



**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Appropriate Regulatory Treatment for) CS Docket No. 02-52
Broadband)
Access to the Internet Over Cable Facilities)

COMMENTS OF THE
AMERICAN CIVIL LIBERTIES UNION

We offer these comments on behalf of the American Civil Liberties Union (ACLU) to urge the commission to adopt open access regulations that will allow multiple Internet Service Providers (ISPs) to offer their services and content to broadband customers. The ACLU is a non-partisan, non-profit organization, consisting of nearly 300,000 members, dedicated to protecting the liberties and freedoms guaranteed in the Constitution and laws of the United States.

The ACLU believes that the Commission was mistaken when it classified cable modem service as an information service as defined in 47 U.S.C. 153 (20)¹. The companies providing cable modem service are generally accorded a monopoly to use a public right of way to offer a conduit for communication. They are first and foremost offering their customers a “pipe” through which their customers can express themselves and should be viewed as classic common carriers. Consumers – they are really speakers and listeners – should have an option to choose an ISP that will allow them to access and engage in free speech in a manner consistent with their own choices.

¹ “The term ‘information service’ means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”

We believe that cable modem service is properly classified as a telecommunications service and that cable modem providers are telecommunications carriers 47 U.S.C. Secs 153 (44)&(46)² and that the providers of telecommunications services should be treated as “common carriers” regardless of the method of transmission. See AT&T Corp v. City of Portland , 216 F3d 871 (9th Cir. 2000). As communications carriers, the Cable Modem providers should, of course, be free to offer their own expression, but they must also allow others to express themselves as they choose.

As an organization dedicated to preserving free speech and fostering the open exchange of ideas and access to information, the American Civil Liberties Union urges the Commission to reverse its earlier declaratory ruling that cable modem service is an information service.

That said, the Commission’s NPRM now seeks comment on whether and how cable modem service should be regulated by the Commission. The ACLU strongly urges the Commission to adopt regulations providing for open access to cable modem service, in order to allow multiple Internet providers to offer a variety of choices to consumers on how they can access the Internet and accordingly how they can exercise their First Amendment rights both to speak and to listen.

The ACLU believes that free expression must be accompanied by the wide availability of free forums where that expression can take place, and that the Internet has emerged as one of the nation’s most precious such forums. However, there is a danger that as cable becomes the dominant provider of broadband connections to the Internet, that network will fall under the private control of companies that are restrained neither by competition nor by regulation. Action by the Commission is needed to curb the power of the cable companies over the Internet, just as the Commission helped to make the Internet possible by curbing the power of the telephone companies in previous decades.

The ACLU believes that open access regulations are needed for the following reasons:

The Internet has succeeded because it is open

The tremendous growth and success of the Internet is a result of the lack of centralized control over how the network is used. No company, individual, or institution has the power to decide what applications are allowed to run by users at the ends of the network, what kinds of data can be moved through the network, or whose data moves faster. And a large part of the Internet’s openness is a result of the “common carrier” regulatory regime that has been applied to the phone system. That regime requires a network owner to treat all information the same, and prohibits the owner from halting, slowing, or otherwise tampering with the transfer of any data.

² “The term ‘telecommunications carrier’ means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.” (44)

“The term ‘telecommunications service’ means 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.” (46)

Cable networks are not open

In contrast, cable companies are not currently required to provide unfettered access to content, as the phone companies do. Unlike phone companies, cable providers are not subject to the “common carrier” regulatory regime. As a result, the information content that cable companies deliver is under their sole control, allowing them to restrict customers’ options and interfere with their free access to information.

Cable providers wield total control over Internet use

Cable companies’ technical control over the content they deliver is complete. They can block their customers from using particular applications, such as video conferencing, Internet telephony, and virtual private networks. They can slow or block access to Web sites or content considered objectionable for political or competitive reasons. And that control has serious privacy implications; cable providers can record everything their customers do online, down to every mouse click.

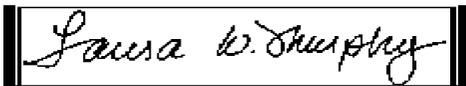
Cable broadband is not restrained by competition

The preferred check on corporate power in America is free-market competition. But most Americans will continue to be served by only one cable provider. Opponents of cable regulation have argued that competition will flow from the availability of other, non-cable forms of access. The main alternative form of high-speed access, DSL, is not an option for a large proportion of the population, however, and has not developed into an effective alternative to cable.

In short, without action by the Commission to mandate open access, cable broadband providers are in danger of becoming Lords of the Internet, immune from both of the traditional restraints on the power of large corporations: competition and regulation.

This situation would be bad enough if it were just a case of unrestrained monopoly power threatening consumer interests. But Internet access is not just any business; it involves the sacred role of making available to citizens a forum for speech and self-expression – a forum that is perhaps the most valuable new civic institution to appear in the United States in the past century. An unregulated monopoly is bad for consumers; a monopoly in Internet access is far worse: it is bad for *citizens*, and therefore bad for America.

Dated: June 17, 2002



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