ORIGINAL

STATE OF CALIFORNIA

GRAY DAVIS, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

EX PARTE OR LATE FILED

RECEIVED
APR 23 2001
FCC MAIL ROOM

April 3, 2001

Ms. Magalie R. Salas, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20024

Re: **Ex Parte Comments: In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities: GN Docket No. 00-185, Two Copies**

Dear Ms. Salas:

In accordance with Section 1.1206(b)(1) of the FCC's Rules, the California Public Utilities Commission (California) hereby submits for filing two copies of an ex parte written presentation California has made to Dorothy Atwood, Chief of the Common Carrier Bureau. Please include this presentation in the public record in the above-referenced docket. The written ex parte presentation consists of the letter to Ms. Atwood and the attachment to that letter.

Thank you in advance for your assistance.

Very truly yours,

Lionel B. Wilson
Assistant General Counseil

LBW/rir

Enclosures: 2

No. of Copies rec'd 0+1
List ABCDE

EX PARTE OR LATE FILED

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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

RECEIVED
APR 23 2001
FCC MAIL ROOM

EX PARTE COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE CALIFORNIA PUBLIC UTILITIES COMMISSION

GARY M. COHEN
LIONEL B. WILSON

505 Van Ness Ave.
San Francisco, CA 94102
Phone: (415) 703-2047
Fax: (415) 703-2262

Attorneys for the People of the State of California and the Public Utilities Commission of the State of California

April 3, 2001

TABLE OF CONTENTS

Page

I. **SUMMARY** 1

II. **INTRODUCTION** 3

III. **OVERVIEW OF MARKET FOR HIGH-SPEED ACCESS TO THE INTERNET** 6

A. Providers Of Internet Access Services 6

B. Providers Of Access To The Internet Via A Cable Modem Platform 8

IV. **CLASSIFICATION OF CABLE MODEM SERVICE AND/OR THE CABLE MODEM PLATFORM** 10

A. Cable Operators' Cable Modem Service Consists Of Both A Telecommunications Service Component And An Information Service Component 11

B. Cable Modem Access Service And the Cable Modem Platform Are Not Cable Services 13

C. Implications For Classifying the Cable Modem Platform As A Telecommunications Service 15

1. Legal Implications 15

2. Policy Implications 17

V. **ISSUES SURROUNDING OPEN ACCESS** 18

A. What Is "Open Access"? 18

B. Approaches To Achieve Open Access 20

C. Is Open Access A Desirable Policy Goal? 23

D. If Open Access Is A Desirable Policy Goal, What Are The Most Appropriate Means Of Achieving That Objective 25

E. The FCC's Options 28

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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

EX PARTE COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE CALIFORNIA PUBLIC UTILITIES COMMISSION

I. SUMMARY

Under the Telecommunications Act of 1996, Congress sought "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[1] California welcomes the FCC's inquiry to consider the framework governing high-speed access to the Internet over cable and other facilities in light of Congress' intent.

Typically, high-speed access to the Internet over cable facilities in residential and small business markets is provided by a single cable operator in an exclusive arrangement with an ISP. An ISP not affiliated with the cable operator generally is not given access to the cable operator's facilities, and customers generally are not able to access an unaffiliated ISP of their choice. Competitive access technologies offering a similar range of Internet services either are limited

[1] Preamble to Telecommunications Act of 1996, Public Law 104-104 (Feb. 8, 1996).

in their geographic scope (e.g., a three mile loop radius for digital subscriber line ("DSL") service), or are not yet sufficiently developed to be widely available (e.g., wireless services) as viable alternatives. As a result, cable operators have emerged as the dominant providers of high-speed access to the Internet. To date, thirty-seven percent of cable customers are served by cable operators who are under no obligation to open their systems to unaffiliated ISPs.

California believes that the FCC should adopt open access as a national policy in order to fulfill the goals of the 1996 Act. Further, because current market conditions are not sufficient to discipline cable operators to offer open access on reasonable and nondiscriminatory terms and conditions, California believes that continued reliance in the near term on a market-based approach (i.e., a hands-off approach) to open access will not achieve the purposes of the Act. California therefore urges the FCC to adopt minimum guidelines that enable ISPs unaffiliated with a given cable operator to access that operator's cable network on reasonable terms and conditions, and on a nondiscriminatory basis. The FCC has authority to adopt guidelines under Title II of the Act by properly classifying the transmission component of cable modem service as a common carrier telecommunications service. Pursuant to Title II, the FCC may then require the cable operator to unbundle the transmission component of cable modem service (i.e., the cable modem platform) from the content (i.e., information) component to enable unaffiliated ISPs to purchase the former on reasonable terms and conditions.

California does not believe that it is necessary to revisit the FCC's rules governing high-speed access to the Internet over telephone lines. Nor does California believe that wireless, broadcast or satellite facilities for accessing the Internet are sufficiently developed to warrant regulatory oversight, other than monitoring, at this time.

California urges the FCC to initiate a rulemaking to adopt guidelines governing access to the cable modem platform. The public interest goal of promoting the widespread and rapid deployment of innovative and new technologies, securing lower prices, and affording higher quality services is best served by maximizing the choice of ISP broadband services to customers.

II. INTRODUCTION

The People of the State of California and the California Public Utilities Commission ("California") respectfully submit these ex parte comments in response to the Notice of Inquiry ("NOI") issued September 28, 2000 by the Federal Communications Commission ("FCC") in the above-captioned proceeding. In its NOI, the FCC seeks comment regarding the appropriate legal and policy framework for cable modem service[2] and the cable modem platform.[3] The FCC has recognized that one of the principal objectives of the Telecommunications Act of 1996 ("1996 Act") is to promote the widespread and rapid deployment of new telecommunications technologies, including high-speed

[2] The FCC uses the term cable modem service when referring to the Internet services that are provided to end user subscribers using cable modem technologies. NOI, ¶ 1,n.1.

[3] The FCC uses the term cable modem platform when referring to the underlying facilities used to provide cable modem service. NOI, ¶ 1, n 1.

access services, while at the same time preserving and promoting the competitive Internet market.[4] The 1996 Act further seeks to secure "lower prices and higher quality services" as well as enhance the choices of services available to consumers.[5]

Currently, customers may purchase high-speed access to the Internet via DSL from numerous providers. DSL service is considered a regulated, telecommunications service. Customers may also obtain high-speed access to the Internet from cable operators via cable facilities (i.e., the cable modem platform). However, unlike DSL services, which are regulated, the FCC to date has relied exclusively on market forces to spur competitive access to the Internet over cable facilities. The FCC's reliance on market forces alone has generally led to exclusive arrangements between operators of cable networks and Internet Service Providers ("ISPs"), both affiliated and non-affiliated. As a result, customers effectively have no choice but to subscribe to the services of the ISP selected by the cable operator if they seek to access the Internet via cable facilities.[6] The FCC has declined to impose an open access requirement for the cable modem platforms offered by cable modem service providers.

Other methods of accessing the Internet use wireless, broadcast, and unlicensed spectrum technologies. The FCC has declined to regulate such access

---

[4] NOI, ¶ 2.

[5] Preamble to 1996 Act.

[6] Customers could subscribe to the access services of an unaffiliated ISP, but in doing so, would be paying twice for access – once to the ISP affiliated with the cable operator, and again to the ISP of the customer's choosing.

as well. However, these technologies for accessing the Internet are currently not widely available to customers as a viable alternative to either DSL or cable modem service.

In its NOI, the FCC seeks to develop a record that "examines the full range of high-speed service providers" in order to determine the appropriate legal and policy framework which promotes competition, investment in and deployment of new technologies and services, and customer choice.[7] Among other things, the FCC seeks input on the extent to which open access to cable modem services and/or the cable modem platform is necessary to benefit consumers, and hence a desirable national policy goal.[8] The FCC further asks commenters to evaluate the legal and policy framework that would apply to cable modem services and/or the cable modem platform, and implications of the chosen framework.[9] The FCC also seeks comment on how open access should be defined, and how a market versus a regulatory approach to open access potentially affects the availability of high-speed access services.[10] In addition, the FCC asks parties to comment on several approaches to classifying cable modem service and/or the cable modem platform and the implications of each classification. Finally, the FCC asks parties to comment on the need for rulemaking and whether the FCC should exercise its forbearance authority.[11]

---

[7] NOI, ¶¶ 3, 4.

[8] NOI, ¶ 14.

[9] *Id.*

[10] *Id.*

[11] *Id.*

In accordance with the NOI, California will generally track the organization of issues set forth in the NOI in addressing these issues.

III. OVERVIEW OF MARKET FOR HIGH-SPEED ACCESS TO THE INTERNET

A. Providers Of Internet Access Services

As the FCC recognized in its order approving the AT&T/MediaOne merger, there are essentially five different types of participants involved in Internet services.[12] They are access service providers, application providers, content providers, backbone providers, and end-users. End users can access the Internet via narrowband or broadband technologies. Narrowband Internet access services are provided via basic network services, such as plain old telephone service.[13] Broadband Internet access services are provided via cable modems (offering a speed of 1 to 10 Megabits per second), DSL technology (offering a speed of 1.5 Megabits per second or higher), ISDN technology, private line and frame relay (offering a speed of up to 45 Megabits per second), wireless technologies (including fixed wireless), satellite-based access, and unlicenced spectrum technologies.

[12] Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. Transferor, to AT&T Corp., Transferee, CS Docket No. 99-251, *Memorandum Opinion and Order*, FCC 00-202, ¶ 103 ("AT&T/MediaOne Order").

[13] Plain old telephone service is a basic network access line that is not conditioned to offer speeds exceeding 200 kilobits per second.

Narrowband and broadband access services make available a two-way transmission path on which content may be transmitted.[14] These services, however, do not include content.

Cable modem-based access to the Internet currently dominates the broadband services market for residential and small business customers. However, DSL-based access is expected to catch up with cable modem-based Internet access within the next few years. Wireless and satellite-based access is minimally available at this time.

The main drawback to cable modem-based Internet access is that transmission speeds degrade as more subscribers are on line. In addition, because the cable network is a shared medium, data transmissions are potentially more vulnerable to interference and degradation caused by the actions of any individual subscriber's equipment.[15]

The principal limitation of DSL service is signal attenuation where provision of DSL service is limited to between 4,000 and 18,000 feet or a 3 mile maximum loop radius from the carrier's central office.[16] As a result, DSL service is generally limited to urban areas, with distance limitations even within those areas.

---

[14] Broadband Today: A Staff Report to William E. Kennard, Chairman of the Federal Communication Commission on Industry Monitoring Sessions Convened by Cable Services Bureau, October 1999, 18-20. ("Broadand Today").

[15] *Id.* at 19.

[16] *Id.* at 20.

Wireless access suffers from a number of problems, not the least of which is slow transmission speed, limiting its use to functions like checking e-mail as opposed to surfing the web. There are also technical problems, including line of sight issues where the presence of obstacles such as foliage, buildings, or heavy rain can hinder reception.[17] Commercial availability of satellite-based access is at least two to three years away, and such access also faces technical challenges in serving the mass market. Further, the delay in getting into the broadband services market may significantly undermine the ability of satellite-based access to gain a foothold therein.[18]

B. Providers Of Access To The Internet Via A Cable Modem Platform

The majority of cable operators combine (a) broadband transport through their cable systems with (b) Internet access and proprietary content through an ISP (usually affiliated with the cable operator) with which they have an exclusive contract (predominantly or Excite@Home or Road Runner). Excite@Home is the nation's largest cable broadband ISP and currently has more than 2.3 million subscribers. Road Runner is the second largest cable broadband ISP, and has approximately 1.1 million subscribers.

AT&T/MediaOne has ownership interests in cable systems with the last-mile facilities reaching nearly 63% of homes passed by cable nationwide.[19] As a

---

[17] *Id.*, at 21.

[18] *Id.*, at 22.

[19] AT&T/MediaOne Order, ¶ 110.

condition to their merger, AT&T agreed to open its cable systems to unaffiliated ISPs upon expiration of its exclusive contract with Excite@Home in 2002. AT&T also agreed to negotiate private contracts with multiple ISPs in order to offer those ISPs reasonably comparable access prices, the opportunity to market and bill customers directly, and the opportunity to differentiate service offerings and to maintain brand recognition in all such offerings. In addition, AT&T committed to allowing unaffiliated ISPs using its cable systems to obtain Internet backbone capacity from AT&T's own service, if they so choose. AT&T further committed to facilitating maximum access by its customers to any content of their choosing.[20]

The remaining cable operators, serving 37% of homes passed by cable nationwide and dominated by Time Warner and Cox Cable, are under no obligation to open their cable systems up to unaffiliated ISPs. Time Warner has an exclusive contract with Road Runner and Cox Cable has an exclusive contract with Excite@Home. Time Warner and Cox Cable have suggested that they will terminate their exclusive contracts with Road Runner and Excite@Home over the next two years, in favor of open access to multiple ISPs. However, there is no guarantee that they will do so, or that the terms they offer for open access would be attractive to unaffiliated ISPs.

In its order approving the AT&T/MediaOne merger, the FCC itself recognized that if customers do not have the ability to choose among viable, alternative broadband Internet access providers or ISPs, competition and diversity

[20] *Id.*, ¶¶ 120-121.

in the emerging broadband Internet arena would be undermined.[21] The FCC also stated that these harms could be avoided if (a) consumers are able to select among various alternative broadband access providers, such as DSL, wireless, and satellite, or (b) unaffiliated ISPs are permitted to access a cable operator's network.[22]

IV. CLASSIFICATION OF CABLE MODEM SERVICE AND/OR THE CABLE MODEM PLATFORM

The FCC asks for comment on four possible classifications of cable modem service and/or the cable modem platform under the Communications Act, as amended: (1) a "cable service" under Title VI; (2) a "telecommunications service" under Title II; (3) an "information service" subject to Title I; or (4) a hybrid service subject to multiple provisions of the Act. California believes that access to an ISP via cable modem facilities (i.e., the cable modem platform) is most appropriately classified as a common carrier "telecommunications service," and that such classification is supported as a matter of law and policy. Further, cable modem service is a bundled telecommunications and information service offering because it combines the cable modem platform, a telecommunications service, with Internet service, an information service.

---

[21] AT&T/MediaOne Order, ¶ 116.

[22] *Id.*

A. Cable Operators' Cable Modem Service Consists Of Both A Telecommunications Service Component And An Information Service Component

Section 153(43) defines "telecommunications" as the "transmission 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."[23] Section 153(46) defines a "telecommunications service" as the "offering of telecommunications 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."[24] Section 153(20) defines an "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications..."[25]

Access to an ISP via narrowband or broadband services consists of making available a two-way transmission path on which content may be sent. These access services, however, do not include content. DSL service, for example, is a two-way transmission path between a subscriber and an ISP. As a pure transmission service, access to the Internet via DSL service fits the definition of a telecommunications service under the Act, and is currently regulated as such. Services provided by the ISP after the transmission is delivered to the ISP that

[23] 47 U.S.C. § 153(43).

[24] 47 U.S.C. § 153(46).

[25] 47 U.S.C. § 153(20).

enable an ISP subscriber to access content information, e-mail, or other services offered over the Internet qualify as "information services,"

Access to an ISP server via cable modem facilities, i.e., the cable modem platform component of cable modem service, is the functional equivalent of DSL transmission service.[26] As the Ninth Circuit found in *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), AT&T's Excite@Home Internet service consists of two components: the cable broadband facility, used in lieu of telephone lines, to access the ISP; and the Internet service transmitted through the broadband facility. The Court found that to the extent that AT&T's Excite@Home provides its subscribers transmission to the Internet over its cable broadband facility, it is providing a common carrier telecommunications service under Section 153(46) of the Act.[27] However, to the extent that Excite@Home provides services that enable users to access content, information, e-mail or other services offered over the Internet, the Court found that AT&T is providing information services as an ISP.[28] The Court went on to say that AT&T qualifies as a telecommunications carrier to the extent that it is providing telecommunications services.[29] The fact that AT&T

[26] An end user purchasing DSL service is purchasing a common carrier telecommunications service to access an ISP and the Internet. An ISP providing Internet service via cable facilities should likewise be viewed as an end user whom purchases the cable modem platform service (a telecommunications service) from the cable operator. The ISP then offers an information service to its subscriber, and delivers the information directly to the subscriber's premises. In both cases, the telecommunications component, whether provided via telephone lines and cable facilities, should be treated the same for regulatory purposes.

[27] 216 F.3d at 878.

[28] *Id.*

[29] 216 F.3d at 877-878.

offers its transmission services over cable, instead of telephone, facilities is not relevant to whether it is providing a telecommunications service.[30]

This analysis is fully consistent with the FCC's recognition that functionally equivalent DSL service consists of two components. An ISP utilizes digital transmission line — a telecommunications service — to connect a subscriber to the ISP server. The ISP then provides an information service when it "combines computer processing, information storage, protocol conversion, and routing with transmission to enable users to access Internet content and services."[31] The fact that an ISP uses telephone lines instead of cable facilities as the pipeline for transmission service from the customer to the ISP's server does not alter the nature of this service as "telecommunications" under Section 153(46) of the Act. Indeed, as the FCC recognized in its *Computer III* proceeding, wherein it adopted unbundling requirements for the provision of information services under Open Network Architecture, the transmission component of information services does not lose its character as a common carrier telecommunications service subject to Title II, even though the information service itself is not subject to Title II.[32]

B. Cable Modem Access Service And the Cable Modem Platform Are Not Cable Services

"Cable service" is defined as "(A) the one-way transmission to subscribers

---

[30] 47 U.S.C. §§ 153 (44) & (46). A provider of telecommunications service is a "telecommunications carrier" "regardless of the facilities used."

[31] *In the Matter of GTE Telephone Operating Cos., Memorandum Opinion and Order*, 13 FCC Rcd 22466 (released October 30, 1998) ("GTE DSL Order"), ¶ 6.

[32] GTE DSL Order, ¶ 20.

of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service."[33] As stated in *City of Portland*, "the essence of cable service ... is one-way transmission of programming to subscribers generally."[34] In contrast, the cable modem platform allows for a two-way transmission path on which content may be transmitted. Further, Internet access "is interactive and individual" which is distinct in both a "practical and a technical sense."[35] For example, both e-mail and voice telephony over the Internet are interactive and individual, and do not qualify as a "programming service" within the meaning of the Act.[36] While the 1996 Act broadened the definition of "cable service" to include information services made available to subscribers by the cable operator, the legislative history makes clear that Congress did not intend to affect federal or state regulation of services otherwise classified as "telecommunications service" that are offered over cable facilities.[37]

---

[33] 47 U.S.C. § 552(6).

[34] *City of Portland*, 216 F.3d at 876.

[35] *Id.* at 877.

[36] In contrast, in *MediaOne Group v. County of Henrico*, 97 F.Supp. 2d 712, 715 (E.D.Va. 2000), *app. pending*, the court simply concluded, without any analysis, that MediaOne was providing a cable service because it "contains news, commentary, games and other proprietary content with which subscribers interact as well as Internet access."

[37] Conference Report at 169. Notably, when common carriers provide video programming transmission service, they are subject to Title II of the Act. 47 U.S.C. § 651(a)(2).

C. Implications For Classifying the Cable Modem Platform As A Telecommunications Service

1. Legal Implications

As a matter of law, in light of *City of Portland*, cable modem-based access to the Internet (i.e., the cable modem platform) is appropriately classified as a telecommunications service. Cable modem-based access is also a common carrier service and subject to regulation by the FCC, the states, or both.[38] To the extent that this service is jurisdictionally interstate, providers would be subject to Title II of the Act.

Under Title II, a cable operator would be required to offer the cable modem platform to unaffiliated ISPs on a nondiscriminatory basis at reasonable charges.[39] In particular, Section 201 would compel cable operators to provide the cable modem platform to unaffiliated ISPs as end users upon reasonable request and at just and reasonable charges.[40] Section 202 would make it unlawful for any cable operator to unjustly or unreasonably discriminate in its charges, practices,

---

[38] The telecommunications component of cable access service may qualify as an intrastate service subject to state jurisdiction. *Cf. Bell Atlantic Telephone Cos. v. FCC*, 208 F.3d 1 (D.C. Cir. 2000). To the extent that the cable provider offers the telecommunications service as a local exchange carrier, Section 251(d)(3) of the 1996 Act would enable a state commission to establish access and interconnection obligations so long as they were consistent with Section 251.

[39] The telecommunications component of the cable access service does not fit the definition of "exchange access" because it is not used for the completion of long distance calls. However, assuming *arguendo* that this component qualifies as "exchange access," the FCC could lawfully compel the provider of such service to offer it to non-carriers, such as ISPs. *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385, ¶ 43 (the FCC has "always required LECs to offer access service to parties that may not be common carriers;" the FCC has stated that non-carriers may purchases exchange access service. *Id.*)

[40] 47 U.S.C. § 201.

classifications, regulations, facilities or services for or in connection with the cable modem platform, including compliance with service quality standards.[41]

Cable modem services currently bundle an enhanced/information (ISP) service with basic telecommunications (the cable modem platform) used to deliver the information service to the end user. Under AT&T's existing practice, the ISP service is offered to the public while the cable modem platform is provided through exclusive arrangements with the ISP. California believes that the cable operator should be required to unbundle the basic cable modem platform from the ISP service, and offer it on a common carrier basis to all ISPs.[42]

The interconnection obligations of Section 251 of the Act would not appear to apply to a cable operator's interconnection with ISPs because, as providers of information services, ISPs do not qualify as "telecommunications carriers" under the Act. Section 251(a) by its terms governs telecommunications carriers' interconnection with "other telecommunications carriers."[43] [44] However, in the event that a telecommunications carrier wishes to build facilities connecting the cable operator's facilities to the ISP's facilities, the cable operator would be required under Section 251(a) to allow the telecommunications carrier to

[41] 47 U.S.C. § 202.

[42] NOI, ¶ 54.

[43] 47 U.S.C. § 251(a)(1).

[44] Nevertheless, as discussed, the cable operator would be required under Section 201 to offer (i.e., interconnect) its cable modem platform to an end user, including an ISP, upon reasonable request.

interconnect with the cable operator's facilities.[45] This scenario would be analogous to a competitive local exchange carrier providing connections between an incumbent local exchange carrier and an ISP.

2. Policy Implications

Consistent with the policies underlying the1996 Act, customers should have the ability to freely choose high quality access services at reasonable charges among viable, alternative broadband Internet access providers. Enhancing customer choice not only promotes competition among various providers of access services, but it also spurs investment in and diversity of new and innovative access technologies. In particular, smaller ISPs tend to bring more innovation into the market than larger, more established ISPs.[46] Enabling customers who utilize cable modems to gain access to these ISPs will cause more established ISPs to likewise innovate and improve customer service.

California believes that access to ISPs should be treated consistently, from a regulatory perspective, regardless of whether such access is via cable facilities or DSL. The adoption of a consistent regulatory policy promotes a level playing field among competitive providers and affords customers the widest choice at the lowest prices, and neither favors one technology over another nor skews investment decisions. California recognizes that incumbent local exchange carriers ("LECs") have urged the FCC to forbear from its regulation of their DSL

[45] *Id. See also* 47 U.S.C. § 201(a) (FCC could also find it in the public interest to require carriers to establish physical connections with other carriers, after opportunity for hearing).

[46] Broadband Today at 35.

services. However, as the FCC correctly noted when it required incumbent LECs to offer line sharing, current market, technology, and industry conditions demonstrate that incumbent LECs have not willingly made line sharing available to competitive LECs. Line sharing requirements are needed to ensure that DSL service is available to end users from multiple providers (i.e., both the incumbent LEC and competitive LECs) in a timely, cost effective manner.[47] For the reasons discussed in Section V. *infra*, California believes that, like line sharing, "open access" to cable networks is a desirable policy goal, and such access should be subject to regulatory oversight.

V. ISSUES SURROUNDING OPEN ACCESS

In its NOI, the FCC seeks comment on the definition of open access, whether open access is a desirable policy goal, and if so, whether the FCC should adopt a market or regulatory approach to promote such access.[48]

A. What Is "Open Access"?

The FCC notes that most open access proposals entail two broad requirements, providing unaffiliated ISPs with the right to: (i) purchase transmission capability; and (ii) access the customer directly from the incumbent cable operator.[49] ISPs tend to define open access as the ability to purchase, on a nondiscriminatory basis, the use of the "last mile" communications facilities

[47] Advanced Services Third Report and Order (FCC 99-355), adopted November 18, 1999, ¶¶ 35-60.
[48] NOI, ¶¶ 25-49.
[49] NOI, ¶ 27.

necessary to reach consumers who are requesting their service.[50] Cable operators propose that open access would be defined through negotiated commercial agreements between cable operators and ISPs operating in a free market. They assure the FCC that while the prices, terms and conditions for such agreements may differ depending on the ISP's needs and the cable operator's resources, they will not vary based on affiliation or lack thereof.[51]

California supports, as a starting point, the definition of "open access" agreed to by AT&T in the AT&T/MediaOne merger proceeding. In that proceeding, "open access" was defined as (1) a choice of ISPs; (2) the ability to exercise the consumer's choice of ISP without having to pay twice for both the ISP and cable-affiliated ISP; (3) a choice of Internet connections at different speeds, at reasonable prices; (4) direct access to all content available on the World Wide Web without any charge imposed by the cable operator to the consumer for such content; (5) the continued ability to customize the customer's "start page" and other aspects of their Internet experience; and (6) the functionality of the customer's chosen ISP comparable to that which such ISP has on competing broadband systems, subject to any technical constraints particular to and imposed on all ISPs using the cable system to deliver high-speed Internet access.[52]

In addition, California believes that open access should require the cable operator to (1) facilitate maximum access by its customers to any content of their

---

[50] NOI, ¶ 28.

[51] *Id.*

[52] AT&T/MediaOne Order, ¶ 120.

choosing; (2) enable multiple ISPs to negotiate private contracts with cable operators at reasonably comparable access prices but have tariffed alternatives available if negotiations are not successful; (3) provide the opportunity for ISPs to market and bill customers directly, and the opportunity to differentiate service offerings and maintain brand recognition in all such offerings; and (4) ensure the ability of an ISP to access Internet backbone capacity from the cable operator, if the ISP so chooses.

Such an approach to defining open access would help ensure that cable modem users gain access to the ISP of their choice regardless of whether they have broadband Internet access alternatives, such as DSL-based access or cable modem service from alternative facilities-based cable operators, available to them. In addition, granting cable modem users access to the ISP of their choice will promote competition, innovation, investment and diversity not only in the broadband Internet access market but also in the ISP market as well.

B. Approaches To Achieve Open Access

The FCC seeks comment on whether it should consider an approach that relies on freely negotiated commercial agreements between cable operators and unaffiliated ISPs in order to achieve open access.[53] California believes that negotiated arrangements at best would allow only the largest ISPs unaffiliated with the cable operator to enter into contracts at the expense of innovative, smaller ISPs, and to the detriment of customers whose choices would be circumscribed.

[53] NOI, ¶ 29.

California therefore does not support an approach to open access which relies solely on negotiated agreements.

In the first place, a negotiated approach would allow a cable operator to negotiate more favorable agreements with its own affiliates or even larger, unaffiliated ISPs who could potentially add a large number of customers to the cable provider's Internet access market at the expense of smaller, unaffiliated ISPs. Not only would smaller ISPs themselves be disadvantaged, but this approach would also limit the customer's choice of ISP and limit innovation in the marketplace that smaller ISPs tend to bring.

Second, while a nondiscrimination provision could be required, such a requirement would be insufficient to ensure reasonably negotiated agreements. This is because the cable operator could negotiate excessively high rates with its affiliated ISP that would be made available to the unaffiliated ISP on a nondiscriminatory basis. The excessive rates would undoubtedly harm unaffiliated ISPs, particularly those smaller ISPs with more limited resources.

The FCC has suggested two other possible models for open access, and seeks comment on each.[54] Under the first model, no particular ISP would have a privileged or preferred relationship with the cable operator; rather, each ISP would purchase transmission capability and customer access from the cable operator on nondiscriminatory prices, terms and conditions, and the cable operator would manage the network on a nondiscriminatory basis. Under the second model,

[54] NOI, ¶ 30.

multiple ISPs would purchase transmission capability and customer access from the cable operator on nondiscriminatory prices, terms and conditions, but an affiliated or preferred ISP would manage the network on a nondiscriminatory basis.

California believes that the first approach provides the most reasonable model of open access. However, as discussed above, nondiscriminatory access is not sufficient to ensure open access to all ISPs. For this model to be viable there must also be an assessment of the justness and reasonableness of rates charged by cable operators for open access.

The second approach is not reasonable. Allowing the affiliated ISP to manage the network would necessarily provide it with the incentive and opportunity to make network modifications that best suit its future plans as opposed to meeting the needs of the ISP market in general. Affiliated ISP managers may also become privy to commercially sensitive information about their competitors to the detriment of those competitors. These competitive advantages outweigh any efficiencies that this model offers.[55]

The FCC further seeks comment on how a decision to pick any of these open access models for cable-based networks would affect other providers of high-speed access services.[56] California believes that the rules for open access to DSL services offered by incumbent LECs have been addressed and that these rules

[55] The competitive advantages could be minimized if management responsibilities were placed instead with the cable operator. In addition, it may be more feasible to take action against a cable operator for abuse of network management duties rather than its unregulated ISP affiliate.

[56] NOI, ¶ 30.

should not be revisited at this time.[57] The remaining broadband services – namely, wireless, satellite and unlicensed spectrum technologies – are limited primarily to e-mail use, or are years away from ubiquitous availability to the mass market. To date, there is no evidence to suggest that the providers of these services will limit a customer's choice of ISP, as is the case with cable operators today. California therefore believes that the FCC should monitor the development of these new and emerging broadband services at this time.

C. Is Open Access A Desirable Policy Goal?

California believes that open access is a desirable policy goal. Open access promotes competition among broadband services, which in turn produces innovation, spurs investment in new technologies and services, widens the choices available to customers, and ensures lower prices for products and services.

As discussed in Section III, cable modem-based access to the Internet currently dominates the broadband services market of residential and small business customers. Access to the Internet via DSL service is the only other broadband technology which has developed sufficiently to compete with cable-based technology, but DSL service is limited primarily to urban markets, and is technically limited to a three-mile maximum loop radius from the carrier's central office.

Exclusive arrangements between cable operators and ISPs are potentially anticompetitive. First, with control over a large portion of the broadband customer

[57] Advanced Services Third Report and Order (FCC 99-355), adopted November 18, 1999.

base, cable operators could gain power to determine unilaterally the content, products, and services available to broadband customers, and to dictate the prices for such products and services. This concern is heightened by the tendency for cable operators to vertically and horizontally integrate into related markets, such as Internet content, software and equipment, and offer those services through affiliated providers. Such integration may result in a closed network environment whereby cable operators are capable of limiting the content, software and equipment available to end users which access the Internet via cable modems. In addition, cable operators could develop proprietary software which would limit its availability to other types of broadband Internet access services, and thereby hinder the development of alternative broadband services.

Second, exclusive arrangements between a cable operator and an ISP could compromise the viability of other ISPs. If in order to access the ISP of their choice customers must reconfigure their Internet access device and pay additional charges to bypass the cable-affiliated ISP, customers are unlikely to do so. As a result, ISPs offering innovative services and products are unlikely to remain viable in the market.

These harms cannot be mitigated by alleged competition from DSL providers or other facilities-based cable operators offering service within the incumbent cable operator's territory. As discussed in Section D., *infra*, the conditions in the cable and broadband services markets are presently not conducive to the development of open access without regulatory intervention.

The FCC also seeks comment on what costs may be associated with open access. The costs associated with open access would include any network upgrades required to accommodate, among other things, interconnection by multiple ISPs. However, by requiring open access at this time, the FCC would likely minimize long run costs associated with technical and operational issues. Several cable operators are in the process of upgrading their cable systems to offer broadband services. Requiring open access at this time would encourage these cable operators to incorporate the technical and operational adjustments needed for open access into the initial network upgrade, and minimize the problems and costs associated with instituting open access after the upgrade has been completed.

D. If Open Access Is A Desirable Policy Goal, What Are The Most Appropriate Means Of Achieving That Objective

The FCC seeks comment on whether a market-based approach will adequately achieve the objective of open access, or whether the FCC should adopt another approach.[58] California believes that a market-based approach is insufficient to ensure open access, and that regulatory oversight is appropriate at this time in order to ensure nondiscriminatory charges and practices on behalf of unaffiliated ISPs and their subscribers.

There are at least three reasons why a market-based approach will not successfully bring open access to the cable market. First, there is no evidence to suggest that cable operators are willingly entering into nonexclusive agreements

[58] NOI, ¶ 51.

with ISPs. While the FCC has cited commitments by AT&T and Time Warner to provide open access, these are based on merger-related conditions that were mandated by the FCC. Moreover, with vertical and horizontal integration occurring in the cable market, the incentives for cable operators to provide open access are declining.

Second, facilities-based cable competition has not developed, and is not likely to develop, in most cable markets around the country. Even if facilities-based cable competition were to develop in some markets, there is no evidence to suggest that these new entrants would have the incentive to negotiate nonexclusive agreements with multiple ISPs. As a result, any expectation that new cable entrants will negotiate nonexclusive agreements with ISPs and exert pressure on incumbent cable operators to follow suit is not realistic in the foreseeable future.

Third, because of the technical limitations associated with DSL service (i.e., its limited availability to within three loop miles of a central office), at this time it cannot be considered a substitutable alternative to cable modem service for customers living beyond the three loop mile radius from the central office, including customers living in rural areas. In fact, several incumbent LECs which currently offer DSL service are proponents of open access to cable facilities because they are interested in using that technology to provide broadband services to customers which are not eligible for DSL service. While some incumbent LECs are making network upgrades that would increase the use of fiber in their outside plant, and therefore will eventually make DSL available to more customers, such

network upgrades will take years to complete, and may still not bring DSL services to all customers in a given exchange.

In short, California believes that market forces are insufficient to achieve open access in cable markets in the foreseeable future. Actual facilities-based competition is years away, and the potential for such competition does not pose a threat sufficient to discipline markets currently dominated by one facilities-based cable operator. Moreover, even if facilities-based competition eventually develops in the cable market, it is not a foregone conclusion that the cable competitor will afford ISPs open access if it is more profitable to negotiate an exclusive ISP contract.

In light of all of the above, California believes that the FCC should not rely on a market-based approach to open access. Instead, the FCC should establish minimum guidelines for open access, which ensure just, reasonable and nondiscriminatory terms and conditions, including the charges, for such access.[59] Reliance on voluntary commercial arrangements to ensure open access to cable facilities by ISPs may become appropriate only when and if viable facilities-based competition actually develops. Moreover, there is no evidence to suggest that incumbent cable operators are voluntarily entering into nonexclusive contracts at just, reasonable and nondiscriminatory rates with unaffiliated ISPs.

[59] As discussed in Section IV.C *supra*, the FCC has authority under Title II to require open access to cable networks.

The FCC seeks comment on whether a uniform open access framework should apply to all providers of high-speed services.[60] As previously discussed, California does not believe that the FCC should revisit the rules governing open access via DSL services at this time. Further, the remaining broadband services, such as wireless, satellite and unlicensed spectrum technologies, are not yet sufficiently developed to warrant regulatory oversight. Absent a finding, upon monitoring, that providers of these broadband services limit access to the customer's chosen ISP, as is the case with cable operators today, it is premature to impose an open access framework for these services.

E. The FCC's Options

For the reasons discussed above, California does not believe that market-based incentives alone will cause cable operators to voluntarily provide open access to unaffiliated ISPs. California therefore urges the FCC to initiate a rulemaking proceeding to develop minimum guidelines to ensure the widespread development of open access to the cable modem platform. At the same time, the FCC should decline to exercise its forbearance authority, and instead should require cable operators to unbundle the common carrier telecommunications component of their cable modem service (i.e., the cable modem platform) to enable access by unaffiliated ISPs. The public interest goal of promoting widespread and rapid deployment of innovative and new technologies, securing

[60] NOI, ¶ 52.

lower prices and affording higher quality services is best served by maximizing the choice of broadband ISP services to customers.

Respectfully submitted,

GARY M. COHEN
LIONEL B. WILSON

By: _____
LIONEL B. WILSON

505 Van Ness Ave.
San Francisco, CA 94102
Phone: (415) 703-2047
Fax: (415) 703-2262

Attorneys for the People of the
State of California and the
Public Utilities Commission of the
State of California

April 3, 2001