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Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Inquiry Concerning High-Speed Access to the Internet Over Cable and other Facilities, GN Docket No. 00-185.

Dear Ms. Salas:

The Center for Democracy and Technology ("CDT") hereby submits its reply to comments filed with the Federal Communications Commission regarding its Notice of Inquiry ("NOI"), *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities.*

CDT believes that openness is a central characteristic of the narrowband Internet, and one that must be maintained and implemented in the broadband world. CDT is a non-profit, public interest organization dedicated to developing and implementing public policies that preserve civil liberties and democratic values on the Internet. CDT has worked to preserve the Internet's open character and was at the forefront of efforts to establish and protect the very high level of constitutional protection that speech on the Internet has been afforded by the United States Supreme Court in *ACLU v. Reno.* It has helped define the vision of the Internet as a user-controlled, decentralized, democratic medium. In conjunction with its initial filing in response to the FCC's NOI, CDT released *Broadband Backgrounder: Public Policy Issues Raised by Broadband Technology.* The *Broadband Backgrounder* provides a detailed overview of the public policy issues and arguments concerning broadband access to the Internet.

After reviewing the initial comments submitted in this proceeding, we urge the Commission to engage in a process to monitor the adoption by industry of open access principles and their implementation across multiple facilities. This monitoring should be ongoing, and should be based upon agreed-upon critiera that establish what constitutes open access and when it has been achieved. We urge the Commission to initiate this monitoring process in keeping with the following principles.

1. Openness is imperative and achieveable.

The comments submitted in the first phase of this proceeding confirm CDT's fundamental assertion that implementing open access is crucial to preserving the consumer-empowering, speech-enhancing, democratic character of the Internet. Commenters demonstrated that an open Internet enhances broad access to affordable, usable information and communications services for the purpose of bringing more and better affordable health care to citizens, expanding educational opportunities, and enabling independent living for senior citizens and people with disabilities. Some cited the opportunities for jobs and economic advancement enabled through open access. Others discussed the positive effects of consumer choice and deployment of competitive facilities to provide high speed Internet access encouraged by open access. Still others echoed CDT's belief that open access serves First Amendment values and that absent open access, competing incentives will endanger the free flow of ideas on the Internet. Whether on economic or constitutional grounds, comments submitted to the Commission demonstrate that openness and open access are imperative.

The comments filed in this proceeding also confirm CDT's belief that openness and open access are possible. While commenters articulated a broad range of views about the relative appropriateness of open access, ways in which it might be achieved, and whether it should be required by regulation, the ability to provide open access was not called into question. Clearly, the "open access" debate has shifted from *whether* there and will be open access to *how* such access will be implemented and monitored, and whether it should be mandated.

2. Openness must be implemented and monitored based on a clear definition and set of criteria.

If "openness" or "open access" is to be fairly and consistently implemented, it is critical that it be clearly and understandably defined. Industry, the Commission, policymakers and the public must have a concrete set of criteria against which to evaluate whether and to what extent broadband access offered over a given communications facility can be considered "open." To that end, CDT respectfully draws the Commission's attention to CDT's "Broadband Open Access Metrics Checklist" (attached hereto) designed to assist in this evaluation. This tool -- developed as a result of CDT's year-long Broadband Access Project – enumerates essential elements of openness and open access. This checklist can serve two purposes. First, it can enable the evaluation of a particular communications facility where openness may be lacking. Second, it can allow comparison of openness across different broadband systems and technologies.

3. The public interest must be involved in monitoring and decision-making about broadband and monitoring.

CDT urges the Commission to take concrete steps to include representation of the public interest in decisionmaking about openness and open access. The free speech values at stake in the open access debate, and their importance to creating a rough parity of speakers require that the decision-making process involve not only corporate interests, but the greater public interest community. To do otherwise would exclude precisely those that most need protection – those that lack money, numbers, or market power. We look forward to the Commission's implementation of a monitoring and decision-making process that includes public participation.

Respectfully submitted,

Jerry Berman
Alan Davidson
Paula Bruening

Center for Democracy and Technology

Broadband Open Access Metrics Checklist

The checklist uses the following definitions:

> The term "facility owner" refers to the communications company that installed and/or owns the underlying physical equipment that provides a way to deliver broadband Internet service to individual users. This term would include, for example, a local telephone or cable company.
>
> The term "Internet Service Provider" or "ISP" refers to the company that provides the connection between the underlying communications facility and the Internet. These terms would include, for example, America Online, Earthlink, and @Home. ISPs can be owned by or affiliated with a facility owner, or can be independent and unaffiliated.
>
> The term "Internet user" refers to any user or consumer of retail Internet services, whether that user is an individual, a small business, or other entity.

#	QUESTION	EVALUATION	✓ * ✗
	Openness from the perspective of the individual Internet user		
1.	Can the Internet user access and receive any lawful content on the Internet, free from any limitation imposed by the broadband facility owner?	If "Yes" enter a ✓, otherwise enter an ✗.	
2.	Can the Internet user speak and post any lawful content to the Internet, free from any limitation imposed by the broadband facility owner?	If "Yes" enter a ✓, otherwise enter an ✗.	
3.	Can the Internet user utilize any generally available content delivery technology (such as streaming audio or video applications) to access and receive content on the Internet, free from any limitation imposed by the broadband facility owner?	If "Yes" enter a ✓, otherwise leave blank and proceed to Questions 3a.	
3a.	If "No" to Question 3, are any restrictions on use (a) applied equally to all users and all ISPs using the broadband facility, (b) based on reasonable technical and engineering concerns, *and* (c) narrowly drawn to constrain only those uses that raise technical and engineering concerns?	If "Yes" enter a *, otherwise enter an ✗.	

#	QUESTION	EVALUATION	✓ * ✕
4.	Can the Internet user use any generally available Internet technology (such as web servers) to deliver content to the Internet, free from any limitation imposed by the broadband facility owner?	If "Yes" enter a ✓, otherwise leave blank and proceed to Questions 4a.	
4a.	If "No" to Question 4, are any restrictions on use (a) applied equally to all users and all ISPs using the broadband facility, (b) based on reasonable technical and engineering concerns, *and* (c) narrowly drawn to constrain only those uses that raise technical and engineering concerns?	If "Yes" enter a *, otherwise enter an ✕.	
5.	Can the Internet user access the Internet without first accessing a "start page" or initial screen controlled or required by the broadband facility owner?	If "Yes" enter a ✓, otherwise enter an ✕.	
6.	Can the Internet user choose from a variety of service plans offered by a variety of ISPs, including both local and national ISPs?	If "Yes" enter a ✓, otherwise enter an ✕.	
7.	Can the Internet user obtain service from an ISP that is not affiliated with the facility owner without *also* having to purchase Internet service from an ISP that is affiliated?	If "Yes" enter a ✓, otherwise enter an ✕.	
8.	Are research or development efforts under way to reduce or eliminate any restrictions identified in Questions 3 and 4 above?	If "Yes" enter a ✓, if no restrictions were identified leave blank, otherwise enter an ✕.	
	Openness from the perspective of the Internet Service Provider (ISP)		
9.	Does the facility owner permit unaffiliated ISPs to offer Internet service over the owner's broadband network?	If "Yes" enter a ✓, otherwise enter an ✕.	
10.	Does the facility owner limit the number of ISPs that can offer service over the broadband network?	If "No" enter a ✓, otherwise leave blank and proceed to Questions 10a and 10b.	
10a.	If "Yes" to Question 10, is the limit exclusively based on legitimate technical limitations on the number of ISPs supportable on the network?	If "Yes" enter a *, otherwise enter an ✕.	
10b.	If "Yes" to Question 10, are research and development efforts under way to reduce or eliminate the limits?	If "Yes" enter a *, otherwise enter an ✕.	
11.	Can an unaffiliated ISP contract with the facility owner for access to Internet users on essentially the same financial terms as are given to an affiliated ISP for similar access?	If "Yes" enter a ✓, otherwise enter an ✕.	

#	QUESTION	EVALUATION	✓ * ✗
12.	In terms of speed of access, technical functionality, and ability to offer service to customers, does an ISP affiliated with the facility owner have any advantages over an unaffiliated ISP?	If "No" enter a ✓, otherwise enter an ✗.	
13.	In terms of operational support systems and the procedures and timetable used to offer service to new customers, does an ISP affiliated with the facility owner have any advantages over an unaffiliated ISP?	If "No" enter a ✓, otherwise enter an ✗.	
14.	Does the facility owner require ISPs to use any equipment or services of the facility owner (such as Internet transport services) beyond those essential to the Internet access service itself?	If "No" enter a ✓, otherwise enter an ✗.	
15.	Can an unaffiliated ISP establish a direct vendor-customer relationship with the ultimate Internet user?	If "Yes" enter a ✓, otherwise enter an ✗.	
16.	Can an unaffiliated ISP initiate the process of establishing service to an Internet user, such that the ISP can permit a new user to establish service via a single request to the ISP (avoiding any need for the user to also contact the facility owner)?	If "Yes" enter a ✓, otherwise enter an ✗.	