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**JAN 10 2001**

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**

January 10, 2001

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Magalie Roman Salas, Secretary  
Federal Communications Commission  
Office of the Secretary  
445 12<sup>th</sup> St., S.W.  
Room TW-B204  
Washington, D.C. 20554

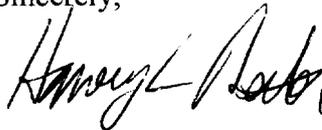
*Re: In the Matter of Inquiry Concerning High-Speed Access to the Internet Over  
Cable and Other Facilities – GN Docket No. 00-185*

Dear Secretary Salas:

Enclosed please find a copy of the Reply Comments of the Competitive Access Coalition  
in the above referenced matter.

If the Commission has any questions about this filing, please do not hesitate to contact  
me at (202) 785-9100.

Sincerely,



Harvey L. Reiter  
Counsel for Competitive Access Coalition

Enclosure

cc:

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**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION**

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**

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

**REPLY COMMENTS**  
**OF THE COMPETITIVE ACCESS COALITION**

Pursuant to the Commission's procedural schedule, the Competitive Access Coalition hereby submits its comments in reply to various initial comments submitted in this proceeding on December 1, 2000. These comments reply, in the main, to arguments advanced by the cable companies supporting continuation of the Commission's "hands-off" policy on regulation of high speed Internet access service.

The cable company arguments fall into several basic categories. First, the cable industry argues that enforcement of non-discriminatory access conditions would retard the deployment of cable modem service, and, therefore, would be bad policy. Second, they continue to argue that open access is technically infeasible. Third, they maintain that the Internet service provided by their affiliates is either (1) a cable service that the Commission should continue to watch, not regulate, or (2) an information service that does not lose its unregulated character when it is bundled with cable modem service. Fourth, several cable interests argue that, even if cable modem service is considered a telecommunications service, it is nonetheless a form of private carriage and therefore exempt from common carriage obligations imposed under sections 201 and 202 of the Communications Act. Finally, several of the cable companies maintain that the

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Commission lacks authority to mandate open access, because, to do so, would be to impair their First Amendment rights to free speech.

With respect to the first point discussed above, the Competitive Access Coalition has discussed at length why, as a matter of regulatory policy, a “hands-off”<sup>1</sup> approach to the issue would simply prevent competition among ISPs, to the disadvantage of consumers. We note here only our incredulity at the argument made by Cox Communications and the National Cable Television Association (NCTA), namely that a competitive ISP market is “not very important” (*NCTA Comments* at 53) because the “openness that matters to consumers” is access to web sites, which cable companies will continue to provide [albeit while steering customers to preferred websites of the cable company’s choosing]. *Cox Comments* at 31. Consumers themselves, not the cable companies, must be assured of the right to decide if a choice of ISPs matters. The Coalition has also explained in detail why the assertions that open access regulation will retard the deployment of high-speed cable modem service are supported neither by the empirical evidence nor sound logic. *See* Coalition Initial Comments at 75. Similarly, we have discussed in detail the feasibility of open access.<sup>2</sup> There is no need for the Coalition to repeat those comments here<sup>3</sup>.

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<sup>1</sup> *See* NOI, ¶ 4.

<sup>2</sup> The cable industry raises the familiar canard of technical infeasibility (National Cable Television Association Comments at 69-81), an argument frequently raised by monopolists seeking to foreclose competitors. *See, e.g.,* Otter Tail Power Co. v. United States, 410 U.S. 366, 377 (1973); MCI v. AT&T, 708 F.2d 1081, 1133 (7<sup>th</sup> Cir. 1983). Many of these so-called technical impediments are really artificial entry barriers. The cable companies should not be permitted to create technical hurdles and then claim open access is not technically feasible.

<sup>3</sup> In our initial comments, the Competitive Access Coalition pointed out that the Commission could not logically defend a decision to forbear from regulating cable modem service and still maintain technological neutrality. Coalition Comments at 1-4. Nor, we added, could the Commission achieve technological neutrality by forbearing from the regulation of telephone companies, having determined only a few months ago that stricter regulation of open access was needed. Incredibly, in their comments, the telephone companies urge blanket forbearance. The Competitive Access Coalition shares the concern of the Texas Office of Public Counsel, expressed in reply comments filed today, that such a “solution” to the open access debate would have devastating, negative implications for competition and consumer welfare.

The Coalition's comments, therefore, will focus on the three remaining issues identified above. Although, we discussed those issues at greater length *infra*, the Coalition's position with respect to each issue can be stated briefly as follows:

(1) The argument that cable companies can avoid regulation of cable modem service as a telecommunication service by bundling it with federal regulated Internet service is not credible. The Ninth Circuit, *City of Portland v. AT&T*,<sup>4</sup> has already ruled definitively that the bundled Internet and cable modem service offered by cable company affiliates is, in reality, two distinct services. Indeed, it cannot be otherwise for the corporately separate ISPs cannot provide high-speed Internet service on their own. They must, by definition, acquire cable modem service from the cable companies with which they are affiliated in order to offer the "integrated" high-speed Internet service to consumers. The cable company argument leads to the perverse conclusion that cable companies can escape the obligation to provide access to their competitors by having an affiliate bundle the telecommunications service it receives with the separate Internet access the affiliate provides to end users. The very act of anticompetitive tying would then become its own defense.

The private carriage argument advanced by the cable companies fares no better. Cable companies that have elected to provide cable modem service offer it to "all people indifferently." *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 640 (D.C. 1976). Indeed, they vigorously advertise its availability. By characterizing the service as one provided privately to the cable companies' affiliates, cable interests forget that the public is still receiving a bundled end use product that is more properly severed into two products. In any event, even if the proper "customer" for purposes of defining the nature of the carriage service is the ISP, cable companies

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<sup>4</sup> 216 F.3d 871 (9<sup>th</sup> Cir. 2000).

cannot claim both that they are offering a private carriage and assert to the Commission that they are willing - - albeit on their own terms - - to offer cable modem service to other ISPs. Further, the concept of private carriage under Commission case law has no applicability where, as here, cable companies have market power in the transmission of information service.<sup>5</sup>

Finally, the argument that requiring cable companies to provide access to cable modem serviced by their competitors would violate the First Amendment rights of the cable operators is wholly without basis. If, as the Ninth Circuit has held, cable modem service is a telecommunications service, there is no First Amendment issue at all. Having voluntarily chosen to offer a common carrier service, the cable companies cannot lawfully discriminate among customers. Indeed, taken to its logical conclusion, the cable company argument would apply to telephone companies now offering even garden-variety dial up service to unaffiliated ISPs. Since many telephone companies themselves offer Internet service, they could argue, under the cable company theory, that they cannot be required to provide access to competing ISPs since such action would infringe their First Amendment rights. Similarly, the cable argument, if accepted, would render unconstitutional the leased access provisions of the Communications Act as well.

Conversely, if cable modem service is a cable service, as the cable companies continue to maintain, they are no better off. Congress has already held, as a matter of law, that cable companies possess market power in the provision of cable service. Cable modem service is a transport service distinct from the information service provided by cable company affiliates. It

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<sup>5</sup> This is true even if one assumes that telephone companies offering DSL access provide a complete substitute for cable companies offering cable modem service. Since the telephone companies have been found by the Commission to possess market power, the cable companies must, by definition, have market power as well. The Coalition has discussed, moreover, in its initial comments and accompanying affidavit of Dr. Sinclair, how, in most sub-markets, there is no telephone company alternative to cable modem service.

does not alter the content of Internet service and the Commission is empowered to regulate it, just as it regulates other cable services. In the analogous context of must carry regulations, the courts have spoken clearly that the Commission can properly distinguish between the *provision* of content and the *transmission* of content. The latter is a service that the Commission can regulate without infringing on First Amendment rights, particularly where, as here, the transportation provider has market power.

The Competitive Access Coalition discusses each of these points in more detail below.

**I. Cable Modem Service is a Telecommunications Service, Not a Cable Service or an Information Service.**

Opponents of open access make the argument that the bundled cable modem services offered by affiliates of the cable companies are “best classified” as either a cable service or an information service. *See, e.g.*, Comments of the National Cable Television Association (“NCTA”) at 2. The strategic value of this position is plain enough. If, as the Ninth Circuit has already ruled, cable modem service is a telecommunications service, it is subject to the common carriage provisions of the Communications Act. If, on the other hand, cable modem service can be treated as a cable service, or better yet, as an unregulated information service, cable companies are better situated to fight any form of open access that threatens the market shares of their affiliated ISPs. The Competitive Access Coalition has already explained, in detail, why the Ninth Circuit’s decision in the *City of Portland* forecloses these arguments and binds the Commission. *See* Initial Comments of Competitive Access Coalition at 75. To sidestep this obvious problem, the cable industry dismisses the Ninth Circuit’s holding that cable modem service is a telecommunications service as a mere “suggestion” and as “dictum.” *NCTA Comments* at 10 and 10 n.23. According to NCTA, all the Court held was that cable modem service is not a cable service, and therefore not subject to local franchising authority oversight.

*Id.* This is ludicrous. The *reason* the Court concluded that Portland had no authority to regulate cable modem service was that it was a telecommunications service, not a cable service. The reason for a court's conclusion on the central issue in a case cannot ever be dicta. NCTA's argument to the contrary is unmitigated chutzpah.<sup>6</sup> Even if the *City of Portland* holding were dicta, however, the argument of the cable companies should be rejected.

Take first the argument that cable modem service is somehow to be considered a cable service, notwithstanding that cable service is defined as "one-way transmission service" used to carry either (1) "video programming" or "other programming." According to the cable companies, the definition of cable service and the legislative history of Section 522(6)(d) show that the term "one-way transmission" was "only meant to exclude telephony-type services from the definition of a 'cable service.'" See NCTA Comments at 7. "Under the expanded definition of 'cable service,' cable modem service and other 'interactive services' are considered cable services if they are provided by a cable operator over a cable system." *Id.* Notwithstanding the Eleventh Circuit's decision in *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11<sup>th</sup> Cir. 2000), AT&T and other cable companies argue that bundled cable Internet service is a cable service because it constitutes the "one-way transmission to subscribers of . . . other programming services. See AT&T Comments at 12. According to the cable companies, the qualification to the Communications Act that allows for subscriber interaction "required for the selection or use of . . . other programming service" is sufficient to bring the bundled cable Internet services they provide within the coverage of the cable service definition. *Id.*, 47 U.S.C. § 522(6). This

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<sup>6</sup> "Chutzpah is a young man convicted of murdering his parents, who argues for mercy on the grounds that he is an orphan." *Harbor Ins. Co. v. Schnabel Foundation Co.*, 946 F.2d 930,937 n.5 (D.C. Cir. 1991).

argument distorts beyond its reasonable meaning the concept of cable service as a “one-way transmission” service. As AT&T notes, the statute defines “other programming service” to “mean information that a cable operator makes available to all subscribers generally.” *AT&T Comments* at 12. Internet service, of course, is not limited to information provided by the Internet service provider. The Internet service subscriber, like the user of any telecommunication service, can and does generate information. Internet users do not merely receive news, they deliver it. Internet users do not simply receive streaming video, they produce it. Internet users do not simply download data, they upload it as well. Internet users do not merely receive email, they send it – often to the Commission.

The short answer to the cable argument that cable modem service is a cable service, of course, is that it ignores the plain language of the statute. Cable service is the *one-way* transmission of “video programming” or “other programming.” The cable companies’ arguments would expand the concept of incidental “use” so broadly as to render meaningless the statutory provision defining cable service as a “one-way” service.<sup>7</sup>

Finally, this Commission, as we noted in our initial comments, has already ruled that Internet service is not “video programming.” Competitive Access Coalition Initial Comments at 15 (citing *Internet Ventures*). In addition, the Eleventh Circuit has already ruled that Internet

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<sup>7</sup> AT&T appears to want to have it both ways. AT&T first argues that its bundled information service is just an information service that incidentally uses transmission, and the cable companies are in charge of the content being provided. It then states that the cable modem services it offers allow subscribers to “specify the ultimate points of communication on the Internet.” *AT&T Comments* at 22, note 48. Of course, subscribers develop their own home pages, which then become sites that other subscribers are free to visit. Further, after the user makes her “single click” to the Internet (*see Comcast Comments* p. 31), the ultimate points are not under AT&T’s control, nor is it AT&T that is making the information generally available to the subscriber. AT&T essentially argues that the Internet is a cable service. But as we all know, information services “use telecommunications.”

service is not “other programming” either. *Id.*, (citing *Gulf Power, supra*). It bears no small emphasis, moreover, that the same cable companies that now argue that interactive services like Internet service can nonetheless be considered cable services if they are provided by a cable operator argued vociferously - - and successfully - - that Internet service is too interactive to be considered a one-way cable service. See Initial and Reply Comments of NCTA on Petition of Internet Ventures, Inc. (IVI), Docket No. CSR-5407-L (Comments at 7; Reply Comments at 7); Time Warner Comments on IVI Petition at 4.

The cable industry’s alternative argument that cable modem service, even if not a cable service, is an information service, fares no better. To be an information service, a cable modem service must be offering a “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications.” 47 *USC § 153 (20)*. However, while this may be the function of the information service *provider* - - the ISP, - - it is not the function of the cable company, which provides cable modem service. The purpose of cable modem service is to connect the user to the Internet backbone via the cable modem. Once connection is established, information may be transmitted to the Internet.

To avoid the statutory consequences of the distinction between the transmission of information service (*i.e.* the cable modem service) and the information service itself, the cable companies argue that the cable modem service they offer cannot be unbundled. “The wires used by the cable modem service are merely the means of delivering content and Internet connectivity to cable subscribers, not any severable aspect of the service.” *NCTA Comments* at 12. Not only was this argument flatly rejected by the Ninth Circuit, it has no logical basis.

The most obvious problem with this “single service” contention is that it ignores the reality of the cable companies’ own operations. The bundled cable modem service they describe

is offered by corporately separate, albeit affiliated, ISPs. These ISPs, like Roadrunner or @Home, do not own cable lines. Therefore, they cannot offer high-speed Internet service on their own. How do they do so? They acquire access to the cable system from the affiliated cable company<sup>8</sup>. In short, *transmission* of data and the *provision* of the data service are two distinct services<sup>9</sup>. By offering cable modem service to unaffiliated ISPs, even on a trial basis, the cable companies give the lie to the argument that there is but one integrated cable modem Internet service.

The essence of this argument is encapsulated in the comments of AT&T. What AT&T describes as “Cable Internet Services,” *i.e.*, the bundled Internet and transmission services the cable companies package to subscribers, are not telecommunication services, they are simply information services delivered “via telecommunications.” *AT&T Comments* at 21-22. According to AT&T, “telecommunications services” provide customers with a pure transmission conduit without any accompanying information. “Because cable Internet services undeniably include information,” it claims, “they simply cannot be telecommunication services.” *Id.* “[T]he implications,” AT&T concludes, “would be truly staggering” if the Commission could somehow “sever” “a telecommunications component from other” components of an information service and separately regulate the telecommunications component as a common carrier telecommunications service. *AT&T Comments* at 24.

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<sup>8</sup> AT&T explains that its cable systems “purchase cable modem services at wholesale from either Excite @ Home or Service Co. and offer the services at retail under the trade names AT&T @ Home or AT&T Roadrunner.” *AT&T Comments* at 10-11. It is unclear how AT&T can purchase cable modem services from its ISP affiliate when the cable modem services include transmission that AT&T must provide to its affiliate.

<sup>9</sup> It is true, as the cable companies maintain, that an information provider does not become regulated solely because its information service is delivered by means of telecommunications facilities. *AT&T Comments* at 23-24. Thus, for example, an ISP offering dial-up service does not lose its status as an information service provider simply because it relies on telephone lines to carry its service. By the same token, however, the fact that the dial-up service provider is affiliated with the telephone company would not exempt the telephone company from common carriage obligations on the theory that its affiliate, an ISP, is providing a service by means of telecommunications facilities.

The implications, of course, are exactly the opposite. Telecommunications services are telecommunication services “regardless of the facilities used.” 47 U.S.C. § 153(43).<sup>10</sup> Thus, a telecommunications service provider cannot escape regulation simply because it provides telecommunication services over cable facilities rather than conventional telephone wires. Nor can it escape regulation with the contrived argument that transmission is somehow “incidental” to the provision of the information service. The cable companies are primarily in the business of transmitting programming and the information produced by others. When the transmission takes on a two-way character, it becomes telecommunications service. There is nothing the least bit “staggering” about the implications of severing the telecommunications component from the information service. Indeed, that is essentially what the Commission has done for years under its *Computer II* rules.

The notion that a regulated provider of transportation service can avoid the reach of Federal regulation by the artifice of bundling that service with an unbundled service was long ago rejected by the Supreme Court in *FPC v Louisiana Power & Light Co*, 406 U.S. 453 (1972), a case decided under similar provisions of the Natural Gas Act. Under the provisions of that Act, the Federal Power Commission was granted authority to regulate the interstate transportation of natural gas, but was given no authority to regulate the direct sale of natural gas to consumers. 406 U.S. at 636. The interstate pipeline company in that case had entered an agreement with an electric utility to sell natural gas directly to the utility for consumption in its generating plants. When the FPC, which was concerned at the time about the use of scarce natural gas in electric utility boilers, opposed limits on the transportation of natural gas to end-users engaged in less-favored uses of natural gas like electric generation, the end user challenged the agency’s action.

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<sup>10</sup> See also, Initial Comments of Open Net Coalition at 13.

According to Louisiana Power & Light Company, the FPC lacked authority to regulate the transportation of natural gas to end-users because the pipeline was offering a single service - - the sale of natural gas to end-users - - that the FPC had no authority to regulate. *Id.* at 628, 637. The court disagreed, affirming the FPC's assertion of jurisdiction over the transportation component of the bundled arrangement. *Id.* at 640-42.

*Mississippi River Transmission Corp. v. FERC*, 969 F.2d 1215 (D.C. Cir. 1992), is to similar effect. There, the D.C. Circuit similarly upheld the Federal Energy Regulatory Commission's jurisdiction to regulate interstate transportation of natural gas sold under a bundled arrangement:

FERC is not barred from regulating a pipeline's interstate transportation of natural gas merely because the sale of gas being transported is not itself subject to federal regulation. FERC's authority over such transactions is beyond dispute.

*Id.* at 1217. Any other rule, the court observed, would invite manipulation by the utility, which could avoid regulation by offering bundled pricing of the same services:

As far as the statute is concerned, there would have been no doubt of FERC's section 1(b) authority if MRT, instead of charging a bundled price, had charged separately for transporting the gas and for the gas itself. To accept MRT's position would therefore be tantamount to conferring on private parties the power whether FERC could set the rate for interstate transportation. Private parties would have this power because it would be entirely up to them whether to structure a direct sale and interstate-transportation in terms of a bundled price or separate charges.

*Id.* at 1218.

The facts in *Louisiana Power & Light* and in *Mississippi River* are directly analogous to the situation in this case. Like the interstate pipeline in *Louisiana Power & Light*, *supra*, the cable companies argue that by the artifice of bundling cable modem "transport" service with

unregulated information service (*i.e.*, Internet service) they have succeeded in fashioning an unregulated information service that just happens to be delivered over cable lines. The Commission, however, has full authority to regulate the cable modem service and cannot be stripped of that authority by the cable company's end-around decision to bundle the service with the Internet service offered by its affiliate.

## **II. THE PRIVATE CARRIAGE ARGUMENT OF THE CABLE COMPANIES IS WITHOUT MERIT**

The cable companies, as noted above, have argued that the bundled cable modem services they offer are either cable services to which the Commission's hands-off policy should continue to apply, or information services that cannot be regulated at all. As a fallback, the cable companies argue that even if cable modem service is a telecommunication service, it is a form of private carriage and thus exempted from the common carrier obligations imposed by the Telecommunications Act discussed below. *NCTA Comments* at 14. This argument, too, should be rejected by the Commission.

The essence of the cable company argument is as follows. Under *National Association of Regulatory Utilities Commissioners v. Federal Communication Commission*, 525 F.2d 630 (D.C. Cir. 1976) (hereinafter "*NARUC I*"), a telecommunications carrier is to be regulated as a common carrier if (1) it will "make capacity available to the public indifferently" or if "the public interest requires common carrier operation of the proposed facility." *Cable & Wireless, PLC*, 12 FCC R-8516 ¶¶ 14-15 (1997), (citing *NARUC I*). Citing this two-prong test, NCTA argues that in providing cable modem services its members are simply offering private carriage to their affiliated ISPs. *See NCTA*, at 14-17.

The argument runs like this: The cable companies have chosen to offer Internet service solely through their affiliates. They do not offer access to cable modem services

indiscriminately, but have simply negotiated arrangements with those affiliates. Therefore, under the first prong of *NARUC I*, they do not hold themselves out to the public as common carriers. *NCTA Comments* at 14-15. The cable companies satisfy the second prong of *NARUC I* as well, they maintain. The Commission, NCTA acknowledges, has interpreted the public interest standard under *NARUC I* to require common carriage where the carrier either “possesses market power” or where “alternate common carrier facilities are not available.” *NCTA Comments* at 15, (citing *Cable & Wireless, PLC*, 12 FCC RCD 8516, 8522 ¶¶ 14-15 (1997)). This test poses no problem, NCTA claims, because the Commission has already concluded the cable operators do not possess market power in the delivery of Internet access service. *Id.*

These arguments, if accepted, turn the primary purpose of the Communications Act on its head. In essence, telecommunication providers would be given a license to monopolize related lines of business by the mere act of deciding that they would no longer deal with their competitors, and will henceforth offer their services only to affiliates. Under this theory, the predivestiture AT&T would have been an exempt private local carrier in its dealings with the Long Lines division. It could simply have declared that its local companies were offering exchange access only to its affiliated long distance company. It cannot be in the public interest to define cable modem service as private carriage where the only “private” customer is the cable company’s affiliate and the purpose of the restricted carriage is to reduce competition from ISPs that would otherwise vie for the same customers as the cable company’s affiliate. If anything, dealings between regulated carriers and their affiliates require heightened scrutiny.<sup>11</sup>

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<sup>11</sup> See generally, Watkiss, Utility Diversification and Federal Rate Regulation of Inter-Affiliate Transactions, 2 Virginia J. of Nat. Resources Law 1 (1982).

Even if the Commission were to conclude that cable companies could theoretically exempt themselves from the common carriage obligations of telecommunications providers by limiting the services to their affiliates, the cable companies have nonetheless failed to make out a case under either prong of the *NARUC I* test. First, the cable companies cannot credibly claim that they have offered this service solely on a private basis, regardless of whether one views the customers as the cable company affiliates or the cable modem subscribers.

One need only look at the ubiquitous ads for cable modem services found in print and over the airwaves in the Washington, D.C. area to get the plain message that the cable companies are offering cable modem service generally, and directly, to the public. That they have bundled this service together with the Internet service provided by their affiliate does not and cannot change this obvious fact. “Telecommunications services” are “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used.” 47 U.S.C. § 153(46).

Nor does it help the cable companies to define the customer as the affiliate either. Indeed, in virtually the same breath as it makes the private carriage argument, NCTA argues for continued regulatory restraint because the market is already making cable modem services available to unaffiliated ISPs. *NCTA Comments* at 48. “The two largest cable operators, AT&T and Time Warner,” AT&T notes in its comments, “have committed to provide direct access to other ISPs and have begun conducting extensive technical and other trials to develop and determine the feasibility of alternative methods of providing this access.” *AT&T Initial Comments* at 3. The cable companies simply cannot have it both ways. They cannot maintain that they are entitled to private carriage status at the same time that they ask the Commission for

regulatory restraint on the grounds that they will voluntarily provide non discriminatory access to others.<sup>12</sup>

Finally, the cable companies cannot sustain a blanket assertion that their private carriage claim satisfies the “public interest” prong of the *NARUC I* test on the grounds that the Commission, to date, has found no market power problem. Market power is simply “the power to control market prices or exclude competition.” *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956). It is a fundamental precept of general economic theory -- and antitrust policy as well – that relevant economic markets have both a product and a geographic dimension. *Id.* at 377. Indeed, “[w]ithout a definition of [the relevant] market there is no way to measure [an entity’s] ability to lessen or destroy competition.” *Id. Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965). The Commission, however, has not done an analysis of the relevant markets and submarkets in which the cable companies compete. By contrast, the Justice Department and the Federal Trade Commission, our nation’s antitrust enforcement agencies, *have* done so. And they have found, in reviewing the mergers of Time Warner/AOL and AT&T and MediaOne, respectively, that the two largest cable companies have market power in a product market that the FTC terms “Broadband Internet Transport Service” and in the geographic markets that are defined as both the United States and the various franchise areas in which Time Warner and AT&T operate. *See*, In the Matter of America Online, Inc. and Time

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<sup>12</sup> Given Time-Warner’s agreement with the Federal Trade Commission obligating it to provide nondiscriminatory access, moreover, it no longer has any argument that it is entitled to a private carrier exemption.

Warner, Inc., FTC Docket No. C-3989, Complaint issued December 14, 2000, ¶¶ 9-14; 21-24;<sup>13</sup> *U.S. Department of Justice v. AT&T and MediaOne Group, Inc.*, Amended complaint, May 26, 2000. The Commission should give deference to the views of its sister agencies on this important matter.

In any event, while the FCC has not done a relevant market analysis, what it has done is to publish data that enabled Micronomics to conclude that, as the Competitive Access Coalition noted in our Initial Comments, there are many regions of the United States where, in fact, “alternate common carrier facilities are not available.” *Cable & Wireless, supra* at ¶¶ 14-15. Even where alternate facilities are available, such as facilities to provide high speed internet access via DSL, customer choices are limited to at most one or two high speed carriers in over 80% of the regional markets within the United States. *See* Coalition Comments at 44 and attached Micronomics Affidavit at 8. Under any reasonable definition of market power, companies operating in such a highly concentrated environment would *all* -- DSL and cable companies alike -- possess market power.<sup>14</sup>

### **III. REQUIRING OPEN ACCESS DOES NOT VIOLATE THE FIRST AMENDMENT**

The central defect in the cable company First Amendment argument is that it assumes away the consequences of the decision to offer telecommunications services. Putting aside the fact that cable companies can be forced to carry programming offered by their competitors under

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<sup>13</sup> Underlying the FTC’s conclusion that it was necessary to condition the merger of AOL/Time Warner to include a non-discriminatory access condition, the FTC found that Time Warner possessed sufficient market power over Broadband Internet Transport Service that it could use such power to retard competition in the provision of Internet service offered over broadband. *Id.*

<sup>14</sup> *See also* the Reply Comments of the Texas Office of Public Utility Counsel and the Consumer Federation of America documenting the market power of cable operators.

both the leased access and the must-carry provisions of the Communications Act, as telecommunications service providers they necessarily assume a common carriage obligation. In other words, while the decision to offer a common carrier service is itself a voluntary one, having made that election, a common carrier cannot then decide that it will select which content it will carry.

The cable company bind is this. If, as they argue, cable modem service is a cable service, then the Commission has already concluded that cable companies possess market power in the provision of cable services. *See, e.g.,* Reply Comments of the Texas Office of Public Utility Counsel, citing *In the Matter of Implementation of Section 3 of the Cable Television Protection Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Services, and Equipment*, MM Docket No. 992-266, June 15, 2000, p. 5. Moreover, Congress has made that finding as well in providing for the must-carry provisions of the Act and in providing for leased access for video programmers unaffiliated with the cable companies.<sup>15</sup> Thus, if cable modem service is in fact a cable service, there has already been a statutory finding that the cable companies possess market power in the provision of cable service. Therefore, under the Supreme Court's decision in *Turner Broadcasting, Inc. v. F.C.C.*, 512 U.S. 622, 636 (1994), cable companies can be forced to "carry" content of competing Internet providers in the same way that they can be required to carry the content of competing video programmers under leased access or competing broadcasters under the must carry rules.

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<sup>15</sup> *See, Turner Broadcasting, Inc. v. F.C.C.*, 512 U.S. 622, 636 (1994); Cable Television Fact Sheet, FCC, at 14 (Aug. 1997), (<http://www.fcc.gov/csb/facts/csgen/html>); S. Rep No. 102-92 at 29-30 (1991). Indeed, the express language of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 460 § 2(a)(2) refers to leased access as a means to limit the anticompetitive conduct of cable companies who had hampered the entry of competing video programmers.

If, as the Ninth Circuit has held, on the other hand, cable companies are telecommunications providers when they offer cable modem services, there are specific consequences that follow. Having made a decision to offer a common carrier service, the cable company is prohibited, like any other common carrier, from discriminating. The cable company can no more decide which ISP will be entitled to cable modem service than a telephone company affiliated with an ISP can pick and choose which unaffiliated ISPs will get access to its dial up or DSL services. The Competitive Access Coalition discusses the cable argument in more detail below.

The Supreme Court, NCTA observes, has stated that the “First Amendment protects the interests of a cable operator to exercise ‘editorial discretion over which stations or programs to include in its repertoire’ and determine how the channels and the capacity of the system will be used to service its customers.” NCTA at 38, Comcast Comments at 26 (citing *Turner Broadcasting, Inc. v. F.C.C.*, 512 U.S. 622, 636 (1994) (citing *Leathers v. Medlock*, 499 U.S. at 444)). From this holding, the cable companies argue, one can conclude that open access would contravene their First Amendment rights. This is a gross overstatement of the import of the Court’s decision. The *Turner* decision, it bears emphasis, upheld an access obligation over cable company objections. In the same decision cited by the cable companies, the *Turner* Court subsequently states that “the First Amendment’s command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.” *Id.* at 657.

Even though *Turner* concerned must carry rules for cable television systems to devote some of their channels to the transmission of local broadcast television stations, it is analogous to the present case because both involve using cable as a conduit for transmitting information.<sup>16</sup>

The *Turner* Court recognized that because cable serves as a “conduit for broadcast signals (or, in this case, data transmission), there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator.” *Id.* at 655. Similarly, the argument that information transmitted through the pipes may be offensive to the public at large does not raise any First Amendment concerns because such information is not affiliated with the cable company itself.

Additionally, as the City of Los Angeles recognized in its Comments, “ISPs First Amendment rights must be balanced with cable operator’s First Amendment rights, and the public’s First Amendment right to a wide diversity of information sources.” *City of Los Angeles Comments* at 9. If non-affiliated ISPs are not provided nondiscriminatory access to the cable modem platform, “cable operators, as gatekeepers to the cable modem platform, will be in a position to restrict the free flow of ideas to the public in contravention to purpose (4) of the Cable Act.” *Id.*

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<sup>16</sup> Opponents of open access eagerly refer to the recent court decision in Broward County ruling against “forced access” by the county. *See Comcast Cablevision of Broward County v. Broward County*, No. 99-6934-CIV (S.D. Fla. Nov. 8, 2000). However, Judge Middlebrooks argument rested, erroneously, on the conclusion that the cable company was offering one bundled service and ignored the consequences of Comcast’s decision to offer a common carrier telecommunications service. In any event, the judge’s reasoning in that case is distinguishable. Judge Middlebrooks distinguished his case from *Turner* stating that *Turner* applied to everybody who sought cable service and *Broward County* only applied to those residents in the county who wanted high speed Internet access. *Slip Op* at 22. Unlike *Broward County*, the present case not only applies to all Americans who wish to acquire high speed access through the cable modem system but arguably applies to anybody who wishes to have high speed Internet

#### IV. FEDERAL LAW MANDATES OPEN ACCESS

The cable companies and other opponents of open access argue that § 621(c) of the Communications Act prohibits regulation of cable services as a common carrier or utility. *NCTA* at 18. They state that open access requirements would subject cable systems to common carrier or utility regulation, thereby subjecting them to regulation as common carriers. This argument, however, mistakenly assumes that “cable modem services” fall under the definition of “cable service,” which, as discussed above, is wrong.

The argument that cable modem services are information services that are not subject to common carrier requirements is equally wrong. In support of this argument, opponents cite *Computer II*<sup>17</sup> where the Commission adopted “a regulatory scheme that distinguish[ed] between the common carrier offering of basic transmission services and the offering of enhanced services.” *Id.* at 23.

*Computer II*, however, undercuts, rather than supports the cable industry argument. Under the *Computer II* test, cable modem service to the Internet is a basic service, which is “an offering of transmission capacity between two or more points suitable for a user’s transmission needs, and subject only to the technical parameters of fidelity or distortion.” *In the Matter of Communications Protocols under §64.702 of the Commission’s Rules and Regulations*, 48 FR 54351, 54352 (November 21, 1983) (citing *Final Decision*, 77 FCC2d at 420). An enhanced service, on the other hand, “alters the subscriber’s information or electrical signals, or it involves subscriber interaction with stored information.” *Id.* When information is transmitted through the cable operator’s wires in order to access the Internet, the content of the information does not

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access because, as stated above, access through the cable modem is the only realistic viable way to obtain high speed internet access for many Americans.

<sup>17</sup> 77 F.C.C.2d at 387 ¶ 5.

change. Therefore, such service is a basic service, which is subject to regulation as a common carrier service under Title II. Indeed, *Computer II* and *Computer III* both hold that carriers that own “transmission facilities and provide enhanced [now information] services must unbundle “the transmission path and provide it to other enhanced service providers [e.g., ISPs] “under the same tariffed terms and conditions under which they provide such services to their own enhanced service operations [e.g., affiliated ISPs].” *Petition for Declaratory Ruling that AT&T’s Interpass Frame Relay Service is a Basic Service*, 10 FCC Rcd 13717, 13719 ¶¶ 13-14 (1995). As the Competitive Access Coalition observed in its initial comments, this is precisely the type of unbundling the FERC has directed in the gas and electric industries to promote competition in the sale of electricity and natural gas.

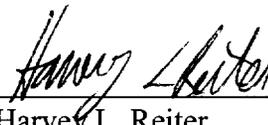
## CONCLUSION

It is ironic that, by its support for a regulatory policy of benign neglect in the cable industry, the telephone industry that the Commission has worked so diligently to open to competition, now argues for a policy of regulatory neutrality that would leave ILEC competitors to the wolves as well. The way to solve the closed cable system problem is to not close the telephone network too.

The Competitive Access Coalition reiterates its concern that the FCC not confuse (or conflate) encouraging competition for broadband facilities and facilitating competition for the information services that use broadband facilities. A continued policy of regulatory inaction in the hope that the marketplace will protect consumers is neither legally defensible after *City of Portland* nor is it sound competition policy, as the Federal Trade Commission has made plain by its actions on the Time Warner/AOL merger. Today’s robust Internet services market gives consumers a broad choice of services and prices, choices that can only be enhanced if

independent ISPs are given non-discriminatory access to broadband networks. Limited broadband competition between DSL and cable for those consumers who have such options will not protect competition in the provision of Internet service, but destroy it, for even where consumers have more than one broadband choice -- and most do not -- competition among at most a handful of broadband providers will inevitably limit choice among ISPs. The public interest demands the Commission's vigilance and an end to its failed experiment in "hands-off" regulation of cable modem service.

Respectfully submitted,



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