC reduced the cost of its enhanced residential DSL service by \$20 per month, which includes a customized Compaq personal computer); “Verizon Communications cuts DSL prices,” CNET News, July 6, 2000, <http://news.cnet.com/news/0-1004-200-2212919.html> (stating that Verizon “has cut prices for its high-speed Internet service by 20 percent . . . in Northeast and Mid-Atlantic states such as New York, Massachusetts and Pennsylvania”); *id.* (“The DSL price cuts mark the latest in a string of broadband price cuts that underscore the maturation of the high-speed Net access market”); “Verizon Slashes DSL Prices in Some Areas,” CNET News, September 5, 2000, <http://news.cnet.com/news/0-1-4-200-2704270.html> (“Competition from smaller DSL companies and cable operators . . . has contributed to the price wars”). See also *infra* at pp. 9-10 and nn.17-19.

^{12/} See “Cable Modem Guide,” at <http://www.zdnet.com/zdhelp/stories/main/0,5594,2278598,00> (visited Nov. 30, 2000) (noting that an Internet user employing a second line is “probably paying between \$35 and \$45 per month for dial-up Internet access at speeds up to

expect that “steep growth in broadband will bring lower rates for high-speed and dial-up Internet access in the next 5 years. . .”^{13/}

- * **Broadband content choices available to consumers have expanded dramatically.** In the last two years, full-motion video, movies, music, sports, educational content and a sweeping range of e-commerce services and applications have become available to broadband subscribers.^{14/}

In short, all of the available evidence demonstrates that the marketplace is working effectively to provide consumers with broadband Internet service choices at competitive prices.

A. The Rapid Build-out of Cablevision’s Broadband Infrastructure, and the Acceleration in Broadband Subscribership and Competition in its Service Areas, Underscore the Success of the Commission’s Hands-off Policy

Cablevision’s experience providing cable modem service within its geographic service areas during the last two years has mirrored the broader developments in the marketplace as a whole with respect to broadband competition and consumer choice. The FCC’s policy of restraint has created a regulatory environment that fosters substantial broadband investment by companies like Cablevision. Moreover, it is particularly noteworthy that the increase in Optimum Online subscribership has been accompanied by an equally rapid growth in

56kbps,” while cable modem users generally “pay around \$40 per month for unlimited, ‘always connected’ access at speeds up to 10Mbps”); *see also* “DSL Price Continues to Drop,” at <http://www.help.com/cgi-perl/question/3/299/307?sidx=2315480&from=http://www.help.com&tag=st.cn.sr.hp.1> (Sept. 2, 2000) (stating that “consumers are getting the benefit of active competition between cable companies and telecommunications carriers,” and discussing cuts that have brought DSL prices to under \$40).

^{13/} “Short Take: Broadband growth may drive down monthly fees,” *CNET News*, November 2, 2000, <http://news.cnet.com/news/0-1004-200-3365182.html>.

^{14/} *See* “Unshackling Broadband From TV,” at <http://www.zdnet.com/zdnn/stories/comment/0,5859,2650109,00.html> (Nov. 3, 2000) (“Broadband content has already demonstrated its staying power among the hottest fields of online development”); “Digital Debacle,” at <http://www.zdnet.com/devhead/stories/articles/0,4413,2644179,00.html> (visited Nov. 29, 2000) (noting the development of content that will provide interactivity, new paradigms of text, and streaming media).

competition from other broadband providers, thereby reinforcing the competitive and consumers benefits of the FCC's decision to refrain from imposing forced access requirements.

Cablevision's substantial investment in broadband network infrastructure has made high-speed Internet access available to hundreds of thousands of new homes in the last two years. Cablevision began an aggressive rebuild and upgrade of its networks in 1998, and expects to have spent over one billion dollars on its broadband project by the time of its scheduled completion in 2003. As a result of this substantial investment, the number of homes able to receive cable modem service from Cablevision has grown from over 600,000 in 1998 to 2.1 million by year-end 2000. Presently, 51 percent of the company's potential customer base has access to broadband and high-speed cable services; by 2003, the company expects that all of its potential subscriber base will have access to such services.

Cablevision is making high-speed Internet access service available in low-income areas. Cablevision's broadband network investments have made high-speed Internet access service available to tens of thousands of homes in low-income neighborhoods in cities such as Newark, NJ, Bridgeport, CT, Elizabeth, NJ and Norwalk, CT. Cablevision's rebuild and upgrade activities also are underway in the Bronx, and the company has recently begun offering Optimum Online to thousands of Brooklyn residents.

Optimum Online subscribership has grown dramatically. In the last two years, the number of cable modem subscribers served by Cablevision has grown substantially, from just over 11,000 at the end of 1998 to more than 190,000 at present.

Cablevision faces vigorous competition from an array of broadband service providers. In its franchise areas, Cablevision faces intense competition in the provision of high-speed service from a variety of broadband providers and technologies, including Verizon,

SBC/SNET, and RCN. More homes in Cablevision's service area have access to DSL service than to Optimum Online. In fact, Verizon's DSL service alone is estimated to be available to at least half of the four million homes passed by Cablevision's cable network. SNET's DSL offering is now available to more than 700,000 homes in Connecticut, and serves a majority of the 24 towns in the state served by Cablevision.^{15/} RCN is presently furnishing high-speed Internet access to its customers in New York City, and will soon be offering it in several New Jersey franchise areas served by Cablevision.^{16/} Moreover, narrowband Internet access remain the dominant providers of Internet access service.

Broadband service prices in Cablevision's franchise area are falling. Not surprisingly, given the array of competing service providers, the prices charged by Cablevision for its Optimum Online service are highly competitive. In 1998, the monthly price charged to Cablevision subscribers for Optimum Online was \$34.95 per month; today the typical Cablevision subscriber pays a monthly rate of \$29.95. Meanwhile, both Verizon and SBC/SNET have cut their DSL prices.^{17/}

Cablevision is making it easier and more affordable for consumers to obtain high-speed Internet access. Cablevision has pioneered the use of retail outlets and self-installation programs in order to make becoming a high-speed Internet access customer easier, more

^{15/} "SNET offers DSL Internet Service and new computer special," News Release, at <http://www.snet.com/About/NewsCenter/ShowRelease/0,1346,20001019-01,00.html?NID=> (Oct. 19, 2000).

^{16/} See http://www.rcn.com/support/cable_modem/faq/general/index.html; see also, "RCN To Expand its Northern New Jersey Cluster," Press Release, at <http://www.rcn.com/investor/press/07-00/07-25-00/index.html> (July 25, 2000).

^{17/} See *supra* at n.11; see also "Verizon cuts prices," *ZDNet*, September 6, 2000 ("Verizon Online is cutting prices on DSL subscriptions for existing customers and waiving modem fees for new sign-ups") <http://zdnet.com/zdnn/stories/bursts/0,7407,2625007,00.html>

consumer-friendly and more affordable.^{18/} For example, Cablevision is currently offering a holiday promotion under which customers that purchase \$100 worth of items at The Wiz retail stores can obtain a free cable modem from Optimum Online. In addition, new customers also can receive their first month of service free.

The Wiz stores feature kiosks that enable customers to “test-drive” cable modem service, trained personnel who offer instructions and tips on self-installation, and an instructional videotape to use at home, thereby facilitating additional savings by enabling customers to avoid installation costs. Further, customers utilizing self-installation have 24-hour access to trained customer representatives to help them through the entire self-installation process. This year, thousands of new Optimum Online subscribers have opted for self-installation, and over 80 percent complete the installation without assistance from customer service.

The popularity of self-installation is underscored by the fact that broadband competitors such as Verizon and SBC/SNET now offer this option to their customers. In addition, the providers also are offering promotions and other incentives aimed at growing their subscriber base.^{19/}

Cablevision is providing non-commercial, community-specific online educational content. Cablevision’s investment in, and emphasis on, “significant operator-provided content” has been expressly recognized by the FCC’s Office of Plans and Policy, in its white paper on

^{18/} See e.g., “Do It Yourself,” Wall Street Journal, June 26, 2000; “Venturing Into Retail: Potential Customers Can ‘Experience’ High Speed Access Both in Stores and on The Web,” Extra Extra Daily, July 17, 2000.

^{19/} See SBC Unveils New DSL/PC Promotion With Prodigy, at http://www.sbc.com/News_Center/1,3950,31,00.html?query=20000901-1 (visited Nov. 30, 2000) (noting that SBC offered consumers three months of DSL free and reduced monthly charges for consumers signing up for SBC’s “DSL Internet service and the DSL-equipped Compaq PC”); Verizon Online DSL, at <http://www.bel-atl.com/infospeed> (offering a free period of service, free activation, and free modem to subscribers who order online).

cable-delivered Internet services,^{20/} and reflects the company's roots as one of the pioneers of local and regional cable programming content.

Approximately two years ago, Cablevision launched yet another innovative content initiative. Power To Learn™ is an online educational initiative designed to enable teachers, students and parents to integrate and utilize the power of the Internet in a commercial-free environment.^{21/} Power To Learn is an advertising free service tailored specifically for teachers, students and parents in the New York metropolitan area, offering high-speed Internet access to schools and libraries, an online learning community, and training programs and materials to assist teachers in integrating the Internet into their classrooms. Designed through cooperation and consultation with local teachers and educators, Power to Learn has been described by one local publication as a "cyberspace extension of the classroom" that is making Cablevision into "one of the most effective tutors our children can have."^{22/} Through Power to Learn, Cablevision also has provided more than 50 libraries on Long Island and 500 public and private schools with high-speed, broadband Internet connections at no charge.

Cablevision's substantial broadband infrastructure investments, its commitment to making high-speed Internet access available in low-income areas, its marketing activities aimed at making cable modem service more readily available, easier to use and more affordable, and the company's Power to Learn initiative are all a testament to the success of the Commission's

^{20/} B. Esbin, INTERNET OVER CABLE: DEFINING THE FUTURE IN TERMS OF THE PAST, FCC Office of Plans and Policy Working Paper Series, No. 30 (August 1998), at 79. ("Internet over Cable").

^{21/} <http://www.powertolearn.com/home/index.html>

^{22/} "A true partnership between business and the classroom," Long Island Business News, March 17, 2000; see also Linda Saslow, "Back to School: Double Click on Education: Explosion of Online Programs in Schools Challenges the Concept of the Classroom," New York Times, September 3, 2000.

hands-off policy. That regulatory policy of restraint is allowing the company to focus on what it needs to do in the market, which is to invest substantial capital to build a broadband network and undertake bold new broadband marketing and content initiatives. Likewise, the decline in price for Cablevision's cable modem service and the proliferation of broadband service providers in its geographic areas illustrate that the hands-off policy is also providing consumers with more choices at competitive prices.

B. There Is No Sound Policy Basis for Substituting the Commission's Successful Hands-off Policy with a Forced Access Regime

Cable operators, telephone companies, and other providers are rapidly deploying broadband networks and services. The phenomenal growth in subscribership over the last two years demonstrates that the Commission's hands-off approach has spurred broadband competition and provided consumers with new services and more choices at competitive prices.

Residential consumer access to the Internet is not a "broken" market drastically in need of a government "fix." There is no tangible competitive or consumer harm warranting the intrusive remedy of forced access. Tellingly, forced access proponents have been repeatedly unable to proffer any concrete evidence of a present market failure associated with the provision of cable modem service that necessitates the imposition of the draconian remedy they seek. In the face of marketplace facts that prove the utility of the FCC's hands-off policies, forced access proponents have done little more than conjure potential harms that might arise at some unspecified future time which they believe can only be remedied through drastic government intervention now. This invitation to set policy based upon the gloomy and unfounded prophecies of forced access proponents should be soundly rejected by the FCC, particularly in light of the powerful empirical record demonstrating the success of its current approach.

Internet access subscribers are interested primarily in obtaining full and unfettered access to any content on the Web at a competitive price. Optimum Online subscribers can reach any content available on the Internet, customize their own home pages or “start screens,” and access their favorite Web sites without having to navigate through mandatory welcome screens, advertisements, or pop-up promotions from Cablevision. Further, Optimum Online subscribers can avail themselves of the services and content offered by other ISPs. For instance, customer survey information shows that approximately 52% of new Optimum Online customers also subscribe to AOL. An Optimum Online subscriber can obtain both Cablevision’s broadband offering and AOL services, content and features for \$39.90, which is comparable to, or less than, the price paid for obtaining AOL over a second telephone line.^{23/}

The inability of forced access proponents to identify any concrete competitive or consumer harm that justifies the remedy they seek reveals the true purpose of their position: they want the terms and conditions for access set by government fiat rather than marketplace arrangements and business negotiations. Whether an ISP requires a cable modem service subscriber -- or any other broadband customer -- to pay in order to obtain access to content, services and capabilities offered by that provider is entirely up to that ISP. Yahoo, Amazon, and Real Networks, for example, do not charge users that seek access to their content and services; AOL charges a reduced price of \$9.95 for their content and services for subscribers that do not use AOL to obtain an Internet connection. Still other ISPs may require those so-called Bring Your Own Access subscribers to pay full price in order to have access to their content and capabilities. The forced access “debate” is more an issue of price points and business models --

^{23/} See <http://www.optimumonline.com/1aol>.

which are best left to marketplace negotiations -- than a matter of remedying a demonstrable market defect.

There is no need for the Commission to intervene in the marketplace in order to “preserve” consumer access to content or ISPs, since cable modem service providers do not restrict such access. Moreover, given the competitiveness of the broadband marketplace, any broadband provider that sought to restrict access to, or refused to negotiate with, unaffiliated ISPs that offer services, capabilities and content of interest to broadband consumers (whether or not those ISPs require subscriber to pay extra for such offerings), would risk losing business to competitors that are open to such arrangements.

II. REGARDLESS OF THE REGULATORY CLASSIFICATION ACCORDED CABLE MODEM SERVICE, THERE IS NO LEGAL AUTHORITY FOR IMPOSING FORCED ACCESS REQUIREMENTS ON CABLE OPERATORS

A. There is No Statutory or Constitutional Basis for Requiring Cable Operators to Provide Unaffiliated ISPs with Access to Cable Broadband Facilities

In the last year, three different Federal courts have rejected efforts to impose government-mandated access to cable networks for third-party ISPs. Thus, not only are there now two years of solid marketplace results that confirm the success of the Commission’s policy of vigilant restraint, there are also now three different court decisions that reinforce the wisdom of that policy.^{24/} Indeed, these decisions serve to highlight the risks associated with embarking down the road of government-imposed requirements for forced access. Proponents of forced access effectively seek to trade the proven investment and marketplace results and stable legal ground associated with the Commission’s “hands-off” policy for the dampened investment climate and shaky legal terrain associated with forced access.

^{24/} AT&T Corp. v. City of Portland, 216 F.3d 871 (9th Cir. 2000); Media One Group v. County of Henrico, 97 F.Supp.2d 712 (E.D. Va. 2000); Comcast Cablevision of Broward County v. Broward County, Florida, Case No. 99-6934-Civ-Middlebrooks (rel. Nov. 8, 2000).

While the rationales for the district court decisions in Broward County and Henrico County, and the 9th Circuit’s decision in City of Portland, have varied,^{25/} such variances only prove that forced access contravenes several different relevant Constitutional and statutory provisions. As detailed more fully in the comments submitted in this proceeding by the National Cable Television Association, regardless of the regulatory classification that is affixed to cable modem service, the result is the same: there is no legal basis for imposing forced access requirements on cable operators.^{26/}

As demonstrated by the recent decision in the Broward County case, there are also constitutional issues that constrain the Commission’s authority to order forced access. It is well established that cable programmers and cable operators “engage in and transmit speech, and they are entitled to the protection of speech and press provisions of the First Amendment.”^{27/} These speech rights also are fully implicated when operators provide cable modem service.^{28/}

At a minimum, courts are obligated to determine whether a burden imposed on the speech rights and editorial activities of cable operators furthers a substantial or important government interest and alleviates a “real, not merely conjectural harm” in a “direct and material

^{25/} See AT&T Corp. v. City of Portland, 216 F.3d at 877 (holding that the county could not impose forced access through its franchising authority); Media One Group v. County of Henrico, 97 F.Supp. 2d at 716 (holding that the Henrico Ordinance imposing forced access is preempted by Title VI of the Communications Act); Comcast Cablevision of Broward County v. Broward County, Florida, slip op. at 21-27 (holding that the Broward County ordinance imposing forced access violates the First Amendment).

^{26/} See Comments of National Cable Television Association.

^{27/} Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 636 (1994) (“Turner I”), citing Leathers v. Medlock, 499 U.S. 439, 444 (1991); City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986) (“the activities in which [a cable operator] ... engage[s] plainly implicate First Amendment interests.”).

^{28/} Broward County, slip op. at 11-14.

way.”^{29/} After observing that most Americans receive Internet access from narrowband providers and noting both the substantial competition presently faced by cable modem providers from DSL providers and the “large number of potential entrants” that will soon be entering the residential broadband market, the court in Broward County court concluded that whatever “harm the ordinance is purported to address appears to be non-existent.”^{30/} Having failed to find that the burdens on cable operator speech rights imposed by forced access are aimed at preventing a harm that “is real, not merely conjectural,” the court concluded that the Broward County ordinance violates the First Amendment.^{31/}

B. Interactive Television Issues Are Beyond the Scope of this Proceeding

The NOI alludes to potential issues arising in connection with the provision of interactive television services by cable operators,^{32/} and some participants in the forced access debate appear intent on using the issue as a Trojan Horse to support the imposition of regulatory constraints or even common carrier-like obligations on the provision of interactive television services.^{33/} Cablevision urges the Commission to avoid conflating the issue of access to cable broadband

^{29/} Turner I, 512 U.S. at 664.

^{30/} Broward County, slip op. at 25-26.

^{31/} Id. at 24, 26. A forced access regime also raises takings issues under the Constitution, since cable operators would be compelled by the government to involuntarily surrender a portion of their property for use by others. Forced access would result in both a government-authorized permanent physical occupation of cable operator property by another, as well as direct interference with the use of that property by operators, and would thereby constitute a regulatory taking subject to the Constitutional requirement of just compensation. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982); Keystone Bituminous Coal Ass’n v. Duncan, 771 F.2d 707, 712 (3d Cir.), *aff’d*, 480 U.S. 470, 488 (1987).

^{32/} NOI at ¶ 49.

^{33/} See e.g., In the Matter of Applications of America Online, Inc. and Time Warner, Inc. for Transfers of Control, CS Docket No. 00-30, Ex Parte Presentation of The Walt Disney Company at 53-80 (filed July 27, 2000).

networks for unaffiliated ISPs with any issues associated with the nascent market for interactive television services.

The selection, packaging, and tiering or positioning of video programming services -- whether one-way or interactive -- for distribution to subscribers is the heart of the cable television business. Any government regulation that interferes with the manner by which cable operators select and provide interactive television services to their subscribers implicates core business, statutory and Constitutional issues for cable operators, as well as a range of complex technological and equipment issues. These issues are separate and distinct from the question of whether to force cable operators to provide ISPs with wholesale access to their networks in order to offer high-speed Internet service, and are therefore well beyond the scope of this proceeding. Thus, even if the Commission determines that it has some authority to regulate access to cable broadband platforms for unaffiliated ISPs, that determination has no bearing or effect on the legal and regulatory framework governing cable operator provision of interactive television services.

CONCLUSION

The comments set forth herein provide clear evidence of vigorous competition among broadband technologies and the proliferation of investment in broadband networks and content in accordance with the demands and dynamics of the marketplace. The marketplace facts demonstrate that there is no threat to competition or consumers that would necessitate a change in the Commission's policy of monitoring the broadband market while allowing it to develop without government intervention. Thus, the Commission should reiterate its continued support for its "hands-off" policy vis-à-vis regulation of the broadband services market and cable modem services.

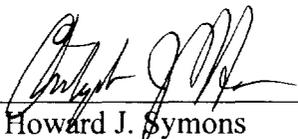
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I, Jonathan P. Cody, hereby certify that on this 1st day of December, 2000, I caused true and correct copies of the foregoing Comments of Cablevision Systems Corp. to be hand-delivered to the following persons:

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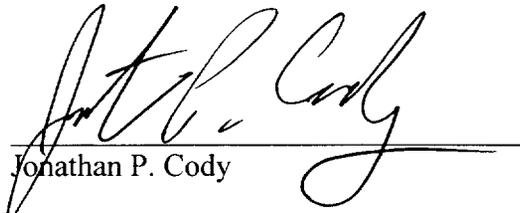
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