

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

JAN 10 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

GN Docket No. 00-185

REPLY COMMENTS OF WORLDCOM, INC.

Mark D. Schneider
John B. Morris, Jr.
Nory Miller
Elena N. Broder-Feldman
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Richard S. Whitt
Cristin L. Flynn
WORLDCOM, INC.
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 887-3845

Dated: January 10, 2001

No. of Copies rec'd 0 + 4
List ABC

TABLE OF CONTENTS

EXECUTIVE SUMMARY	ii
Introduction	1
I. Open Access to Cable is Good Policy	2
A. Cable System Operators have Bottleneck Facilities and Can Exert Market Power	3
B. A Diversity of ISPs is a Significant Benefit to Internet Users	9
C. Mandating Open Access Will Not Quash Investment in Broadband Cable	10
II. The Commission Has Legal Authority to Mandate Open Access	12
A. The Transmission Component of Cable Modem Service Is a Telecommunications Service	12
1. Cable broadband offerings meet the 1996 Act definition of “telecommunications services” offered to “such classes of users as to be effectively available directly to the public”	14
2. Cable broadband also satisfies the traditional understanding of “common carriage”	15
a. Cable operators do offer telecommunications indiscriminately to the public	16
b. The public interest also mandates a nondiscrimination requirement	20
3. As a telecommunications service, cable modem service is subject to specific regulatory obligations, from which the FCC should not forbear	23
B. The Transmission Capability of Cable Modem Service Is Not Cable Service	27
C. Even If Cable Modem Service Is an Information Service, Regulation to Create Open Access Is Authorized by Law and Merited by Market Conditions	32
1. The Commission’s general powers under Title I support open access	32
2. The Commission’s Section 706 authority to promote advanced services also supports cable open access	34
III. Commission Regulation Mandating Open Access Would be Constitutional.	35
A. Open Access Would Not Violate the Compelled Speech Doctrine.	35
B. Open Access Does Not Unconstitutionally Limit Cable Operator’s Speech	37
C. An Open Access Rule Would Not Constitute a “Taking” of Cable Operators’ Property	39
Conclusion	40

EXECUTIVE SUMMARY

As WorldCom and many other commenters argued in the first round, the Commission should act to mandate open access to cable modem systems. Among other grounds offered, the fundamental ground for such action is one that goes to the heart of the Commission's mission – the need to regulate bottleneck communications facilities to prevent the leveraging of monopoly control onto upstream markets dependent on the bottleneck for access to customers. Contrary to the claims of the cable operators, narrowband dial-up Internet access is not an adequate substitute for high-speed broadband access over cable modem systems, and other forms of broadband access such as DSL are not sufficient to prevent cable companies from abusing their bottleneck control over a critical “last mile” facility.

In the absence of Commission action, cable operators and their favored ISPs will be able to lock users into their services and exploit that control to gain undue advantage over other segments of the broad markets for Internet services. Mandating open access, however, will not (as the cable operators claim) significantly hinder the upgrading of cable systems to support broadband access. Whether such Commission action two years ago might have had a negative affect on investments in cable systems is debatable, but there is no longer any question that cable modem service is today the most viable method to offer residential users broadband access. The cable operators are committed to the broadband market, and that market is far too substantial for the operators to back out in the face of an open access mandate – a mandate that will certainly allow the cable operators to receive fair compensation for the last mile access provided.

The Commission has clear authority to impose an open access requirement on cable companies. Even the cable operators concede that there is a telecommunications component to

the services offered by cable modems, and their arguments that they do not meet the statutory definition of “telecommunications service” are unavailing. Cable operators are offering telecommunications directly to the public, or at a minimum “to such class of users as to be effectively available directly to the public.” Cable operators also come within the traditional parameters of common carriage. Fundamentally, the “last mile” telecommunications capability that cable operators provide is specifically being offered as a substitute for other traditional common carrier last mile services, and cable operators’ claims that they are providing information services does not alter the basic nature of the last mile telecommunications service. The Commission has the authority to require that cable operators offer those last mile services unbundled from the information services that cable operators’ favored ISPs provide.

Moreover, even if cable providers are not voluntarily offering broadband cable transmission indiscriminately to the public, the public interest compels the Commission to require that the operators provide such service on a common carrier basis. The potential for abuse by cable operators of their bottleneck facilities warrants Commission action. Similarly, because of the threat to competition in the broad Internet marketplace, the Commission should not forebear from any of the obligations that are appropriately imposed on cable operators.

The strained arguments of the operators that their Internet access service is properly viewed as a “cable service” are without merit. Nothing that the cable operators assert changes the fundamental nature of the service. Internet access service is inherently a two-way service in which the user (*not* the cable operator) selects the content to be transmitted, and that content is transmitted over the “last mile” cable facility without significant alteration. AT&T attempts to avoid these facts by claiming, without any basis in reality, that the two-way interactive aspects of

Internet usage are merely “incidental” to aspects of Internet usage that it claims are akin to traditional cable services. This approach fundamentally misconceives Internet access and usage.

Even beyond the Commission’s authority to mandate open access because cable modem service is properly viewed as a “telecommunications service,” the Commission also has ample authority under both Title I of the Communications Act and Section 706 of the 1996 Telecommunications Act. Open access regulations would directly further the Commission’s Title I mandate, and further would protect the Commission’s jurisdiction over undisputed telecommunications services such as DSL. Moreover, cable modem service clearly falls within the ambit of advanced services that the Commission is directed to promote under Section 706.

Finally, an open access requirement would clearly be constitutional. First, open access would not violate the compelled speech doctrine. The cable companies can offer no objection to content that users might access using unaffiliated ISPs (because the cable companies are themselves offering access to the identical content). Moreover, no one would reasonably believe that the Internet service obtained from an independent ISP somehow reflected views that might be attributable to the cable operators providing the last mile facility. Second, an open access mandate would not limit the ability of cable companies to speak. Once the cable operators have allocated bandwidth to offer Internet access, an open access requirement would not significantly burden the companies. In any event, even if there were some burden on the cable companies, an open access mandate would clearly satisfy the applicable governmental interest test.

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

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 WORLDCOM, INC.

WORLDCOM, Inc. (“WorldCom”) hereby respectfully submits its reply comments in response to the Federal Communications Commission’s Notice of Inquiry (“NOI”), *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185 (released Sept. 28, 2000).

Introduction

Two decades ago, the Commission recognized that where the owner of last mile facilities was also the provider of enhanced services, the ability and incentive to tie together the necessary input of telecommunications and the provision of the enhanced service would be damaging to the public interest in a vibrant market for enhanced services. *Computer II*¹ ¶ 231. For this reason, it required facilities-based providers of such integrated services to sell transmission service on a nondiscriminatory basis to their enhanced services competitors. *See id.*; *see also*

¹ *In re Amendment of Section 64.702 of the Commission’s Rules and Regulations*, Docket No. 20828, Final Decision, 77 F.C.C.2d 384 (1980) (“*Computer II*”).

*Frame Relay Order*² at ¶ 13 (“carriers that own common carrier transmission facilities and provide enhanced services must unbundle basic from enhanced services and offer transmission capacity to other enhanced service providers under the same tariffed terms and conditions under which they provide such services to their own enhanced services operations”). The opening round of comments in this proceeding make clear that the same threat is present where owners of cable facilities providing a “wide pipe” connection to the home – a scarce resource – seek to leverage control of that asset to require those wishing to make use of the transmission capacity of that last mile facility to do so only if they also pay for information services from the cable operator. This threat demands the same nondiscriminatory access to underlying transmission imposed in *Computer II*.

I. Open Access to Cable is Good Policy

The ability of cable operators to leverage market power to the detriment of users and unaffiliated Internet Service Providers (“ISPs”), combined with the value to Internet users of having choice among ISPs, require that the Commission adopt an open access policy for Internet access over cable systems. Contrary to the assertions of some cable operators, such a policy will not bring cable broadband deployment to a halt, but is more likely to accelerate broadband penetration.

² *In re Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling that AT&T’s Interspan Frame Relay Service is a Basic Service*, Memorandum Opinion and Order, 10 F.C.C.R. 13717 (1995) (“*Frame Relay Order*”).

A. Cable System Operators have Bottleneck Facilities and Can Exert Market Power.

Just as incumbent local exchange carriers developed their telephone networks under historic grants of monopoly power, the leading cable system operators built their facilities relying on exclusive authority, and those operators are now seeking to leverage their control over those monopoly-built facilities to gain an advantage in the broadband Internet access market. Undeniably, cable operators have bottleneck control over their own cable facilities. The cable operators make various responses attempting to address this fact: that they lack market power, that dial-up narrowband access is a fair substitute for broadband access, or that other methods of broadband access provide sufficient competition to balance their market power over the cable facility. *See, e.g.*, AT&T Comments at 44-48; Cox Comments at 8-9. None of these contentions are valid.

The cable operators' claim that the existence of other Internet access methods means that they lack the market power in Internet access to leverage any enhanced position in ISP services is false. Their primary reason for fighting open access is their hope of realizing additional profits from tying their cable modem services to affiliated ISP services. If a cable operator has no such market power, its affiliated ISP's profits result from subscribers choosing it on its own merits, without regard to any tie-in with a cable operator, and so would be unaffected by open access. Open access only affects the outcome if a cable operator would otherwise wield sufficient market power to parlay it into an *unmerited* position in the ISP market.³

³ Indeed, with a goal of maximizing revenue, the cable operators' opposition to open access can only be understood if the cable operators are unfairly profiting from their bottleneck power. Take the scenario with a cable operator having X customers based on the merit of the favored

Narrowband dial-up service is not competitive with broadband cable access.

Narrowband service through ordinary dial-up access is too slow and limited (*e.g.*, it cannot deliver stable streaming audio or video). *See* SBC Comments 3-4 (noting the FCC has already recognized that broadband is a separate market); Big Planet Comments 5-6 (noting DOJ has found that broadband is a separate market). What is critical about cable modem transmission over the last mile is that, as a “wide pipe,” it improves the quality of the end users’ use of the information services available on the Internet. Dial-up simply is not an adequate substitute.

Further, the existence in some markets of at most one broadband alternative to cable modem access does nothing to guarantee a flourishing ISP market and adequate consumer choice. Cable is far more available, and likely to remain more available, than other broadband options for residential customers, as this Commission has already determined.⁴ Cable’s likely continuing market power in the residential market is well supported. Cable enjoys the head start of already having lines into almost 70 percent of the nation’s households. Cable access also is

ISP, and Y customers based on unfair market power. In essence, the cable operators are contending that they are not exercising undue market power and thus $Y=0$. But if that were true, then under open access they would receive the same revenue from their X customers *plus* additional revenue from unaffiliated ISPs for the Z customers that those ISPs will service. This would appear on its face to be a more desirable outcome for the cable operators, but one which the operators are vigorously resisting. The simplest explanation is that in fact Y is *not* equal to zero, and that some of the cable operator’s current (and future) customers would defect from the cable company and would choose unaffiliated ISPs if they were available.

⁴ *See* FCC News Release on its Advanced Telecommunications Services Report (Aug. 3, 2000). As of mid-year, 70% of the high speed access to residences and small businesses was through cable, 24% through ADSL, and only .02% by satellite or fixed wireless. FCC, High-Speed Services for Internet Access: Subscriberhip as of June 30, 2000, Table 3 (October 2000). Figures for advanced services to residences (over 200 Kbps in both directions, not only one) would show even greater dominance by cable.

generally available for a lower per month charge than any alternatives. Comments of the Center for Democracy and Technology, Att. at 24 (“CDT Comments”).⁵

DSL not only trails far behind cable in the residential market, but inherent limitations suggest it will continue to do so. As this Commission has noted, a significant percentage of loops cannot currently support DSL because they are longer than 18,000 foot, have load coils, or are fed into incompatible digital loop carrier systems that are not upgraded to handle DSL transmission. *See In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Second Report, FCC 00-290 ¶¶ 38-40 (rel. Aug. 21, 2000) (“706 Report”); Comments of the Competitive Access Coalition at 66 n.69 (“CAC Comments”). These inherent limitations in DSL technology disproportionately affect access options for the residential market because most of these longer and DLC loops serve residential areas. Big Planet Comments 7. Moreover, even to the extent DSL is available, it is often slower than cable access. *See* Big Planet Comments 7; CDT Comments, Att. at 23. Indeed, Cox makes clear in its discussion of the competition it faces that its fastest competitors provide downstream transmission only half or two-thirds as fast as Cox, and some less than one-tenth as fast. Cox’s

⁵ Monopoly dominance in the residential market is a compelling argument in support of cable open access. As the FCC noted in its *Line Sharing Order*, incumbent residential providers outnumber competitive providers 17 to 1. *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Third Report & Order, 14 F.C.C.R. 20912, ¶ 34 (1999). The Commission should act to promote competition in the residential market wherever possible.

data also shows cable modem service is generally less expensive than DSL. Cox Communications at Comments 9-11.⁶

Satellite and fixed wireless are not yet working alternatives in the residential broadband marketplace. Although both technologies have potential, it is far from clear yet whether either will present a strong competitor to cable broadband access. Similarly, fiber to the home is also unlikely to become a broad-based alternative in the foreseeable future because of the high cost of deployment in existing communities. CDT Comments, Att. at 27.

Moreover, the barriers to switching from the dominant cable modem service further supports cable unbundling. Once a customer has chosen the dominant cable broadband access technology, it is prohibitively expensive to switch to another technology. Each approach requires specialized, non-interchangeable equipment at a cost of hundreds of dollars.⁷ This makes it highly likely that cable modem service will retain its dominant market position – and will leverage that position to the detriment of the upstream ISP markets – unless its access facilities are shared.

Still another factor underpinning the reasonableness of requiring each access method to provide nondiscriminatory access to ISPs is the significant disparity between the number of

⁶ And, as explained in WorldCom's opening comments, even in areas where DSL may in fact be available to the same customers who can obtain cable broadband service, this represents at best a duopoly, not the vibrant competition necessary to protect the public interest in the absence of regulation.

⁷ See Berkeley Roundtable on the International Economy, *Defending the Internet Revolution in the Broadband Era: Why Open Policy Has Been Essential, Why Reversing That Policy Will Be Risky*, at 13 (visited Jan. 8, 2001), <<http://e-economy.berkeley.edu/publications/wp/ewp12.html>>; Big Planet Comments 8.

companies providing broadband access – only a few even in major markets – and the thousands of ISP services. To the extent access providers are permitted to tie access to ISP services and use that vertical integration to become gatekeepers over their subscribers' access to the Internet, the greater the danger to both competition among ISPs and the open communication forum that has hitherto characterized the Internet and generated rapid innovation. Comments of Consumers Union *et al.* at 9-10 (“CU Comments”); CDT Comments, Att. at 62-64.

That cable operators have the power to favor their own ISPs – and the content providers that have contracted with those ISPs – is plain from the comments filed. As Excite@Home explains, the distributed content servers that place the content of preferred content providers very close to subscribers are critical to the broadband services that it can offer because of its exclusive contracts with cable operators. Excite@Home Comments at 8-9. This arrangement allows subscribers very fast access to the broadband content of the preferred content providers and so provides to Excite@Home a tremendous advantage in offering Internet users high quality broadband content. In the absence of an open access requirement that would allow competing ISPs (with competing preferred content providers) similar access to cable Internet users, the cable operators and Excite@Home will be able to leverage their bottleneck control into a very significant market advantage.

The National Cable Television Association seeks to discount the large advantage gained by cable companies (in the ability to deliver high speed broadband content) by contending that other ISPs and other content providers can use content distribution networks of companies such as Akamai Technologies in an effort to speed delivery of broadband content to cable operators.

See Comments of the National Cable Television Ass'n at 55-6 ("NCTA Comments").⁸ This response, however, *proves* that cable operators will be able to take unfair advantage of their control of the access facilities. While cable operators (and Excite@Home) will be able to offer very high speed access to preferred broadband content through the use of distributed content servers, competing content providers will be required to pay a third party such as Akamai for content delivery that inherently cannot be as close to the cable Internet user as the content servers run by the cable operators' favored ISP.⁹ Thus, competing providers will have to pay more for lower quality delivery and will be at a distinct disadvantage in the delivery of high quality broadband content to end users. This is just one concrete example of the ways that cable operators and their preferred ISPs will be able to leverage their bottleneck control to gain an advantage over competing ISPs and content providers.

⁸ NCTA conflates, and thus confuses, two distinct problems – the use of caching servers by the cable operators' favored ISP, and the use of content distribution servers by those ISPs. As NCTA correctly describes, a caching server stores recently accessed content and is generally not dependant on ISP contracts with content providers. Although there are issues raised by the existence of caching servers, *see* WorldCom's opening Comments at 20, these issues are distinct from the issues raised by the use of content distribution servers – which are used to favor preferred content providers over all other content on the Internet.

⁹ Moreover, it is not even clear that services such as those offered by Akamai will significantly help deliver content to cable subscribers. Excite@Home operates a national network and connects to other Internet providers only at selected peering points around the country. Even if an Akamai server is a block away from an Excite@Home cable installation, requests for content on the Akamai server may well travel great distances on Excite@Home's network before being handed off to other ISPs.

B. A Diversity of ISPs is a Significant Benefit to Internet Users

There is no dispute – in the filed comments or elsewhere – that the Internet and its users have benefitted from the diversity of Internet Service Providers that have emerged over the past ten years. As even the National Cable Television Association acknowledges, ISPs’ “business models come in all shapes and sizes and will continuously evolve to meet consumer’s needs. ISPs . . . have attempted to provide service to the end user through a multitude of business models.” NCTA Comments at 63. These business models range from AOL’s combined access and proprietary services to “pure” Internet access providers such as Earthlink, to free, advertising-supported services such as those offered by AltaVista. *See id.* at 63-64. In the dial-up world,¹⁰ this multitude of choices has directly benefitted Internet users in the form of competition over price, ease of use, and service choices. Users have been able to choose among general purpose ISPs or niche providers aimed at specific market segments (e.g., telecommuters, game players, etc.).

It also cannot be disputed that the evolution of this diversity of ISPs is a direct result of affirmative regulatory steps taken by the Commission to ensure that ISPs can easily offer services and users can easily reach any of the ISPs. As the General Accounting Office recently concluded, “telephone laws and regulations were fundamental in promoting the development and growth of the ISP industry.”¹¹ It is this choice among ISPs, and the resulting competition

¹⁰ Dial-up access is still the way most Americans reach the Internet, largely because until recently it was the *only* affordable way Americans could reach the Internet.

¹¹ United States General Accounting Office (GAO) Report to the Subcommittee on Antitrust, Business Rights and Competition Committee on the Judiciary, U.S. Senate, *Technological and*

between ISPs, that will be missing from the broadband market if the Commission does not act to require cable operators to permit multiple unaffiliated ISPs to offer access services over their cable plants.¹²

C. Mandating Open Access Will Not Quash Investment in Broadband Cable

In their comments, a number of cable operators make vague and unsupported arguments that an open access requirement would reduce investment in the upgrading of cable facilities to support Internet access. *See, e.g.*, Charter Comments at 29-30. Those arguments, however, ignore the reality of what has happened and is happening in the broadband cable marketplace. First, as support for their contentions, Charter and others rely on comments from the investment community that are more than two years old – a lifetime in terms of Internet business and finance, and a point in time when there was much greater uncertainty about the viability of cable modem services than there is today. *See id.* at 29 n.59. Second, the concerns of the investment community have primarily been about *uncertainty* about regulation, not the mere fact of regulation. So long as any action taken by the FCC permits cable operators to receive fair compensation for the access services they provide, the investment community should welcome the Commission's definitive resolution of an issue that has been an open question for a number of years. Additionally, the arguments about investment in upgrading cable systems ignore the

Regulatory Factors Affecting Consumer Choice of Internet Providers, 24 (Oct. 2000), available at <http://www.gao.gov/new.items/d0193.pdf>.

¹² That the user may be technically able, through the cable-affiliated ISP, to connect to another ISP does not answer the concern. By layering in the costs of the cable operator's affiliated ISP, the cable operator effectively raises the cost of its rivals' services, creating an effective roadblock to competition.

simple fact that all major cable companies are *already* committed to upgrading their systems, and have already (presumably) arranged financing of that effort. As Cox frankly admits, the “massive capital investment [to upgrade the cable networks to support broadband] is already well underway.” Cox Comments at 2.

Moreover, the experience in Canada belies the argument that investment will dry up in the fact of an open access requirement. Canadian cable companies have been subject to an open access requirement since 1996, and yet those companies are *farther along than their American counterparts* on the task of upgrading their cable networks to support broadband access.¹³ As the Canadian experience demonstrates, open access regulation does not deter the investment needed to allow cable companies to have a major piece of what is undeniably a huge potential market for broadband access. It is patently unrealistic to argue that cable companies will simply turn their backs on the broadband market if they are ordered to permit – for fair compensation – unaffiliated ISPs to offer services over their networks.

Cable operators are firmly committed to the market to bring broadband services into American homes. Although they would certainly like to leverage their bottleneck to obtain monopoly profits, a requirement to act as a wholesaler will fairly compensate operators for the use of their networks and will not lead the cable companies to withdraw from the market.

¹³ For example, by the end of 1999, Rogers Communications offers upgraded Internet access service to 92% of its cable subscribers. *See Rogers Communications announces strong fourth quarter 1999 subscriber results*, Press Release, Jan. 6, 2000, <http://micro.newswire.ca/releases/January2000/06/c8128.html/84735-0> (viewed Jan. 9, 2001). In contrast, AT&T (51%), Time Warner (80-85%), Comcast (85%), Charter (32%), Cox (55%), Adelphi (82%) and Cablevision (62%) lag behind. *See Table, 706 Report.*

Today, cable companies have a huge edge over DSL providers, an edge that cable companies have a powerful incentive to maintain by proceeding with their deployment of cable modem service. Broadband access is far too important to the prospects of any communications company of the twenty-first century for the cable industry give up on the broadband market – even in the face of mandated open access.¹⁴

II. The Commission Has Legal Authority to Mandate Open Access.

Unable to rebut the showing in opening comments that the public interest is greatly furthered by nondiscriminatory access to last-mile cable broadband transmission, cable operators suggest that the FCC lacks authority to implement such a policy. As WorldCom and many other commenters demonstrated in opening comments, however, this suggestion is unsupported.

When the characteristics of cable broadband transmission and the ISP services to which it gives access are understood, it is clear that the FCC has the power to mandate open access under Title II and Title I of the Act.

A. The Transmission Component of Cable Modem Service Is a Telecommunications Service.

The majority of commenters who addressed the issue in the opening round joined WorldCom and advocated regulation of broadband transmission capability provided via cable modem under Title II because that “last mile” broadband service at root provides “transmission,

¹⁴ Although an array of technical issues and concerns were raised in the comments, no one seriously disputes the fundamental point that open access is technically possible. At this juncture the Commission need not determine the technical means by which open access should be implemented, but should instead continue to receive input on the technical issues from all interested parties.

between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received" – the statutory definition of "telecommunications." 47 U.S.C. § 153(43). *See, e.g.*, WorldCom Comments at 10-11.¹⁵

Even the cable companies concede that there is a telecommunications component to the services offered via cable modems. *See, e.g.*, AT&T Comments at 23, 24¹⁶; Cox Comments at 27, 29; NCTA Comments at 8; Comcast Comments at 15. What they dispute, however, is that this telecommunication meets the statutory definition of "telecommunications service," because, they argue, the telecommunication is not offered "for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). *See* AT&T Comments at 20-24; Cox Comments at 27; NCTA at 9, 11; Comcast at 24-25. This argument is unavailing for several reasons.

¹⁵ Commenters agreeing that broadband transmission over cable facilities to provide Internet access falls within the definition of telecommunications service include Qwest, Verizon, SBC & BellSouth, CenturyTel, Comptel, USTA, Earthlink, OpenNet Coalition, Consumer and ISP representatives, New Hampshire ISP Association, Texas Office of Public Utility Counsel, Competitive Access Coalition, Center for Democracy and Technology, United States Internet Association & iAdvance, Alliance for Public Technology, and Circuit City Stores.

¹⁶ AT&T states that cable Internet services "transmit information chosen by the cable operator," not the subscriber, and thus suggests that the cable operator's actions do not meet the definition of "telecommunications", which requires transmission of "information of the *user's* choosing, without change in the form or content of the information as sent and received." AT&T Comments at 21. Even on AT&T's own terms, this argument is unavailing, for AT&T claims also to be an information service provider, which it concedes is a *user* of telecommunications. *See* AT&T Comments at 22, 23; *see also* Cox Comments at 27. As a user of transmission, its activities fall within the definition of telecommunications. As explained elsewhere, however, *infra*, page 28, it is the end user, not the ISP, who primarily selects and even creates the information to be exchanged via the Internet, and the last mile cable broadband facility transmits this information both to and from the end user without alteration, thus satisfying the definition of telecommunications.

1. Cable broadband offerings meet the 1996 Act definition of “telecommunications services” offered to “such classes of users as to be effectively available directly to the public.”

First, under the 1996 Act, “telecommunications services” include not only offerings of telecommunications directly to the public at large, but also offerings “to such classes of *users* as to be effectively available directly to the public.” 47 U.S.C. § 153(46) (emphasis added). Thus, “telecommunications service” by definition includes telecommunications provided by facilities owners to users of telecommunications such as ISPs who are not themselves telecommunications carriers, but who make telecommunications available to the public indiscriminately through the public offering of their information service. *See* Earthlink Comments at 26-28; *Cf. Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 925-27(D.C. Cir. 1999) (finding similar reading to be reasonable but deferring to administrative interpretation that statute did not require Commission to classify as common carrier provider of submarine cable who sold on contract basis full transmission capacity of cable to local telephone common carrier). This statutory provision clearly answers cable operators’ claims about private carriage, as well. *See infra*, Section II.A.2.b.

2. Cable broadband also satisfies the traditional understanding of “common carriage.”

But the Commission need not even rely on the second clause of the definition of “telecommunications service” to find that cable broadband transmission providing access to an ISP is a “telecommunications service.” Such service also falls squarely within the Commission’s traditional understanding of “common carriage.” *See, e.g., In re Cable & Wireless, PLC*, File No. SCL-96-005, Cable Landing License, 12 F.C.C.R. 8516, ¶ 13 (1997) (“*Cable and Wireless*”) (employing longstanding understanding of “common carriage” under 1996 Act).

A telecommunications provider is regulated as a common carrier if either (a) it holds itself out to do business indiscriminately with all members of the eligible user public or (b) there is a specific legal compulsion that it serve all indifferently. *See National Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976) (“*NARUC I*”); *see also Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994); *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) (“*NARUC II*”). Under either prong of this test, broadband transmission via cable facilities clearly qualifies as telecommunications service and thus must be provided on nondiscriminatory terms and conditions.

- a. Cable operators do offer telecommunications indiscriminately to the public.

When cable companies sell cable modem service, which they have done to more than 1.4 million residential customers¹⁷ and will do to any others in their service area willing to pay the fee, a part of the standard monthly fee provides to those consumers the use of the cable company's last mile transmission facilities that permit rapid broadband access to any content of the network of networks known as the World Wide Web. *See Earthlink Comments at 26-28. Cf. Computer II* ¶ 132 ("basic services form one component of the charges for enhanced services"). In fact, a central, if not sole, emphasis in the sales pitches of cable operators is the speed of that transmission, especially in comparison to dial-up.¹⁸ Cable providers are thus not only offering broadband transmission capability indiscriminately to the public, but marketing the transmission capability as the distinguishing feature of their product.

Technologically, too, what the cable operators themselves actually provide – the last mile transmission provided over cable facilities – is a pure transmission capacity. In that last mile, the information that the user obtains or sends is neither created nor altered, beyond a minimal conversion of protocol necessary to set up the transmission, which the FCC has never considered

¹⁷ 706 Report ¶ 71.

¹⁸ *See, e.g.*, <http://www.comcastonline.com/athome.asp> (visited January 2, 2001); <http://www.cox.com/coxathome/> (visited January 2, 2001); <http://www.athome.att.com/> (visited January 2, 2001); *see also* <http://www.broadband.att.com/cgi-bin/index.fcgi> (visited January 2, 2001). That Cox, for example, also advertises that its @Home service provides an index of websites no more negates its offering of telecommunications than does the fact that the local phone company provides a telephone directory negate its offering of telecommunications.

to be enhanced service.¹⁹ To be sure, once the last mile transmission establishes a connection to the ISP, and through it, to the Internet, the end user is making use of that broadband telecommunications service to access an information service, but this is no different from end users who reach the Internet through other last-mile connections that the FCC has consistently acknowledged to provide pure telecommunications services, including narrowband POTS dial-up, broadband DSL,²⁰ and ISDN. Regardless of whether that ISP is Excite@Home, Road Runner, Earthlink, or some smaller actor, the weather reports, news items, sports and other proprietary content, as well as the ability to reach other content on the Web, comes from the ISP and not from the cable provider. The cable operators attempt to conflate themselves with their current ISP-affiliates, even though those affiliates are plainly separate entities. *See* Excite@Home Comments at 3-4. And the ongoing tests of access for multiple ISPs demonstrate

¹⁹ *See, e.g., Frame Relay Order* ¶¶ 14-16 (“[T]hree types of protocol processing are not enhanced services within the meaning of the Commission’s rules. First, . . . the enhanced services definition applies only to end-to-end communications between or among subscribers. Thus, communications between a subscriber and the network itself (e.g., for call setup, call routing, and call cessation) are not considered enhanced services. Second, . . . protocol conversions necessitated by the introduction of new technology are also outside the ambit of the enhanced services definition. This circumstance arises when innovative basic network technology is introduced into the network in a piecemeal fashion, and conversion equipment is used in the network to maintain compatibility with CPE. Third, . . . internetworking protocol conversions – those conversions taking place solely within the network that result in no net conversion between users – should be treated as basic services. This final exemption applies in situations where a carrier uses the protocol conversions merely to facilitate provision of an overall basic service.”) (footnotes omitted)

²⁰ *See In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 F.C.C.R. 24012, ¶ 36 (1998).

that what the cable operator is offering indisputably is the pure last-mile broadband transmission capacity.

Cable facilities owners' more serious argument is not that they do not offer and provide the public the use of the telecommunications transmission capacity of their last mile facilities. Instead, they argue that they have not to date voluntarily offered *pure* transmission capacity separately from the sale of Internet services. *See, e.g.*, Cox Comments at 27; AT&T Comments at 22, 23; NCTA Comments at 11-12. *See also* Comcast Comments at 15. In other words, their argument reduces to the circular claim that they cannot be *made to* unbundle their transmission service because they have not *chosen to* unbundle their transmission service.

But that argument is question begging; it is no answer to the question whether the Commission can require cable transmission service to be unbundled that cable operators have not chosen to do so on their own. Nor is this the first time that providers of telecommunications services for use exclusively with their favored ISP's service have argued that the Commission lacks the authority to require them to provide access to that telecommunications service for other users. Exposed to the light, the cable companies' argument is really the same argument made unsuccessfully by AT&T in 1995 with respect to its then-new offering of frame relay service – namely that the bundling of an information service with a new form of transmission “contaminates” the transmission so as to require regulators to treat both as a unitary information service that cannot be regulated as a telecommunication service. *See Frame Relay Order* ¶ 17-18, 37; *see also* Comcast Comments at 30-31 (invoking contamination theory). But is it just as true today of cable broadband service as it was in 1995 of Frame Relay, that “application of the

contamination theory to a facilities-based carrier such as AT&T would allow circumvention of the *Computer II* and *Computer III* basic-enhanced framework. AT&T would be able to avoid *Computer II* and *Computer III* tariff and unbundling requirements for any basic service that it could combine with an enhanced service. This is obviously an unintended and undesirable result.” *Frame Relay Order* ¶ 44. *Accord* Earthlink Comments at 29-31. Rejecting AT&T’s argument, to avoid that result, the Commission there required facilities-based carriers providing enhanced services to offer the basic telecommunications services on which they were based to competitors on nondiscriminatory terms and conditions. Just as the dichotomy between basic and enhanced services lives on in the 1996 Act’s distinction between telecommunications services and information services, so too must the FCC again reject this attempt by the last-mile facilities owners to escape basic requirements to offer their transmission capacity on a nondiscriminatory basis by bundling it with unregulated information service.²¹ Indeed, if the Commission wishes to continue the growth and innovation that its hands-off approach to information service providers has fostered, it must equally continue its policy of making sure that the necessary telecommunications inputs are readily available.

²¹ Clearly, in the 1996 Act, Congress intended no change in the regime established by *Computer II*, assuring that information services and the underlying telecommunications services would retain their separate existences. *See* S. Rep. No. 104-230, at 18 (1995) (“interactive . . . shopping services and other services involving interaction with stored information” are information services, but “[t]he underlying transport and switching capabilities on which these interactive services are based . . . are included in the definition of ‘telecommunications services’.”); *see also* Conf. Rep. No. 104-458, at 116 (1996) (“[t]he House recedes to the Senate . . . with respect to the definitions of . . . ‘telecommunications,’ ‘telecommunications carrier,’ and ‘telecommunications service’”).

b. The public interest also mandates a nondiscrimination requirement.

The cable operators in the end for good reason do not rest on their “contamination” arguments. Instead, in addition to their claims that they have not at present offered a telecommunications service to the public because they have not separately marketed the pure transmission capability that underlies and is a main attraction of cable Internet service, cable operators contend that any future voluntary arrangements they may make to provide pure transmission capacity to unaffiliated ISPs will be at best private carriage. See AT&T Comments at 34-35; Cox Comments at 44-46; Comcast Comments at 25, NCTA Comments at 13-17. As already discussed, *supra* Section II.A.1, as a legal matter, under the 1996 Act, ISPs present the quintessential case under which the offering to a “class of users” such as a limited group of ISPs is effectively an offering to the public because it is the end consumers who really purchase and make use of the last-mile transmission service. Even under a narrower view, however, the cable companies’ argument in this respect should not preclude Commission action. “[A] carrier cannot vitiate its common carrier status merely by entering into private contractual relationships with its customers.” *Southwestern Bell Tel. Co.*, 19 F.3d at 1481. Cable operators may make their transmission capability available to the class of ISP users on a sufficiently indiscriminate basis to meet the common law definition of common carriage. But more importantly, the particular formal contractual arrangement through which end users receive telecommunication services carried over bottleneck facilities cannot possibly be conclusive of the question whether these bottleneck telecommunications services should be subject to regulation as common carrier services. To the contrary, the Commission has always recognized that in the end the judgment