

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

GN Docket No. 00-185

**REPLY COMMENTS OF
NATIONAL ASSOCIATION OF
TELECOMMUNICATIONS OFFICERS AND ADVISORS;
US CONFERENCE OF MAYORS; NATIONAL ASSOCIATION OF COUNTIES;
MINNESOTA ASSOCIATION OF COMMUNITY TELECOMMUNICATIONS
ADMINISTRATORS (MACTA); ILLINOIS ASSOCIATION OF
TELECOMMUNICATIONS OFFICERS AND ADVISORS; GREATER METRO
TELECOMMUNICATIONS CONSORTIUM (GMTC); MONTGOMERY COUNTY,
MARYLAND; CITY AND COUNTY OF DENVER, COLORADO; CITY OF CHICAGO,
ILLINOIS; MT. HOOD CABLE REGULATORY COMMISSION (MHCRC); CITY OF
CONCORD, CALIFORNIA; CITY OF SPRINGFIELD, MISSOURI; TEXAS
ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS
(TATO); CITY OF VANCOUVER AND CLARK COUNTY, WASHINGTON; CITY
OF TACOMA, WASHINGTON; CITY OF DUBUQUE, IOWA; CITY OF WHEATON,
ILLINOIS; MIAMI VALLEY CABLE COUNCIL, CENTERVILLE, OHIO; STATES
OF CALIFORNIA & NEVADA CHAPTER OF NATOA (SCAN NATOA); AND THE
MICHIGAN COALITION TO PROTECT THE PUBLIC RIGHTS-OF-WAY FROM
TELECOMMUNICATIONS ENCROACHMENTS ("PROTEC")**

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SUMMARY

The Local Governments urge the Commission to reject the argument that cable modem service must be regulated as common carriage. Whether access to interactive broadband facilities need always be offered on a common carrier basis is a matter within the Commission's discretion, and the Commission has long pursued a policy of providing industry and the public with alternatives to the common carrier model of providing and acquiring communications services. The Commission should classify cable modem service as a cable service to encourage continued and increased facility-based competition between cable operators and ILECs.

The statutory definition of "cable service" was amended in 1996 to abandon the line drawn by the 1984 Cable Act between the capacity to retrieve selected information and content and the capacity to *use* "other programming," including third-party information services. Congress explicitly contemplated "the evolution of cable to include . . . information services made available to subscribers by the cable operator." The classification of cable modem service as a cable service is consistent with the expanded definition, and promises the fulfillment of the Commission's 1968 vision of cable systems that would provide "new communications services"— from "facsimile reproductions of newspapers" (www.washingtonpost.com), "electronic mail delivery" (www.aol.com) to "man to computer communications in the nature of inquiry and response" (www.westlaw.com)—through interconnection with "high capacity terrestrial and/or satellite intercity systems."

The Commission should reject the argument that cable modem service is a statutory "information service" because it entails "making available information via

telecommunications." Cable service has always and everywhere been exactly that. "Information service" classification is irrelevant when used in a Title VI context.

The classification of cable modem service as a cable service is essential to preserving the "deliberately structured dualism" of the regulatory regime devised by the Commission and codified by Congress. The distinction between digital advanced television services delivered by cable systems and cable modem service is fading if not already illusory, but that provides no warrant for the abandonment of the Commission's Title VI authority and responsibilities.

The role of local governments under Title VI must also be protected. Since 1968 the Commission has recognized that some governmental authority "must face up to providing some means of consumer protection" to cable subscribers, and the Commission has consistently assigned that role to local governments. Local governments have embraced that responsibility and have established procedures and working relationships with cable operators to address consumer complaints. The continued fulfillment of that responsibility depends finally on local government franchising authority under Title VI and the permissible scope of cable franchise agreements. The division of regulatory authority between local governments and ill-equipped state or federal agencies over different services offered over the cable system would cloud the authority of both regulators and confound consumers.

Even more importantly, local governments share the commitment of Congress and the Commission to the rapid, nationwide deployment of broadband services, and they are uniquely positioned to advance that goal. The goal of nationwide deployment, and

the erasure of the "digital divide," depends finally on local deployment, street-by-street. Local governments are the frontline forces — motivated by the demands of their own constituents and the promise of economic growth to encourage the deployment of interactive broadband facilities and services. The Local Governments urge the Commission to embrace local governments as a valuable ally, and to acknowledge their authority under Title VI to establish "requirements for facilities and equipment" in cable franchise agreements, and to enforce franchise requirements for "broad categories of video programming or other services."

Finally, the Local Governments urge the Commission to adopt a middle ground between the demands of ILECs, CLECs and ISPs and the cable industry. On the one hand, the ILECs, CLECs and ISPs argue for common carrier-style access on demand to the cable head-end. The cable industry insists, on the other hand, that the Commission and local franchising authorities are powerless to address anti-competitive abuse of market power to restrict public access to diverse sources of information. If cable modem service is not a cable service, then it must be a telecommunications service, and must then be subject to Title II regulation. The Commission can and should avoid imposing a common carrier regulatory regime simply to address the problems that arise with control of bottleneck facilities and the integration of services offered over those facilities. Title VI provides the Commission with sufficient authority to ensure that cable operators do not restrain competition between affiliated and unaffiliated content providers, and that cable operators provide consumers with meaningful choice between competing ISPs. The Commission should emphatically assert its Title VI authority. It is time to put the cable industry on unambiguous notice that the Commission will exercise that authority if,

when, and where the marketplace forces of competition and consumer choice are thwarted.

In particular, the Commission should remain mindful that the relevant market for interactive broadband service is not only a product market defined by acceptable substitutes for cable modem technology; it is also defined geographically by *available* substitutes for cable modem technology. In a nation and world in which the relevant geographic market is increasingly a single national or international market, the geographic dimension of the market for interactive broadband services is persistently local. Nationwide market share statistics relied upon by cable industry commenters to support claims that the market is highly competitive and regulation is entirely unnecessary simply mask reality. Millions of consumers across the country, particularly residential consumers, must purchase broadband Internet access from a local monopoly. The diversity of local market conditions counsels the Commission to explicitly acknowledge the role of local governments in advancing the deployment of cable modem facilities. It is for local governments to identify “the future cable-related community needs and interests” as well establish “requirements for facilities and equipment” in cable franchise agreements. And local governments are best positioned to enforce and franchise requirement for deploying this cable service.

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RIGHTS-OF-WAY FROM TELECOMMUNICATIONS ENCROACHMENTS
("PROTEC")**

The National Association of Telecommunications Officers and Advisors; the US
Conference of Mayors; the National Association of Counties; the Minnesota Association
of Community Telecommunications Administrators (MACTA); the Illinois Association

of Telecommunications Officers; the Greater Metropolitan Telecommunications Consortium (GMTC¹); Montgomery County, Maryland; the City and County of Denver, Colorado; the City of Chicago, Illinois; the Mt. Hood Cable Regulatory Commission (MHCRC);² the City of Concord, California; the City of Springfield, Missouri; the Texas Association Of Telecommunications Officers and Advisors (TATO) ; the City of Vancouver and Clark County, Washington;* the City of Tacoma, Washington;* the City of Dubuque, Iowa;* the City of Wheaton, Illinois;* the Miami Valley Cable Council, Centerville, Ohio;³* the States of California and Nevada Chapter of NATOA ("SCAN NATOA");* and the Michigan Coalition To Protect The Public Rights-Of-Way From Telecommunications Encroachments ("PROTEC")⁴* (collectively, "The Local Government Coalition" or "Local Governments") hereby submit the following reply comments in response to the Commission's above- captioned Notice of Inquiry ("NOI").

* This party was not party to the Initial Comments of the Local Government Coalition. By joining this Reply it hereby acknowledges its concurrence with the Initial Comments.

¹ The GMTC is a consortium of 28 greater metropolitan Denver, Colorado communities formed to facilitate regulation of telecommunications issues on behalf of their jurisdictions. GMTC members include: Adams County, Cherry Hills Village, Golden, Littleton, Arapahoe County, Commerce City, Greenwood Village, Northglenn, Arvada, City and County of Denver, Idaho Springs, Parker, Aurora, Douglas County, Jefferson County, Sheridan, Brighton, Edgewater, Lafayette, Thornton, Broomfield, Englewood, Lakewood, Westminster, Castle Rock, Glendale, Lone Tree, Wheat Ridge.

² The MHCRC, by intergovernmental agreement, conducts cable regulatory matters on behalf of six Oregon local governments, including the City of Portland, Multnomah County, and the Cities of Gresham, Troutdale, Fairview, and Wood Village.

³ MVCC is a council of governments serving eight cities, all southern suburbs of Dayton, aggregate population 150,000 or greater, with cable access and general government services.

⁴ The mission of PROTEC is to preserve the control over public rights-of-way that the citizens of our communities require, as well as their right to receive fair compensation from the telecommunications companies that use public property.

I. INTRODUCTION

The central issues framed in this proceeding are: 1) the proper regulatory classification of cable modem service, and 2) whether the Commission should take steps to insure that unaffiliated ISPs have access to the cable modem platform. The resolution of both issues is driven by two overriding goals: 1) the rapid deployment of broadband access to the Internet, and 2) the development and protection of competition—both facility-based competition between cable and telecommunications service providers, and competition between ISPs who require access to last-mile broadband facilities.

Both of those goals counsel strongly against the classification of cable modem service as a telecommunications service or information service:

- The classification of cable modem service as a telecommunications service, and the imposition of attendant Title II common carrier obligations on cable operators, would discourage the deployment of cable modem service. The interconnection obligations imposed on common carriers could also discourage facility-based competition between cable operators and incumbent local exchange carriers ("ILECs") acquire last mile transport from their cable competitors rather than deploying their own facilities.
- Classification of cable modem service as an information service would undermine the Commission's authority to address abuses of market power by cable operators who control the only last-mile broadband facility in many discrete markets throughout the United States. More generally, it

would threaten the Commission's Title VI authority over the cable industry because all cable services, including traditional one-way video programming, will be available over the cable modem platform as streaming video. The exception will consume the rule.

In contrast, both the rapid deployment of broadband services, and the development and protection of competition are substantially advanced by the classification of cable modem service as a Title VI cable service. The cable service classification is essential to preserving facility-based competition between cable operators and traditional telecommunications service providers. It is essential to preserving the Commission's authority to address the anticompetitive denial of access to the cable modem platform if, when, and where that should become necessary. It is essential to preserving the ability of local franchising authorities to encourage cable operators to upgrade cable systems; to provide interactive broadband service; and to resolve consumer issues related to cable modem service within established procedures for addressing consumer complaints.

The open access debate does not change this conclusion. If open access was not an issue, the Commission would still be confronted with the regulatory classification issue, and the Commission's commitment to the development of facility-based competition and the nationwide deployment of broadband services would require the classification of cable modem service as a cable service. The portrayal of issues surrounding open access as a threat to facility-based competition and the deployment of broadband service is misbegotten. The Commission's threshold question regarding open access—whether it is a desirable policy goal—is largely uncontroversial. None of the

commenters in this proceeding have taken the position that exclusive access to an affiliated ISP is necessary or desirable. Since the release of the Notice of Inquiry, the Federal Trade Commission ("FTC") has imposed open access requirements on systems serving 20% of the nation's cable subscribers in connection with its approval of the AOL merger with Time Warner. According to the FTC, "the purpose of these provisions is to ensure that a full range of content and services from non-affiliated ISPs is available to subscribers; prevent discrimination . . . as to non-affiliated ISPs on the basis of affiliation, which would interfere with the ability of the non-affiliated ISP to provide a full range of content and services; and remedy the lessening of competition in the market for broadband ISP service" *In the Matter of America Online, Inc. and Time Warner, Inc.*, Analysis of Proposed Consent Order, Federal Trade Commission, Docket No. C-3989 (2000), at 6. If competitive access to the cable modem platform is a desirable policy goal with respect to 20% of the cable service markets in the country, it is perforce a desirable policy goal with respect to the other 80% of cable service markets in the country. The only question that remains is what actions the Commission should take now to advance that goal, or whether cable operators will take timely steps without Commission intervention to assure that subscribers are provided a meaningful choice between ISPs.

II. THE REGULATORY CLASSIFICATION OF CABLE MODEM SERVICE

On the issue of the regulatory classification of cable modem service, industry comments take predictable positions with a view toward competitive advantage. Telecommunications service providers urge the Commission to classify cable modem

service as a telecommunications service "to level the playing field."⁵ Cable service providers urge the Commission to classify cable modem service as cable service,⁶ an information service,⁷ or both a cable service and information service⁸ but in any event unrestrained in the exercise of market power to exclude competitors and restrict consumer access to diverse sources of information.⁹

The Commission's choice is not so stark. The Commission has authority to develop a regulatory regime that recognizes the unique characteristics of cable television systems; that preserves the distinction between cable service providers and telecommunications service providers; that encourages the development of facility-based competition; and that addresses potential abuses of market power as they arise, nationwide and in discrete local markets. The Act gives the Commission "sufficiently elastic powers . . . [to] readily accommodate dynamic new developments in the field of communications."¹⁰ "In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest,

⁵ Comments of Verizon at 1-3 Comments of SBC and BellSouth at i-ii, 2-3; Comments of Qwest at 8.

⁶ Comments of NCTA pp. 6-8; Comments of AT&T at 11-19.

⁷ NCTA at 8-13, Cox at 26-28; Comcast at 11-22, AT&T at 19-24.

⁸ *See generally*, Comments of NCTA, Comments of AT&T.

⁹ Comments of NCTA at 18-34, Comments of Cox at 12-17.

¹⁰ *General Telephone Co. of the Southwest v. United States and the Federal Communications Commission*, 449 F.2d 846, 853 (5th Cir. 1971).

the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective."¹¹

The Commission's guideposts are those congressional objectives:

- "[T]o make available . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges. . . ."¹²
- To "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . measures that promote competition in the *local* telecommunications market. . . ."¹³

Since 1992, the Cable Act has also reflected Congress' desire "to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems."¹⁴ That fundamental legislative purpose does not find voice solely in the commercial leased access provisions of Title VI. Indeed, the promotion of access to diverse sources of information is not limited to cable service—it suffuses the Act.¹⁵ Beyond broadcast and cable programming, the Commission has recognized "the public interest in achieving

¹¹ *Philadelphia Television Broadcasting Co. v. FCC*, 359 F.2d 282, 284 (D.C. Cir. 1966).

¹² 47 U.S.C. § 151.

¹³ Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 at 153 (emphasis added).

¹⁴ 47 U.S.C. § 532(a).

¹⁵ *See, e.g.*, 47 U.S.C. § 396 (establishing the Public Broadcasting Corporation to "facilitate the full development of public telecommunications in which programs of high quality, *diversity*, creativity, excellence, and innovation, which are obtained from *diverse* sources, will be made available to public telecommunications entities . . .") (emphasis added).

ubiquitous availability to consumers of competitive, diverse, and advanced telecommunications service offerings."¹⁶ The Supreme Court, as well, has recognized that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."¹⁷

In furtherance of those objectives, both Congress and the Commission have taken pains to foster the development of facility-based competition with traditional telecommunications service providers and to ensure that facility-based providers of both telecommunications services and cable services do not use their market power to unreasonably restrict consumer choice. Those concerns should guide the Commission's further action in this proceeding.

¹⁶ *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order, FCC 00-366, at ¶ 176 (2000).

¹⁷ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663, 114 S. Ct. 2445, 2470 (1994).

A. Classification of Cable Modem Service as a Telecommunications Service Would Discourage the Development of Facility-Based Competition.

1. The Commission should continue to encourage facility-based competition between common carriers and non-common carriers.

"[I]n the long term, the most substantial benefits to consumers will be achieved through facilities-based competition, because only facilities-based competitors can break down the ILECs' bottleneck control over local networks and provide services without having to rely on their rivals for critical components of their offerings. Moreover, only facilities-based competition can fully unleash competing providers' abilities and incentives to innovate, both technologically and in service development, packaging, and pricing."¹⁸ "In order for competitive networks to flourish and convey the greatest benefits to consumers, competitors must be free to introduce different service, architectural, and technological approaches, and the market should determine which of these approaches succeed for different purposes."¹⁹

It is not necessary to regulate the facility-based competitors of ILECs as common carriers. The classification of cable modem service as a telecommunications service would mark a sharp reversal of the Commission's 50-year old commitment to provide both industry and the public with alternatives to the common carrier model of providing and acquiring communications services. In 1949, when the Commission allocated frequencies for the creation of private land mobile radio services, it recognized that the

¹⁸ *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, 14 FCC Rcd. 12673, at ¶ 4 (1999).

¹⁹ *Id.* at ¶ 25.

public interest would benefit by the allocation of the frequencies to both common carriers and private users for the provision of similar service through similar facilities.²⁰ Ten years later, in the *Above 890*²¹ decision, the Commission authorized private point-to-point microwave systems over the protests of the common carriers, upon finding that a private carriage alternative would drive competition in the manufacture of equipment and the development of communications technology. In 1975, the Commission relied on the same policy to allocate frequencies for non-common carrier service in the domestic public land mobile radio service.²² In 1982, the Commission authorized the provision of non-common carrier domestic satellite service.²³ The Commission acknowledged that "transponder sales represent a significant departure from the manner in which satellite service has generally been provided," but recognized an over-riding reality—"the satellite industry is one characterized by fluidity."²⁴ The Local Government Coalition urges the Commission to approach the regulation of cable modem service mindful of the same principles it identified when it authorized satellite transponder sales:

- (a) to maximize the opportunities for the early acquisition of technical, operational, and marketing data and experience in the use of this technology as a new communications resource for all types of services;
- (b) to afford a reasonable opportunity for multiple entities to demonstrate how any operational and economic characteristics peculiar to [cable modem] technology can be used to provide existing and new specialized

²⁰ *General Mobile Radio Service*, 13 F.C.C.2d 1190, 1209-1211 (1949).

²¹ 27 F.C.C. 359 (1959).

²² *Land Mobile Service*, 51 F.C.C.2d 945 (1975), *affirmed sub nom.*, *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) (*NARUC I*), *cert. denied* 425 U.S. 992 (1976).

²³ *In the Matter of Domestic Fixed-Satellite Transponder Sales*, 90 F.C.C.2d 1238 (1982).

²⁴ *Id.* at ¶ 23.

services more economically and efficiently than can be done by [telecommunications service] facilities;

(c) to facilitate the efficient development of this new resource by removing or neutralizing existing institutional restraints or inhibitions; and

(d) to retain flexibility in . . . policy making with respect to the use of [cable modem] technology for domestic communications so as to make such adjustments therein as future experience and circumstances may dictate.²⁵

The Commission has similarly concluded that the public interest in facility-based competition and assuring the availability of diverse sources of information supports the authorization of a common carrier alternative to traditional non-common carrier services. Thus the Commission authorized the provision of "video dial-tone" service on a common carrier basis, concluding that the attending common carrier obligations are "critical to achieving increased competition in the delivery of video services and greater diversity of video programming."²⁶ The 1996 Act repealed the Commission's video dial-tone rules, but endorsed the Commission's premise—that facility-based competition and access to diverse sources of information are enhanced by authorizing the provision of the same essential service under different regulatory regimes. The 1996 Act authorizes telephone companies to provide video programming through radio communication under Title III; on a common carrier basis under Title II; as a cable system under Title VI; or through an "open video system" under Section 653 of the Communications Act.²⁷

²⁵ *Id. citing Domestic Communications Satellite Facilities*, 35 F.C.C.2d 844, 846-47 (1972), *recon. in part*, 38 F.C.C.2d 665 (1972).

²⁶ *In the Matter of Telephone Company-Cable Television Cross-Ownership Rules*, 10 FCC Rcd. 244, at ¶ 31 (1994).

²⁷ 47 U.S.C. § 573.

More recently, the Commission has signaled the breach of the barricade between service classifications in concluding that "ancillary and supplementary services" permissibly offered by Title III television broadcast licensees "could include, but are not limited to, subscription television programming, computer software distribution, data transmissions, teletext, interactive services, audio signals, and any other services that do not interfere with the required free service."²⁸

2. The classification of cable modem service is discretionary and is not definitional.

The Commission has discretion in the regulatory classification of services and facilities. Similar facilities may be authorized and operated on a common carrier or non-common carrier basis; and the Commission may require services to be offered on a common carrier basis or on a non-common carrier basis.

In 1985, the Commission extended its policy of authorizing non-common carrier alternatives to common carrier treatment when it authorized the operation of a private Trans-Atlantic cable.²⁹ The Commission found that non-common carrier submarine cable systems would provide users with new alternatives to satisfy their capacity needs and any special operational or technical requirements, and could also stimulate technological development in cable systems.³⁰ Revisiting its submarine cable landing

²⁸ *In the Matter of Advanced Television Systems*, 12 FCC Rcd. 12809, at ¶ 29, (1997).

²⁹ *In the Matter of Tel-Optik Limited Application for a License to Land and Operate in the United States a Submarine Cable Extending Between the United States and the United Kingdom*, 100 F.C.C.2d 1033 (1985).

³⁰ *Id.* at ¶¶ 19-20.

license policy, the Commission recently outlined its approach to deciding whether a service must be offered on a common carrier basis:

64. In determining whether a cable system qualifies to be operated on a non-common carrier basis, the Commission uses the two-part test set forth in *NARUC I*. The test first looks to whether there is a legal compulsion on the applicant to serve the public indifferently, and, if not, then to whether there are reasons implicit in the nature of the operations of the submarine cable system to expect an indifferent holding-out to the eligible user public.

65. In applying the first prong of the *NARUC I* test to submarine cable authorizations, the Commission has stated that there will be no legal compulsion to serve the public indifferently where there is no public interest reason to require facilities to be offered on a common carrier basis. . . .

66. If the Commission finds that there is no public interest reason to require the submarine cable facilities to be offered on a common carrier basis, then, under the second prong of the *NARUC I* test, the Commission considers whether there is reason to expect an indifferent "holding-out" to the eligible user public. In making this determination, the Commission generally relies on a statement of the applicant's intentions in this regard If the Commission finds that an applicant has shown that it will make individualized decisions whether and on what terms to provide service and will not undertake to service all people indifferently, the Commission has held that the second prong of the test has been met³¹

Importantly, for purposes of the discussion below regarding the Commission's authority to address anti-competitive conduct in the provision of cable modem service, the Commission emphasized that "notwithstanding a Commission decision not to require a submarine cable system to be operated on a common carrier basis, the Commission

³¹ *In the Matter of Review of Commission Consideration of Applications Under the Cable Landing License Act*, Notice of Proposed Rulemaking, FCC 00-210, at ¶¶ 64-66 (2000).

retains the ability to impose common carrier *or common-carrier-like* obligations on the operations of that cable system if the public interest so requires.³²

Proper application of the *NARUC I* test to cable modem service allows the Commission discretion to continue to classify cable modem service as a "cable service." Cable operators are *not* today under "legal compulsion" to offer their facilities "indifferently" to the producers of "video programming" or "other programming" that constitute the "cable service" that they will deliver to subscribers. Accordingly, the first prong of the *NARUC I* test can only be satisfied if the Commission determines that the public interest requires cable operators to offer their facilities on a common carrier basis. Arguments by common carrier telecommunications service providers³³ that cable modem service is *definitionally* a common carrier telecommunications service put the cart before the horse. Cable modem service is a common carrier telecommunications service only if the Commission *determines* that the public interest requires cable operators to offer their facilities to ISPs and other online service providers on a common carrier basis.

In our initial comments, Local Governments urged the Commission to put the cable industry on notice that it "expects the timely provision of functionally and economically equivalent access to multiple Internet service providers." But that does not require, at least not today, a requirement that they offer their facilities on a common carrier basis.

³² *Id.* at ¶ 67.

³³ *E.g.*, Verizon at 10-16; Qwest at 4-7; SBC and BellSouth at 8-9.

3. The common carrier obligations attending cable modem service would discourage the deployment of broadband facilities by ILECs.

In our initial comments, Local Governments emphasized that local governments share the Commission's hesitancy to impose explicit open access requirements at the present time, reflecting a primary commitment to encouraging facility-based competition.³⁴ In the same manner, the classification of cable modem service as a telecommunications service may burden the development of facility based competition. In fact, it is likely be counterproductive in the near term.

The comments filed by Verizon make this point clear. According to Verizon, the consequences of classifying cable modem services as telecommunications service are ineluctable: "The Act, without any action by the Commission, automatically imposes a range of obligations on cable providers offering residential broadband access."³⁵ Verizon emphasizes that section 251(a) "requires cable operators to interconnect their telecommunications equipment and facilities with the network of any other requesting carrier."³⁶ The interconnection requirement would plainly afford Verizon and other ILECs an alternative to continued deployment of DSL facilities into residential areas.

The local government commenters believe Earthlink and the Open-Net Coalition mistakenly assume that common carrier regulation of cable operators would entitle non-common carrier ISPs to non-discriminatory interconnection rights to the cable platform.³⁷

³⁴ Initial Comments of Local Government Coalition at 23.

³⁵ Verizon at 17.

³⁶ *Id.* at 18.

³⁷ See Comments of Earthlink at VII, 50 and Comments of OpenNet at 19.

But the interconnection obligations imposed on telecommunications service providers only extend to other common carriers. The classification of cable modem service as a common carrier telecommunications service would thus allow ONLY Verizon, and other ILECs and CLECs nationwide, to resort to cable facilities in lieu of deploying their own facilities. And the most likely deployment strategy by the ILECs would be to slow deployment of DSL facilities in markets dominated by cable operators. A plausible scenario would be an agreement, either explicit or implicit, between “carrier cable operators” and “carrier DSL operators,” relying on interconnection rather than overbuilding to serve residential and business customers seeking broadband access to the Internet.

This would be a least-cost strategy for both dominant local telephone companies and dominant local cable operators. And it would not result in facility-based competition for wire-line broadband Internet access. It would allow cable operators to enter markets (primarily business) dominated by ILECs without building independent cable facilities. It would allow ILECs to enter residential markets without further deployment of DSL. The end result of this unholy alliance, if tolerated by the Commission, would be to cast the market for broadband services as an entrenched duopoly sharing each other's monopoly control of last mile facilities to each other's customers.

The Communications Act clearly reflects a federal policy that facility-based competition between telecommunications service providers and cable operators is preferable to cooperative facility sharing. 47 U.S.C. § 572 generally prohibits the acquisition of cable systems by telephone companies, and the acquisition of telephone

companies by cable operators.³⁸ It also prohibits joint ventures and partnerships between telephone companies and cable companies "to provide video programming directly to subscribers or to provide telecommunications services within such market."³⁹ There is an exception to the prohibition on joint ventures between telephone companies and cable operators, allowing a carrier to obtain last-mile access to the cable operator's customer only "with the concurrence of the cable operator on the rates, terms, and conditions," and only "if such use is reasonably limited in scope and duration."⁴⁰ The provision was intended to "to maximize competition between local exchange carriers and cable operators within local markets."⁴¹ The classification of cable modem service as a telecommunications service, with the odd result of requiring interconnection and facility sharing between the ILEC and the cable operator, would defy the evident purpose of this provision, while eluding its prohibitions.

In addition, the Commission has adopted rules restricting cable operator access to telephone company facilities used to provide Open Video System ("OVS"). "[T]he 1996 Act expressed a clear preference for facilities-based competition between cable operators and telephone companies, and allowing an OVS operator generally to limit the ability of a competing, in-region cable operator to obtain capacity on its system would encourage cable operators to develop and upgrade their own wireline systems."⁴² "Congress

³⁸ 47 U.S.C. § 572(a)-(b).

³⁹ 47 U.S.C. § 572(c).

⁴⁰ 47 U.S.C. § 572(d)(2).

⁴¹ H.R. Rep. No. 104-458, at 174 (1996).

⁴² *In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996* 11 FCC Rcd. 20227, at ¶ 49 (1996).

established cable and open video systems as two distinct video delivery models, each offering a particular combination of regulatory benefits and burdens."⁴³

The classification of cable modem service as a telecommunications service would seemingly thwart the statutory provision restricting telephone company access to cable facilities, by requiring interconnection while eluding the provision's prohibitions on acquisitions and joint ventures. The classification would also effectively repeal the Commission's rules restricting cable operator access to telephone company facilities. Cable operators would become common carriers entitled to interconnection for delivering cable modem services. The Commission's vision of a "two-wire world" is at risk if the proposed classification of cable modem service as a telecommunications service prevails.

B. The Argument that Cable Modem Service is an Information Service is a Red Herring.

Cable modem service provides access to content that falls within the literal terms of the statutory definition of "information service."⁴⁴ However, the same is true of ALL traditional cable services. All cable programming, whether "video programming" or "other programming," can be characterized as an "information service"—a point made

⁴³ *Id.* at ¶ 24; see also *Commission Adopts Open Video Systems Order Enhancing Competition in the video Marketplace*, 1996 WL 290723 (F.C.C. June 3, 1996) (CS Docket 96-46) (Separate Statement of Commissioner Chong) regarding *In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996*, 11 FCC Rcd. 18223 (1996) (pointing to "the combination of a vigorous cable industry and technological advances that would permit telephone companies to provide video programming over their *own* plant," and hailing the advent of "a two wire world, complemented with wireless choices, [in which] consumers will have choices galore for all their communications and information needs.") (emphasis added).

⁴⁴ 47 U.S.C. § 153(20) (definition of "information service" as "making available information via telecommunications").

clearly, if inadvertently, by Congress in 1992 when it adopted the public television must-carry provision to ensure that "these services remain fully accessible to the widest possible audience without regard for the technology used to deliver these educational and *information services*."⁴⁵ The codification of the term reflects the distinction between information, or "content," and basic "content-free" transmission service, and was occasioned by the entry of telecommunications carriers into the market for information. Cable service providers, in contrast, have *always* been in the business of offering information, *i.e.* content, to their subscribers. It simply makes no sense to distinguish between cable service and information service. Title VI adopts an entirely different approach than Title II to the problems presented by the integration of content and transmission facilities.

Information or content — whether provided by CBS World News Tonight or HBO or Lexis or RoadRunner — is unregulated. Indeed the First Amendment constrains the government's ability to regulate content, whether it is provided as a Title III television broadcast, a Title VI cable service or a Title II information service. *All* "communication by wire or radio" within the Commission's authority is used for the transmission of information. The fact that cable modem service involves "making available information via telecommunications" does not alter the Commission's authority to regulate the service as a cable service under Title VI.

Thus, unregulated information may be made available through common carrier telecommunications service providers; broadcast affiliates of network programmers; non-

⁴⁵ H.R. Rep. No. 102-628, at 69 (1992) (emphasis added).