

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

In The Matter of)	
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Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities)	GN Docket No. 00-185
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Internet Over Cable Declaratory Ruling)	
)	
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Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities)	CS Docket No. 02-52
)	
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**COMMENTS OF
THE ASSOCIATION OF COMMUNICATIONS ENTERPRISES**

The Association of Communications Enterprises (“ASCENT”),¹ through undersigned counsel and pursuant to Section 1.415 of the Commission’s Rules, 47 C.F.R. § 1.415, hereby submits its comments in response to the *Notice of Proposed Rulemaking*, FCC 02-77, released March 15, 2002, in the captioned proceeding (“*NPRM*”). The *NPRM* seeks comment on the “regulatory implications” of the Commission’s classification of cable modem service as an interstate information service which does not encompass a separate offering of telecommunications service.²

The *NPRM* also seeks comment on “the scope of the Commission’s jurisdiction to regulate cable

¹ ASCENT is a national trade association representing smaller providers of competitive telecommunications and information services. The largest association of competitive carriers in the United States, ASCENT was created, and carries a continuing mandate, to foster and promote the competitive provision of telecommunications and information services, to support the competitive communications industry, and to protect and further the interests of entities engaged in the competitive provision of telecommunications and information services.

² NPRM, FCC 02-775 at ¶ 72.

modem service, including whether there are any Constitutional limitations on the exercise of that jurisdiction,” and whether the Commission should “require that cable operators provide unaffiliated [Internet service providers (“ISPs”)] with the right to access cable modem service customers directly.”³

Initially, the Commission’s determination that cable modem service does not include an offering of telecommunications service is erroneous. Moreover, the Commission erred in assuming that the contrary conclusion of the U.S. Court of Appeals for the Ninth Circuit (“Ninth Circuit”) was not compelled by the Communications Act of 1934 (“Communications Act”), as amended by the Telecommunications Act of 1996 (“Telecommunications Act”). As explained by the Ninth Circuit, cable modem service “consists of two elements: a ‘pipeline’ (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline.”⁴ And to the extent that a cable operator “provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.”⁵

³ Id.

⁴ AT&T Corp. v. City of Portland, 216 F.3d 871, 877 (9th Cir. 2000).

⁵ Id. at 878.

Continuing, the Ninth Circuit noted that “[s]ubsection 541(b)(3) expresses both an awareness that cable operators could provide telecommunications services, and an intention that those telecommunications services be regulated as such, . . . includ[ing] cable broadband transmission as one of the ‘telecommunications services’ a cable operator may provide over its cable system.”⁶ And, the Ninth Circuit added “[b]eyond the domain of cable-specific regulation, the definition of cable broadband as a telecommunications service coheres with the overall structure of the Communications Act as amended by the Telecommunications Act of 1996, . . . Congress [having] defined advanced telecommunications capability ‘without regard to any transmission media or technology,’ in terms that describe cable broadband.”⁷

Elaborating, the Ninth Circuit advised that “[a]mong its broad reforms, the Telecommunications Act of 1996 enacted a competitive principle embodied by the dual duties of nondiscrimination and interconnection . . . [thereby] mandat[ing] a network architecture that prioritizes consumer choice, demonstrated by vigorous competition among telecommunications carriers.”⁸ And, “this principle of telecommunications common carrier,” the Ninth Circuit concluded, “governs cable broadband as it does other means of Internet transmission such as

⁶ Id.

⁷ Id. at 879.

⁸ Id.

telephone service and DSL, ‘regardless of the facilities used’.”⁹

⁹

Id.

The Commission's assertion that the Ninth Circuit would have reached a different conclusion had it had the benefit of the Commission's "expert opinion on this issue" erroneously assumes that the Court's conclusion were not compelled by the Communications Act.¹⁰ The Commission acknowledges that cable modem service provides Internet access "via telecommunications,"¹¹ and concedes that to the extent that such telecommunications capability were offered on a stand-alone basis, it would constitute a "telecommunications service," albeit, in the Commission's view, offered as private carriage.¹² The Commission parts company with the Ninth Circuit only as to whether in providing cable modem service, a cable operator is providing solely an information service or an information service and a telecommunications service. And with respect to this issue, the Ninth Circuit's reading of the Communications Act is not only the better view, it is the only legitimate interpretation.

¹⁰ NPRM, FCC 02-775 at ¶ 57.

¹¹ Id. at ¶¶ 39 - 41.

¹² Id. at ¶ 54.

In enacting the Telecommunications Act, Congress endorsed the existing *Computer Inquiry* regime. As the Commission has acknowledged, “Congress intended the definitions of ‘telecommunications,’ ‘telecommunications service,’ and ‘information service’ to build upon the frameworks established prior to the passage of the 1996 Act, including the MFJ and Commission precedent.”¹³ More specifically, the Commission, based upon its review of “the statute and the legislative history as a whole,” has recognized that “Congress intended the 1996 Act to maintain the *Computer II* framework.”¹⁴ Thus, consistent with the *Computer Inquiry* regime, it was the intent of Congress that a telecommunications service underlie every information service. As set forth in the Report of the Senate, from whence arose the definitions of “telecommunications” and “telecommunications service contained in the Telecommunications Act,”¹⁵ “[t]he underlying transport and switching capabilities” on which information services are based “are included in the definition of “telecommunications service.”¹⁶

The *Computer Inquiry* regime is predicated on the regulatory assumption that there will always be an identifiable telecommunications service offered in conjunction with each and every information service, whether or not the two services are offered by the same entity. The Commission concluded that it could avoid regulation of enhanced services, regardless of by whom

¹³ Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934 (Order on Remand), 16 FCC Rcd. 9751, ¶ 45 (2001) (*subsequent history omitted*).

¹⁴ Federal-State Joint Board on Universal Service (Report to Congress), 13 FCC Rcd. 11501, ¶ 45 (1998).

¹⁵ Conf. Rep. No. 104-458, p. 116 (1996).

¹⁶ S. Rep. No. 104-23, p. 18 (1995). “Telecommunications services” incorporate “the transmission, without change in the form or content, of . . . [information] services.”

such services were offered, because its statutory obligations would be fulfilled by ensuring the general availability of the underlying transmission service. As described by the Commission, the *Computer Inquiry* regime “provide[d] a mechanism whereby nondiscriminatory access . . . [could] be had to basic transmission services by all enhanced service providers.” “The transmission component would be common to all entities,”¹⁷ “[t]he isolation of the transmission component enabl[ing] any carrier to provide an enhanced non-voice communications service on the same basis, without threat of unfair competitive advantage accruing to a given carrier by virtue of its control over the underlying transmission facilities.”¹⁸

¹⁷ Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry) (Final Decision), 77 F.C.C.2d 384, ¶ 231 (1980) (*subsequent history omitted*).

¹⁸ Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry) (Tentative Decision), 72 F.C.C.2d 358, ¶ 73 (1979) (*subsequent history omitted*).

In its *Third Computer Inquiry*, the Commission explained that the unbundling obligations, among other nonstructural safeguards, “were designed to serve the dual goals of permitting carriers to make enhanced services available to the public in the most efficient manner, while promoting the continued development of competition in the enhanced service marketplace.”¹⁹ Critically, the Commission noted that “achievement of the latter goal could be jeopardized if, in furtherance of the former goal, a carrier were permitted to offer an efficient enhanced service integrated with its basic network facilities, while withholding from its competitors the opportunity to interconnect similar services with its network on a comparably efficient basis.”²⁰ Unbundling, among other nonstructural safeguards, was, the Commission continued, “designed to prevent carriers from engaging in such conduct, which could unnecessarily reduce the opportunities for non-carriers to participate in the enhanced service marketplace and thereby deprive the public of the benefits of competition in this area.”²¹ Confirming this view, the Commission expressly relied on “the safeguard to make available the underlying transmission capacity for the enhanced services” in

¹⁹ Amendment of Section 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry) (Report and Order), 104 F.C.C.2d 958, ¶ 1287 (1986) (*subsequent history omitted*).

²⁰ Id.

²¹ Id.

authorizing the bundled offering of telecommunications and information services last year.²²

Accordingly, the Commission, unless it affirmatively forbears from doing so in accordance with Section 10 of the Communications Act, 47 U.S.C. § 160, must apply the same regulatory regime to the transmission component of cable modem service that it applies to xDSL-based advanced services used to provide broadband Internet access by wireline carriers -- i.e., it must guarantee nondiscriminatory access by applying the basic nondiscrimination and interconnection obligations to cable operators providing cable modem service embodied in Sections 201, 202 and 251(a) & (b), 47 U.S.C. §§ 201, 202, 251(a) & (b).

²² Policy and Rules Concerning the Interstate, Interexchange Marketplace (Report and Order), 16 FCC Rcd. 7418 (2001) (*subsequent history omitted*).

The same regime should also be applied under the regulatory paradigm set forth in the *Declaratory Ruling* associated with the *NPRM*. If cable modem service is to be classified as an interstate information service which does not encompass a separate offering of telecommunications service, public policy considerations nonetheless argue strongly for imposition of a *Computer Inquiry* regime. Like incumbent LECs, cable operators, by virtue of their control of “last mile” facilities built under monopoly franchises, have the ability to leverage market power to the detriment of users and unaffiliated ISPs. And like incumbent LECs, cable operators have no market-based incentives to share their bottleneck facilities with unaffiliated ISPs. To paraphrase the Commission, “negotiations [between cable operators and unaffiliated entities desiring access to the cable modem platform] are not analogous to traditional commercial negotiations in which each party owns or controls something the other party desires.”²³ The unaffiliated entity seeking such last-mile access would “come[] to the table with little or nothing the . . . [cable operator would] need[] or want[].”²⁴ Rather, cable operators would be asked “to make available their facilities and services to requesting . . . [entities] that intend to compete directly with the . . . [cable operator] for its customers.”²⁵ “The inequality of bargaining power” in such a circumstance, the Commission has long recognized, “militates in favor of rules that have the effect of equalizing bargaining power.”²⁶

The highly competitive Internet access market, populated by a large number of ISPs,

²³ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499, ¶ 55 (1996) (*subsequent history omitted*).

²⁴ Id. at ¶ 15.

²⁵ Id. at ¶ 55.

²⁶ Id.

which emerged in a “dial.-up” environment, will be jeopardized if broadband Internet access is limited to two bottleneck connections closed off to unaffiliated ISPs. And this concern is particularly strong in the large sectors of the Nation which do not have access to multiple broadband providers.²⁷

²⁷ A survey of residential Internet users undertaken by the U.S General Accounting Office found that while broadband services were available to a majority of such households, only a quarter of the households had access to both cable modem and DSL services. United States General Accounting Office, “Telecommunications: Characteristics and Choices of Internet Users (Report to the Ranking Minority Member, Subcommittee on Telecommunications, Committee on Energy and Commerce, House of Representatives), pp. 17 - 19 (February 2001). Confirming these results, the Commission recently reported that more than 40 percent of the nation’s zip codes are not served by multiple providers of advanced services. Head-to-head competition in the residential mass market segment is thus surprisingly limited, leaving the large majority of existing and potential residential broadband subscribers with no choice among service providers. Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, 17 FCC Rcd. 2844 17 FCC Rcd. 2844, ¶ 29 (2002).

Open access in the context of cable-based broadband access, in ASCENT's view, is not only a desirable, but an essential, policy goal. As the Commission has repeatedly found, consumers benefit from choice driven by competition.²⁸ Open access will facilitate the competitive provision of Internet-based services and, hence, enhance consumer choice. When but a single entity has access to scarce facilities and, thus, is in a position to impede the competitive provision of service, consumers are denied the price and service competition and innovation that might otherwise flourish if those scarce facilities were opened up to multiple providers. Moreover, small businesses are denied a meaningful opportunity to compete by exclusive control by a single entity of essential facilities. Congress has directed the Commission to drive the availability of "advanced telecommunications and information technologies and services to all Americans *by opening all telecommunications markets to competition.*"²⁹ Congress further mandated that the Commission act to increase the participation in the telecommunications industry by small businesses.³⁰

The benefits to residential and small business consumers that open access to cable-based broadband transmission facilities and services would generate are manifest. Multiple providers generate price competition not only in the form of lower prices, but in the development of innovative service packages as well. Service bundles in a single provider environment generally redound to the benefit of the provider through forced purchase of additional services by consumers;

²⁸ See, e.g., Deployment of Wireline Services Offering Advanced Telecommunications Capability (Third Report and Order), 14 FCC Rcd.20,912, ¶¶ 1 - 6 (1999) (*subsequent history omitted*).

²⁹ Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 104-458, 104th Cong., 2nd Sess. 1.

³⁰ 47 U.S.C. § 257.

service bundles in a competitive environment benefit consumers as multiple providers seek to enhance the attractiveness of their respective service offerings. The presence of multiple providers also generates service innovation and diversity, which in the Internet environment can manifest itself, among other ways, in greater site diversity or enhanced content. Enhanced service quality also is a byproduct of diverse sources of service, as are more user friendly service terms and conditions, such as shorter duration commitments. And, of course, open access would lessen opportunities for abusive caching practices which would allow a single provider to prefer favored advertisers or providers by strategically manipulating transmission priorities and speeds.

Even if cable modem service is deemed to be an information service, the Commission has ample authority under Section 4(i) of the Communications Act, 47 U.S.C. §154(i), to impose a *Computer Inquiry*-like regime. Section 4(i) empowers the Commission to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.” Section 4(i) thus “suppl[ies] the FCC with ancillary authority to issue regulations that may be necessary to fulfill its primary directives contained elsewhere in the statute,”³¹ and to this end “authorizes . . . [it] to take any actions . . . [it] consider[s] ‘necessary and proper’ to further the public interest in the regulation of

³¹ Iowa Util. Bd v. FCC, 120 F.3d 753, 795 (1997) (*subsequent history omitted*).

telecommunications.”³² The Commission is operating under a Congressional directive to speed the availability of broadband Internet access to the public,³³ which directive would be furthered by a vibrant competitive market among ISPs.

³² Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 (Second Report and Order and Memorandum Opinion and Order), 11 FCC Rcd. 19392, ¶ 92 (1996) (*subsequent history omitted*). Courts have long held that “the Commission’s judgment regarding how the public interest is best served is entitled to substantial judicial deference.” FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 (1981).

³³ 47 U.S.C. § 157 note.

By reason of the foregoing, the Association of Communications Enterprises urges the Commission to promulgate rules pursuant to which cable operators would be required to provide unaffiliated entities with the right to purchase broadband transmission capability on a nondiscriminatory basis and thereby access customers directly over cable modem platforms.

Respectfully submitted,

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