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.

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[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.

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April 3, 2001

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served upon all known parties of record by mailing, by first-class mail, postage prepaid, a copy thereof properly addressed to each party.

Dated at San Francisco, California, this 3rd day of April 2001.

/s/ NELLY SARMIENTO

NELLY SARMIENTO