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

To: The Commission

REPLY COMMENTS OF CHARTER COMMUNICATIONS, INC.

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REPLY COMMENTS OF CHARTER COMMUNICATIONS, INC.

Pursuant to the Commission's Notice of Inquiry ("NOI") in the above captioned matter, Charter Communications, Inc. ("Charter") submits the following Reply Comments regarding the provision of Internet access service over cable television systems.

I. INTRODUCTION AND SUMMARY

In its opening comments, Charter responded to the issues raised in the NOI by providing the Commission detailed information, describing from a business and technical standpoint why forced access regulations are unnecessary and inappropriate, and why continued reliance on the market will best serve the public interest. With declarations from its engineers, Charter explained to the Commission that accommodating multiple ISPs under a governmentally regulated regime would arrest the rapid evolution of technical solutions, such as routing protocols and equipment compatibility. Charter explained that existing routing protocols are inadequate for multiple ISP provisioning, and are being replaced by new protocols and equipment. It explained that an overwhelming number of operational issues, such as customer

billing, maintenance and repair, trouble resolution, and installation need to be resolved through business negotiation, not by regulation. It also discussed how the Internet access market is developing various business models to accommodate the needs and approaches of the array of different providers, and how those business models would be damaged by a forced access regime. Charter presented sworn testimony demonstrating the intensely competitive nature of this market, and the growing variety of high and low speed Internet access media. Charter demonstrated that in many of its markets it has equal or lower market share than DSL providers, among high-speed providers, and that dial-up remains the technology chosen overwhelmingly by customers today.

Charter's comments demonstrated that it would be inappropriate and is unnecessary for the Commission to impose forced access obligations on cable operators. In addition, the technical and operational issues discussed in Charter's comments demonstrate why the provision of Internet access service by cable operators does not fit within the Communications Act's Title II regulatory scheme for telecommunications providers. Cable systems are not dedicated loops designed to interconnect with other providers for the purpose of transmitting and exchanging communications between end-user consumers. Rather, all of the signals on a cable system share the same bandwidth; there are not dedicated loops between the headend and each subscriber's residence; and the systems are not designed to interconnect with a multitude of other providers in other locations. As a result, the regulatory structures of Title II do not fit with the provision of Internet service over cable systems.

None of the comments filed in support of forced access meaningfully address or rebut the issues raised by Charter, and certainly none provide the depth and detail provided by Charter. Rather, forced access proponents rely on naked conclusions and unfounded leaps of faith for

many difficult technical and legal issues. Specifically, forced access proponents ask the Commission to ignore the First Amendment and the holding in the *Henrico County* case and to treat the *Portland* decision as dispositive even though the court invited the FCC to resolve the issue. They assume that if cable modem service is a telecommunications service, ISPs are entitled to interconnection, UNEs, resale, collocation, and more; assume that cable operators have monopoly power in the Internet access market; assume that there must be "parity" in regulation of ILECs and cable operators; and ultimately, assume that implementing forced access would be easy. As Charter's opening comments and these reply comments demonstrate, the assumptions, premises, and leaps of faith underlying forced access proponents' comments are fatally flawed, and they along with forced access must be rejected.

The clear conclusion to be drawn from the comments received by the Commission is that various and diverse commenters, from satellite competitors (*e.g.*, StarBand) to municipal interests (*e.g.*, the City Coalition), agree that there is no basis for the Commission to impose forced access obligations on cable operators or others. Form letters from ISPs and copycat comments by coalitions[1] cannot replace the detailed discussions and evidence submitted by diverse parties demonstrating that forced access is not appropriate from a legal, factual, or policy standpoint. The Commission should reject those flawed arguments and reject once and for all calls for forced access to cable systems.

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[1] *Compare* Comments of the Competitive Access Coalition *with* Comments of the Consumer and ISP Representatives (nearly identical and at times verbatim copies). In this proceeding, more than 30 Internet Service Providers ("ISPs") submitted the equivalent of form letters, all tracking portions of the Comments submitted by OpenNet Coalition's Comments verbatim. *Compare* Comments of Portone Internet, Inc. *with* Comments of Supernova Systems, Inc. and Comments of the OpenNet Coalition ("OpenNet Coalition Comments"). Submitting the same document 30-plus times does not eradicate its flaws or make it more persuasive.

II. PROPONENTS OF FORCED ACCESS ARE ASKING THE COMMISSION TO MAKE UNFOUNDED LEAPS OF FAITH

The comments submitted by proponents of forced access and competitors to cable operators share a common tendency: they would all require the Commission to accept or make blind leaps of faith on critical factual and legal issues in order to reach the forced access conclusion the commenters advocate. Charter's opening comments sought to focus on practical, technical, and business issues rather than academic legal debates, but the flaws in proponents' legal arguments require that these reply comments explain their legal fallacies and the technological misunderstandings on which they may be based.

A. The Commission May Not Ignore The Growing Case Law Rejecting Forced Access

In their comments, forced access proponents advance legal theories that they assert support forced access. However, in so doing, they ask the Commission to ignore the fact that every court to address the issue (with the exception of the overruled district court opinion in *Portland*) has struck down attempts to impose forced access. They also ask the Commission to ignore the decisions that make clear that, as a matter of law, the Commission cannot and, as a matter of policy, should not impose forced access. The Commission cannot so easily ignore the rationale of those courts.

1. *Henrico County*

For example, many forced access proponents ignore the holding and rationale of the *Henrico County* court.[2] Yet, the court's holding and rationale are quite clearly correct, and

[2] *See, e.g.,* Comments of The Competitive Telecommunications Association ("Comptel Comments") at 40-41; Comments of the Texas Office of Public Utility Counsel at 7; Comments of the Alliance for Public Technology at 4-6.

should be followed by the Commission. On May 10, 2000, the district court for the Eastern District of Virginia struck down Henrico County, Virginia's attempt to impose forced access requirements on the transfer from MediaOne to AT&T.[3] In so doing, the court rested its holding on the fact that the provision of Internet access service over a cable system by a cable operator (what is being called "cable modem service" in this proceeding) is a "cable service" under the definitions of the Cable Act, and thus the imposition of a forced access requirement violated Section 621(c) of the Cable Act, 47 U.S.C. § 541(c).

The court was correct, particularly in light of the 1996 amendments to the Cable Act. In the Telecommunications Act of 1996, Congress amended the definition of "cable service." The legislative history of the 1996 Act explains that the amendment to the definitions was intended to "reflect the evolution of cable to include **interactive services** such as game channels and **information services** made available to subscribers by the cable operator, as well as **enhanced services**."[4] That concise Congressional statement answers the entire inquiry.[5]

There is essentially universal recognition by commenters that the provision of Internet access service is an "information service" under the 1996 Act, and an "enhanced service," under

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[3] *MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712, 715 (E.D. Va. 2000).

[4] H.R. CONF. REP. NO. 104-458, at 169 (1996) (emphasis added). While the first line of inquiry must always be the plain language of the statute, the phrase added by Congress, "or use" is sufficiently ambiguous to permit the Commission to look to the legislative history. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 861-62 (1984).

[5] The focus of some commenters on certain statements in the legislative history of the 1984 Cable Act appearing to indicate a more limited meaning of "cable service" is irrelevant and superceded since the 1996 Act amended the definition to include the provision of Internet access service over a cable system. *See* Comments of Earthlink, Inc. at 13-14 ("Earthlink Comments").

Computer II and *III*.[6] The Commission has recognized that Congress was aware of the meaning of "enhanced services" when it adopted the 1996 Act.[7] Thus, when Congress stated that the amended definition of "cable service" was intended to encompass a cable operator's provision of "information services" or "enhanced services," it clearly meant that the provision of Internet access service by a cable operator over a cable system would fall within the definition of "cable service."

Some commenters assert that the *Henrico County* decision is consistent with their claim that cable modem service is a telecommunications service. Their analysis, however, mischaracterizes and misinterprets the court's decision. For example, the so-called Competitive Access Coalition points to the court's conclusion that the County ordinance would require the operator to provide telecommunication service in violation of Section 621(c), and from that, the Competitive Access Coalition concludes that cable modem service is a "telecommunications service."[8] What that argument ignores is the fact that the conclusion by the court was that *the County's requirement* that the operator carry multiple ISPs would *force* the operator into

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[6] *See, e.g.,* Comments of the National Cable Television Association at 8-9 ("NCTA Comments"); Comments of the Texas Office of Public Utility Counsel at 8; Comments of Cox Communications at 33 ("Cox Comments"); *see also Federal-State Joint Board on Universal Service*, 13 FCC Rcd. 11501 at ¶ 75 (1998) ("*Universal Service Report to Congress*"); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 FCC 2d 384 ¶¶ 97-98 (1980) ("*Computer II*"); *Amendment of Section 64.702 of the Commission's Rules and Regulations* ("*Computer III*"), Report and Order, Phase II, 2 FCC Rcd. 3072 (1987) (subsequent history omitted).

[7] *See Universal Service Report to Congress* at ¶ 21.

[8] Comments of the Competitive Access Coalition at 14-15.

providing common carrier service—which of course the government cannot do under Section 621(c).[9]

The court did not hold that the operator's provision of cable modem service using a single ISP constituted telecommunications service. Rather, the court held that "MediaOne's Road Runner service contains news, commentary, games, and other proprietary content with which subscribers interact as well as Internet access, and *therefore it falls under the statutory definition of 'cable service.*"[10] The court found that MediaOne's "cable service" would be transformed into a "telecommunications service" only by enforcement of the County's ordinance: "by reason of its provision of cable modem services, ***the Ordinance would require*** MediaOne Virginia to provide indiscriminate access to its facilities to all ISPs on set terms and conditions."[11] By selectively choosing statements and portions of the decision, the Competitive Access Coalition and others cannot change the holding or analysis of the *Henrico County* court to serve their agenda.

2. They Ignore The First Amendment

On November 8, 2000, the U.S. District Court for the Southern District of Florida held that Broward County's forced access ordinance violated the First Amendment rights of cable operators.[12] In its decision, the court held that a forced access requirement on cable operators violates the First Amendment under either a strict or intermediate scrutiny standard. The court

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[9] *Henrico County*, 97 F. Supp. 2d at 714.

[10] *Id.* at 715 (emphasis added).

[11] *Id.* (emphasis added).

[12] *Comcast Cablevision of Broward County, Inc. v. Broward County,* 2000 U.S. Dist. LEXIS 16485 (S.D. Fla. Nov. 8, 2000).

rightly held that "[c]ompelled access like that ordered by the Broward County ordinance both penalizes expression and forces the cable operators to alter their content to conform to an agenda they do not set."[13] Recognizing the fact that all signals carried on cable systems share capacity, it further found that forced access "deprives the cable operator of editorial discretion over its programming and harms its ability to market and finance its service, thereby curtailing the flow of information to the public."[14]

The *Broward County* court's decision, and particularly its focus on how forced access regulations unlawfully restrict content through regulation of the *means or channels* of distribution[15] is consistent with previous Supreme Court precedent. For example, in *City of Lakewood v. Plain Dealer Publishing Co.*, the Court held that an Ordinance giving the City broad power to license and regulate the location of newspaper racks violated the First Amendment.[16] The Supreme Court's decision demonstrates that laws, like forced access, that regulate or restrict the means or methods of transmission of speech, and thereby restrict or potentially restrict the editorial discretion of the speaker, are just as offensive to the First Amendment as explicit limitations on content.[17]

Commenters supporting "compelled access" (as the *Broward* court called it), generally ignore the *Broward County* decision. The Commission, however, cannot so simply ignore the rights of cable operators. Any forced access obligation imposed by the Commission would

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[13] *Id.* at *28.

[14] *Id.* at *25.

[15] *Id.* at *20-*21.

[16] 486 U.S. 750 (1988).

[17] *See id.* at 769.

suffer from the same Constitutional defects as the Broward County ordinance. Thus, the Commission should reject calls for forced access, and recognize the First Amendment rights of cable operators.

3. The *Portland* Decision Does Not Compel Forced Access

Some commenters supporting forced access argue that the Commission is required to compel forced access by the ruling of the Ninth Circuit in *AT&T v. City of Portland,* 216 F.3d 871 (9th Cir. 2000). The basis for their arguments appears to be that the Commission filed an *amicus curiae* brief with the court.[18] The commenters are incorrect, and their argument ignores the court's recognition of the Commission's primary jurisdiction to resolve such telecommunications policy issues as are raised by calls for forced access.

The Ninth Circuit explicitly recognized in its decision that the Commission should decide questions regarding the regulatory scheme applicable to cable modem service, stating "Congress has reposed the details of telecommunications policy in the FCC, and we will not impinge on its authority over these matters."[19] In this case, that conclusion is particularly appropriate and important because the Commission's expert understanding of the industry and technology are integral to the interpretation of the statute and the subsequent policy that would result.

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[18] *Brief for the Federal Communications Commission as Amicus Curiae, AT&T Corp., Telecommunications, Inc., et al. v. City of Portland et al.*, Case No. 99-65 PA (9th Cir. 1999). Of course, mere participation by the Commission as *amicus curiae* does not make the court's holding binding on the Commission under *res judicata* principles. *Kerr-McGee Chemical Corp. v. Hartigan*, 816 F.2d 1177, 1181 (7th Cir. 1987) (quoting *TRW, Inc. v. Ellipse Corp.*, 495 F.2d 314, 318 (7th Cir. 1974)); *see also Adams v. Bell*, 711 F.2d 161, 197 n.128 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1021 (1984); *Munoz v. Imperial County*, 667 F.2d 811, 816 (9th Cir.) ("the filing of an amicus brief has never been enough to bind a non-party to the results of a proceeding"), *cert. denied*, 459 U.S. 825 (1982).

[19] 216 F.3d at 879-80.

In any event, the *Portland* decision is far from the gospel that some commenters assert. Contrary to the claims of some, the decision is clearly at odds with the decision of the Eleventh Circuit in *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000)("*Gulf Power II*") and the district courts in *Henrico County* and *Broward County*. In *Gulf Power*, the Eleventh Circuit held that cable modem service is neither cable service nor telecommunications service.[20] While Charter disagrees with the Eleventh Circuit's analysis and conclusion, nonetheless, it is clearly inconsistent with the decision of the Ninth Circuit. The claims by some commenters that they are consistent mischaracterize and misread the *Gulf Power* decision. Those commenters wishing to distinguish *Gulf Power* assert that the court never addressed whether the "transmission" component of cable modem service is a "telecommunications service."[21] Commenters are simply wrong. The Eleventh Circuit never stated or suggested that its conclusion was limited to the "ISP" component of cable modem service. The Court's conclusion, while incorrect, was plainly that the provision of Internet access service by a cable operator, as a whole, is not a telecommunications service.[22]

If anything, there is judicial confusion regarding the status of cable Internet service – with three courts who have addressed the issue reaching three different conclusions.[23] Under such circumstances, the Commission should not feel "bound" by the Ninth Circuit's decision.

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[20] *See Gulf Power II* at 1276-78.

[21] Comptel Comments at 41.

[22] *See Gulf Power II* at 1276-78.

[23] In reality, three out of five courts have held that cable Internet service is a cable service. *See Comcast Cablevision of Broward County, Inc. v. Broward County,* 2000 U.S. Dist. LEXIS 16485 (S.D. Fla. Nov. 8, 2000); *MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712, 715 (E.D. Va. 2000); *AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146, 1154 (D. Or. 1999).

B. Forced Access Advocates Mistakenly Assume That If Cable Modem Service Is Telecommunications Service ISPs Get Common Carrier Transport

A common leap made by proponents of forced access is from their premise that cable modem service is a telecommunications service to their conclusion that as a result, ISPs get common carrier access to the cable system. Their argument is that cable operators offer cable modem service to all residential consumers on nondiscriminatory rates and conditions, that such service is therefore a common carrier service, and that therefore ISPs should get to purchase access on the same terms and conditions. That argument, however, is mistaken in fact and law.

Offering cable service to all subscribers does not create forced access rights. Cable operators offer expanded basic service to all subscribers at nondiscriminatory rates. But they are not, as a result, required to provide common carrier transport over their systems for every programming network that requests it. Yet, that would be precisely the result of commenters' argument.

Indeed, according to the logic advanced by forced access advocates, all services "carried" over a cable system fit within the definition of telecommunications service. Operators offer their services to all potential subscribers. And the cable system, under forced access advocates' theory, is simply providing transport between the points of the subscribers' choosing (*i.e.*, from their home to various content sources, such as pay-per-view movies). Moreover, that transport is as bi-directional as Internet access service—given that surfing Internet sites, even clicking through on links, is as much two-way or interactive as choosing pay-per-view movies or surfing a digital cable tier and clicking through to multiplexed programming (like HBO multiplex). Under proponents' analysis, that simplistic view of a cable system would be a

telecommunications service. Congress has clearly determined, however, that cable operators are not common carrier telecommunications providers.[24] Commenters' approach would have the Commission discard the careful definitions emerging from three decades of law for the sake of their special interest.

Even assuming *arguendo* that the cable modem service offered to residential consumers is "telecommunications" (which it is not), that does not mean that cable operators owe ISPs carriage on the same terms and conditions. As Charter discussed in its opening comments,[25] the Commission has 25 years of experience recognizing that certain services can be offered on a private carriage basis.[26] There should be no difficulty, therefore, in recognizing that the provision of Internet access service between cable subscribers and the cable operator's ISP could be done on a private carriage basis. Indeed, as Charter, and others, emphasized in opening comments, the unique technological issues raised by cable system carriage of Internet traffic dictates that the cable modem service be handled on a private carriage basis, like in *Norlight*.[27]

Moreover, the assumption by nearly all commenters supporting forced access is that all cable operators provide high-speed Internet access service in the same way—that is, through an

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[24] *See, e.g.*, 47 U.S.C. § 541(c).

[25] Comments of Charter Communications, Inc. at 32 ("Charter Comments").

[26] *See National Ass'n of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) ("*NARUC II*"); *National Ass'n of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) ("*NARUC I*").

[27] *Norlight Request for Declaratory Ruling*, Declaratory Ruling, 2 FCC Rcd. 132 (1987); *see* Charter Comments at 9-18; NCTA Comments at 69-81; Comments of Comcast Corp. at 33-35 ("Comcast Comments"), Cox Comments at 21-26; Comments of AT&T Corp. at 52-65, 80-85 ("AT&T Comments").

exclusive deal with a separate ISP (*i.e.*, the AT&T/@Home model).[28] Yet, that is not true. Many operators, including Charter and Adelphia for example, in some markets offer Internet access service directly—without any outside ISP. In those cases, there is not even a private carriage service being provided. Rather, the operator is integrating its in-house ISP function into its cable system equipment and facilities—it is an integral part of its cable package. Thus, there is no service to be offered to an ISP.

C. They Assume That If Cable Modem Service Is Telecommunications Service, ISPs Are Entitled To Interconnection, Unbundled Network Elements, Resale, And Other ILEC-level Obligations

A significant leap of faith made by supporters of forced access is that the classification of cable modem service as a telecommunications service will provide ISPs with a host of entitlements, such as interconnection, unbundled network elements, resale, and other items generally required only of ILECs by the 1996 Act.[29] That leap is flawed in numerous respects.

1. Cable Operators Would Not Be Subject To ILEC Obligations

In the 1996 Act, Congress adopted two distinct sets of obligations on providers of telecommunications services—one for ILECs, and one for all other providers. In Section 251(a) and 251(b), Congress imposed one set of obligations on all telecommunications carriers (251(a)) and all local exchange carriers (251(b)). In Sections 251(c), 252(a), and 252(b), however,

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[28] *See, e.g.*, Comments of the Competitive Access Coalition at 43; OpenNet Coalition Comments at 2, 25; Comments of The Newspaper Association of America at 4; Comments of the Texas Office of Public Utility Counsel at 22, Comments of the Consumer and ISP Representatives at 3.

[29] *See* Comptel Comments at 6-8; Comments of Verizon Communications at 17-21 ("Verizon Comments"); Communications Workers of America ("CWA Comments") at 1, 3-5; OpenNet Coalition Comments at 18-19, 21-22, 24; Comments of the Association of Communications Enterprises at 11, 13, 15 ("ASCENT Comments"); Comments of SBC Communications, Inc. and BellSouth at 3, 12, 30, 37-38.

Congress adopted additional and separate obligations that apply only to ILECs. 47 U.S.C. § 251(c), 252(a), 252(b). Congress adopted those different duties in order to facilitate market entry and to end the long standing state-sanctioned monopoly such incumbents enjoyed.[30] In *Iowa Utilities Board,* the Supreme Court recognized that these obligations on ILECs were different from the obligations of general local exchange carriers.[31] The Commission also recently noted the distinctive obligations of incumbents under Section 251, stating that "incumbent carrier compliance with the obligations set forth in Section 251 of the Communications Act is absolutely necessary for achievement of the pro-competitive goals and policies of the 1996 Act."[32]

Cable operators are not ILECs. They did not provide telephone exchange service in 1996, did not belong to the exchange carrier association in 1996, are not the successors to any such entities, and do not occupy a position in the market for telephone exchange service comparable to an ILEC.[33] Thus, they are not ILECs, and cannot be regulated as such under Sections 251 or 252.

2. ISPs Would Not Qualify For Interconnection Under Section 251

If cable modem service is a telecommunications service, cable operators would be subject only to the obligations imposed on other non-ILEC providers. Specifically, they would be subject to Section 251(a). Yet, generally, ISPs would not be entitled to interconnect with cable

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[30] *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 371 (1999) (stating "foremost among these duties is the [incumbent] LEC's obligation under 47 U.S.C. §251(c)" to facilitate market entry by competitors).

[31] *Id.* at 397.

[32] *See Section 257 Report to Congress (Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses)*, Report, 15 FCC Rcd. 15376 at ¶ 26 (Aug. 10, 2000).

[33] 47 U.S.C. § 251(h).

operators under Section 251(a). Section 251(a) requires telecommunications carriers to "interconnect directly *or indirectly* with the facilities and equipment of *other telecommunications carriers*. . . ." 47 U.S.C. § 251(a) (emphasis added). As Charter noted in its opening comments, at a minimum, it already satisfies Section 251(a) because it indirectly interconnects with all ISPs via the Internet backbone. In any event, ISPs are not entitled to interconnection under Section 251(a) because they generally are not "telecommunications carriers," but rather are information services providers, and end-user customers.[34]

3. ISPs Would Not Qualify For Interconnection Under Section 201

Some commenters argued that if cable modem service is a common carriage service, cable operators must allow ISPs to interconnect under the common carrier obligations of Section 201.[35] For the same reason that ISPs would not be entitled to interconnection under Section 251(a), they would not be entitled to interconnection under Section 201. Section 201 provides that a common carrier, "in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers. . . ." 47 U.S.C. § 201(a). Even ignoring the fact that the Act requires a specific hearing on a request for interconnection under Section 201, the provision only provides for physical connection with "other carriers." ISPs generally are not common carriers, and therefore, would not be entitled to interconnection under Section 201(a).

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[34] *See In re Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges*, First Report and Order, 12 FCC Rcd. 15982 at ¶¶ 344-45, 348 (1997).

[35] Comptel Comments at 44-45; Verizon Comments at 17-18; Comments of the Alliance for Public Technology at 8; Comments of SBC Communications Inc and Bellsouth at 3.

4. The Commission's *Computer* Orders Do Not Properly Apply To Cable Operators Acting In The Dynamic Internet Access Market

Some commenters argued that cable operators should be required to provide resale and access to unaffiliated ISPs under the Commission's *Computer II* and *Computer III* orders.[36] Those orders, however, do not properly apply to cable operators.

The Commission adopted the *Computer II* and *Computer III* orders because it was concerned that certain common carriers had both the opportunity and incentive to engage in cross-subsidization and anticompetitive behavior in offering both basic (telecommunications) and enhanced (information) services. The Commission noted that because the provision of enhanced services was dependent on access to a common carrier's basic service, enhanced service providers needed access to that basic service without being subject to discriminatory tactics.[37] Because the Commission's concern centered on cross-subsidization and anticompetitive behavior, and developed at a time when its focus was almost entirely on the Bell Operating Companies and GTE, the *Computer* orders do not properly apply to cable operators.

Indeed, a statement by the Commission in 1980 concisely summarizes why the *Computer* orders do not apply to cable operators engaged in the dynamic and competitive Internet access market today:

> The need, then, does not exist to subject carriers to the resale structure if such entities lack the potential to cross-subsidize or to engage in anticompetitive conduct to any significant degree. We believe that ***with the changes taking place in the competitive makeup of the***

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[36] Comptel Comments at 42-43; ASCENT Comments at 10; Comments of Consumer's Union, Consumer Federation of America, Center for Media Education and Media Access Project at 16-18; Comments of Worldcom, Inc. at 13-15 ("Worldcom Comments"); Comments of the Texas Office of Public Utility Counsel at 8.

[37] *See Computer II*, 77 FCC 2d at 474-75 ¶ 231.

> ***communications industry*** our regulatory concerns which give rise to the need for structural separation should be directed at ***monopoly telephone companies*** exercising ***significant market power*** on a ***broad geographic basis***."[38]

The Commission has reiterated that finding. In 1987, the Commission held that the non-structural safeguards of *Computer II* did not properly apply to Independent Telephone Companies.[39] In so doing, the Commission stated that "[t]hese new regulatory requirements were designed to guard against the possibility that *AT&T and the BOCs*, in the absence of structural separation, might engage in cross-subsidization or discrimination."[40] Subsequently, the Commission held that ONA and nondiscrimination safeguards should apply to GTE, but only because its size and geographic scope equaled or exceeded some of the BOCs.[41]

The Commission's rationale in its *Computer* decisions demonstrates that those regulations were not intended to apply to cable operators providing Internet access service. The *Computer* orders were adopted in a wave following the breakup of the Bell Operating Companies. They were designed specifically to apply to telephone companies whose core operation was the monopoly provision of basic telephone services in regions spanning multiple states. They clearly were not intended to, and should not now, apply to cable operators that are, at most, new entrants into the telecommunications market, with no market power over the

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[38] *Id.* at 468 ¶ 220 (emphasis added).

[39] *See Computer III*, 2 FCC Rcd. at 3101.

[40] *Id.* (emphasis added).

[41] *Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corp.*, 9 FCC Rcd. 4922, 4933-34 (1994) ("GTE is substantially similar to the BOCs in overall size. When compared to the BOCs, GTE ranks second behind BellSouth in total operating revenue, total gross plant, and the number of employees. While GTE has many service areas that are

provision of basic telephone services, or even related telecommunications services, and that serve geographically separate individual communities (or at most small clusters of communities). The "changes taking place in the competitive makeup of the communications industry" today are more dynamic than even those in 1980, and thus, the Commission should recognize again that there is no need for regulation in the form of forced access.

D. Cable Operators Do Not Have Market Power In The Internet Access Service Market

A common theme among commenters seeking forced access is their insistence that cable operators have market power in the Internet access service market. This theme came in two forms. One was the commenters who baldly asserted that cable operators have a monopoly over high-speed Internet access service.[42] Such assertions were typically without any citation, and for the reasons discussed below, are plainly incorrect. The second form came from commenters that attempted to bootstrap cable operators' position in the provision of multi-channel video programming services into market power over Internet access service.[43] Such a leap, however, is improper and ignores the facts. As discussed below, DSL is widely available, cable operators do

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smaller and more rural than those of the BOCs, it has more working loops than Southwestern Bell even if study areas with less than 200,000 working loops are excluded").

[42] Worldcom Comments at 1-4; Comptel Comments at 22; Comments of LavaNet, Attachment at 2.

[43] Comments of Consumer's Union, Consumer Federation of America, Center for Media Education and Media Access Project at 19; OpenNet Coalition Comments at 21; Comments of the United States Internet Industry Association ("USIIA") and iADVANCE at 10; Comments of the National Associations of Towns and Townships, Citizen Power, Inc., the Utility's Commission, New Smyrna Beach, Florida, Amigo.net, and Northnet at 3; Comments of Circuit City Stores, Inc. at 5-6.

not have market power, even looking only at high-speed access, and competition is growing at an overwhelming pace.[44]

1. DSL Is Widely Available

Several commenters attempt to support their claim that cable operators have a monopoly in the Internet access market by alleging that DSL is not widely available.[45] The facts introduced by Charter, other commenters, and the Commission's own findings demonstrate the falseness of those claims.

The Commission's most recent statistical findings regarding the availability of high-speed Internet access demonstrate that DSL is widely available. In the Common Carrier Bureau's October 2000 report, *High-Speed Services For Internet Access: Subscribership as of June 30, 2000*, it reported that high-speed services were available in about 70% of zip codes.[46]

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[44] Cable operators' lack of market power supports Commission forbearance under 47 U.S.C. § 160(a). If the Commission were to determine that cable modem service is a telecommunications service offered to ISPs, it is required by Section 160(a) to forbear from imposing the obligations of Section 201 and 251 on cable operators. Because of the competitive alternatives for carriage available to ISPs (*e.g.*, DSL, satellite, wireless), enforcement of those provisions is not necessary to ensure that charges, practices, classifications, or regulations are just and reasonable. 47 U.S.C. § 160(a)(1). Moreover, as described in Charter's opening comments, its prices to consumers are already constrained by competition, and thus enforcement of regulations is not necessary for the protection of consumers. 47 U.S.C. § 160(a)(2). Finally, as Charter described in its opening comments, forbearance from regulation has encouraged the development of competition and advanced technologies. It would not serve the public interest to thwart that development through burdensome regulation. 47 U.S.C. § 160(a)(3). Thus, the Commission must forbear from regulation if cable modem service is deemed a telecommunications service.

[45] *See, e.g.*, Comptel Comments at ii, 12-14; OpenNet Coalition Comments at 4-5.

[46] Industry Analysis Division, Common Carrier Bureau, *High-Speed Services For Internet Access: Subscribership as of June 30, 2000*, at 3-4 (Oct. 2000).

More importantly, the Bureau noted that 95% of the Country's population lived in those 70% of zip codes.[47] This is overwhelming evidence rebutting claims that DSL is not widely available.

Indeed, additional evidence of the market power for DSL appears constantly. For example, on January 8, 2001, the Commission released yet another order recognizing the market presence of DSL. In its Seventh Annual Report on competition in the market for delivery of video programming, the Commission recognized that "[a]nalysts predict that by year-end 2000, there will be over 1.7 million DSL subscribers, compared to only 445,000 subscribers by year-end 1999. Some analysts predict that there will be more residential DSL subscribers than cable modem subscribers by 2002."[48] Those predictions further emphasize the availability and strength of DSL service.

As Charter and other commenters demonstrated, real world experience supports the Commission's finding that DSL is widely available and a powerful competitor. In Charter's experience, DSL is widely available and aggressively marketed. Moreover, potential limitations on DSL, such as distance from central offices, which are overemphasized by forced access proponents, are being overcome and eliminated every day.[49] Other commenters identified a similar experience. For example, Cox Communications detailed how it faces competition from

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[47] *Id.*

[48] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, FCC 01-1 at ¶ 52 (rel. Jan. 8, 2001) (internal citations omitted).

[49] Charter Comments at 5. The Commission should note the disingenuous nature of forced access proponents' technical arguments. Because it serves their purposes, they claim that some technical aspects of DSL service cannot be overcome, while at the same time completely ignoring the various and well-documented technical issues faced by cable operators.

DSL in its markets.[50] The National Cable Television Association also provided the Commission with substantial evidence demonstrating the extensive availability of DSL.[51] Claims that DSL is not available are overstated and false.

2. Cable Operators Do Not Have Market Power, Even Looking Only At High-Speed Internet Access Providers

Some forced access proponents asserted in their comments that cable operators have a monopoly over or market power in the market for high-speed Internet access service.[52] Again, such claims are contrary to the clear evidence before the Commission.

In its comments, Charter provided evidence that in many markets its cable modem service and DSL service have essentially identical market shares.[53] Moreover, Charter provided the Commission with evidence that in some markets, Charter's cable modem service actually ***has less market share than that of DSL providers***.[54] Other cable operators reported similar experiences.[55] In its comments, Cox discussed its pricing decisions based on DSL competition and demonstrated that it was subject to a full array of competitive market forces and that it responds accordingly to these forces.[56] Similarly, Comcast told the Commission that it faces

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[50] Cox Comments at 8-12.

[51] NCTA Comments at 42-43, 46-47, 53-54.

[52] *See, e.g.,* Worldcom Comments at 1-4; Comptel Comments at 22; Comments of LavaNet, Attachment at 2; Comments of Consumer's Union, Consumer Federation of America, Center for Media Education and Media Access Project at 19; Comments of the United States Internet Industry Association ("USIIA") and iADVANCE at 10; Comments of the National Associations of Towns and Townships, Citizen Power, Inc, the Utility's Commission, New Smyrna Beach, Florida, Amigo.net, and Northnet at 3; Comments of Circuit City Stores, Inc. at 5, 6.

[53] Charter Comments at 4 and Conner Declaration at ¶ 5.

[54] Charter Comments at 4 and Conner Declaration at ¶ 4.

[55] *See, e.g.,* Comments of Cablevision Systems Corp. at 8-9.

"intense competition" not only from ISPs utilizing DSL service, but also competitive wireline providers that currently offer, or soon will launch, broadband Internet services.[57]

At its core, forced access is posited as a remedy for an alleged market imbalance. Without such an alleged imbalance, there is no possible need for regulation. Accordingly, imposing a forced access obligation on Charter and other operators, given that in many markets they are evenly competing with DSL or actually trail DSL, would be wholly inappropriate.

3. Competition Is Growing So Fast Commenters Cannot Keep Track

The Commission has repeatedly recognized that the market for Internet access is new and rapidly developing. The truth of the Commission's recognition was born out in the comments. For example, the Competitive Access Coalition, in seeking to downplay competition and claim that cable operators have a monopoly, boldly asserted that two-way broadband satellite Internet service would not be available "for several years."[58] Yet, several weeks before the comment deadline, StarBand (previously known as Gilat) publicly launched nationwide its two-way, high-

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[56] Cox Comments at 8-12.

[57] Comcast Comments at 7-11, 38, Appendix A at A-6.

[58] Comments of the Competitive Access Coalition at 80. The Coalition cited a 1999 affidavit from William Shapiro for support of its statement. Mr. Shapiro's testimony and expertise on the issue of forced access was generally rejected by the Vermont Public Service Board in its decision not to impose forced access as a condition of Adelphia's renewal, and was discredited during hearings before the Vermont Board. *See* Petitions for Renewal of Certificates of Public Good Held By Mountain Cable Company and Better TV, Inc. of Bennington, both d/b/a Adelphia Cable Communications and Motion of Vermont Department of Public Service for a Show Cause Hearing re: Non-Compliance by Mountain Cable Company d/b/a Adelphia Cable Communications of Stipulation and Board Order, Final Order and Renewed Certificates of Public Good, Docket Nos. 6101 and 6223 (Apr. 28, 2000). At the hearings, it was exposed that Mr. Shapiro is not an engineer, has no meaningful practical experience or training on the issues, and ultimately even refused to identify himself as the State's expert on Internet access during the Vermont hearings. Mr. Shapiro's affidavit testimony cited by commenters in this proceeding is unreliable and should be ignored.

speed satellite Internet access service.[59] Indeed, StarBand is marketing its service heavily[60] and has engaged in bundling deals with DBS satellite providers to increase its general availability.[61] The Satellite Association's comments further demonstrate that claims about the lack of satellite competition are simply wrong.[62] Such examples emphasize that it would be foolhardy for the Commission to proclaim that cable operators have market power when the market and its players are not yet fully defined.

4. The AOL/Time Warner Decision Does Not Support Industry-Wide Forced Access

Since the filing of opening comments in this proceeding, the Federal Trade Commission, AOL and Time Warner have reached a consent order governing the merger of AOL and Time Warner.[63] That Order sets forth certain terms and conditions governing access to AOL/Time Warner's cable systems by unaffiliated ISPs. The FTC's AOL/Time Warner accord, however, is not appropriate for application to the cable industry as a whole.

The FTC Order is clearly designed to deal with the unique facts of the merger, and particularly, the market dominance of AOL. Under the Order, AOL/Time Warner must provide access to its cable systems to "nonaffiliated" ISPs under certain circumstances. That access requirement is triggered by AOL/Time Warner's offering of ISP service over its cable systems

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[59] *See* Comments of Starband Communications, Inc. at 2, 4 ("Starband Comments").

[60] Charter Comments at 4.

[61] Starband Comments at 7-8; Charter Comments at 4.

[62] Comments of the Satellite Broadcasting and Communications Association and Satellite Industry Association Broadband and Internet Division at 3.

[63] *In re America Online, Inc. and Time Warner, Inc.*, Decision and Order, Docket No. C-3989 (rel. Dec. 14, 2000).

from an "affiliated" ISP.[64] Critically, however, Road Runner, the ISP that is majority owned by Time Warner,[65] is explicitly ***excluded*** from the definition of an "affiliated" ISP.[66] Thus, the FTC was not concerned about Time Warner's exclusive offering of Road Runner. Indeed, AOL/Time Warner could continue offering Road Runner exclusively under the Order without triggering the access requirements.

The conclusion to be drawn is that exclusive offering of Internet access service from any other ISP over a cable system, even from an affiliated ISP, does not trigger the same concern as AOL, *the nation's largest ISP*, offering Internet access service over cable systems that it owns or controls. The Commission should recognize the unique factors that governed the AOL/Time Warner situation, and recognize, as the FTC did, that forced access is not justified on any other cable systems.

E. There Is No Basis For ILEC Calls For "Parity"

A common theme echoed in comments by ILECs, not surprisingly, was a call for "regulatory parity." In this argument, the ILECs use the regulatory burden imposed on them by Congress in the 1996 Act as both a sword and a shield. On the one hand, ILECs, like Verizon, would like to avoid the burdens imposed on them, so they argue that because cable operators are free from regulation, they should be too.[67] On the other hand, ILECs, like SBC, seek to use their regulatory burdens as a sword. They argue that cable operators are providing the same service as

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[64] *Id.* at 6.

[65] *See TW, AT&T Restructure Road Runner, End Exclusive Deals*, Comm. Daily, Dec. 19, 2000.

[66] *In re America Online* at 3.

[67] Verizon Comments at 21-28.

the ILECs' DSL service, and thus cable operators should be subject to the same level of regulatory burden.[68] Neither approach is correct.

1. "Parity" Arguments Ignore Congressional Choices And Plain Language Of The Act

The "parity" arguments are unavailing. As discussed above, Congress made a conscious and explicit decision in the 1996 Act to impose different regulatory schemes on different classes of providers. CLECs providing DSL service are providing services *identical* to the ILECs' services, yet there is no question that the two are subject to different regulatory burdens under the 1996 Act. *See* 47 U.S.C. §§ 251, 252. Indeed, in the 1996 Act, Congress chose in several instances not to adopt regulatory "parity" requirements. For example, Congress rejected a "parity" provision for Section 253 that would have required identical treatment of new and incumbent telecommunications providers.[69] Similarly, the OVS scheme demonstrates that "parity" was not always Congress' intent. OVS operators and cable operators provide essentially identical bundles of multiple channels of video programming to subscribers over wired facilities. Yet, in the 1996 Act, Congress explicitly adopted a different and less burdensome regulatory scheme for OVS operators than the one applicable to cable operators.[70] While parity is a catchy sound-bite, it is not supported in law or policy.

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[68] Comments of SBC Communications, Inc. and BellSouth Corporation at 25-31.

[69] *See* 141 Cong. Rec. H8427 (Aug. 4, 1995).

[70] 47 U.S.C. § 573 ("An operator of an open video system shall qualify for reduced regulatory burdens under subsection (c) of this section. . ." upon receiving certificate from the Commission).

2. ILECs' Complaints Are Best Resolved In Other Forums

The ILECs' complaints are with the unbundled network element ("UNE") price of DSL, and the alleged differential profit margins associated with unbundling for DSL. Those complaints are being addressed in their appeal of *Deployment of Wireline Services Offering Advanced Telecommunications Capability*.[71] That is the proper forum for resolving such concerns.

We note, however, that the ILECs' complaints do not focus on the market as it actually operates. They complain about the alleged differential profit margin associated with unbundling for DSL, yet the rate of investment by ILECs in infrastructure and the actual use of their DSL plant belie the argument. If providing unbundled DSL loops were not financially lucrative, ILECs would not be investing in upgrading such loops, and would not be attracting the positive levels of investment that they have.[72] Moreover, if nearly 80% of DSL Internet traffic termination is in the ILECs' DSL ISPs,[73] then the combined margins of transport and Internet are being enjoyed by the ILECs, not siphoned off to ISPs. Competitors with the strength and financial power of the ILECs hardly need help from the Commission in the name of "parity."

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[71] Order on Remand, 15 FCC Rcd. 385 (1999), *appeal docketed*, *Qwest Communications Int'l, Inc. v. FCC*, No. 00-1062 (D.C. Cir. Feb. 22, 2000).

[72] *See* Corey Grice, "Tough Times for high-speed ISPs despite demand," CNET news.com (Dec. 5, 2000) http://news.cnet.com/news/0-1004-200-4006449.html (detailing the Baby Bells strength in the DSL market); John Borland, "Telecom players spend big, but win little," CNET News.com (Sept. 27, 2000), http://news.cnet.com/news/0-1004-200-2878444.html (stating that Verizon Communications is investing a total of $18 billion in infrastructure this year and that it is "very comfortable with its investment").

[73] *High-Speed Internet Competition*, Broadband Intelligence, Inc. at 5-6 (Dec. 2000) (attached as Attachment B to NCTA Comments).

F. Forced Access Advocates Ask The Commission To Assume That Technical Issues And Business Models Support Forced Access

As a necessary predicate of their position, forced access proponents ask the Commission to ignore the technical and financial implications of forced access, as if they were resolved. Such a leap, however, is not supported by the evidence before the Commission.

In the *Notice of Inquiry*, the Commission recognized that many technical and business issues were raised by the prospect of forced access to cable systems.[74] In its comments, Charter elaborated, making clear that there are substantial technical impediments to using government regulation to impose forced access.[75] Charter explained that in a very short period of time, the technology surrounding routing of Internet packets has shifted dramatically, with new protocols and solutions being constantly developed.[76] Charter's points were echoed in the comments of the National Cable Television Association ("NCTA") and Comcast. Specifically, NCTA stated that the technical and operational issues "include bandwidth management, service provisioning, billing and operations support."[77] Comcast commented that "[t]he technical issues are . . . complicated: *e.g.*, reserved versus shared bandwidths, upstream versus downstream bandwidths, tunneling versus source-code routing, contention, scaling, and numerous other factors."[78]

The forced access advocates base their technology arguments on the Canadian experience, and the availability of Cisco routers. We believe they miss the point. As Charter

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[74] *In Re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other facilities*, Notice of Inquiry, GN Docket No. 00-185, FCC 00-355 at ¶ 47 (Sept. 28, 2000).

[75] *See* Charter Comments at 9-16.

[76] *Id.*

[77] *See* NCTA Comments at 69-81.

[78] *See* Comcast Comments at 34 (citations omitted).

demonstrated in its opening comments, there is better technology pending that would be thwarted by a forced access mandate. In addition, the Canadian experience has taken over three years, and the technological aspects are still not fixed. Indeed, the Canadian experience is a showcase for the myriad technical issues that are raised, but that are *still unresolved*, in a forced access regime. After several years of work, the parties involved still do not agree on a workable technical solution.[79]

Other claims that there are no technical issues are simply without merit. For example, the Competitive Access Coalition asserts that source based routing or tunneling is the answer.[80] The sources that they cite for this proposition are dated and inadequate. For example, the Coalition relies heavily on 1998 and 1999 information. As Charter's comments expose, however, the technical "solutions" of 1999 have proven inadequate. In addition, as mentioned previously, the lack of technical qualifications in the Coalition's sources were exposed, and their positions rejected during the Vermont Public Service Board's consideration of Adelphia's franchise renewal.[81] The expert testimony introduced by Charter must outweigh the unqualified sources relied upon by the Coalition.

Charter also presented evidence demonstrating that the business model for multiple ISP access has not yet been established, and that, in fact, there are many known and unknown

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[79] Order CRTC 2000-789, *Terms and rates approved for large cable carriers' higher speed access service*, ¶ 2 (Aug. 21, 2000) (instructing the industry to "address various unresolved technical, operational and business issues relating the implementation of access service within the CRTC Interconnection Steering Committee (CISC) framework"); Comments of François D. Ménard, "Third Party Access to Cable Modems in Canada" at 8-13 (discussing technical and operational disagreements, from the ISP's point of view).

[80] *See* Comments of the Competitive Access Coalition at 70.

[81] *See supra* note 58.

possibilities for business models that would be thwarted by a government-mandated one-size-fits-all forced access regime.[82] Yet, forced access advocates generally assert that the Commission should adopt a cost-based wholesale regime for ISP access.[83] Indeed, several commenters go so far as to assert that the monthly wholesale rate for a single 6 MHz channel should be in the $10 range.[84] Those commenters reach their flawed price by assuming that an ISP would be one channel worth of capacity (6 MHz), and that one premium channel of cable programming (*e.g.*, HBO) costs consumers approximately $10 per month. That analysis ignores the myriad technical and operational issues raised by forced access which are not implicated when HBO is included among downstream program offerings. It ignores the substantial effect that forced access has on the very limited upstream capacity of a system. It ignores the difference between forced common carriage and using the system to include one channel in an editorially selected array of service offerings designed to meet consumer demand. And it relies upon a leased access model that the Commission rightly determined does not apply to ISP access to cable systems.[85]

In reality, commenters' premium channel analogy emphasizes the editorial discretion that cable operators exercise over the allocation of their capacity, and the First Amendment violation

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[82] *See* Charter Comments at 20-33.

[83] *See* Comments of the Competitive Access Coalition at 44-45; Comments of Consumer's Union, Consumer Federation of America, Center for Media Education and Media Access Project at 22.

[84] Comments of the Competitive Access Coalition at 44, 54; Comments of Consumer's Union, Consumer Federation of America, Center for Media Education and Media Access Project at 22.

[85] *Internet Ventures, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd. 3247 at ¶¶ 12-14 (rel. Feb. 18, 2000).

that would result from forcing operators to alter that editorial control by carrying various ISPs. As the court in *Broward County* held: "[forced access] intrudes upon the ability of the cable operator to choose the content of the cable system and imposes a cost in time and materials in order to make available space that may be demanded . . . compelled access . . . both penalizes expression and forces the cable operators to alter their content to conform to an agenda they do not set."[86] Commenters reliance on HBO as an example simply emphasizes that any channel a cable operator is forced to give to ISPs is one less channel that the operator can program with HBO or some other programming offering. Such an unjustified imposition on cable operators' editorial discretion is precisely the violation identified in *Broward County*.[87]

The Canadian experience again emphasizes the flaws in commenters' approach. Even in the wholesale pricing approach imposed in Canada, after years of work the CRTC still had pending 40 pages of unresolved business issues in late 1999.[88] And the process continues. In its August 21, 2000 order addressing proposed tariffs for ISP access, the CRTC directed the industry to "address various unresolved technical, operational and business issues relating the implementation of access service within the CRTC Interconnection Steering Committee (CISC)

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[86] *Comcast Cablevision of Broward Co. Inc. v. Broward Co.*, 2000 U.S. Dist. Lexis 16485 at *28 (S.D. Fla., Nov. 18, 2000).

[87] *Id.*

[88] *Third Party Residential Internet Access: Business Interface Requirements Specifications*, Sept. 10, 1999, Canadian Cable Television Ass'n Report, *available at* www.crtc.gc.ca/ENG/Prop_REP/Telecom/1998/8638/C12-17.html.

framework."[89] Accordingly, even a "one-size-fits-all" approach will lead to a multitude of business issues that the Commission would have to resolve.

Ultimately, the failures of Internet and e-commerce ventures in the past year demonstrate the sensitivity and dynamism of the nascent Internet economy. As Charter discussed in its opening comments, parties are still exploring and experimenting with business models for use in the burgeoning Internet economy. In the past few months, we have been reminded that for every successful Internet business model, several others will fail. The important lesson for the Commission is that it should not attempt to choose "the model" that will drive Internet access service over cable operators' networks. The model that seems logical today may prove fatally flawed when the economics around it make a rapid change to accommodate new services or technologies. If the model is imposed by an inherently slow government regulatory structure, the parties under its control (cable operators) will not be able to respond to changes in the market, and thus will be ill-suited to survive and invest further in the development of advanced technologies and services.

G. Regulation Will Not Be Easy

One of the most untenable leaps that forced access proponents ask the Commission to take is the assumption that adoption, implementation, and enforcement of forced access regulations would be easy. Of course, that assumption is critical to their argument, as they attempt to market the forced access regime as a quick, easy solution. Its fallacy, however, is quite apparent.

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[89] Order CRTC 2000-789, *Terms and rates approved for large cable carriers' higher speed access service* at ¶ 2, 21 Aug. 2000, *available at* http://www.crtc.gc.ca/archive/Orders/2000/O2000-789.htm.

1. The Canadian Experience—Years Later And Still Not Done

As Charter discussed in its opening comments, the experience of the Canadian CRTC in seeking to impose forced access regulations has been far from quick or easy. The CRTC released its initial order adopting forced access requirements in 1996.[90] Over 4 years later, the CRTC has still not fully resolved the fundamental issues and implemented forced access.[91] Even a cursory search of the CRTC's document database reveals hundreds if not thousands of submissions on the issue. The Commission must recognize the experience of the CRTC as illustrative of the regulatory quagmire that will be created by a forced access scheme.

2. More Difficult Than The Commission's Telco Interconnection Experience

The Commission should also learn from its own experience. In the wake of Congress' sweeping reform of the telecommunications industry nearly four years ago, the Commission has issued numerous orders addressing the implementation of the fundamental interconnection, unbundling, and resale obligations of the 1996 Act. In addition, the Commission had to increase its "Full Time Equivalents (FTEs) devoted to policy and rulemaking activities by 50%" in two years.[92] As a result, the Commission's budget request for 1997 was an increase of $30 million

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[90] Telecom Decision CRTC 96-1, 30 January 1996, *available at* http://www.crtc.gc.ca/archive/Decisions/1996/DT96-1.htm.

[91] *See* Comments of François D. Ménard, "Third Party Access to Cable Modems in Canada" at 2, 7. Mr. Menard's comments decidedly favor forced access, but nonetheless make the point that the issues are far from resolved.

[92] *See* Statement of Reed Hundt, Chairman, Federal Communications Commission, on the FCC's Fiscal Year 1998 Budget Estimates, before the Subcommittee on Commerce, Justice, State, and Judiciary, Committee on Appropriations, U.S. House of Representatives, March 13, 1997, *available at* http://www.fcc.gov/Speeches/Hundt/spreh715.html.

from the previous year.[93] Although budgetary and personnel increases were due to implementing the 1996 Act as a whole, a substantial portion has been related to telco unbundling. And, the Commission's work has not even included the massive undertaking of State commissions in upholding their portion of the regulatory burden. Moreover, all of the Commission's work was in the context of telephone companies that had been interconnecting with others for many years, and whose entire business structure developed out of government regulation.

Creating from whole cloth a forced access regime applicable to cable operators would be an even greater undertaking. As discussed next, the Commission would be required to address technical issues, pricing issues, and operational issues, as a threshold matter. And it would be required to implement and enforce its regulations without the aid of 50 state commissions. To suggest that such an undertaking would be either quick or easy is absurd.

3. The Regulatory Nightmare The Commission Would Face

In order to give a brief glimpse into the issues that the Commission would face, the following identifies and briefly addresses just some of the issues that would be raised under the regulatory suggestions made in comments by forced access proponents.

- Interconnection At Any Technically Feasible Point –In addition to the legal and policy issues that would have to be resolved before such a requirement could be imposed, this proposal would raise numerous technical issues, including disputes over what is technically feasible. Thus, it would require the Commission to delve deeply into the engineering and architecture of cable systems. It would also require the Commission to face the fact that not all

[93] *Id.*

cable systems are technically identical. The Commission would also have to consider how technical feasibility would also ultimately impact costs and rates. This proposal would likely lead to a constant stream of complaints and disputes for the Commission to resolve going forward, both regarding interconnection agreements, and their implementation.

- Collocation – Like interconnection, this proposal would require resolution of legal and policy issues. It would then require the Commission to face the same panoply of technical and practical issues it has faced in dealing with telco interconnection. It would also raise the same takings issues. The Commission would likely be asked to regulate collocation rates, which would require investigations of costs and allocations. Like interconnection, collocation has proven a fertile source of disputes that would burden the Commission for years to come.
- Cost-Based Rates – Most forced access advocates seek cost-based rates. After addressing the legal and policy impediments, the Commission would be required to propose and adopt rules regarding cost allocations and pricing. The Commission's consideration would have to start from a clean slate, however, as it does not have in place any pricing schemes that consider the costs of Internet access.[94] Ultimately, therefore, such rules would involve the

[94] As discussed *supra*, the Commission's commercial leased access regulations are not appropriate for application to ISP access. Commercial leased access was developed for a very limited and specific purpose—providing some limited competition in the provision of video—and the pricing and regulations developed were created based on very specific and limited

same massive level of cost studies and subsequent rate cases as the Commission has encountered in other circumstances.

- Line/Capacity Conditioning -- As a threshold matter, it is unclear exactly how line conditioning, as it is known in the telco context, would even apply to cable systems, but to the extent that parties have requested it,[95] such an undertaking would be overwhelming. The terms "conditioned," "clean copper," "xDSL-capable" and "basic" loops all describe ***copper*** loops from which bridge taps, low-pass filters, range extenders, and similar devices have been removed. Incumbent LECs add these devices to the basic copper loop to gain architectural flexibility and improve voice transmission capability. It is unclear therefore what "line conditioning" would even mean in the context of a cable system. Moreover, even in the telco world, the undertaking has been substantial. The FCC first grappled with loop conditioning in its 1996 First Report and Order on Local Competition,[96] and subsequently twice more in 1999.[97] Moreover, state commissions nationwide are addressing specifics of

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situations. Commercial leased access pricing would not cover the unique costs of forced access, and as a result would be confiscatory.

[95] CompTel Comments at 6-8, 26-27.

[96] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* First Report and Order, 11 FCC Rcd. 15499 at ¶ 382 (1996) ("Local Competition First Report and Order"), *aff'd in part and vacated in part sub nom., Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part, and remanded sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) ("*Iowa Utilities Board*").

[97] *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.

loop conditioning in generic unbundling and costs proceedings as well as in interconnection arbitration proceedings. For example, the California Public Utilities Commission is currently conducting a proceeding to determine what costs ILECs may pass along to CLECs for conditioning loops.[98]

Clearly, implementation of these issues, and others, would not be easy.

III. FORCED ACCESS IS A RUSE TO APPROPRIATE CABLE SYSTEMS FOR ANY AND ALL PURPOSES

Classic and popular mythologies teach of the dangers of blindly accepting ideas that are superficially appealing – *e.g.*, the Trojan Horse, or the wolf in sheep's clothing. The comments in this proceeding demonstrate the importance of those lessons in the case of forced access. Wrapped in a politically inviting cloak of consumer protection rhetoric, traditional opponents of cable, such as the ILECs, and recent market entrants in need of business development, such as ISPs, have come to the Commission with the real intention of appropriating the investment of cable operators for their own purposes. But now they are exposed. In several comments, parties have exposed that their true desire is to appropriate cable systems ***for any purpose***, including the provision of multichannel video programming services.[99]

3696 at ¶ 165 (1999); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Third Report and Order, 14 FCC Rcd. 20912 at ¶ 83 (1999) ("*Advanced Services Third Report and Order*").

[98] *See, e.g.*, *Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish A Framework for Network Architecture Development of Dominant Carrier Networks*, Cal. Pub. Util. Commission, Rulemaking 93-04-003 and *Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks*. Cal. Pub. Util. Commission, Investigation 93-04-002.

[99] *See, e.g.*, Comments of EchoStar Corporation at 8-9.

The Competitive Access Coalition, for example, explicitly states that "while Internet access is a useful function of the cable platform, as an advanced telecommunications capability, it is useful for many other purposes."[100] The Coalition then goes on to discuss how they would compete with cable operators for multichannel video programming—using the operators' own systems.[101] Similarly, the Association for Maximum Service Television urges the Commission to expand the scope of this proceeding to encompass electronic program guides ("EPGs") as well as digital and interactive programming and services.[102]

There is no basis in law or policy for the appropriation that is sought under the label of "open access." Cable systems are private networks, built with private investments, at a sizeable risk. The Commission is not free to appropriate those systems for use by others. It is well settled that the Commission cannot force a network owner to offer services over its network on a common carrier basis.[103] Such an appropriation would also constitute a taking under the Fifth

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[100] Competitive Access Coalition at 58.

[101] Competitive Access Coalition at 58-60.

[102] *See* Comments of the Association for Maximum Service Television, Inc. at 1-2.

[103] *See, e.g., Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994) (barring FCC from forcing ILECs to offer "dark fiber" on a common carrier basis simply because ILECs had filed service contracts with the Commission); *Wold Communications, Inc. v. FCC*, 735 F.2d 1465 (D.C. Cir. 1984) (affirming FCC order permitting satellite operators to sell a portion of their transponders rather than lease them under common carrier tariffs); *In re Revisions to Part 21 of the Commission's Rules Regarding the Multipoint Distribution Service*, Report and Order, 2 FCC Rcd. 4251 1987) (proceeding terminated) (permitting operators to offer MDS service on either a common carrier or non-common carrier basis, at their election); *In re Applications of Western Union Telegraph Co.; For Authority to Construct and Launch a Fourth and Fifth Westar Space Station in the Domestic Fixed Satellite Service; For Authority to Lease Fifty Percent of the Advanced Westar Capacity for the Provision of Communication Common Carrier Services*, Memorandum Opinion, Order, and Authorization, 86 FCC 2d 196 (1981).

Amendment to the Constitution.[104] Ultimately, as Charter discussed in its opening comments, even a "narrow" forced access regime poses a substantial risk to continued investment in advanced networks and technologies. The adoption, or even suggestion, of a massive appropriation of cable operators' systems would virtually guarantee a freeze on investment in technology, innovation, and even system upgrades—all to the detriment of consumers and the public.

Even if cable modem service were deemed a telecommunications service, in the 1996 Act, Congress made clear that carriers are not required to provide interconnection to their video platforms. Section 651(b) of the Act, 47 U.S.C. § 571(b), provides that "a local exchange carrier that provides cable service through an open video system or a cable system shall not be required, pursuant to Title II of this Act, to make capacity available on a nondiscriminatory basis to any other person for the provision of cable service directly to subscribers." Under Section 651(b), if, as some commenters argue, cable operators are local exchange carriers as a reason of providing cable modem service, then they are explicitly exempted from having to provide capacity to parties that seek to offer competing cable services over that capacity. Thus, there is ultimately yet another statutory prohibition on the broad appropriation of cable systems that commenters seek.

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[104] *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994), *superseded by statute as stated in GTE Service Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000). Although the ultimate issue of mandatory collocation was superseded by statute, the Court's "takings" analysis nevertheless remains valid.

IV. CONCLUSION

Charter's opening comments demonstrated that there is no justification for imposing forced access obligations on cable operators providing cable modem service. Charter showed that technical, operational, practical, and business issues all supported letting the market continue to work. No commenter provided meaningful evidence proving otherwise. No party submitted evidence indicating that without forced access the Internet access market would cease its robust development. No commenter demonstrated that the various business models in the Internet economy today would fail to support yet additional models for Internet access service. No commenter provided unquestionable expert testimony rebutting Charter's testimony that rapid developments in advanced Internet access technology would be thwarted by a government-mandated access regime. In these reply comments, Charter identifies and explains the flaws in law, policy, and fact that underlie the comments submitted by forced access proponents. Based on Charter's opening and reply comments, as well as on the comments by the various unrelated parties that presented evidence against forced access, the Commission should affirm its existing,

effective policy of allowing the market to work, and reject calls for unnecessary and potentially harmful government regulation.

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January 10, 2001

CERTIFICATE OF SERVICE

I, Glendora Williams, hereby certify that I have this 10th day of January, 2001, caused a copy of the foregoing to be delivered by courier to the following:

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