

**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
)	
Internet Over Cable Declaratory Ruling)	
)	
Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities)	CS Docket No. 02-52
)	

Comments of the



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SUMMARY

The American Cable Association submits these Comments to supplement the record and to respond to several questions raised in the NPRM. Concerning the small cable sector, the record before the Commission in the Notice of Inquiry and developments since the close of that comment cycle all point in one direction: The Commission's policy of regulatory restraint is working to foster broadband deployment in smaller markets.

Continuing progress in smaller markets. The Notice of Inquiry record currently contains the results of an ACA member survey demonstrating substantial progress in broadband deployment in smaller markets. Since conducting the survey, ACA's membership has increased nearly fourfold, and the subscribers served by ACA members have almost tripled. Projections and estimates based on the original survey show the increasing importance of the small cable sector as a key source of broadband Internet access.

Mandated multiple ISP access in smaller markets would chill investment and stall broadband deployment. In an environment of regulatory restraint, small communications businesses continue to respond to demand and develop innovative solutions to providing broadband services in lower density markets. Imposing burdensome federal or local regulations on cable modem services offered by small cable companies will only work to chill investment and stall deployment. The ACA survey results establish one point without equivocation: small cable businesses would not risk the investment necessary to deploy broadband in smaller markets if subject to burdensome regulations.

In smaller markets, the cost/benefit analysis weighs overwhelmingly against mandated multiple ISP access. The Commission is exploring the costs and benefits of mandated multiple ISP access. Concerning smaller markets, the benefit side of the equation appears to be zero. No party has advocated, much less demonstrated, any benefits of multiple ISP access in smaller markets. The cost side of the equation, on the other hand, is overwhelming. Based on current technology costs and implementation complexity, the costs of multiple ISP access are far beyond the resources of any small cable company. Moreover, the Commission has well-developed records elsewhere concerning the consequences of regulatory burdens on small companies and should incorporate those records into this proceeding. Between the growing record of small system EAS financial hardship waiver requests and the Commission's experience gained in small cable rate regulation, the Commission has a solid factual basis for declining to impose regulated open access on small cable operators.

If the Commission mandates any form of multiple ISP access, it should adopt an exemption for small cable operators. If the Commission concludes that concerns in larger markets and with larger companies warrant some measure of regulation of cable modem service, it should adopt an exemption for small cable operators. The small cable operator threshold in 47 USC § 543(m)(2) is the appropriate threshold, providing regulatory relief to those companies recognized by Congress and the Commission as needing such relief.

The Commission should protect smaller cable operators from unreasonable and unnecessary local regulations and fees. The risks and potential consequences of burdensome federal regulations in smaller markets apply with equal force to local regulations and municipal fees. ACA supports the Commission's conclusion concerning Title VI restrictions on franchise fees and other regulations of information services provided over cable systems. Similarly, the recently extended Internet Tax Freedom Act establishes Congress' continuing concern over state and local fees on Internet access as barriers to deployment.

In smaller markets, mandated multiple ISP access is a costly solution in search of a nonexistent problem. There is strong factual data showing that the Commission's policy of regulatory restraint is working well in smaller markets. ACA members are leading the cable and telecom industries in deploying broadband Internet access in lower density markets. The Commission should "stay the course" and resist the call to impose burdensome regulations on smaller market cable companies.

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I. INTRODUCTION

As reported in response to the Notice of Inquiry,¹ ACA members are leading the industry in delivering cable modem services in smaller markets. Fostered by the Commission's policy of regulatory restraint, small cable companies are making the substantial investments in infrastructure necessary to deliver cable modem services in lower density areas. Many smaller operators are transacting with unaffiliated ISPs to provide these services. The results are exactly what Congress and the Commission intended - delivery of advanced services to an increasing number of consumers in smaller markets through market-based solutions. In short, smaller cable companies are part of the solution, not part of the problem.

¹ *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, 15 FCC Rcd 19287 (2000) ("Notice of Inquiry").

The Commission's action in this docket will have a fundamental impact on the viability and growth of cable modem services in smaller markets. Continued regulatory restraint will help preserve and promote the progress ACA members have made in smaller markets. Conversely, burdensome common-carrier regulations or a patchwork of local regulations and costly municipal fees threaten to chill investment, stall deployment, and raise costs to consumers. The record in the Notice of Inquiry contains solid support for continued regulatory restraint in smaller markets. ACA provides these comments to supplement that record and respond to questions raised in the NPRM.²

These Comments focus on five questions raised in the NPRM relating to smaller cable systems and smaller markets. These are:

- What developments have occurred in smaller markets since the close of the comment cycle in the Notice of Inquiry?
- How would mandated multiple ISP access impact broadband development in smaller markets?
- Is the cost/benefit analysis of mandated multiple ISP access different for small cable operators?
- If the Commission mandates multiple ISP access, should it adopt an exemption for small cable operators?
- How should the Commission address the risks of a patchwork of local regulations and costly municipal fees in smaller markets?

We address each question in sequence in the following sections.

² *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, CS Docket No. 02-52 (rel. March 15, 2002) ("NPRM").

The American Cable Association. ACA represents more than 950 independent cable companies. Together, ACA members serve 7.5 million cable subscribers, primarily in smaller markets and rural areas. ACA member systems are located in all 50 states, and in virtually every congressional district. ACA members range from family-run cable businesses serving a single town to multiple system operators that focus on smaller systems and smaller markets. About half of ACA's members serve fewer than 1,000 subscribers. All ACA members face the challenges of building, operating, and upgrading broadband networks in lower density markets.

II. ANALYSIS

A. The Commission's policy of regulatory restraint has continued to promote broadband deployment in smaller markets.

1. ACA members continue to make solid progress in deployment of cable modem services in smaller markets.

The NPRM asks that we refresh the record concerning marketplace developments.³ The record currently contains the results of a comprehensive member survey conducted by ACA during October and November 2000.⁴ The results demonstrate ACA members' impressive progress in deploying cable modem services. Moreover, since conducting the survey, through ACA's strategic alliance with the National Cable Television Co-operative ("NCTC"), ACA membership has increased substantially. As discussed below, even conservative extrapolations from the original survey results show the increasing importance of the small cable sector as a source of broadband Internet access.

According to the survey, at the end of 2000:

- ACA members served more than 38,000 cable modem customers.⁵
- ACA members served approximately 2.5% of the total U.S. cable customers and approximately 2.7% of the total U.S. cable modem customers.⁶
- ACA members offered cable modem service in systems passing nearly 840,000 homes in smaller markets and rural areas.⁷

³ NPRM at ¶¶ 84.

⁴ ACA Comments at 3-9.

⁵ ACA Comments at ii.

⁶ ACA Comments at 5.

⁷ ACA Comments at ii.

- ACA members had invested nearly \$330 million to install fiber, upgrade plant, and acquire equipment necessary to offer cable modem services and other advanced services.⁸
- Most ACA members obtained the capital required to upgrade networks and purchase equipment from sources typical for smaller business - banks or retained earnings.⁹
- Many ACA members provided cable modem service through negotiated agreements with unaffiliated ISPs.¹⁰

The survey also requested projections for the deployment of cable modem service. Based on these projections, by the end of 2002:

- ACA members will offer cable modem service in systems passing nearly 1.7 million homes in smaller markets and rural areas.¹¹
- ACA members will serve nearly 80,000 cable modem service customers.¹²
- Many ACA members will continue to provide cable modem service through negotiated agreements with unaffiliated ISPs.¹³

But these numbers do not reflect the full extent of ACA members' progress in deploying cable modem services. The survey polled 108 ACA member companies at a time when ACA had 250 members serving 2.6 million subscribers. At the end of 2000, ACA and NCTC had formed a strategic membership alliance. As a result, by the first quarter of 2001, ACA's membership had grown fourfold to 930 members, and the subscriber base had nearly tripled to 7.5 million subscribers.

⁸ ACA Comments at 5.

⁹ ACA Comments at 6.

¹⁰ ACA Comments at 11.

¹¹ ACA Comments at ii, 12.

¹² ACA Comments at ii, 12 (extrapolating from then-current penetration rates).

¹³ ACA Comments at 11.

Using the conservative assumption that this sharp increase in membership increases cable modem service deployment by ACA members by only 25%, the projections for the end of 2002 are:

- ACA members will serve more than 100,000 cable modem customers.
- ACA members will offer cable modem service in systems passing over 2.1 million homes.

In addition to the projections gleaned from the ACA survey, in December 2001, *Independent Cable News* published the results of another survey of small cable operators.¹⁴ The average respondent to the *Independent Cable News* survey serves about 6,000 subscribers company-wide.¹⁵ Consistent with the results of the ACA survey, *Independent Cable News* reported that 48% of the respondents offered cable modem services as of 4th quarter 2001, with another 38% planning to launch the services in the near term.¹⁶

These results show that local and regional communications businesses are continuing to respond to demand and develop innovative solutions to providing broadband services in lower density markets.

2. The Commission's policy of regulatory restraint has been a key factor in the deployment of cable modem services by smaller cable companies.

The ACA survey also sought information on why small cable operators choose to invest in the substantial upgrades necessary to launch cable modem services. The responses are particularly important for the Commission to consider in this proceeding.

¹⁴ Independent Cable News, "Smaller Operators Evaluations," December 2001, at 8-15 ("ICN Survey").

¹⁵ ICN Survey at 12.

When asked why they had made the investment to provide cable modem service, most ACA members responded as follows:¹⁷

- The investment was necessary to remain competitive.
- The investment was necessary to respond to marketplace demands.
- Business models showed that the investment would earn a satisfactory rate of return.

Equally important: Nearly all ACA members surveyed indicated that they would not risk the investment necessary for this expansion if burdensome regulations were imposed on cable modem services in their markets.¹⁸ This data directly answers the Commission's next question concerning the consequences of mandated multiple ISP access in smaller markets.

B. Mandated multiple ISP access in smaller markets would chill investment and stall broadband deployment.

The NPRM asks whether mandated multiple ISP access would “promote deployment of advanced telecommunications capability [and] spur investment in facilities to provide high-speed Internet access service... Or would it have the opposite effect?”¹⁹ Where smaller markets are concerned, the record supports one answer: Imposing burdensome regulations on cable modem services offered by small cable companies will chill investment and stall deployment.

The results of the ACA survey are unequivocal on this point – small cable operators cannot risk the investment in system upgrades if faced with the administrative

¹⁶ ICN Survey at 13.

¹⁷ ACA Comments at 6.

¹⁸ ACA Comments at 7.

burdens and costs and financial uncertainty of regulated open access.²⁰ On this point, the Notice of Inquiry record contains substantial support from other commenters as well.

The following analysis of the Progress and Freedom Foundation is representative:

So putting aside for the moment the technical and operational difficulties associated with devising a 'reasonable' regime for sharing a limited amount of bandwidth, it is clear that a mandatory sharing regime is likely to retard the very investment upon which the continuing development of competing infrastructures depend.²¹

In short, in smaller markets, mandated multiple ISP access will serve only to frustrate the Commission's policy of encouraging deployment of advanced services.

C. In smaller markets, the cost/benefit analysis weighs overwhelmingly against mandated multiple ISP access.

The NPRM asks, "Is the cost/benefit calculation for multiple ISP access different for small cable operators than it is for others?"²² By any measure, mandated ISP access would impose an inefficient regulatory regime on smaller market cable operators. Beyond inefficiency, burdensome regulations on the small cable sector in current market conditions could threaten the viability of a substantial number of small companies. Put another way, in smaller markets, mandated multiple ISP access is a dangerous and unnecessary intervention in a market that is functioning very well under

¹⁹ NPRM at ¶ 85.

²⁰ ACA Comments at 7, 10.

²¹ Notice of Inquiry, Comments of Progress & Freedom Foundation (filed Dec. 1, 2000) at 10-11 (emphasis added); see also Comments of Net Compete Now (filed Dec. 1, 2000) at 1-2 (arguing that efforts to regulate the Internet with measures that have traditionally been applied to common carriers and 'essential facilities' are much more likely to thwart than to promote continued growth, innovation, and competition); Comments of the AeA (filed Dec. 1, 2000) at 2 (arguing that forced access would stifle investment, reduce competition, and therefore slow deployment of advanced services); Comments of the Telecommunications Industry Association (filed Dec. 1, 2000) at 25 (noting that cable operators have been investing heavily to upgrade the cable plant to provide high-speed Internet access and other services without government-imposed open access regulation, and that a regulatory requirement mandating mandatory access would discourage investment).

a policy of regulatory restraint. Moreover, between the growing record of small system EAS financial hardship waiver requests and the Commission's experience gained in small cable rate regulation, the Commission has a solid factual basis for declining to impose regulated open access on small cable operators.

1. No party has substantiated any benefits of multiple ISP access in smaller markets.

Determining the benefits of mandated ISP access in smaller markets requires speculation and conjecture. Based on the Notice of Inquiry record, no tangible benefits of multiple ISP access in smaller markets have been advocated, much less demonstrated. No smaller market consumers are calling for multiple ISPs on small cable systems. No ISP interests are specifically seeking multiple ISP access on small cable systems. This is a key distinguishing factor between smaller markets and major markets in the open access debate. In smaller markets, *there is no debate*.

Without evidence of marketplace failure that deprives consumers of benefits they seek, the rationale for regulation in smaller markets evaporates. With a denominator of zero in the cost/benefit equation, the analysis could stop here. But we should also consider the costs.

2. The current costs of multiple ISP access are far beyond the resources of any small cable company.

Based on current technology, the costs of mandated multiple ISP access would overwhelm small cable operators. For example, AT&T reportedly spent \$20 million for the open access trial in Boulder.²³ That \$20 million bought AT&T a trial with 320

²² NPRM at ¶ 88.

²³ CED inDepth, *Hitchin' a Ride*, by Jeff Baumgartner (June 2002) ("CED inDepth") at 8.

customers. The Commission is familiar with the costly multiple ISP trials and deployments conducted by Cox, Comcast, and Time Warner.

A recent special issue of *CED inDepth* explores some of the reasons why implementation is within the means of only the largest MSOs, and why the technology costs remain far beyond what a smaller market cable system could support.

Concerning Cox's 50 participant trial in El Dorado, Arkansas, CED reports:

While the technical aspects of the trial in El Dorado are rather straightforward, it is bringing up additional operational questions related to what Cox might need to do for future trials or deployments. Those questions revolve around the type of equipment and the amount of capital that would be required to build a network to support multiple ISPs with policy-based routing, and what changes Cox would have to implement. . .

At the same time, Cox also is starting to sift through questions that are tied to the operational relationship with multiple ISPs, including billing and customer support. "The technical trial has pointed out that those will be heavy issues for us... There are still a lot of issues that most of the large MSOs and large ISPs need to work out. It could get messy."²⁴

According to CED, even for the largest MSO's, provisioning and routing present "extremely difficult issue[s]."²⁵

These reports of the substantial costs and extreme difficulty of multiple ISP access involve the top four MSO's, companies that serve between 6.9 and 13.5 million subscribers.²⁶ By comparison, the average ACA member company serves 8,000 subscribers, and the median ACA member company serves fewer than 1,000 subscribers. No one can seriously maintain that these small companies have the

²⁴ CED inDepth at 11 (quoting Michael Hale, Cox's director of data engineering).

²⁵ CED inDepth at 14.

resources to launch multiple ISP trials in smaller markets, or to undertake the extremely difficult technical and operational challenges of full-scale implementation.

3. The data in the Commission's small system EAS waiver dockets shows that many small cable companies require relief from the costs of existing regulations.

In evaluating the ability of the small cable sector to support mandated multiple ISP access, the Commission should incorporate the growing record of small system EAS waiver requests. The Enforcement Bureau currently has before it temporary EAS waiver requests from at least 45 ACA members companies covering more than 900 cable systems in 35 states. Additional waiver requests are filed each week. ACA supports the efforts of each member seeking relief from the October 2002 deadline based on financial hardship.

To date, in the five decisions involving ACA members, the Bureau has found that the financial hardship of compliance warrants relief.²⁷

The record before the Enforcement Bureau demonstrates that the viability of many small cable businesses depends on regulatory relief. Small cable operators continue to face higher costs, lower marginal revenues and margins, and intense competitive pressure from EchoStar and DirecTV. This detailed record of the difficult

²⁶ http://www.ncta.com/industry_overview/top50mso.cfm, citing Kagan World Media, a Media Central/Primedia Company. Data from *Cable TV Investor*.

²⁷ See *Carson Communications, L.L.C., Request for Waiver of Section 11.11(a) of the Commission's Rules*, File No. EB-02-TS-079, DA 02-1273, (rel. May 31, 2002); *Cunningham Communications, Inc., Request for Waiver of Section 11.11(a) of the Commission's Rules*, File No. EB-02-TS-067, DA 02-1274, (rel. May 31, 2002); *Project Services, Inc., Request for Waiver of Section 11.11(a) of the Commission's Rules*, File No. EB-02-TS-080, DA 02-1276, (rel. May 31, 2002); *Souris River Television, Inc., Request for Waiver of Section 11.11(a) of the Commission's Rules*, File No. EB-02-TS-090, DA 02-1275, (rel. May 31, 2002); *WMW Cable Television Co., Request for Waiver of Section 11.11(a) of the Commission's Rules*, File No. EB-02-TS-068, DA 02-1277, (rel. May 31, 2002).

financial circumstances of many small cable companies provides the Commission with solid factual data with which to decide against imposing more costly regulations.

4. The Commission should apply in this proceeding the difficult lessons learned from small cable rate regulation.

When considering arguments for mandatory ISP access for “all cable systems,”²⁸ the Commission can reference the lessons learned from the dark days of small cable rate regulation. From the rate rollbacks of 1993 through May 1995, capped rates combined with the administrative burdens and costs of “one size fits all” regulations threatened to crush the small cable sector. In May 1995, the Commission released the *Small System Order*,²⁹ granting “just in time” relief for struggling small cable operators. Congress followed with even broader relief in 1996.³⁰

The *Small System Order* resulted from the Commission’s careful examination of the small cable sector between 1992 and 1995.³¹ That study led to the following conclusions:

- “[A] large number of smaller cable operators face difficult challenges in attempting simultaneously to provide good service to subscribers, to charge reasonable rates, to upgrade networks, and to prepare for potential competition.”³²
- “The comments indicate that smaller cable companies are unduly burdened by the current scheme of rate regulation in two ways. First, the

²⁸ Notice of Inquiry, Reply Comments of ACA (filed Jan. 10, 2001) at 13-16. See also Comments of StarLinX Internet Access and other (filed November 28, 2000) at 3 (arguing that the Commission should impose regulated open access “to all cable broadband providers nationwide”).

²⁹ *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd. 7393, (1995) (“*Small System Order*”);

³⁰ Telecommunications Act of 1996, Section 301(c), Pub. L. No. 104-104, 110 Stat. 56 (February 8, 1996).

³¹ *Small System Order* at ¶ 25.

³² *Id.*

comments suggest that our rate rules do not adequately take into account the higher costs of doing business, and particularly the higher costs of capital, faced by smaller companies. Second, many operators claim that our rules place an inordinate hardship upon them in terms of the labor and other resources that must be devoted to ensuring compliance.”³³

- “In the 1992 Cable Act and its legislative history, Congress made clear its belief that small systems would be in need of administrative and rate relief as a consequence of the re-regulation of the cable industry. We are convinced, however, that systems of up to 15,000 subscribers are likewise in need of relief and that we have the authority to extend relief to them.”³⁴
- “Relaxing regulatory burdens should free up resources that affected operators currently devote to complying with existing regulations and should enhance those operators' ability to attract capital, thus enabling them to achieve the goals of Congress. . . .”³⁵
- “[O]ur relief for smaller cable entities is aimed at those that do not have access to the financial resources, purchasing discounts, and other efficiencies of larger companies.”³⁶

The conclusions in the *Small System Order* apply with equal force to this proceeding. As the Commission’s EAS waiver dockets show, regulatory compliance costs continue to impose financial hardship on many small systems. The costs of a mandated ISP access regime on small cable systems far outweigh any conceivable benefits and would threaten the viability of many affected systems.

³³ *Small System Order* at ¶ 55.

³⁴ *Small System Order* at ¶ 26.

³⁵ *Small System Order* at ¶ 26.

³⁶ *Small System Order* at ¶ 28.

D. If the Commission mandates any form of multiple ISP access, it should adopt an exemption for small cable operators.

The NPRM asks the following, “If we adopt a multiple ISP access mandate for cable systems generally, should we exempt small cable systems from such a mandate because of the particular conditions that they face?”³⁷ The answer is an unequivocal yes.

As discussed above, there is no evidence of marketplace failure or abuse of market power by small cable operators. To the contrary, ACA members have consistently dealt with unaffiliated ISPs. In addition, as described in the *Small System Order* and as shown by the growing record of small system financial hardship in the EAS waiver dockets, this is no time to impose additional costly regulations on the small cable sector.

To that end, if the Commission adopts a multiple ISP access mandate, it should exempt small cable operators from those regulations. As a threshold, ACA advocates the statutory definition of small cable operator in 47 USC § 543(m)(2), as amended by the 1996 Telecommunications Act.³⁸ This will provide protection for an industry sector recognized by Congress and the Commission as requiring relief from the administrative burdens and costs of regulation. In the alternative, the Commission should exempt small cable companies as defined in 47 CFR § 76.901(e).³⁹

³⁷ NRPM at ¶ 90.

³⁸ 47 USC § 543(m)(2) (A small cable operator is a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.).

³⁹ 47 CFR § 76.901(e) (A small cable company is a cable television operator that serves a total of 400,000 or fewer subscribers over one or more cable systems.).

E. The Commission should protect smaller cable operators from unreasonable and unnecessary local regulations and fees.

The risks and potential consequences of burdensome federal regulations in smaller markets apply with equal force to local regulation and municipal fees. ACA supports the Commission's conclusion concerning Title VI restrictions on franchise fees and other regulations of information services provided over cable systems.⁴⁰ Similarly, the recently extended Internet Tax Freedom Act establishes Congress' continuing concern over state and local fees on Internet access as barriers to deployment.

To advance "the ubiquitous availability of broadband to all Americans"⁴¹ and "to preserve the vibrant and competitive free market that presently exists for the Internet. . . unfettered by Federal or State regulation,"⁴² the Commission will need to address unnecessary and costly regulation by local franchise authorities. This may require the adoption of "barrier to entry" procedures similar to those under Section 253, with a streamlined, low-cost process for small cable companies. ACA will evaluate the record and provide further input on reply.

III. CONCLUSION

There is strong factual data showing that the Commission's policy of regulatory restraint is working well in smaller markets. ACA members continue to deploy cable modem services in smaller markets. At the same time, many ACA members cannot risk the investment necessary for expansion of cable modem services if burdensome regulations are imposed in their markets.

⁴⁰ NPRM at ¶ 69.

⁴¹ NPRM at n. 12, citing *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, Notice of Proposed Rulemaking at ¶ 3 (rel. Feb. 15, 2002).

