



1225 Nineteenth Street, N.W., Suite 450 Washington, D.C. 20036 (202) 296-4933  
e-mail: alex.netchvolodoff@cox.com

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*Handwritten initials*

EX PARTE OR LATE FILED

Alexander V. Netchvolodoff  
Vice President of Public Policy

December 4, 2000

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Honorable William E. Kennard  
Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 8-B201  
Washington, DC 20554

Re: GN Docket No. 00-185  
WRITTEN EX PARTE PRESENTATION

Dear Chairman Kennard:

Attached are the comments of Cox Communications, Inc. (a subsidiary of Cox Enterprises) on the Commission's Notice of Inquiry on broadband access issues. I am sending them to you personally because I notice that you were sent a copy of USTA's November 29, 2000 ex parte letter to Chairman Kennard in the same proceeding (a letter which USTA did not have the courtesy to serve on Cox). I call your attention to the analysis of the Portland decision beginning on page 30 of Cox's Comments.

USTA's letter misstates the law with respect to the situation in the 9<sup>th</sup> Circuit states of California, Nevada, and Arizona in which Cox operates. Cox has suspended collection of cable franchise fees in those states because the 9<sup>th</sup> Circuit has ruled in the Portland case that cable-based Internet access service is not a Title VI cable service. However, this ruling does not affect the fact that Cox's cable data service, Cox@Home, fully meets the statutory definition of a Title I information service. Thus, regardless of whether Cox@Home is also a cable service, it most certainly is an information service and it most certainly is not a telecommunications service. Moreover, the 9<sup>th</sup> Circuit's dicta in Portland that there is a telecommunications service component in a cable-based Internet service is not controlling. Indeed, although the court did hold that cable-based Internet service is not a cable service, it specifically noted that the expert agency (in this case the FCC) may not concur with its suggestion that there is a segregable telecommunication service component in this service. This very issue is being addressed by the FCC in this proceeding.

Finally, I would suggest that the question whether information service providers, including cable-based ISPs, should be subjected to Universal Service payments under the

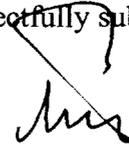
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Honorable William E. Kennard  
December 4, 2000  
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Communications Act is a global one, and does not turn on Cox's decision to conform its collection of cable franchise fees to controlling precedent in the 9<sup>th</sup> Circuit.

In accordance with Section 1.1206 of the Commission's Rules, an original and one copy of this letter will be submitted to the Secretary's office by the end of the business day following this date.

Respectfully submitted,



Alexander V. Netchvolodoff

Attachment

cc w/o attach.: Johanna Mikes  
Christopher Libertelli  
Karl Kandutsch  
Douglas Sicker  
Robert Cannon  
Janice Myles  
Lawrence E. Sarjeant

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

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

**COMMENTS OF COX COMMUNICATIONS, INC.**

Respectfully submitted,

**COX COMMUNICATIONS, INC.**

Barbara Esbin  
J.G. Harrington  
Laura Roecklein

Alexander V. Netchvolodoff  
Alexandra M. Wilson  
Cox Enterprises, Inc.  
1225 19<sup>th</sup> Street, N.W.  
Suite 450  
Washington, D.C. 20036  
(202) 296-4933

Dow, Lohnes & Albertson, PLLC  
1200 New Hampshire Avenue, N.W.  
Suite 800  
Washington, D.C. 20036  
(202) 776-2000

Its Attorneys

December 1, 2000

## SUMMARY

Although still in its infancy, the broadband marketplace that the Commission is examining in this proceeding could hardly be healthier. Competition for broadband and other Internet access services is flourishing. Investment in broadband networks and technologies continues to grow. Consumers around the country enjoy a range of Internet service choices, both narrow and broadband. Subscribership is rising rapidly, and innovative new broadband applications continue to emerge.

All of these exciting developments have occurred with minimal government intrusion. Indeed, the Commission has steadfastly maintained that market forces, not government micro-management, will best ensure that the public interest is served. Against this backdrop, the Commission is now asking whether it should reverse this policy and respond to demands that it become intimately involved in regulating relationships among the myriad companies that help provide Internet access to consumers. Specifically, the Commission questions whether it should require broadband service providers, including cable operators, to carry unaffiliated Internet service providers (“ISPs”) on their networks on an indiscriminate basis. The only sound answer to this question – from a legal, policy and technology perspective – is “no.”

Indeed, Congress already has resolved the mandated access issue, at least as far as cable operators are concerned. High-speed Internet access services provided by cable systems meet the statutory definitions of both “cable service” and “information service” set forth in the Communications Act. In no event do they meet the statutory definition of “telecommunications services.” They thus cannot lawfully be subjected to the host of common carrier obligations imposed on telecommunications service providers under Title II of the Act.

In adopting these service definitions, Congress codified long-standing Commission precedent that information services and telecommunications services are mutually exclusive. An information service is something more than the pure, unenhanced transmission of information on behalf of a third party – it is an offering in which both provider and customer are able to choose or manipulate the form and content of the transmission. The Commission has repeatedly found that Internet service providers offer unregulated interstate information services. Information service providers do not lose their unregulated status merely because there is an integrated “telecommunications” component in their information service offering. Nor does their regulatory classification change simply because they construct and use their own transmission facilities.

The refusal by both the Congress and the Commission to subject information service providers to common carriage requirements makes perfect policy sense. The robust marketplace in which such providers compete bears no resemblance to the government-protected monopolies for which common carriage obligations were originally designed. Information service providers (including cable data providers) also enjoy no bottleneck control over “essential facilities,” a traditional pre-requisite for mandatory unbundling of networks and services.

Besides being dictated by the relevant statutory language and FCC pronouncements, an information service classification for cable Internet service also has the benefit of accomplishing the Commission’s three primary policy objectives in this proceeding. First, such a classification enables the Commission to refrain from regulating cable Internet services under current competitive market conditions, in which there is no evidence of market failure. Second, it permits the Commission to develop a coherent national policy with respect to the development and deployment of broadband services in general, and cable data services in particular. And

third, the classification ensures that the Commission has ample ability and authority to implement rules to correct any market failures or other policy concerns about cable data services that might develop in the future.

Some parties in this proceeding will implore the Commission to ignore the statutory definitions, court decisions and Commission precedent, and impose a host of common carrier obligations on cable and other information service providers. The consistent bright line distinction between regulated telecommunications services and unregulated information services, however, has been the cornerstone of the competitive market that presently exists for the Internet. Jeopardizing this cornerstone by treating the transmission component of an information service as a telecommunications service not only would be inconsistent with the express national policy that the Internet remain unregulated; it also would create a devastating entanglement for the entire Internet community, for competition and for consumer welfare.

In addition, technological limitations preclude the imposition of common carriage requirements on cable Internet service providers (and operators of other shared networks) in any event. Requiring cable operators to carry unaffiliated ISPs on an indiscriminate basis is impracticable, if not impossible, as a matter of physics and network functionality. Third-party ISP access can be accommodated, but only through the cable operator's judicious management of the spectrum it has created on its network for high-speed data services, under commercially reasonable terms and conditions, and on a provisioning schedule that the operator controls.

Significantly, cable operators already are motivated by market forces to explore relationships with unaffiliated ISPs. Internet users are making it increasingly clear that they want to have a choice of ISPs from their broadband service provider. To enhance their customers' Internet experience, cable operators are actively exploring ways to enter into

relationships with ISPs that can add value by offering special content or unique functionality. Cox itself plans to conduct a test of its shared broadband high-speed data infrastructure with several unaffiliated ISPs during the first half of 2001, with an eye to seeking relationships with third-party ISPs after its contractual obligation to its affiliated ISP expires. In such a competitive marketplace, surely the best approach is to keep the government away from the bargaining table and let the entity closest to the consumer – the cable operator – negotiate these arrangements.

Finally, there is an additional check on the Commission's authority to impose forced access on cable Internet service providers: the U.S. Constitution. Cable operators are First Amendment speakers who exercise editorial discretion not only when they decide to include a particular channel in a particular service, but also when they decide how much spectrum on their networks to allocate among a range of different services. Mandatory access requirements would fail both the strict and the intermediate scrutiny tests used to assess potential First Amendment violations, and would thus be unconstitutional. In addition, a forced access requirement that has the effect of commandeering some portion of the spectrum on a cable network for use by third-party ISPs raises concerns under the Fifth Amendment's "Takings Clause."

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

**COMMENTS OF COX COMMUNICATIONS, INC.**

Cox Communications, Inc., (“Cox”), by its attorneys, hereby submits its comments in the above-referenced Notice of Inquiry into the provision of high-speed Internet access by cable and other broadband service providers.<sup>1</sup> As discussed below, competition in the highly-dynamic marketplace for broadband and other Internet access services is flourishing. Given the range of service choices enjoyed by consumers around the country, there simply is no policy predicate for forcing cable service providers to carry unaffiliated Internet services providers (“ISPs”) on an indiscriminate, common carrier basis. Moreover, the physical limitations of their shared broadband networks preclude the imposition of common carrier access obligations on cable systems offering high-speed Internet access as a matter of physics and network functionality. Cable operators, including Cox, will provide their customers with a choice of ISPs, but these arrangements will be negotiated in private under commercially reasonable terms and conditions.

Because cable operators do not operate common carrier networks and are not providing telecommunications services under Title II of the Communications Act, there also is no statutory basis for the imposition of a mandatory open access requirement. Rather, cable operators, like

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<sup>1</sup> Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, *Notice of Inquiry*, GEN Docket No. 00-185, FCC 00-355 (rel. September 28, 2000) (“*Notice*”).

all other providers of Internet services, are properly categorized as “information service” providers under the Act. As such, they are and must remain unfettered by Federal or state regulation, consistent with the express congressional policy embodied in Section 230 of the Act. Finally, adopting mandated open access requirements for cable would violate cable operators’ First and Fifth Amendment rights.

**I. COX IS A LEADING PROVIDER OF ADVANCED BROADBAND SERVICES**

Cox is the country’s fifth largest cable MSO, providing basic cable services to roughly 6 million regionally-concentrated and highly-clustered customers.<sup>2</sup> Since the passage of the Telecommunications Act of 1996 (“1996 Act”), Cox has transformed itself from a distributor of traditional, one-way video programming services to a provider of multiple, two-way advanced digital offerings. This metamorphosis has been costly, difficult and time-consuming. It also has been embraced fully by Cox’s cable customers, who have signaled their approval by purchasing more than 1.2 million new services from Cox to date.

In the past year and a half, Cox spent \$10 billion acquiring more cable systems to ensure that it has sufficient scale and scope to enter the broadband marketplace successfully. Through these acquisitions, Cox increased its customer base from approximately 4 to 6 million. Cox also is spending an additional \$10 billion to upgrade its cable networks to support new broadband services.<sup>3</sup> This massive capital investment is already well underway. By the end of this year, roughly 80 percent of Cox’s cable plant in its 15 largest cluster markets will have two-way

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<sup>2</sup> More than 70 percent of Cox’s customers are located in 15 markets that serve an average of 285,000 customers apiece. Cox’s three largest markets are Phoenix (serving 610,000 customers), San Diego (serving 509,000 customers) and New England (serving 430,000 customers).

<sup>3</sup> This \$20-plus billion investment in broadband is a substantial commitment for a company with annual revenues of \$3 billion.

capability and 750 MHz capacity. By the end of next year, Cox will have completed similar upgrades for 80 percent of all of its cable systems nationwide.

During the past several years, Cox has deployed three new broadband services over its upgraded cable platform. The first of these is a digital television service, branded Cox Digital Cable, that enables Cox to compete more effectively against the high-channel, high-quality video programming services offered by DBS providers DirecTV and Echostar and, in some cases, the incumbent telephone company.<sup>4</sup> The second offering is a suite of residential local telephone services, branded Cox Digital Telephone, that already has proven to be a formidable lower-priced competitor to services offered by incumbent local exchange carriers. And the third new service is high-speed Internet access, offered by Cox under the brand names Cox@Home, Cox Road Runner and Cox Express. These services provide customers high-speed access to the Internet via cable modems and a network designed to maximize cable technology.

Customer response to these new digital services has exceeded expectations. At the end of the third quarter of 2000, Cox provided digital television service to 683,000 customers, residential telephony services to 206,000 customers using over 285,000 telephone lines, and high-speed data services to 399,000 customers. Customer acceptance of Cox's new services continues to accelerate: Cox is now installing 18,000 new services each week, more than double its weekly run rate of 7,500 one year ago.

Cox intends to continue deploying this trio of digital services throughout its cable systems over the next four years. By the end of 2004, Cox anticipates that over 95 percent of the households passed by its networks will have the option of purchasing Cox Digital Cable and

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<sup>4</sup> For example, U S West (now Qwest) provides a 181-channel, digital video programming service in Phoenix called Choice TV using VDSL technology.

Cox's high-speed Internet access service, and fully 65 percent will be able to purchase Cox Digital Telephone. Although Cox still enjoys a healthy growth rate in its provision of basic cable services (2.4 percent for third quarter 2000), it expects growth for its new digital services to be far more robust.

To take further advantage of its broadband platform, Cox also is exploring how to provide other advanced services to its customer base. It already has begun limited testing of video-on-demand and a variety of interactive television ("iTV") applications. Cox's San Diego system, for example, has launched a video-on-demand trial, and also is working with Liberate and Excite@Home on an iTV trial that it plans to launch to paying customers early next year. Other Cox systems have partnered with WorldGate to deploy its iTV technology. Cox also is actively pursuing other broadband service concepts, including e-commerce, energy management and home security monitoring. For instance, Cox's Las Vegas system has undertaken a trial with @Security to test a home security service called SafeVillage.

Given the complexity, risk and substantial operational challenges involved in developing and deploying a new broadband service, it is no surprise that Cox sometimes elects to provide the service through a joint venture in which Cox's venture partner contributes specialized expertise and shares the financial risk. When Cox and other cable MSOs entered into their joint venture with @Home several years ago, for example, there was widespread skepticism even among key equipment manufacturers that high-speed cable data services could be deployed successfully to the mass market. The cable MSOs also did not have the expertise to provision software or design and operate a distributed national data network, among other things. By partnering with @Home on a limited-term exclusive basis to develop and deploy high-speed Internet access over the cable infrastructure, the cable MSOs were able to share the enormous

financial risk and obtain the necessary expertise. Had Cox not been able to enter into that relationship – and guarantee its venture partners a limited exclusivity – it would not have been able to roll out high-speed cable data services. When that exclusivity expires, Cox is committed to seeking relationships on commercially reasonable terms and conditions with other ISPs to provide additional high-speed data services over its cable networks.

\* \* \* \* \*

As the foregoing demonstrates, Cox is an established leader in its local markets in the provision of consumer broadband services. This experience makes it particularly well-suited to respond to the questions raised in the Commission's *Notice*.

## **II. THERE IS NO POLICY PREDICATE FOR GOVERNMENT-MANDATED ACCESS TO BROADBAND PLATFORMS**

### **A. The Broadband Market Is Competitive**

The Commission has been assessing competition in the marketplace for high-speed Internet access almost from the moment that broadband services were introduced to the American public. In proceeding after proceeding over the past several years, the Commission has concluded that the marketplace for broadband services is, and likely will remain, competitive. Cox already has considerable experience with the market forces that influence the deployment of broadband services. Its experience fully confirms the Commission's earlier conclusions that broadband service providers face significant and growing competition.

The Commission first studied broadband services in 1998, when it conducted its maiden inquiry under Section 706 of the 1996 Act. That provision requires the Commission to regularly assess "whether advanced telecommunications capability is being deployed to all Americans in a

reasonable and timely fashion.”<sup>5</sup> In its first report to Congress on this question, released in February 1999, the Commission observed that, although “the consumer broadband market is in the early stages of development,”<sup>6</sup> “deployment of broadband, both backbone and last mile, is occurring on a major scale.”<sup>7</sup> It further determined that there was every reason to believe that consumer broadband services would be provided in a competitive marketplace:

The preconditions for monopoly appear to be absent. Today, no competitor has a large embedded base of paying residential consumers. The record does not indicate that the consumer market is inherently a natural monopoly. . . . [T]here are, or likely will soon be, a large number of actual participants and potential entrants in this market. . . . The consumer market for broadband should be characterized by new products and services being offered and costs falling as a result of technological change.<sup>8</sup>

Eighteen months later, in August 2000, the Commission affirmed this initial assessment in its second Section 706 Report. Using data from a survey of broadband service providers and other public sources, the Commission concluded that competition in the advanced services marketplace is in fact emerging at a healthy rate. With respect to the consumer market in particular, the Commission observed that “advanced telecommunications capability is available now and continues to be deployed to a significant number of residential customers in communities of all types – affluent and lower income, inner city, suburb, small town and thinly populated countryside.”<sup>9</sup> The Commission further determined that this trend will only

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<sup>5</sup> Pub. L. No. 104-104, Title VII, § 706(b), 110 Stat. 153 (1996).

<sup>6</sup> 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, *Report*, 14 FCC Rcd 2398, 2405 (1999) (“*First Section 706 Report*”).

<sup>7</sup> *Id.* at 2415.

<sup>8</sup> *Id.* at 2423-25.

<sup>9</sup> 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, *Second Report*, CC Docket No. 98-146, FCC 00-290, ¶ 217 (rel. Aug. 21, 2000) (“*Second Section 706 Report*”).

accelerate. “By all major indicators, both residential subscribers and investment in facilities will continue to increase. Investment of billions of dollars in deploying ATC [advanced telecommunications capability] to residential customers will continue. Rivalry among providers will increase. New technologies will continue to become available. Consumer demand will continue to grow.”<sup>10</sup>

In addition to these general inquiries into the state of broadband deployment, the Commission has had several other occasions on which to examine the competitiveness of the Internet access market. When analyzing the proposed acquisition by AT&T of TCI’s cable systems in early 1999, the Commission observed generally that “there are a large number of firms providing Internet access services in nearly all geographic markets in the United States, and these markets are quite competitive today.”<sup>11</sup> Focusing specifically on the provision of high-speed Internet access, the Commission noted that “quite a few other firms [in addition to AT&T-TCI] are beginning to deploy or are working to deploy high-speed Internet access services using a range of other distribution technologies.”<sup>12</sup> By the time the Commission was asked to examine the proposed merger of AT&T and MediaOne one year later, it was able to make an even more definitive statement about the status of broadband competition. “We find that there is significant actual and potential competition [to cable broadband services] from both alternative broadband providers and from unaffiliated ISPs that may gain access to the merged firm’s cable network.”<sup>13</sup>

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<sup>10</sup> *Id.*, ¶ 218.

<sup>11</sup> Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Telecommunications, Inc., Transferor to AT&T Corp., Transferee, *Memorandum Opinion and Order*, 14 FCC Rcd 3160, 3206 (1999).

<sup>12</sup> *Id.*

<sup>13</sup> Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp. Transferee, *Memorandum Opinion and Order*, 15 FCC Rcd 9816, 9866 (2000).

Cox's own experience in the Internet access marketplace only confirms the Commission's conclusion that the market is competitive. Cox began providing high-speed access to the Internet over its upgraded cable system in Orange County, California in the fourth quarter of 1996. Since then, it has aggressively rolled out Cox@Home in most of its large markets. Yet as strong as consumer demand has been for its cable modem services, Cox has not won its customers without a fight. Cox faces competition from a number of alternative Internet access service providers in all of its local markets. Most obviously, all of Cox's customers can choose from an array of narrowband dial-up ISPs. These services offer Internet access at slower speeds than Cox's cable modem services, and they typically do not include the "always-on" capability that Cox's high-speed Internet access services provide. Nonetheless, as Cox's market research shows, large numbers of Cox customers continue to view narrowband dial-up services as fully satisfying their Internet access needs. The vast majority of customers online use the Internet primarily for e-mail and web surfing purposes – activities that are readily supported by a 56.6 Kbps dial-up service.<sup>14</sup> Although applications requiring greater bandwidth are being developed, they have yet to become an integral part of the Internet experience for most online customers.

Accordingly, when Cox makes pricing decisions for its Cox@Home and other high-speed data services, it strives to make those prices competitive to dial-up services. This approach is evident in Cox's marketing materials, which frequently contain price comparisons to dial-up as well as to other broadband services. As Steve Case, CEO of America Online has stated, a customer's upgrade to broadband service is largely a function of price – as is the decision to fly

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<sup>14</sup> See Ken Kerschbaumer, *Is the Web Losing Its Leisure-Time Appeal?*, BROADCASTING AND CABLE, November 6, 2000, at 42 (citing recent PricewaterhouseCoopers Consumer Technology study finding that the two top reasons

first class rather than coach.<sup>15</sup> For these reasons, Cox believes that dial-up Internet access will continue to provide significant competition to its broadband cable modem services for the foreseeable future.

Moreover, an increasing number of companies are beginning to offer competitive broadband services in Cox's local markets. For example, in Phoenix, Arizona, one of Cox's most mature markets, U S West (now Qwest) has aggressively rolled out its MegaBit DSL service, increasing its customer base from 5,000 in mid-1999 to an estimated 25,000 today. Other DSL service providers in Phoenix include Flashcom, Rhythms DSL, and Broadband Digital Group, which offers a free DSL service that is advertiser-supported. Consumers also may choose from two wireless broadband services: Speed Choice (available in 90 percent of the market) and Sprint Broadband Direct. Alternatively, they may select DirectPC, a high-speed Internet access service offered by DBS provider DirecTV. Some Phoenix consumers even have a choice of cable modem service providers: instead of Cox@Home, they may purchase "TERRAbit," a high-speed data service offered by cable overbuilder Cable America.

These different broadband providers offer Phoenix customers a wide variety of service options. For example, for \$29.95 a month (exclusive of ISP service<sup>16</sup>), residential consumers can purchase Qwest's "MegaBit Deluxe," a DSL service that promises always-on connectivity and provides between 256 and 640 Kbps both upstream and downstream. Alternatively, for \$19.95 a month (exclusive of ISP service), consumers can opt for Qwest's less expensive "MegaBit 256

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consumers use the Internet are for research (90%) and e-mail (89%).

<sup>15</sup> According to Mr. Case, "A lot of people are very satisfied with the service they get today. People would like it to be faster; most people are willing to pay something more for it, but not necessarily twice as much for it." Morgan Stanley Dean Witter Software, Networking, and Internet Conference; Presentation with AOL CEO Steve Case and Morgan Stanley Analyst Mary Meeker, January 5, 1999. <<http://www.corp.aol.com/ir/presentation2.html>>

<sup>16</sup> ISP service typically costs an additional \$22 a month.

Select,” which offers similar speeds but limits users to two-hour sessions and provides less reliable connectivity.<sup>17</sup> Cox also offers two levels of residential service in Phoenix: Cox@Home (available in upgraded areas), which provides speeds of up to 3 Mbps downstream and 256 Kbps upstream for \$39.95 a month, and Cox@Home Express (available in non-upgraded areas), which offers somewhat slower speeds (up to 1.5 Mbps downstream and 33.6 Kbps dial-up upstream) but also a lower price point (\$19.95 a month). Sprint Broadband Direct charges \$39.95 a month for its 2 Mbps downstream/256 Kbps upstream high-speed service, while Cable America charges \$49.95 a month for its very high-speed cable modem service (up to 10 Mbps in both directions). Phoenix customers shopping among these and other Internet access services also enjoy many choices with respect to features such as modem rental or purchase, installation and activation charges, number of e-mail accounts and amount of webspace provided.

Consumers in Cox’s New England system (which includes franchise areas in Connecticut and Rhode Island) face a similarly broad range of Internet access choices. Verizon in Rhode Island and SNET in Connecticut offer both residential DSL and dial-up Internet access. Network Plus offers residential customers customized packages of voice and DSL services. Other DSL providers offering residential data services include Northpoint, Rhythms and Covad. Telergy has partnered with Narragansett Electric to use its interduct and fiber to provide residential phone and data services. Still other companies have announced that they will soon begin offering broadband services over their own high-capacity networks. American Broadband, for example, is constructing a broadband network in Rhode Island over which it plans to provide packages of consumer voice, video and high-speed data services. It expects to be operational in the second

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<sup>17</sup> After the two-hour session, the user must wait five minutes before logging on again.

quarter of next year. And, in Connecticut, overbuilder Gemini Communications plans to begin launching broadband services over its new network by the end of the year.

A brief comparison of just a few of these offerings reveals the range of high-speed Internet choices that New England consumers enjoy. For \$29.95 a month, consumers can purchase a \$299 modem and sign up for Cox@Home, which offers speeds up to 3 Mbps downstream and 256 Kbps upstream. Or, for \$39.95 a month (inclusive of ISP service), they can rent a modem and purchase Verizon's "Personal Infospeed" service, which offers speeds up to 672 Kbps. If a consumer wants even greater speed and has his own ISP, Verizon offers three price points for three different speed ranges as part of its "Professional Infospeed" service.<sup>18</sup> SNET similarly offers consumers a choice between "basic" and two levels of "professional" DSL service. SNET Basic DSL provides speeds of 1.5 Mbps downstream/128 Kbps upstream for \$39.95 a month with a one year contract; SNET Professional DSL (A) offers the same speeds and additional IP accounts for \$79.00 a month; and, SNET Professional DSL (B) offers 6.0Mbps downstream/384 Kbps upstream for \$199.00 a month.

Significantly, Cox has noticed a substantial drop in the price and/or an increase in the availability of DSL in its markets after the launch of Cox@Home. For example, in Orange County, Pacific Bell charged more than \$100 for its DSL service before Cox began offering cable modem service in late 1996. Pacific Bell now offers DSL service to Orange County customers for only \$39.95 a month (plus ISP charge), and has expanded its DSL coverage to 40 percent of Cox's local service area. In Oklahoma City, Southwestern Bell did not begin offering DSL service until after Cox@Home was launched. When it did roll out its DSL service in late

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<sup>18</sup> The price points are \$39.95, \$59.95 and \$109.95 a month for speeds of 640 Kbps downstream/90 Kbps upstream, 1.6 Mbps downstream/90 Kbps upstream, and 7.1 Mbps downstream/680 Kbps upstream, respectively.

1999, the standard rate was \$49.95 a month (plus ISP charge). Today, in this very competitive market, Southwestern Bell offers customers a 12-month contract at \$39.95 a month with free installation, free modem and free ISP service.

Taken together, these data demonstrate that Cox already faces considerable competition in the provision of high-speed Internet access. Far from enjoying a protected or dominant market position, Cox is subject to a full array of competitive market forces and must respond accordingly. Moreover, that competition will only become more intense as more broadband providers enter its local markets. Qualcomm and Sprint PCS, for example, have already begun trials in the U.S. of a third-generation (“3G”) broadband wireless network. According to the companies, the data trials should lead to commercial deployment of the network by Sprint PCS in the second half of 2001.<sup>19</sup> Both Sprint and WorldCom are gearing up to introduce multichannel, multipoint distribution service (“MMDS”) into a number of markets over the next few months, as a complement to DSL.<sup>20</sup> Moreover, companies such as RCN Corporation have begun rollout of their bundled high speed service packages. RCN offers phone, cable and high-speed Internet services over the company’s Megaband Network throughout the East and West Coast corridors.<sup>21</sup> Cox’s experiences thus bolster the Commission’s earlier conclusion: competition in the provision of high-speed Internet access is alive and well.

#### **B. Competition Precludes the Imposition of Forced Access Requirements**

In the face of a competitive broadband marketplace, the Commission has no sound policy basis on which to impose “open access” on broadband service providers. As the Commission

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<sup>19</sup> <[http://www.allnetdevices.com/wireless/news/2000/05/10/sprint\\_pcs.html](http://www.allnetdevices.com/wireless/news/2000/05/10/sprint_pcs.html)>.

<sup>20</sup> <<http://www.internetweek.com/infrastructure/infra092500-1.htm>>.

<sup>21</sup> <<http://www.clec-planet.com/news/0003/000317rcn.htm>>.

correctly observes in the *Notice*, there is no consensus among industry participants or regulators about what “open access” actually means.<sup>22</sup> At the heart of the requests that have been floated by various “open access” proponents, however, lies the notion that broadband service providers should be required to allow unaffiliated ISPs to use their networks pursuant to government mandate rather than marketplace negotiations.

Yet before pursuing an interventionist policy, regulators necessarily would have to embrace one (or both) of two distinct arguments. Specifically, they would have to conclude either (1) that the market power of certain service providers is so strong that the government must force open their networks to competitors; or (2) that, without regard to market power, the public interest can only be served if common carrier principles (such as interconnection and non-discriminatory carriage) are imposed on all broadband service providers.<sup>23</sup> Even a cursory analysis of these two propositions reveals that each is fatally flawed.

#### **1. The Prerequisites for Mandatory Unbundling Do Not Exist**

Although there have been occasions on which a facilities owner, in the name of competition, has been forced by government to share its plant with third parties, those occasions have been few and far between. When facilities sharing (or “unbundling”) has been mandated, courts and regulators have used theories akin to the antitrust “essential facilities” doctrine. As a brief review of that doctrine makes clear, it cannot be applied to cable modem and other competitive service providers in today’s broadband marketplace.

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<sup>22</sup> *Notice*, ¶ 27.

<sup>23</sup> Although the *Notice* asks numerous questions about cable modem services in particular, there is no basis for distinguishing among the range of broadband service providers that are entering the marketplace when considering many of the policy issues raised by the *Notice*. For example, there is no reason to consider imposing common carrier obligations on cable companies and not also consider imposing them on similarly-situated service providers such as DBS companies, MMDS operators, cable overbuilders, broadcasters and PCS carriers.

Generally speaking, the prerequisites for application of the essential facilities doctrine are: (1) control of an essential facility by a monopolist; (2) the inability of competitors, practicably or reasonably, to duplicate the essential facility; (3) the refusal of the monopolist to let would-be competitors use the facility; and (4) a facility that is capable of being shared.<sup>24</sup> Those who would use this doctrine to mandate forced sharing in the broadband marketplace could not meet the first prerequisite, let alone the second, third or fourth. As the Commission itself has recognized, most broadband service providers are not monopolists controlling essential facilities.<sup>25</sup> Indeed, the only “monopolists” are the incumbent telephone companies, who enjoy a monopoly position not in the broadband services marketplace but in the telecommunications market for local exchange services.<sup>26</sup> All other broadband providers are simply jockeying for position in a competitive marketplace in which cable modem, DSL, and a range of satellite and wireless broadband technologies are being rapidly deployed.

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<sup>24</sup> The essential facilities doctrine is succinctly described by Professor Einer Elhauge, Harvard Law School, in his paper, *Analysis of the Proposed Internet Freedom Act*, released October 12, 1999 (available at <<http://www.ncta.com>>).

<sup>25</sup> See, e.g., Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services; Hyperion Communications Long Haul, L.P.; Application for Expedited Review, *Third Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 11857, 11865 (2000) (stating that the “record before us, which shows a continuing increase in consumer broadband choices within and among the various delivery technologies – xDSL, cable modems, satellite, fixed wireless, and mobile wireless, suggests that no group of firms or technology will likely be able to dominate the provision of broadband services.”).

<sup>26</sup> Moreover, even in the local exchange market, the ILECs’ monopoly control over essential facilities is limited primarily to the local loop and a handful of other critical unbundled network elements. See *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee; For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, Memorandum Opinion and Order*, CC Docket No. 98-184, FCC 00-221, ¶ 269 (rel. June 16, 2000) (“We find that, as a general matter, incumbent LECs have no market power in the advanced services market independent of their bottleneck control of those facilities, such as local loops, that are necessary to provide such services.”); see also *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696 (1999) (limiting the national list of unbundled network elements to local loops (including dark fiber and high-capacity loops), subloops, network interface devices, local switching (except under certain highly competitive conditions), interoffice transport, signaling and call-related databases, operations support systems, and, in very limited situations, packet switching).

Furthermore, in the case of cable modem service providers at least, regulators would be hard pressed to find that the remaining elements of the essential facilities doctrine have been satisfied. Just as consumers have a range of ways to access the Internet, broadband service providers have numerous options for securing the telecommunications capability needed to provide an Internet connection. The most obvious choice is to use the ubiquitous telecommunications network built by the incumbent telephone companies that is in the process of being updated to carry broadband services. Many service providers have, in fact, chosen to go this route. A number of others have decided instead to self-provision the requisite telecommunications capability by building their own broadband networks. Given the widespread availability of the public telephone network and the enormous risk investment that is being made in the deployment of other “last-mile” technologies, it is impossible to argue that cable’s broadband competitors cannot “practicably and reasonably” hope to find an alternative distribution facility (thus failing the second element).

Similarly, the fact that most large cable MSOs, including Cox, are now actively exploring ways to bring additional ISPs onto their networks belies an assertion that cable systems are “refusing” to let would-be competitors use their facilities (the third element).<sup>27</sup> And, with respect to the fourth element concerning feasibility of facilities-sharing, the laws of physics dictate that a shared network such as an upgraded cable system cannot accommodate all ISPs indiscriminately and still operate.<sup>28</sup> In short, there is no aspect of the essential facilities doctrine that can reasonably be applied to cable high-speed data services.

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<sup>27</sup> See discussion of Cox announcement of third-party trials in Section III, *infra*.

<sup>28</sup> See discussion in Section III, *infra*.

Finally, the public interest requires the Commission to hew closely to the teachings of the essential facilities doctrine, particularly given a marketplace as dynamic as that for broadband services. The adverse social consequences that result from a forced sharing requirement were recently described by Justice Breyer in his concurring decision in *AT&T v. Iowa Utility Board*.<sup>29</sup> As Justice Breyer observed, even a simple obligation to share a physical facility imposes significant administrative costs because a regulatory body must then be tasked with overseeing the terms and conditions of access. Additional societal costs then arise because the sharing “may diminish the original owner’s incentive to keep up or improve the property by depriving the owner of the fruits of value-creating investment, research, or labor.”<sup>30</sup> Furthermore, “the more extensive the sharing demanded, the more likely these costs will become serious . . . And the more serious they become, the more likely they will offset any economic or competitive gain that a sharing requirement might otherwise provide.”<sup>31</sup>

Justice Breyer also observed that a policy that merely encourages competitors to all use the same underlying resources does little for competition as a whole:

A totally unbundled world – a world in which competitors share every part of an incumbent’s existing system, including, say, billing, advertising, sales staff, and work force (and in which regulators set all unbundling charges) – is a world in which competitors would have little, if anything, to compete about.<sup>32</sup>

The same principles should apply when evaluating the relative merits of a government-imposed “open access” policy for broadband service providers. Where, as here, the marketplace

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<sup>29</sup> 525 U.S. 366 (1999).

<sup>30</sup> *Id.* at 428-29 (Justice Breyer concurring in part and dissenting in part). A similar theory is embodied in federal copyright and patent law, which grants creators and inventors a protected period of time in which to exploit exclusively the fruits of their labor.

<sup>31</sup> *Id.* at 429 (citation omitted).

<sup>32</sup> *Id.* at 430.