

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

GN Docket No. 00-185

Reply Comments of the



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SUMMARY

The American Cable Association files these reply comments to supplement ACA's earlier comments. ACA's comments contain the results of a comprehensive member survey on cable modem service deployment. The results of the ACA Cable Modem Survey provide concrete evidence that the Commission's policy of regulatory restraint is working in smaller markets. Independent cable companies are responding to marketplace incentives, making substantial investments in infrastructure, and transacting with unaffiliated ISPs and other businesses.

The results are exactly what the Commission intended - delivery of advanced services to an increasing number of consumers in smaller markets through market-based solutions.

These reply comments provide a recap of the ACA Cable Modem Survey results and address two aspects of the record. Section II.A. and attached Tables 1 - 3 summarize the important results of the ACA survey.

Section II.B. highlights how a broad array of diverse *non-cable* commenters support ACA's analysis on four key issues:

- Regulatory restraint has encouraged investment in infrastructure in smaller markets.
- The imposition of mandatory open access regulations would impose significant additional costs and deter investment.
- In smaller markets, the marketplace is working – independent cable companies are transacting with unaffiliated ISPs.
- The Commission should not impose regulations where the marketplace is working.

Section II.C. rebuts the assertions of two groups of mandatory regulated open access advocates:

- ISPs advocate regulation in all markets instead of innovation and marketplace transactions.
- ISPs and others demanding regulation based on erroneous generalizations concerning the conduct of "all cable operators".

Solid factual and analytical information on the record undercut these arguments, and the Commission should discount them. No open access advocate has articulated any credible justification for imposing mandatory regulated open access on smaller market cable systems.

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I. INTRODUCTION

ACA's comments in this proceeding contain the results of a comprehensive member survey on cable modem service deployment.¹ The results of the ACA Cable Modem Survey show robust investment in broadband infrastructure by independent cable companies in smaller markets and rural areas. Far from languishing on the wrong side of a digital divide, consumers in almost a million homes passed by ACA member systems have access to cable modem service today. Current expansion plans will double the availability of the cable modem service within 24 months. Many ACA members deliver cable modem service through negotiated agreements with unaffiliated ISPs.

The progress of ACA members in smaller markets substantiates the Commission's current approach to cable modem service. Marketplace solutions have flourished in smaller markets. Independent cable companies are responding to

¹ Comments of the American Cable Association (filed December 1, 2000) ("ACA Comments").

marketplace incentives, making substantial investments in infrastructure, and transacting with unaffiliated ISPs and other businesses. The result is the delivery of advanced services to an increasing number of consumers in smaller markets.

ACA files these reply comments to address three aspects of the record. First, ACA provides a recap of its survey results, which can serve as a testimonial to the success of the Commission's policy of regulatory restraint. Second, we highlight how a broad array of diverse non-cable commenters - think tanks, industry associations, and others, including many ISPs - support ACA's analysis on four key issues:

- Regulatory restraint has encouraged investment in infrastructure.
- The imposition of mandatory open access regulations would impose significant additional costs and deter investment.
- The marketplace is working – independent cable companies are transacting with unaffiliated ISPs.
- The Commission should not impose regulations where the marketplace is working.

Third, ACA replies to the following two groups of mandatory regulated open access advocates:

- ISPs that call for regulation as a substitute for innovation and marketplace solutions.
- Open access advocates that base their arguments on erroneous generalization concerning the conduct of “all cable operators.”

The record does not support the positions asserted by these commenters.

II. ANALYSIS

A. The results of the ACA Cable Modem Survey validate the Commission's policy of regulatory restraint in smaller markets.

As stated in the NOI, the Commission has maintained a policy of regulatory restraint concerning cable modem service.² In doing so, “the Commission has sought to reduce barriers to entry, encourage investment, and facilitate the deployment of high-speed services.”³ The Commission has also expressed a special concern for the deployment of high-speed services in smaller markets.⁴ The ACA Cable Modem Survey verifies that in smaller markets, the Commission's approach has facilitated exactly the intended result – significant investment in infrastructure and substantial progress in the delivery of advanced services to smaller market consumers.

² *In the Matter of Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities*, FCC 00-355 (rel. September 28, 2000) (“NOI”) ¶ 4.

³ *Id.* at ¶ 3.

⁴ See, e.g., *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Second Report, FCC 00-290 (rel. Aug. 21, 2000), ¶ 5 (“...the market for advanced telecommunications capability is in its early stages and this Commission has already taken important steps to accelerate and facilitate widespread deployment. We will continue and expand these efforts as we strive to ensure that all Americans have access to advanced telecommunications capability.”); Statement of FCC Chairman William E. Kennard on Report on Deployment of Advanced Telecommunications Capability to All Americans, (Aug. 3, 2000), (transcript available at www.fcc.gov/commissioners/kennard/states.html). (“Of equal concern, the data in the report show, even at the aggregate level, that rural areas and low-income areas are much less likely to have access to advanced services. It is incumbent on us not to let these particularly vulnerable areas be left behind in connecting all Americans to high speed services.”).

We provide below a brief recap of the survey results presented in ACA's comments.⁵

- ACA members currently serve more than 38,000 cable modem customers.
- ACA members serve approximately 2.5% of the total U.S. cable customers and approximately 2.7% of the total U.S. cable modem customers.
- ACA members offer cable modem service in systems passing nearly 840,000 homes in smaller markets and rural areas.
- Current expansion plans will double homes passed to 1.7 million within the next 12 to 24 months.
- ACA members have invested nearly \$330 million to install fiber, upgrade plant, and acquire equipment necessary to offer cable modem services and other advanced services.
- Most ACA members obtained the capital required to upgrade networks and purchase equipment from sources typical for smaller business - banks or retained earnings.
- ACA members indicated that they would not risk the investment necessary for this expansion if burdensome regulations were imposed on cable modem service in their markets.
- Many ACA members provide cable modem service through negotiated agreements with unaffiliated ISPs.

ACA invites the Commission to point to the information gathered by the ACA Cable Modem Survey as a testament to the success of regulatory restraint in smaller markets. Conversely, those advocating nationwide, one-size-fits-all, mandatory open access regulations will need to demonstrate how their plans could possibly work better.

We now reply briefly to several points raised in the comments.

⁵ For reference, we also append the ACA Cable Modem Survey summaries contained in Tables 1-3 of ACA's Comments.

B. The record contains strong support for continued regulatory restraint in smaller markets.

Out of over 115 commenters, only ACA and one other party, Millennium Digital Media, directly address the concerns of independent cable companies and smaller markets.⁶ Yet the principles underlying ACA's analysis receive strong support from a broad and diverse array of non-cable commenters.⁷

The Commission should note how the well-researched and thoughtful comments of many *non-cable* interests corroborate ACA's observations. Think tanks, research groups, non-cable trade associations, and even a group representing more than 125 ISPs provide powerful endorsements of four key points in ACA's analysis. These are:

- The benefits of regulatory restraint in smaller markets.
- The consequences of imposing mandatory open access regulations in smaller markets.
- Unaffiliated ISPs are successfully negotiating for access to smaller market cable systems.
- The absence of marketplace failure in smaller markets.

We summarize briefly below ACA's conclusion on each point, followed by the key observations of other non-cable commenters.

⁶ See Comments of Millennium Digital Media (December 1, 2000) ("Millennium Comments"). Millennium is an ACA member serving 170,000 cable customers and 5,000 cable modem customers, primarily in suburban markets and smaller communities.

⁷ To bolster ACA's analysis, we could look to the excellent filings by NCTA, AT&T Broadband, Cablevision Systems, Charter Communications, Comcast, Cox Communications and other cable-related interests. But the corollaries would not be remarkable, and not precisely on point, as those analyses focus primarily on large systems and large markets.

1. The benefits of regulatory restraint in smaller markets.

What ACA says:

The Commission's policy of regulatory restraint has spurred investment in infrastructure and the deployment of advanced services in smaller markets.⁸

What non-cable commenters say:

Think tanks

The Progress & Freedom Foundation

In light of the marketplace evidence, as a matter of sound policy, there is no need for the Commission to intervene to impose mandatory 'open access' requirements. The costs of doing so now almost certainly would outweigh the benefits.⁹

Mercatus Center at George Mason University

[Our] economic analysis suggests that continuation of the Commission's market-based approach to open access will best promote consumer welfare.¹⁰

Net Compete Now

There is already ample evidence that the marketplace is fostering rapid growth, innovation and competition in the provision of Internet facilities, technology, services and content.¹¹

The marketplace is providing consumers with competing facilities-based providers of high-speed Internet access.

⁸ See ACA Comments at 5, 6.

⁹ Comments of The Progress & Freedom Foundation (filed December 1, 2000) ("Progress & Freedom Foundation Comments") at 9 (emphasis added). The Progress & Freedom Foundation is a Washington, D.C.-based non-partisan research institution.

¹⁰ Comments of Mercatus Center at George Mason University (filed November 16, 2000) ("Mercatus Comments") at 1 (emphasis added). The Regulatory Studies Program of the Mercatus Center studies the impact of regulation on society.

¹¹ Comments of Net Compete Now (filed December 1, 2000) ("Net Compete Now Comments") at 1 (emphasis added). Net Compete Now is a Washington, D.C.-based association representing Internet users and providers, small businesses, think tanks, consumers and education and community leaders.

And it is impelling these providers to make their service available to communities of all types – urban and rural, rich and poor.¹²

ACA member systems now pass nearly 1 million homes with cable modem service. ACA members have risked significant investments in infrastructure improvements to deliver these services. A key factor in that investment has been the continued regulatory restraint by the Commission. The non-cable commenters quoted above confirm this analysis.

2. The consequences of imposing mandatory open access regulations on smaller markets.

What ACA says:

ACA members have developed business models on the assumption that marketplace forces would govern their provision of cable modem service. Nearly all ACA members currently providing cable modem service would not risk additional capital if the service became subject to burdensome regulations.¹³

What non-cable commenters say:

Think tanks

The Progress & Freedom Foundation

So putting aside for the moment the technical and operational difficulties associated with devising a 'reasonable' regime for sharing a limited amount of bandwidth, it is clear that a mandatory sharing regime is likely to retard the very investment upon which the continuing development of competing infrastructures depend.¹⁴

¹² *Id.* at 5.

¹³ See ACA Comments at 10.

¹⁴ Progress & Freedom Foundation Comments at 10-11 (emphasis added).

Apart from the negative impacts of the mandatory ‘open access’ regime described above, as a practical matter, such a regime imposes very substantial transactional costs as the regulator attempts to determine the ‘right’ rates, terms, and conditions under which access will be mandated.¹⁵

Mercatus Center

A vast literature in economics and political science documents that regulation itself can impose significant costs. These costs include the cost of compliance, the costs of litigation and lobbying to shape or circumvent the regulation, and the perverse incentives created by many forms of price regulation.¹⁶

Net Compete Now

And there is also more than enough accumulated wisdom – among economists, regulators and antitrust authorities – to confirm that efforts to regulate the Internet with measures that have traditionally been applied to common carriers and ‘essential facilities’ are much more likely to thwart than to promote such continued growth, innovation and competition.¹⁷

Regulation is likely to add to the risks of investment and innovation while reducing the potential rewards – a sure-fire formula for putting the brakes on Internet growth.¹⁸

Non-cable trade associations

AeA (formerly the American Electronics Association)

Adoption of a ‘forced access’ policy toward cable modem services would stifle current investment levels, reduce competition among providers, and therefore slow deployment of advanced services to all Americans.¹⁹

¹⁵ *Id.* at 11(emphasis added).

¹⁶ Mercatus Comments at 11 (emphasis added).

¹⁷ Net Compete Now Comments at 1 (emphasis added).

¹⁸ *Id.* at 2 (emphasis added).

¹⁹ Comments of the AeA (filed December 1, 2000) (“AeA Comments”) at 2 (emphasis added).

Telecommunications Industry Association

Cable operators have been investing heavily to upgrade the cable plant in order to provide residential high-speed Internet access and other services. These efforts have been undertaken outside the shadow of government-imposed open access regulation. There is no assured return on this investment. Yet, the potential for a profitable return is enough for them to justify the risk of financial losses. However, a regulatory requirement mandating that cable operators open their high-speed platforms to unaffiliated ISPs clearly changes the equation. The risk-reward scenario is altered so as to discourage the investment.²⁰

ACA members report risking substantial investment in infrastructure to provide cable modem service. Most members committed these resources after assessing the market, developing business models and making business decisions based on analysis of marketplace incentives. Nearly all ACA members making these decisions indicate that the imposition of regulation would discourage further investment. The non-cable comments referenced above confirm this adverse consequence of burdensome mandatory open access regulation.

routers, switches, semi-conductors and other electronic components.

²⁰ Comments of the Telecommunications Industry Association (filed December 1, 2000) ("TIA Comments") at 25 (emphasis added). TIA is a Washington, D.C.-based association representing communications and information technology manufacturers and service providers.

3. Unaffiliated ISPs are successfully negotiating for access to smaller market cable systems.

What ACA says:

Many ACA members provide cable modem service through transactions with unaffiliated ISPs.²¹

What non-cable commenters say:

Think tank

The Heartland Institute

[ISPs] are, of course, free to sit down with cable companies and negotiate terms to be included in the cable companies' broadband offerings. Such negotiations in fact are taking place in many areas of the country.²²

Non-cable trade association

Newspaper Association of America

NAA believes that market incentives currently are working to encourage cable modem open access, and that the Commission need not take a more aggressive regulatory action at this time.²³

While the debate continues concerning access by unaffiliated ISPs to cable systems in the largest markets, ACA members report dozens of successfully negotiated solutions. The non-cable comments quoted above confirm that marketplace incentives are working.

²¹ See ACA Comments at 13.

²² Comments of the Heartland Institute (filed December 1, 2000) ("Heartland Comments") at iii (emphasis added). The Heartland Institute is a Chicago-based nonprofit public policy research organization.

²³ Comments of Newspaper Association of America (filed December 1, 2000) ("NAA Comments") at 5 (emphasis added). NAA is a Washington, D.C.-based non-profit trade association with more than 2,000 members.

4. **The absence of marketplace failure in smaller markets.**

What ACA says:

No evidence of market-based harm exists in markets served by ACA members, so regulations are not warranted for companies serving these markets.²⁴

What non-cable commenters say:

A wireless competitor

Metricom, Inc.

In addition, it is a bedrock principle of regulatory theory that regulation should be imposed only when necessary to address an identifiable market failure. In the case of the developing market for high-speed Internet access, there is no market failure that needs to be addressed.²⁵

Non-cable trade association

Information Technology Industry Council

ITI urges the Commission to continue its policy of regulatory restraint with respect to new broadband services unless and until marketplace data demonstrates that consumer interests are being harmed because the market is not functioning in a competitive manner.²⁶

²⁴ See ACA Comments at 17.

²⁵ Comments of Metricom, Inc. (filed December 1, 2000) ("Metricom Comments") at 6. Provider of Ricochet2, a high-speed wireless Internet access service.

²⁶ Comments of Information Technology Industry Council (filed December 1, 2000) ("ITI Comments") at 2. ITI is a Washington, D.C.-based information technology trade association representing computer hardware and software manufacturers, networking companies and Internet services companies.

An association representing more than 125 ISPs

Commercial Internet eXchange Association

At this still-early stage in the development of broadband technologies, the Commission should be wary of undertaking the regulation of technical minutia, such as broadband network architecture and standards.²⁷

Moreover, should market failures appear, and competition appear threatened, the Commission can restore competitive balance on an individual case basis or by issuing regulations of general applicability, as is most appropriate at that time.²⁸

The ACA Cable Modem Survey shows that in smaller markets, cable operators and unaffiliated ISPs are negotiating terms of access. Deployment of advanced services flourishes. These are functioning marketplaces. As the non-cable commenters quoted above confirm, no regulatory action is warranted in these markets.

We now turn to two flaws inherent in the arguments of most mandatory open access arguments as applied to smaller markets.

C. Mandatory open access advocates have failed to justify imposing costly open access regulations in smaller markets.

Several commenters appear to disagree with the analysis and conclusions of ACA and other well-researched, thoughtfully presented filings supportive of allowing marketplace solutions to continue in smaller markets. ACA replies briefly to the comments of two classes of mandatory open access advocates:

- ISPs that advocate regulation in all markets instead of innovation and marketplace transactions.
- Open access advocates that have the facts wrong.

²⁷ Comments of The Commercial Internet eXchange Association (filed December 1, 2000) (“CIX Comments”) at 9. (CIX is Washington, D.C.-based association representing ISPs.)

²⁸ *Id.*

The record before the Commission provides ample information to discount these arguments insofar as open access advocates seek to apply them to smaller market cable systems.

1. Some ISPs advocate regulation in all markets instead of innovation and marketplace transactions.

This class of commenters includes at least 34 members of the openNet Coalition that filed separate but identical filings, apparently seeking to establish the "weight of authority" through volume alone. Several additional ISPs filed comments containing similar themes.

The arguments.

This class of ISP commenters argues as follows:

- The Commission should impose regulated open access "to all cable broadband providers nationwide."²⁹
- An elaborate regulatory scheme is necessary to foster "creativity and innovation."³⁰
- Regulation is "the key to rapid broadband investment and deployment and therefore pivotal to future economic growth."³¹

Some ISPs in this group also predict frightful consequences if the Commission does not undertake the full-blown common carrier regulation of cable modem service:

- "Without equal - access, our independent ISP will not survive, nor will most of our independent competitors. We simply can not compete against

²⁹ Comments of StarLinX Internet Access and others (filed November 28, 2000) ("openNet Coalition Template") at 3.

³⁰ openNet Coalition Template at 1.

³¹ *Id.*

the visible and invisible cross-subsidization the carrier-owned monopoly ISP's enjoy."³²

- "We believe the future development of the Internet is in serious jeopardy if cable operators are allowed to limit access by ISPs."³³

As applied to smaller markets, these comments find no support in the record.

What the record shows.

The record contains no data showing that regulation of cable modem service is required to foster innovation, growth, and capital investment in broadband infrastructure in smaller markets. To the contrary, the record demonstrates:

- The Commission's policy of regulatory restraint has been an essential factor in spurring substantial investment in smaller market broadband infrastructure.³⁴
- ISPs unaffiliated with cable operators have chosen to develop innovative solutions to provide broadband internet access on smaller market cable systems.³⁵
- A substantial group of ISPs squarely disagrees with the clamor for mandatory open access.³⁶

The question becomes: How does the Commission reconcile these positions?

On one hand, the record demonstrates of the success of certain unaffiliated ISPs in negotiating access to broadband platforms in smaller markets. On the other hand, some ISPs claim that their only hope of survival is an elaborate regulatory regime imposed on all markets.

³² Comments of APK Net, Inc. (filed November 30, 2000) ("APK Comments") at 2.

³³ Comments of A+Net Internet (filed November 30, 2000) ("A+Net Comments") at 4.

³⁴ See ACA Comments at 10; see Net Compete Now Comments at 1; see Mercatus Comments at 1; see Progress & Freedom Foundation Comments at 9.

³⁵ See ACA Comments at 12-13; see Heartland Comments at iii; see NAA Comments at 5.

³⁶ See CIX Comments at 9.

The record suggests at least one answer. The Commission could conclude that the discordance on this point provides a powerful example of vibrant and functioning markets. Innovative ISPs helping to create marketplace solutions gain customers and are rewarded. ISPs that do not innovate lose customers and are not rewarded. This describes a marketplace at work, not a dire crisis to solve through regulation.

2. Mandatory open access advocates have their facts wrong concerning smaller markets.

Another class of open access advocates attempts to justify the need for a nationwide, mandatory open access regime based on allegations about how all cable operators behave. Concerning smaller market cable operators, these assertions squarely conflict with the record.

The arguments.

- "We do not believe (and history has proven) that cable operators in general will be willing to negotiate in good faith with unaffiliated ISP's."³⁷
- "Over and over, cable operators have exercised their bottleneck control to deny consumers access to the content and services provided by broadcasters and other unaffiliated entities."³⁸

What the record shows.

Concerning smaller market cable systems, these claims are wrong. Nothing on the record (or in any historical work familiar to ACA) demonstrates an unwillingness of smaller market cable systems to negotiate in good faith with unaffiliated ISPs and other content providers. Similarly, nothing on the record even hints that smaller market cable systems are denying consumers access to content and services offered by unaffiliated

³⁷ A+Net Comments at 6.

³⁸ Comments of Association for Maximum Service Television (filed December 1, 2000) at 3.

entities. To the contrary, the ACA Cable Modem Survey shows that most ACA members provide cable modem service through agreements with unaffiliated ISPs.

In short, an active marketplace exists for transactions between smaller market cable systems and unaffiliated ISPs - or at least those with the gumption to help solve the challenges of smaller market broadband services. The result – great progress in delivering advanced service to smaller markets.

III. CONCLUSION

The ACA Cable Modem Survey provides solid data showing that the Commission's policy of regulatory restraint is working well in smaller markets. The filings of diverse *non-cable* commenters support ACA's data and analysis.

To be sure, certain interest groups demand a one-size-fits-all nationwide mandatory access regulatory regime. When viewed in light of the solid data and thoughtful analysis on this record, the arguments of these advocates hold no credence for smaller market cable systems.

The record before the Commission provides ample evidence to support continued regulatory restraint in smaller markets.

Respectfully submitted,

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ACA Cable Modem Survey
as of October 2000

TABLE 1

ACA members currently providing cable modem service

Company and System Data

Companies	Total Cable Customers	Franchise Areas	Approximate Homes Passed
38	1,645,694	3,053	2,530,000

Cable Modem Service (CMS) Data

Franchise Areas Served	Homes Passed	% of total homes passed	CMS Customers	Penetration
355	839,748	33%	38,647	4.6%

Cable Modem Service (CMS) Data cont.

Investment in plant upgrades and equipment	CMS through unaffiliated ISP	CMS through affiliated ISP
about \$300 million	27	10

Near Term Expansion Plans (next 12-24 months)

Additional homes passed	Total Projected Homes Passed by CMS	% of Total Homes Passed
824,000	1,663,748	65%

Principal reasons for making investment to provide CMS:

- The investment was necessary to remain competitive.
- The investment was necessary to respond to the marketplace.

Business models showed that the investment would earn a satisfactory rate of return and provide incremental revenue.

ACA Cable Modem Survey
as of October 2000

TABLE 2

**ACA members planning to launch cable modem service
within next 12 to 24 months**

Company Data

Companies	Total Cable Customers	Franchise Areas	Approximate Homes Passed
36	69,367	167	99,000

Near Term Expansion Plans (next 12-24 months)

Homes Passed	% of Total Homes Passed	CMS planned through unaffiliated ISP	CMS planned through affiliated ISP	Undecided on ISP
54,515	55%	14	14	8

ACA Cable Modem Survey
as of October 2000

TABLE 3

ACA members not planning to provide cable modem service

Company Data

Companies	Total Cable Customers	Franchise Areas	Approximate Homes Passed
34	59,774	181	92,000

Main Reasons For Not Providing CMS:

- Cost -- 17 members
- Affiliated with telephone company offering or considering DSL – 7 members
- System size/customer base too small – 4 members
- Selling company – 3 members