

December 6, 2001



Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12th St., SW  
Washington, DC 20554

Re: Open Access Notice of Inquiry, GEN Docket 00-185

Dear Ms. Salas:

On December 5, 2001, Cheryl A. Leanza, Harold J. Feld and Andrew Jay Schwartzman of Media Access Project met on behalf of our clients Consumers Union *et al.* with several members of the Commission staff with respect to the above-captioned proceeding. Specifically, we met with Ken Feree, Sarah Whitesell, and Peggy Greene of the Cable Services Bureau, Robert Cannon of the Office of Plans and Policy, Trey Hanburg and Praveen Goyal of the Common Carrier Bureau, and Jerry Stanshine of the Office of Engineering and Technology.

First, we explained that if the Commission had chosen to impose open access, the 800,000 customers of AT&T and Excite@Home who lost service last weekend would have been able to continue receiving service by selecting another ISP.

We explained that cable companies that make an investment should be able to earn a return on that investment by charging other companies to use their facilities. We explained that any argument that open access was economically infeasible in essence concedes that the cable company is leveraging its monopoly over its facilities to push content that could not succeed if it were competing with other content on a level playing field. Furthermore, drawing on the experience of Excite@Home, we noted that it is not clear that the cable industry is correct that its model of bundling content with conduit will be successful. The bulk of Excite@Home's financial difficulties stemmed from its attempt to purchase Excite and market that content, despite the fact that there was a long line of customers anxious to obtain service. Despite this fact, we feel that the statements of the cable industry do not indicate that it is moving toward a model of voluntary open access.

We discussed our view that cable operators are obligated to unbundle the telecommunications component of their internet service under the Commission's *Computer II* regime. We endorsed Earthlink's analysis of this issue. Specifically, under various FCC rulings, including the *Frame Relay Order*, 10 FCC Rcd 13717 (1995), any carrier that provides a telecommunications service under the D.C. Circuit's test in *NARUC I* as codified by Congress in the Communications Act must unbundle the telecommunications component of a mixed offering. *NARUC v. FCC*, 525 F.2d 630, 641-42 (D.C. Cir. 1976); 47 U.S.C. § 153(46). We explained that the contamination theory has been thoroughly discredited. We also explained that any approach that based legal treatment on whether a provider separately offers a telecommunications service will invite traditional common carriers to introduce new offerings in order to circumvent the rules.

Specifically, we explained that transmission of pure Internet traffic (i.e., IP packets) constitutes a telecommunications service in the absence of an underlying communications service. Cable ISPs transport IP packets without modifying the information transmitted by the user. Therefore, even without a separate underlying communications service, transfer of IP packets qualifies as a communications service.

We reminded the staff that no court has concluded that Internet over cable infrastructure is a cable service. We also explained that, while we think the Commission would be ill-served to conclude that Internet access over cable facilities is an information service without a telecommunications component, the Commission has ample authority to create non-title II open access under its general authority.

We discussed the economic incentives behind broadband deployment. We explained that facilities-based competition has thus far produced, at best, DSL and cable as duopoly providers. Duopolies do not effectively serve the public. For example, when wireless licenses were limited to a duopoly, little innovation or competition on price emerged. Not until the Commission opened the market to widespread adoption and innovation take place.

*Innovation and creativity are best fostered in a de-centralized environment.* The cable industry appears convinced that broadband deployment will be enhanced once a “killer application” is invented because such an application will incent consumers to purchase it. This killer application is much more likely to be invented under a de-centralized open access model. The killer application that drives deployment through the market (and not through government subsidy) may be invented in a garage in Nebraska or California, not through a large company’s research and development budget or laboratory. Proprietary protocols and software will prevent others from creating applications that work with the new technology. A centralized model decreases the economic incentives and likelihood of success for such entrepreneurs.

We discussed in general terms the location in the architecture required for open access. Operators insisting on bundling backbone transport services are not providing open access, as it precludes innovation and competition in that component. We explained that a model which allowed ISP access at the headend is appropriate because it would allow an unlimited number of ISPs to utilize the cable infrastructure.

I also attach an editorial printed today in the San Jose Mercury news, which I provided separately to the meeting’s attendees.

Sincerely,

Cheryl A. Leanza  
Deputy Director

cc: Ken Feree  
Sarah Whitesell  
Peggy Greene  
Robert Cannon  
Trey Hanburg  
Praveen Goyal  
Jerry Stanshine

## EDITORIAL

The opinion of the Mercury News

December 6, 2001

“At Home's crash teaches a lesson”

Cable modem users were captives; they needed what the cable industry does not want: true competition

AT&T Broadband's 170,000 high-speed Internet customers in the Bay Area are back on the Net again, after having become pawns between AT&T and bankrupt Internet service provider At Home.

Instead of 10 days of interrupted service, most of AT&T's customers went only three days without e-mail and the Internet. AT&T beat its own estimate in transferring cable-modem customers from At Home to its new network.

AT&T can safely assume that customers will grouse, but few, in the end, will jump to DSL. High-speed Internet over telephone lines has its own headaches and delays.

AT&T may have made a smart gamble, but the events of the past week exposed the need for what the cable industry doesn't want: true competition -- fully opening up cable to other broadband providers. This is called open access.

If cable-modem users had had more than one choice of an Internet service provider (ISP), you can bet that AT&T would have thought twice about leaving its customers high and dry, even for a day.

If customers hadn't been captive to AT&T's designated ISP -- Excite@Home -- they could have immediately switched to an alternative.

If cities and towns could regulate high-speed Internet service as they do cable TV, they could have demanded AT&T give ample notice of a cancellation of service.

But these options either don't exist or are limited. Courts have said the Federal Communications Commission has jurisdiction over cable broadband, and the FCC, under its free-market champion, Chairman Michael Powell, wants no such regulatory role. To the contrary, his idea of

a level playing field is to deregulate DSL, thereby minimizing ISP competition over cable and phone.

For years, the cable industry and At Home argued that it was technically difficult to open up the cable lines they own to other ISPs. (We bought the argument for a spell.) Then Time Warner, the nation's second largest cable company, disproved that when it agreed to open its system to three ISPs, as a condition for merging with AOL. Now that AT&T has ended an exclusive deal with At Home, it says it too is committed to let in other ISPs, though it hasn't said when.

There's a huge difference, however, between limiting access to handpicked ISPs, under restrictions that the cable companies set, and true open access. Under true open access, ISPs would compete not only over price and reliability but also over features such as video streaming and home networking. Cable companies wouldn't be able to use their power as gatekeeper to play favorites.

To keep the Internet open and competition vigorous, the FCC or Congress should mandate that cable operators cannot discriminate in the way they treat ISPs.

With AT&T Broadband now considering offers to sell its whole system to cable operators Cox, Comcast or AOL Time Warner, open access becomes critical. Consumers' interests shouldn't be lost in a battle of behemoths over market control.