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

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
1998 Biennial Regulatory Review - Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms	)	CC Docket No. 98-171
	)	
Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990	)	CC Docket No. 90-571
	)	
Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size	)	CC Docket No. 92-237 NSD File No. L-00-72
	)	
Number Resource Optimization	)	CC Docket No. 99-200
	)	
Telephone Number Portability	)	CC Docket No. 95-116

REPLY COMMENTS OF NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association ("NCTA") hereby submits these reply comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.[1/] NCTA is the principal trade association of the cable television industry. Its members provide cable television services to more than 90 percent of the nation's cable subscribers. Its members also provide telecommunications services in many areas throughout the United States.

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1/ Notice of Proposed Rulemaking (rel. May 8, 2001) ("Notice").

INTRODUCTION AND SUMMARY

In the Notice, the Commission requests comment specifically on "how to streamline and reform both the manner in which the Commission assesses carrier contributions to the universal service fund and the manner in which carriers may recover those costs from their customers."[2/] The purpose of this proceeding is to "revisit the concepts underlying the existing contribution system . . . to ensure that providers of interstate telecommunications services continue to contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service."[3/]

Despite the limited focus of the Notice, certain incumbent telephone interests inappropriately seek to use this proceeding to impose universal service contribution obligations on cable modem service providers.[4/] Such arguments are not relevant here and are already being addressed in a separate docket.[5/] In any event, there is no merit to such arguments, because they are based on the faulty premise that cable modem service is a telecommunications service and that cable operators providing cable modem service are telecommunications carriers. The Commission should reject USTA and SBC's entreaties.

I. WHETHER CABLE MODEM SERVICE PROVIDERS SHOULD CONTRIBUTE TO THE UNIVERSAL SERVICE FUND IS OUTSIDE THE SCOPE OF THIS PROCEEDING

The purpose of this proceeding is clear: to "ensure that providers of interstate telecommunications services continue to contribute, on an equitable and nondiscriminatory basis,

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[2/] Id. ¶ 1.

[3/] Id. ¶ 3 (emphasis added).

[4/] See United States Telecom Association ("USTA") Comments at 7; SBC Communications, Inc. ("SBC") Comments at 11-12.

to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service."[6] As part of this inquiry, the Commission asked for comments on a variety of topics pertinent to telecommunications carrier contributions, such as whether carriers should contribute based on a percentage of collected revenues or on a flat-fee basis, such as a per-line charge,[7] and other questions related to the mechanics of universal service fund contribution.

Pointedly, the Notice does not request comment on which entities should be required to contribute to the universal service fund. With respect to whether cable modem service providers should contribute, the Commission specifically noted that it has made that question part of its inquiry into the obligations of cable operators to provide access to multiple Internet service providers.[8] USTA's and SBC's efforts to raise the issue here are outside the scope of this proceeding, and should not be considered.[9]

II. CABLE MODEM SERVICE PROVIDERS SHOULD NOT BE REQUIRED TO CONTRIBUTE TO THE UNIVERSAL SERVICE FUND

Apart from the procedural infirmities, USTA's and SBC's arguments for extending universal service contribution obligations to cable modem service are flawed on the merits.

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[5] Universal Service Contribution Obligations Of Cable Operators That Provide Telecommunications Services, Petition for Declaratory Ruling (filed Sept. 26, 2000) ("USTA Petition").

[6] 47 U.S.C. § 254(d); Notice ¶ 3 (emphasis added).

[7] Id. ¶ 2.

[8] See id. ¶ 13 n.45; Public Notice, United States Telecom Association Files Petition for Declaratory Ruling Regarding Universal Service Obligations of Cable Operators, DA 00-2329 (rel. Oct. 12, 2000).

[9] See, e.g., Amendment of the Commission's Rules Regarding the Modifications of FM and Television Stations Licenses, 59 Rad. Reg. 2d (P&F) 1466 ¶ 7 (1986); Amendment of Section 83.164 of the Rules to Clarify and Improve Requirements Concerning Servicing of Ship Radar Stations, 37 F.C.C.2d 1052, 1053 (1972) ("Many of the comments went considerably beyond the intended scope of this proceeding . . . . Accordingly . . . they are not germane to the instant proceeding and will not be considered").

First, they are based on the faulty premise that cable modem service is a telecommunications service and that cable operators providing cable modem service are telecommunications carriers.[10/] As NCTA demonstrated extensively in its comments in the forced access proceeding, however, under no circumstances is cable modem service a telecommunications service.[11/] Although cable modem service may be provided via telecommunications, that does not render it a telecommunications service. As the Commission recently reaffirmed, "there is a clear distinction between 'telecommunications' and 'telecommunications services'. . .[I]nformation service providers as such are not providing 'telecommunications service' under the Act, and thus are not subject to common carrier regulation."[12/]

USTA and SBC reiterate their argument that the Ninth Circuit's Portland decision[13/] holds that cable modem service is a telecommunications service.[14/] However, the Ninth Circuit's suggestion in the Portland case that cable modem service comprises two separate services offered to end users -- a telecommunications service (transport over cable broadband facilities) and an information service (conventional Internet access) -- is erroneous.[15/] The Ninth Circuit's

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[10/] USTA Petition at 4-7.

[11/] Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, GN Docket 00-185, Comments of NCTA at 5-18 (filed Dec. 1, 2000).

[12/] Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, Order on Remand, CC Docket No. 96-149 (rel. April 27, 2001), ¶ 32.

[13/] AT&T Corp. v. City of Portland, 216 F.3d 871 (9th Cir. 2000).

[14/] USTA Comments at 7; SBC Comments at 11-12.

[15/] See Portland, 216 F.3d at 877-79. In any event, the Ninth Circuit's discussion of this point was not a necessary element of its decision to invalidate Portland's ordinance. The court found the Portland ordinance unlawful because cable modem service is not a "cable service" subject to the regulatory oversight of local franchising authorities. As the Commission has observed, the court's determination that there is a separate transmission component of cable modem service that is a "telecommunications service" under the Act was an "unnecessary extra step." Amicus Curiae Brief of the Federal Communications Commission at 20-22, MediaOne Group, Inc. v. County of Henrico, Record No. 00-1680(L), 00-1709, 00-1719 (4th Cir., filed Aug. 9, 2000) ("FCC Amicus Brief"). Thus the court's holding on this point is dictum, and it does not bind the Commission. See United States v. Crawley, 837 F.2d 291, 292 (7th Cir. 1988) (dictum is "a

opinion rested on the incorrect premise that services provided over "telecommunications facilities" are "telecommunications services," and that because cable operators use telecommunications facilities to deliver cable modem service, cable modem service is a telecommunications service. As the Commission has acknowledged, "not every use of telecommunications facilities necessarily involves the provision of a 'telecommunications service' under the Act's specialized definition of that term"[16/] because "telecommunications" and "telecommunications service" are not the same thing.[17/]

Second, the assertion that cable operators providing telecommunications services do not contribute to universal service[18/] is inaccurate. When cable operators provide Title II services, they are subject to the universal service contribution requirements of Section 254(d).[19/] Cable operators that provide telecommunications services currently contribute to the federal and applicable state universal service funds.[20/]

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statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding"). Indeed, the court itself stated that "Congress has reposed the details of telecommunications policy in the FCC," and it would not "impinge" on the Commission's authority in this area. Portland, 216 F.3d at 879-80.

[16/] FCC Amicus Brief at 21.

[17/] Compare 47 U.S.C. § 153(43) (telecommunications is the transmission of information without change in the form or content) with id. § 153 (46) (telecommunications service is the offering of telecommunications to the public for a fee).

[18/] USTA Comments at 7.

[19/] See, e.g., Federal-State Joint Board on Universal Service, 12 FCC Rcd 8776, 9176 ¶ 781 ("video service providers must contribute to universal service only to the extent that they are providing interstate telecommunications services").

[20/] There is only one situation in which cable operators providing cable modem service might be liable for universal service contributions attributable to those services, and that is if the Commission determines cable operators along with any other Internet service providers ("ISPs") operating their own telecommunications networks are non-common carrier "provider[s] of interstate telecommunications" that can be required to contribute pursuant to Section 254(d). 47 U.S.C. § 254(d). Thus far, however, the Commission has declined to make such a determination. Universal Service Report to Congress, 13 FCC Rcd 11501, 1564-70 ¶¶ 131-139 (1998). Such a determination would have to be applied to all "self-providing" ISPs and not just cable operators. See Melody Music v. FCC, 345 F.2d 730, 732 (D.C. Cir. 1965).

CONCLUSION

The Commission should refrain in this proceeding from considering USTA's and SBC's arguments for extending universal service obligations to cable modem service providers, and should reject such arguments in any event.

Respectfully submitted,

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July 9, 2001