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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

OPENNET COALITION

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SUMMARY OF COMMENTS SUBMITTED BY THE THE OPENNET COALITION

The OpenNet Coalition, the nation's largest Internet Service Provider ("ISP") coalition representing nearly 1,000 ISPs and Internet-related companies, submits the attached comments in response to the Federal Communications Commission's ("Commission") Notice of Inquiry ("NOI") issued on September 28, 2000.

Openness and competition have driven the extraordinary success of the Internet and resulted in consumers reaping the benefits of lower prices, better services, innovation and investment among Internet Service Providers. Through this NOI, the Commission has the opportunity to immediately extend these consumer benefits to high-speed Internet access provided through cable systems by recognizing, consistent with the Communications Act and the Ninth Circuit's decision of *AT&T Corp. v. City of Portland*, that cable Internet service is a telecommunications service subject to federal non-discrimination requirements governing such services. In addition, the Commission should establish and enforce a national framework that sets forth minimum non-discriminatory open access requirements for cable Internet access as detailed in these comments.

The Commission's current "hands off" regulatory framework with respect to cable Internet access is based on the erroneous premise that such an approach fosters the creation of a competitive high-speed Internet market. Since cable currently controls over 80% of the high-speed Internet access market, there is effectively no significant competition in the broadband Internet access market. Market forces alone will not provide the competition that the Commission seeks to foster because cable operators, by and large, have been unwilling to allow cable Internet consumers to subscribe to non-affiliated ISPs that directly provide service over broadband cable lines.

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COMMENTS OF THE OPENNET COALITION

The OpenNet Coalition, the nation's largest Internet Service Provider ("ISP") coalition representing nearly 1,000 ISPs and Internet-related companies, [1] by its counsel submits these comments in response to the Federal Communications Commission's ("Commission") Notice of Inquiry ("NOI") issued on September 28, 2000.[2] The NOI seeks to explore issues surrounding high-speed Internet service, particularly access provided over cable systems, and also seeks comment on the legal and policy approach to be accorded to high-speed Internet service provided over various platforms.

I. INTRODUCTION

OpenNET believes that openness and competition have driven the extraordinary success of the Internet. Consumers have been able to choose from among thousands of ISPs and from among even more providers of Internet content and applications. In the transition to broadband technologies, OpenNET considers it vitally important to preserve the openness and competition which have led to lower prices, better services, innovation and investment.

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[1] For a list of openNET members as well as more information about the coalition, see the website www.opennetcoalition.org.

[2] *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Notice of Inquiry, GN Docket No. 00-185, (September 28, 2000) (hereafter the "NOI").

Because telephone companies have been barred by federal law and regulation from limiting dial-up and Digital Subscriber Line ("DSL") Internet access over telephone lines to affiliated ISPs, thousands of ISPs have emerged nationwide to afford consumers a wide range of options for obtaining access to the Internet, on-line services, and Internet content. If the rules had been otherwise (i.e., if a local telephone company were allowed to limit consumer access to ISPs over the company's phone lines), the healthy and vibrant market for on-line services would not exist today.

Technology is now being developed and deployed to permit access to the Internet at broadband speeds many times faster than the narrowband speed available through dial-up telephone modems. The faster connection allows users access to a wide variety of content, applications and services that are simply not deliverable over a narrowband connection. What is at stake in this proceeding is whether local cable operators can maintain their stranglehold on consumers' speedy access to the Internet through cable modems.

Cable operators want to force those seeking cable Internet access to purchase the services of the ISP affiliated with the cable operator, whether or not consumers would prefer another ISP.[3] This proposition forecloses competition and eliminates consumer choice. A basic requirement for high-speed cable Internet open access, as is the case for all other telecommunications service providers under the Communications Act of 1934, as amended ("the Act"), would allow consumers to obtain the Internet services of their choice without having to pay for unwanted services.

Through this proceeding, the Commission has the opportunity to correct the current regulatory disparity in the treatment of competing broadband Internet providers and ensure that

[3] *See generally*, "Cable Alliances Prompt Some Consumers to Pay Twice for Web Access," *Wall Street Journal* B1 (Nov. 20, 2000).

all Internet users, regardless of which medium they choose to access the Internet, have the ability to choose their preferred Internet Service Provider. While the Commission has requested comments on "numerous different technological and economic models for what open access might mean,"[4] the Commission should ***not*** limit its use of this NOI process solely to determine whether it should "initiate a rulemaking to consider adopting rules, policies, and regulations governing cable modem service or access to the cable modem platform."[5] The Commission should rather immediately recognize, and thereby extend to the rest of the nation, the U.S. Court of Appeals for the Ninth Circuit's finding that the transmission component of cable broadband services is, under federal law, a "telecommunications service" that must be offered on a nondiscriminatory basis.[6]

Under the Act, the transmission of data to the Internet, whether through twisted copper or coaxial cable and irrespective of speed (*i.e.*, narrowband or broadband), is inherently a telecommunications function and must be governed by the same policies, principles and dictates governing other telecommunications transmission. The most important of these is the requirement that all providers of telecommunications services must make those services available to any requesting party on nondiscriminatory terms.

Accordingly, the Commission should require cable operators providing the transmission of cable broadband service to provide non-affiliated ISPs nondiscriminatory open access to this service and the underlying telecommunications platform. The Commission should also establish and enforce a national open access framework that meets the following minimum requirements:

- Consumers of high-speed cable services should have choice among multiple ISPs;

[4] NOI at ¶ 27.

[5] *Id.* at ¶ 52.

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

- Cable providers must negotiate "arms-length" nondiscriminatory commercial arrangements with both affiliated ISPs and non-affiliated ISPs;
- Cable operators must provide nondiscriminatory network management of their system;
- ISPs should be allowed to purchase high-speed backbone transport services of their choice;
- ISPs should have the choice of operating on a national, regional or local basis;
- Both the ISP and the cable operator should have the opportunity for a direct relationship with the consumer;
- ISPs should be allowed to provide video streaming and there should be no discriminatory restrictions on the provision of content;
- ISPs should have the opportunity to connect to the cable provider's network at any technically feasible point.

The Commission's current "hands off" regulatory framework with respect to cable Internet access is based on the mistaken premise that such an approach fosters the creation of a competitive high-speed Internet market because "multiple methods of increasing bandwidth are or soon will be made available to a broad range of customers."[7] As a practical matter, only two methods of two-way high-speed Internet access (two-way transmission at over 200 kilobits per second) are presently available for most Internet subscribers in the United States –cable Internet access and DSL.[8] DSL, however, has technical limitations which make it unavailable to many Americans.

In the August 2000 *Report on the Availability of High-Speed and Advanced Telecommunications Services*, the Commission found that cable's share of the residential

[7] NOI at ¶ 4.

[8] For example, with regard to the other high-speed services available, according to the Commission's October 2000 *Report on Internet Access Subscribership*, satellite and fixed wireless lines represent a mere 3,649 subscribers (or 0.2% of the total advanced services subscribers in the country).

advanced services market is 84%, compared with DSL's 11%.[9] Thus, the cable industry controls the vast majority of the high-speed Internet access market. For this reason, the Commission must impose on providers of cable Internet access the common carrier requirements applicable to "telecommunications services" under the Communications Act.

While the Commission desires to "develop a record that examines the full range of high-speed providers,"[10] the Commission should not allow the wide scope of that inquiry to delay immediate action to address the present exclusion of cable Internet access from enforcement under the provisions of Sections 201, 202, 251 of the Act. Immediate Commission action should be limited to the dominant player in the high-speed Internet access arena: cable broadband. As other nascent industries such as satellite and wireless grow, they will need to be evaluated in their own light.

Failure to immediately require cable operators, as providers of telecommunications services, to also provide nondiscriminatory open access will only serve to allow cable operators to further consolidate their dominant market share over the high-speed Internet marketplace and further impede the growth and development of the Internet. By recognizing that cable Internet access is a telecommunications service, Commission has the opportunity to ensure robust competition among ISPs regardless of which medium their customers use to access the Internet. OpenNET urges the Commission to move promptly to create and enforce a national policy of open access that recognizes that the transmission portion of cable broadband service is a telecommunications service subject to nondiscriminatory open access requirements.

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[9] Federal Communications Commission, *FCC Report On the Availability of High-Speed and Advanced Telecommunications Services; Nationwide Survey of Subscription to High-Speed and Advanced Telecommunications Services Shows 2.8 Million Total Subscribers*, August 3, 2000. Attachment A.

[10] NOI at ¶ 3.

II. OPEN ACCESS IS A DESIRABLE PUBLIC POLICY GOAL

Competition among ISPs is necessary to ensure the widespread availability of high-speed, high-quality services at competitive rates. Competition over narrowband and DSL Internet access platforms has led to the creation of approximately 7,000 ISPs nationwide. These ISPs range from large national ISPs such as America Online and Earthlink, to smaller, community-based ISPs such as CapuNet in Rockville, Maryland. Consumers choose ISPs for a variety of different personal and financial reasons. For example, ISPs offering low cost services help to bridge the "Digital Divide" by making the Internet more accessible to lower-income families and have contributed dramatically to the growth of the industry. Certain ISPs focusing on specialized demographics such as the elderly, African-American, and Hispanic communities, also respond to particular needs and interests and help to bring the Internet to broader segments of the population.

Because many ISPs have become "content aggregators" offering varied content and diverse applications – in addition to basic "on-ramp" capability, preserving choice in the ISP marketplace is key to allowing consumers to "vote with their feet" and switch ISPs if they do not like the content and/or applications of the ISP affiliated with their cable modem service provider.[11] As Professors Larry Lessig and Mark Lemley note:

> The functions performed by ISPs, however, are not fixed. They have no inherent "nature." Hence as bandwidth changes from narrow to broadband, we should expect the range of services offered by ISPs to change. . . .
>
> The functions of ISPs, then, must not be conceived of too narrowly. . . . Their importance is in the range of services they might bundle and offer competitively—from content (including

[11] *See generally,* United States General Accounting Office (GAO) Report to the Subcommittee on Antitrust, Business Rights and Competition Committee on the Judiciary, US Senate, Technological *and Regulatory Factors Affecting Consumer Choice of Internet Providers*, (October 2000), at 30 (hereafter the "GAO Report").

> video and audio services) to help functions to reference functions to special caching needs. In short, ISPs are engines for innovation in markets we do not yet imagine.... This layer of potential competition is especially important given how little we know about how the broadband market will develop. [12]

The historical significance of mandated nondiscriminatory open access to the development of the Internet industry cannot be overstated. As noted in an October 2000 report on *Consumer Choice in Internet Providers* from the General Accounting Office (GAO):

> . . . . many of the industry participants and experts [with whom the GAO spoke] told us that telephone laws and regulations were fundamental in promoting the development and growth of the ISP industry. The regulatory distinction between transport and data processing functions, combined with FCC close regulation of telephone companies' participation in the data processing layer, led to the creation of new independent companies to provide Internet services and also kept these ISPs largely free of regulation. *Moreover, the common carrier status of telephone companies, which requires that they provide nondiscriminatory service at just and reasonable rates, worked to give ISPs easy access to consumers through the telephone network.* (emphasis supplied).[13]

Without mandated open access to the publicly switched telephone network, a diverse array of ISPs would not exist, let alone flourish. Absent corresponding open access via the cable medium, consumers who wish to retain their relationship with their ISP will be relegated to narrowband or be forced to pay for the cable ISP service in addition to their own choice of ISP. The result would be that independent ISPs are stifled.

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[12] *Ex Parte* regarding the Application for Consent to Transfer of Control of Licenses MediaOne Group, Inc., to AT&T Corp. (CS Docket No. 99-251), pp. 18-19 (November 11, 1999). *Citing* Timothy F. Bresnahan, *New Modes of Competition: Implications for the Future Structure of the Computer Industry*, June 1998, http://www/pff/org/pff/microsoft/bresnahan.html. As Timothy Bresnahan notes, we have no good way to know which layer in this chain of services will become the most crucial. Thus, multiplying the layers of competition provides a constant check on the dominance of any particular actor.[12]

[13]GAO Report at 23-24.

The Internet is maturing and customers are demanding higher-speed service. Internet usage is evolving from narrowband to broadband. Subscribership to high-speed services increased by 57% during the first half of 2000 to a total of 4.3 million lines or wireless channels in service.[14] In its October 2000 report, the GAO found that approximately 12% of Internet users have broadband connections.[15] In addition to increasing the speed at which users can navigate the Internet, high-speed Internet delivery offers consumers a wide variety of new content, applications and services that cannot be offered on narrowband. These new services include real-time video and audio downloads, videoconferencing, interactive television and video-streaming, to name a few. Without Commission action requiring nondiscriminatory open access, ISPs will be denied the opportunity to offer these new services to many of their customers because they lack access to broadband capacity.

Allowing a particular provider of transmission to the Internet, the owner of the wire, to prohibit competing ISPs from providing service over that medium will restrict the development of new technologies. For example, cable operators previously announced a decision to limit video streaming over cable modem service to ten minutes. While cable operators claimed this policy stemmed from technical limitations in the cable modem system, many observers pointed out that the policy more likely resulted from a business decision by cable operators to limit competition to the proprietary cable television service also owned by the owners of cable modem service, thereby impeding the development of this important new technology by limiting its markets.

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[14] Federal Communications Commission, *High Speed Services For Internet Access: Subscribership as of June 30, 2000*, October 2000.

[15] GAO Report at 11-12.

In addition to requiring consumers who seek access to their high-speed cable connections to subscribe to each cable company's affiliated ISPs, cable operators also have a great interest in directing those consumers involuntarily to websites that the cable company controls or supports. Such a consumer diversion can be easily accomplished by a cable operator by either providing links to affiliated sites or by intentionally slowing the speed at which consumers could access competing sites. As the Department of Justice noted in its decision requiring AT&T to divest its share of RoadRunner as part of AT&T's merger with MediaOne:

> AT&T's ability to affect the success of individual content providers also could be used to confer market power on individual content providers favored by AT&T. By exploiting its "gatekeeper" position in the residential broadband content market to extract anti-competitive terms and to disfavor certain content providers, AT&T could make it less attractive for content providers to invest in the creation of attractive broadband content thereby reducing the quality and quantity of broadband content in the future.
>
> AT&T could profit from the creation and exercise of such market power either through direct ownership of a favored content provider, or by obtaining payments from favored content providers in exchange for favorable treatment by Excite@Home and Road Runner.
>
> Excite@Home and Road Runner are positioned to become two of the most important providers of aggregation, promotion and distribution of residential broadband content.
>
> By virtue of the large number of subscribers to their residential broadband services, both firms will be able to significantly assist or retard the competitive efforts of broadband content providers, by granting or withholding aggregation, promotion, and distribution services or through the prices, terms, and conditions by which such services are provided. Moreover, because of their ownership affiliations and exclusive contracts with many of the largest cable MSOs, it is unlikely that other providers of residential broadband service will be able to enter and attract comparable numbers of subscribers in the near term.[16]

[16] *U.S. Department of Justice v. AT&T Corp. and MediaOne Group, Inc.*, Amended Complaint, May 26, 2000.

This concern is particularly urgent now because the broadband market is not competitive. As stated above, more than 84% of high-speed consumers use cable modem service where only 11% use DSL.[17] Furthermore, distance limitations exist that restrict the ability of DSL to compete head-to-head with cable Internet access. These limitations prevent DSL from serving households beyond 3 miles from the provider's central office[18] and preclude DSL from reaching significant numbers of American households. Despite marketing and cable industry rhetoric, other Internet access facility providers that could potentially compete with cable Internet access, such as satellite and wireless service, are truly in their infancy and may have other technical limitations which restrict their usability. By contrast, cable networks pass 96.6% of American television households.[19]

In the narrowband and DSL Internet transmission arenas, potential anti-competitive practices are held in check by the federally mandated open access provisions which allow a vast array of competing ISPs to offer their services over these systems. In the cable Internet access arena, however, anti-competitive practices have become widespread, because the owners of the broadband data transmission facility also control the consumer's choice of the ISP which will provide the Internet access. While the Commission has stated its policy is to secure robust competition among the different Internet delivery systems, its "hands off" regulatory approach to open access has limited the vast majority of broadband Internet users to only one choice for the delivery of high speed Internet access. As a result, the only way to ensure a truly competitive

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[17] FCC Report, August 3, 2000, supra.

[18] GAO Report at 17.

[19] Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Sixth Annual Report, CS Docket No. 99-230 (released Jan. 14, 2000) at ¶ 19.

market for ISP offerings is for the Commission to mandate the cable industry to allow all ISP competitors to share its wire to the home.

III. HIGH-SPEED CABLE MODEM TRANSMISSION SERVICE IS PROPERLY CLASSIFIED AS A TELECOMMUNICATIONS SERVICE

The Internet access service provided by cable companies and their affiliated ISPs bears little resemblance to traditional cable service, and is in many ways indistinguishable from services provided over telephone wires and regulated as telecommunications services under federal statute. Indeed, the Ninth Circuit recently addressed the proper classification of cable high-speed service in *AT&T Corp. v. City of Portland*,[20] and found that the transmission component of cable Internet access is not a cable service at all, but rather a telecommunications service. The court also determined that the content components of cable high-speed service, including the ISP home page, proprietary content, chat room services, are properly classified as information services. Consequently, the Ninth Circuit found that the transmission component of cable Internet access is fully subject to regulation under Title II of the Communications Act rather than the regulatory oversight of local franchising authorities or the Commissions Title VI jurisdiction.

In reaching its decision, the Ninth Circuit analyzed the nature of cable Internet access, both the broadband transmission functions and Internet access/content functions, in the context of the Communications Act's definition of "telecommunications service."[21] In noting that the hallmark of telecommunications service is the transmission of two-way communications,

[20] *City of Portland*, 216 F.3d 871.

[21] The Act defines "telecommunications service" 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." 47 U.S.S. 153(46). "Telecommunications" is separately defined as "the transmission, between or among points specified by the user, or information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

whereas traditional cable is inherently a one-way transmission mechanism, the Ninth Circuit stated that:

> Internet access is not one-way and general, but interactive and individualized beyond the "subscriber interaction" contemplated by the statute. Accessing Web pages, navigating the Web's hypertext links, corresponding via e-mail, and participating in live chat groups involve two-way communication and information transmission unmatched by the act of electing to receive one-way transmission of cable or pay-per-view television programming.[22]

The transmission component of cable Internet access is emblematic of the interactive nature of Internet communications and therefore a "telecommunications service," regardless whether the service is provided over a copper wire (traditionally used for telephone communications) or a coaxial cable wire (traditionally used for cable communications). The essential nature of the broadband telecommunications service, transmission of communications between the home and the ISP, is identical whether the customer obtains the communications service through a coaxial cable wire or a copper wire. As the Commission itself has recognized, "[f]unctionally, Internet access provided through cable modems is no different from the . . . capability provided over other facilities such as the wireline telephone network."[23]

A. The Type of Service, Not The Type of Facility Over Which The Service is Provided, is Determinative.

Proper application of the statutory definitions established by the Act dictate that that the transmission component of cable Internet access is a "telecommunications service." Recognizing that the underlying *raison d'etre* of the 1996 Telecommunications Act is to break down the artificial regulatory barriers that have imposed regulation on the basis of the historical service offered by the provider over a particular transmission facility, Congress directed that all

[22] *City of Portland*, 216 F.3d at 876.

[23] Brief of FCC as Amicus Curiae, *AT&T v. City of Portland*, at 25 ("FCC Ninth Circuit Amicus Brief").

services meeting a particular statutory definition be regulated the same. Thus, under the Act, a service satisfying the definition of "telecommunications service" qualifies as a telecommunications service "*regardless of the facilities used.*"[24] Therefore, "transmission" of "information of the user's choosing, without change in the form or content of the information as sent and received" is a "telecommunications service," whether offered over traditional copper telephone wires or traditional coaxial cable wires. The nature of the facilities used to provide the telecommunications service is irrelevant to determining the nature of the service provided.

Pursuant to the approach in the 1996 Act, the broadband services at issue here must be defined in the same way whether provided over a copper telephone wire or a coaxial cable wire. Consistent with that principle, the Commission itself has stated that "[i]f the same type of Internet access service is offered over cable systems as well as telephone networks, it is not readily apparent why the classification of the service should vary with the facilities used to the provide the service."[25] Additionally, in a recent Advanced Services Report, the Commission determined that "whether a capability is high-speed does not depend on the use of any particular technology or [the] nature of the provider."[26]

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[24] *See* 47 U.S.C. § 153(43), (46) (emphasis added). Similarly, in Section 706 of that Act, Congress stated that the term "advanced telecommunications capability," was to be *defined "without regard to any transmission media or technology*" (emphasis added) as "high-speed, switched, high-speed telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology." *See* 47 U.S.C. § 153(46) (service defined "regardless of the facilities used"); *see also* 47 U.S.C. § 541(b)(3)(A) ("If a cable operator is engaged in the provision of telecommunications services . . . ."); 47 U.S.C. § 224(d)(3) (authorizing FCC utility pole attachment rate-setting "for any pole attachment used by a cable system . . . to provide any telecommunications service).

[25] FCC Amicus Brief in Ninth Circuit, at 25.

[26] 1999 *Advanced Services Report*, 14 FCC Rcd 2398 (1999), ¶ 23.

B. Cable Modem Transmission Service Meets Neither the Statutory Definition of a Cable Service nor an Information Service.

The Act defines "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 services."[27] Since cable Internet access is not video programming, the operative term in this definition is "other programming service," which the statute defines as "information that a cable operator makes available to all subscribers generally,"[28] such as program guides, games and weather reports.

In order for this definition to apply, the information ***received*** by the subscriber, as opposed to information ***sent*** by the subscribers, cannot be individualized but must be information made "available to all subscribers generally." Internet data, including e-mails, chats, and other two-way interactive communications, are not made available to all subscribers generally. Congress reinforced this definitional boundary in its Conference Report accompanying the Act by stating that "[i]f information transmitted on a cable system is made available only to an individual subscriber or to a discrete group of subscribers, the transmission of this information is not a cable service."[29] Congress specifically referenced "shop-at-home and bank-at-home services, electronic mail... data processing, video-conferencing, and all voice communications," as the type referenced two-way interactive data services that are not cable services.[30]

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[27] 47 U.S.C. § 522(6).

[28] 47 U.S.C. §522(14).

[29] H.R. Rep. No. 98-934, at 41, 44.

[30] *Id.*

The essence of cable service is one-way transmission of programming to subscribers. Two-way individualized content, such as email and Internet content accessed by subscribers is outside the realm of traditional cable service. When it passed the 1984 Cable Communications Policy Act, Congress specifically contemplated the offering of two-way non-video services over the cable system, and expressly found that such services would not qualify as cable services.

> While cable operators are permitted under the provisions of Title VI to provide any mixture of cable and non-cable service they chose, the manner in which a cable service is marketed would not alter its status as a cable service. For instance, the combined offering of a non-cable shop-at-home service, with service that by itself met all the conditions for being a cable service, would not transform the shop-at-home service into a cable service, or transform the cable service into a non-cable communications service.[31]

As the Ninth Circuit recently observed, "[u]nlike the 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 views seemingly static content... Surfing cable channels is one thing; surfing the Internet over a cable high-speed connection is quite another."[32] Consequently, cable high-speed Internet service is neither "video programming" nor "other programming" under the Act and should not be afforded the regulatory exclusions of cable service.[33] Classification of cable Internet access as a cable service would negatively affect

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[31] Cable Communications Policy Act, Pub. L. No. 98-549, § 622, Legislative History at 44 (1984).

[32] *City of Portland*, 216 F.3d at 876.

[33] Interestingly, Cox Communications is the first cable company to apparently acknowledge that its high speed Internet service is a telecommunications service, albeit, only to the extent accepting such a classification benefits Cox. "'Cox apparently is seeking to reap what benefits it can from the holding of the City of Portland [decision], without any known commitment to meet its universal service obligations,' said Lawrence E. Sarjent, USTA vice president-regulatory affairs and general counsel. 'Cox's reasoning appears to be that high-speed data service is not considered a cable service under [AT&T v.] City of Portland, so that Cox no longer must pay cable franchising fees for that service.'" *Telecommunications Reports*, October 2, 2000.

the Commission's ability to establish a single national policy for the operation of high-speed data services and would result in competing service providers receiving different regulatory treatment. In short, high-speed service over coaxial cable wires, like high-speed service over copper telephone wires, is a telecommunications service and must be regulated as such.[34] As the *Portland* court held, "[w]e cannot rationally apply these cable television regulations to a non-broadcast interactive medium such as the Internet."[35]

The 1996 Amendment to the Act whereby Congress inserted the words "or use" into the definition of "cable services" ("subscriber interaction necessary to select or use ...information") plainly did not contemplate a broad expansion of the statutory definition of cable services. Rather, this amendment was merely intended to recognize that cable providers were offering new types of information to *all subscribers generally*, such as game channels and program guides.[36] The revised definition was not intended to cover subscriber-specific, *individualized* communications to the home such as e-mail, chat rooms or other Internet based services. Indeed, the 1996 Committee Report states that the amendment was "not intended to affect Federal or State regulation of telecommunications services offered through cable facilities."[37]

Nor is high-speed Internet access an "information service." Unlike the provider of a cable or telecommunications service, a provider of an information service does not maintain a wire or other connection directly to the consumer's home. Rather, an information service is "the

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[34] *See In re: Deployment of Wireline Services Offering, Advanced Telecommunications Capability*, (Order on Remand), 15 FCC Rcd. 385, paragraph 9 (1999), where the Commission stated that "we affirm our prior conclusion that xDSL-based advanced services constitute telecommunications services as defined by section 3(46) of the Act."

[35] *City of Portland*, 216 F.3d at 876.

[36] H.R. Conf. Rep. No. 104-458 at 1109 (1996).

[37] *Id.*

offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[38] There is no question that cable providers make available information services, *in conjunction with* telecommunications service, "via telecommunications." Nonetheless, these two distinct services should not be construed as one. As the Ninth Circuit correctly pointed out, cable Internet service "consists of two elements: a 'pipeline' . . . and the Internet service transmitted through that pipeline."[39] Therefore, to the extent that cable providers make available service from an affiliated or exclusive ISP, its activities are that of an information service. However, to the extent that cable operators provide (their) "subscribers with Internet transmission over [a] cable broadband facility," they are "providing a telecommunications service as defined in the Act."[40]

C. Any Cable Company Providing Telecommunications Service is Subject to the Act's Nondiscriminatory Provisions

In order to secure the competitive benefits of nondiscriminatory open access for ISPs and consumers, the Commission should immediately recognize Congress' intention and the Ninth Circuit's affirmation that the transmission component of cable Internet access is a telecommunications service. Such a recognition would create a nationwide definitional standard for these services and create certainty in the market. More importantly, it would usher in a new era of competition in broadband whereby consumers have access to both high-speed Internet access ***and*** the Internet Service Provider of their choice.

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[38] 47 U.S.C. § 153(20).

[39] *City of Portland*, 216 F.3d at 878.

[40] *Id.*

Under the Act, "any provider of telecommunications service" that meets the statutory definition of a "telecommunications carrier"[41] is governed by the statutory requirement that "telecommunications carrier(s) shall be treated as a common carrier under the act only to the extent that it is providing telecommunications services."[42] As the Ninth Circuit noted in *Portland*, the Act's "principle of telecommunication common carriage governs cable broadband as it does other means of Internet transmission such as telephone service and DSL,"[43] and, as such cable Internet providers are telecommunications carriers within the meaning of the Act.

The Act imposes several discrete statutory obligations on cable broadband providers with respect to their provision of telecommunication service and their transmission platform. These requirements apply to all telecommunications carriers without the need for further action by the Commission and regardless of whether the carriers have market power. Pursuant to section 201(a) of the Act, telecommunications carriers must provide nondiscriminatory service to any person requesting carriage. Additionally, section 202(a) states that "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with [a] communications service... or to make or give any undue or unreasonable preference or advantage to any particular person."[44] Moreover section 251(a) requires that a telecommunication carrier interconnect with any other requesting telecommunications carrier.

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[41] 47 U.S.C. § 153(46).

[42] Id. § 153(44).

[43] *City of Portland* 216 F.3d at 879.

[44] 47 U.S.C. § 202(a).

The Commission should forthwith recognize that cable Internet access service is a telecommunications service, thereby subjecting all cable broadband providers to these requirements.

IV. NONDISCRIMINATORY OPEN ACCESS REQUIREMENTS ARE NECESSARY TO ENSURE THAT CONSUMERS AND ISPs FULLY BENEFIT FROM BROADBAND CABLE

A. Open Access Can Be Required While Still Allowing Market Forces To Guide the Development of Broadband Cable Service.

The Commission has expressed a desire to allow market forces to guide the development of the competitive high speed Internet market. By acting swiftly to recognize the transmission component of cable Internet access as a telecommunications service, the Commission can ensure that the next generation of high speed Internet access develops with the open architecture and accompanying vibrant competition that has characterized the development of a competitive Internet to date. Notwithstanding the position advanced by cable operators, nondiscriminatory open access is a necessary pre-condition for a competitive market-based approach. The Commission should confirm that the transmission component of cable Internet access is a telecommunications service subject to the legal requirement that all ISPs have the right to purchase broadband transmission from a consumer's premises to its point of interconnection with the cable operator's facilities on a nondiscriminatory basis. In order to establish the framework under which a competitive market can operate, the Commission should publish clear guidelines to allow private industry to carry out the rule of nondiscrimination required by the Act.[45]

Failure to establish the basic right of nondiscrimination in the provision of broadband service will leave millions of high speed cable Internet consumers with no choice but to accept

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[45] The Commission should consider its wireless interconnection rules as a model for open access. These rules provide that phone companies provide interconnection to requesting cellular companies upon

and pay for ISPs that are owned or affiliated with the cable operator.[46] The cable companies will use their control of the broadband medium to frustrate, delay or simply deny any attempts by independent ISPs to obtain fair and nondiscriminatory provision of service.[47]

As high-speed cable Internet service develops, independent ISPs should retain the choice to operate as either national, regional or local service providers, depending on their business model. A national broadband Internet policy which recognizes and mandates the principle of nondiscriminatory provision of service, thereby allowing private companies to negotiate in good faith for specific terms that comply with that nondiscriminatory principle is the only way to ensure that ISPs retain that ability to operate in diverse and innovative ways.

B. Nondiscrimination Ensures the Equal Treatment of All Requesting ISPs.

As the Internet has developed, consumers have benefited from the ability to choose among multiple ISPs. Because all ISPs are granted open access in the narrowband and DSL markets, small ISPs are able to compete on an equal footing with large ISPs. This competition has forced all ISPs to focus on customer service and satisfaction, and to offer attractive pricing. As the Consumer Federation of America stated, "as communications and commerce converge on the broadband Internet, the public right to nondiscriminatory access to communications networks

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reasonable demand on terms no less favorable than those offered to affiliated cellular systems or independent telephone companies. *See,* 86 FCC 2d at 496.

[46] A comparative review of cable prices and Internet prices demonstrates that cable prices (for services offered by one or few providers in a community) have risen steadily over the years while the cost of Internet access (which is offered by hundreds of providers in most communities) has decreased by 16.8% from 1991 to 1999. *MaCable.com: Closed v. Open Models for the Broadband Internet*, Shooshann, Temin & Weber, October 15, 1999, page 26).

[47] All one need do is to examine the still unfulfilled promises of cable operators to negotiate interconnection agreements with ISPs to comprehend the perils of leaving it the market alone to establish the framework for interconnection agreements.

becomes more important than ever."[48] A simple open access requirement incorporating the principles of nondiscrimination would serve this vital public interest. Cable companies have historically faced no direct competition in the video programming arena due to *de facto* exclusive franchise agreements. This monopolistic control has given rise to a lengthy track record of poor customer service in addition to anti-competitive actions.

During deliberations over the 1992 Cable Act, Congress found that cable operators have undue market power as compared to that of consumers and video programmers.[49] This concentration of power has created barriers to entry for new, unaffiliated programmers and a reduction in the number and diversity of voices available to consumers. Because cable operators and programmers often have common ownership, cable operators have the incentive and ability to favor their affiliated programmers. Extending this structure to the operation of cable Internet access would clearly make it more difficult, if not impossible, for non-cable affiliated ISPs to secure carriage on cable systems.

By incorporating into a national broadband Internet policy Congress' clear intention and the Ninth Circuit's ruling that cable broadband Internet and transmission is a telecommunications service, the Commission can avoid extending historic anti-competitive practices of the cable video industry to the Internet. Cable companies should not be allowed to substitute their closed video programming paradigm for the current Internet model that is inherently free, open and competitive.

With respect to the three open access models outlined in the Commission's NOI, OpenNET believes that the first model could provide the optimal environment for creating

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[48] Consumer Federation of America, *Principles of Nondiscriminatory Access to Broadband Internet Communications Services*, August 16, 2000 at p. 1.

[49] Pub.L.No. 102-385, Sec. 2(a)(5), 106 Stat. at 1460-61 (1992).

nondiscriminatory commercial arrangements and ensuring competition. As noted in the Commission's first interconnection model, no particular connecting ISP has a privileged or preferred relationship with the cable operator. Rather, each ISP purchases transmission capability and customer access from the cable operator at nondiscriminatory prices, terms and conditions. Further, the cable operator manages the network on a nondiscriminatory basis.

This model provides the correct ground rules for open access, and does so in a way that reduces the ability of a cable operator to undermine competitors to its affiliated ISP. If a preferred ISP is allowed to manage the network, as suggested in the Commission's second model, this arrangement could lead to anti-competitive or discriminatory treatment of other ISPs on the network in ways that are similar to the anticompetitive practices that Congress sought to eliminate with the program access provisions of the 1992 Cable Act. The affiliated ISP would have every incentive to keep other ISPs off the system. The opportunity for discrimination in this second model would likely require substantial enforcement and oversight by the Commission.

The Commission's third model, which apparently imposes no explicit requirements for open access but relies exclusively on negotiated arrangements, would likely lead to access only by the largest ISPs to the detriment and exclusion of the thousands of small, independent ISPs currently serving the public. The Commission has pursued this third "model" approach for the last several years, and pursuant to this market approach, cable broadband Internet consumers do not yet have any choice of ISPs. While some movement has recently been made toward opening up cable broadband systems to a few large providers, this progress is arguably more the result of the cable industry's desire to deflect federal regulatory pressure than purely the operation of marketplace forces.

An open access policy must include a nondiscrimination requirement enforced by the Commission which ensures that cable companies do not cross subsidize affiliated ISPs, undercut prices offered by independent ISPs, or defeat the benefits gained by granting multiple ISPs access to the cable operator's system in other ways. Cable companies should be required to deal with affiliated and non-affiliated ISPs on an "arms-length" basis. Nondiscrimination in the context of cable Internet access would further ensure that any ISP, regardless of size, location or ownership would have the ability to fairly negotiate for and secure access to a cable company's high speed platform. Nondiscrimination would also prohibit arbitrary and unreasonable limits on the number of ISPs interconnecting with a particular cable system. Interconnection with a cable company's facilities is scalable through the insertion of additional "off the shelf" hardware. In addition, by establishing the principal of nondiscrimination now, the Commission can ensure that cable operators design and build their networks to accommodate such scalability.

The principle of nondiscrimination will also ensure that cable operators cannot discriminate against independent ISPs through the management of the cable network. Independent ISPs should have the opportunity for a direct relationship with the customer and be able to provide service using the hardware located on the customer's property. ISPs also should have the ability to bill consumers for the underlying transport service and provide consumers a seamless relationship with their ISP.

In addition, consumers should not be required to "go through" a cable company's affiliated ISP to obtain service from the ISP of their choice, nor should a consumer be required to pay for an ISP service which they do not want. A consumer receiving cable internet service from an independent ISP should have no direct interaction with or obligation to the cable operator's

affiliated ISP, and the cable operator should not be able to force the independent ISP to forfeit control of the ISP's home or start page as a condition of the open access arrangement.[50]

Nondiscrimination would also ensure that the cable industry does not exercise control over the content a consumer receives through an independent ISP except under neutral network management practices that apply to all ISPs. ISPs reselling cable Internet access should not be required to "co-brand" their service with the cable operator as a condition of access.[51] Voluntary co-branding arrangements which are the result of mutually beneficial bargaining are not objectionable, but a cable operator forcing itself onto an ISP's home page defeats the point of nondiscriminatory open access.

Finally, nondiscrimination must allow all independent ISPs to directly market their services, including underlying broadband transport services, to all cable customers that have been upgraded to receive high-speed Internet service. Cable operators should not be allowed to control which segments of its customer base are available for interconnection. Cable operators must also not be allowed to roll out their affiliated ISP service in a market and allow that service to operate without competition for a period before allowing interconnection by competing ISPs. A cable company's ownership of the network does not entitle its affiliated ISP service to a "first mover" advantage. All ISPs must be allowed to compete on a fair and equitable basis in every market where a cable company is providing the underlying high speed Internet transport service.

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[50] The concern of cable companies implementing preferential marketing on or control over an ISP's home page is of great concern to leading consumer groups such as the Center for Media Education, Consumer Union and the Consumer Federation of America. (See, *Principles of Nondiscriminatory Access. to Broadband Internet Communications Services*, CFA, Aug. 16, 2000 and Letter from CME, CFA, MAP, OMB Watch & CU to Chairman Kennard, July 1, 1999)

[51] The conduct of AT&T in its ongoing trial in Boulder, CO only underscores the problem of such a co-branding requirement. "[I]f AT&T's flashing logo and its browser become—as the company hopes—vehicles to lure customers to sites run by it partners, the dollars it collects will come at the expense of ISPs that otherwise would have claimed the revenue." AT&T Puts Open Access to a Test," *Washington Post*, E01 (Nov. 23, 2000).

V. THE MARKETPLACE ALONE IS INSUFFICENT TO BRING THE BENEFITS OF OPEN ACCESS TO ALL CONSUMERS AND ISPs

The cable industry has taken the position that the "marketplace" will provide open access without the need for government action. Under the cable industry's model, which to this point has been endorsed by the Commission, privately negotiated agreements between ISPs and cable operators will obviate the need for government action.

The true test of the marketplace's success in this arena, however, is the number of executed ISP interconnection agreements that cable providers have entered into with ISPs. By this measure, cable's marketplace solution has been woefully insufficient. Currently, just a handful of such agreements have been executed, despite public statements of cable operators regarding their commitment to negotiate such interconnection arrangements.[52] The market reality is that while limited trials and statements of principle are a positive first step toward open access, such statements are non-binding and too vague to achieve the important consumer benefits of open access. Small ISPs in particular are concerned that without a clear requirement for open access, they will lack the negotiating leverage with national cable providers. Some ISPs have characterized as uneconomic and unworkable cable access proposals that require ISPs to make non-refundable up-front payments and to surrender large percentages of ISPs' gross revenues associated with cable modem service, along with significant advertising revenues.

A purely marketplace solution is likely to produce inconsistent results in different markets across the nation. Marketplace initiatives announced by cable operators such as Time Warner and AT&T only reflect a portion of the high-speed cable market. Other cable operators

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[52] Earthlink and Time Warner Cable have reached an agreement to offer Earthlink service over Time Warner Cable systems. This agreement is promising, although at the time of these comments the terms of that agreement have not been made public. It remains unclear whether the terms of this agreement can be extended to any other competitive ISP. By and large, other cable operators have yet to agree to put independent ISPs on their systems.

have not matched these efforts with similar marketplace solutions. It is encouraging that some cable operators have abandoned their "technically infeasible" arguments and are finally commencing limited open access trials. However, these trials provide no guarantee that all requesting ISPs will be able to negotiate nondiscriminatory open access agreements. Without a single, uniform national framework establishing the right of ISPs to request access on *nondiscriminatory* terms, the "marketplace" is likely to produce only further statements of support for open access from cable operators without real action to make that promise a reality to the nation's thousands of ISPs.

VI. CONCLUSION

The Commission should follow its general finding that open access is a desirable public policy goal with concrete action to make open access a reality for consumers pursuant to the first model in paragraph 30 in the NOI and the principles set forth in these Comments. Further, the Ninth Circuit determination that cable broadband Internet access is a telecommunications service should be recognized by the Commission as part of a national, enforceable, uniform broadband Internet access policy. This step, along with a strong commitment by the Commission to enforce this policy, would provide independent ISPs the nondiscrimination protections and rights

contained in the Communications Act and would allow the third generation of the Internet to develop with an open and competitive architecture.

Respectfully submitted,

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