Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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 MOTOROLA, INC.

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INTRODUCTION AND SUMMARY

Motorola is strongly committed to the development and deployment of broadband services and equipment. Motorola believes that broadband technology offers enormous opportunity for American consumers and businesses in delivering new services and applications more quickly and more efficiently than has ever been possible before. To help fulfill that promise, Motorola has been committing substantial resources to develop and launch new broadband products, and is particularly proud of its track record of innovation in the cable modem service marketplace.

Motorola is the international leader in the cable modem market, offering DOCSIS 1.0 internal and external cable modems in the SURFboard® High Speed Cable Modem family of products. Motorola offers its products through a variety of distribution channels. For example, it provides cable modem equipment to MSOs, who then sell or lease the equipment to consumers. Motorola has also delivered over five million cable modems to retail outlets for sale to consumers. Motorola SURFboard® modems are now carried in over 1,000 retail stores in the United States, including Best Buy, Circuit City, CompUSA, and The Wiz. Motorola anticipates that the retail sale of modems will only increase as consumers become more familiar with cable modem service and the value the equipment provides in delivering high quality Internet content, video, and audio services to the home.

Motorola is also a significant provider of broadband network routing equipment. For example, the Broadband Services Router 64000 enables operators to introduce voice, video, and data services for corporate and residential customers. The device is a key component of Motorola's end-to-end architecture for voice over IP ("VoIP") cable telephony systems, including both a switched IP access system that interoperates with standard central office switches and a full VoIP softswitched-based system that includes an IP gateway linked to the public switched telephone network. Motorola has also developed and is currently selling customer premises equipment to support VoIP services to cable telephony subscribers, including the VT1000 Voice Terminal, a DOCSIS-compatible home device that allows cable operators to upgrade data subscribers to VoIP service. Motorola is committed to VoIP, and is working with cable operators and other providers to roll out VoIP products and services as quickly as possible.

Motorola applauds the Commission for launching this and other broadband-related rulemakings to consider ways in which government policies can accelerate the availability of broadband services to as many Americans, as quickly as possible.[1] Motorola strongly supports the Commission's determination that "broadband services should exist in a minimal regulatory environment that promotes investment and innovation."[2] As Motorola explains in greater detail below, the Commission's policy of "vigilant restraint" with respect to cable modem service underscores the wisdom of such a deregulatory approach. This policy is working, as is evidenced by recent marketplace developments, and there is no basis for departing from this market-based approach.

Indeed, Motorola believes that the Commission's policy regarding cable modem service should guide the Commission as it considers more generally the proper regulatory treatment of

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1 *See Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 FCC Rcd. 22745 (2001); *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 16 FCC Rcd. 22781 (2001); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers*, 17 FCC Rcd. 2844 (2002).

2 *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling & NPRM, GN Dkt. No. 00-185, CS Dkt. No. 02-52, FCC 02-77, ¶¶ 5, 73 (rel. Mar. 15, 2002) *(hereinafter "Notice").*

all broadband-related services and equipment. In particular, in order to facilitate the deployment of competitive broadband services and equipment, the Commission should pursue a regulatory paradigm predicated on the following key principles:

- *First*, the Commission should refrain from extending existing regulations to, or imposing new regulations on, broadband platforms and services, unless clear and convincing evidence demonstrates that marketplace constraints are inadequate to promote competition and consumer welfare.

- *Second*, the Commission should remove existing regulation of broadband services and equipment, unless clear and convincing evidence demonstrates that the continued regulation is necessary to promote competition and consumer welfare.

- *Third*, the Commission should broadly preempt state and local attempts to regulate in the area of broadband services and/or equipment in order to maintain a uniform national broadband regulatory policy.

Applying these principles in the context of this rulemaking, the Commission should reject proposals to impose government regulation on cable modem service, such as mandated Internet Service Provider ("ISP") access requirements. Such regulation is not only unnecessary given current marketplace developments towards ISP choice, but it also would harm consumers by deterring investment, impeding innovation, and delaying and impairing the provision of broadband services. Moreover, for the same reasons, the Commission should use this proceeding to proscribe state and local governments from regulating cable operators in their provision of cable modem service and related equipment, such as by imposing forced access obligations, requiring a separate franchise to operate a cable modem service, or assessing franchise fees on cable modem service. State and local regulation in this area would only serve to create a patchwork of varying and inconsistent regulations that would chill innovation, investment, and deployments, and undercut the Commission's goal of establishing a national broadband policy.

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COMMENTS OF MOTOROLA, INC.

Motorola, Inc. (Motorola) hereby submits these comments in response to the *Notice* in the above-captioned proceeding.

I. REGULATION OF CABLE MODEM SERVICE IS UNNECESSARY AND WOULD NOT SERVE THE PUBLIC INTEREST.

A. The Commission's Current Policy Of "Vigilant Restraint" Towards Cable Modem Service Is Working, And There Is No Basis For Departing From This Market-Based Approach.

This proceeding represents at least the sixth time the Commission has addressed the question whether "forced access" regulation is necessary to provide consumers with a choice of ISPs. The Commission has consistently concluded that no such regulation is needed,[3] finding

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[3] *See First 706 Report*, 14 FCC Rcd. 2398 (1999); *Second 706 Report*, 15 FCC Rcd. 20913 (2000); *Third 706 Report*, 17 FCC Rcd. 2844 (2002). The Commission reached the same conclusion in two merger proceedings, as well. *See AT&T-TCI Merger Order*, 14 FCC Rcd. 3160 (1999); *AT&T-MediaOne Merger Order*, 15 FCC Rcd. 9816 (2000). Finally, although the Commission imposed a specific ISP access condition in the *AOL-Time Warner Merger Order*, the Commission clearly held that its order did not "portend any specific policy determinations" but was based on the "unique" facts of that merger. *See AOL-Time Warner Merger Order*, 16 FCC Rcd. 6547, ¶¶ 54-55, 58 (2001). Specifically, the Commission found that AOL Time

(footnote continued…)

instead that the Commission's longstanding policy of "vigilant restraint" is the better approach to drive the industry towards ISP choice.

Cable operators' roll-out of multiple ISP offerings confirms that the Commission should reach the same conclusion in this proceeding. Competition and market forces provide cable modem service providers with every incentive continually to improve their offerings and to deliver high quality, low cost, easy-to-use services that provide consumers with as much choice and innovation as possible.[4] Toward this end, leading cable operators have already taken concrete steps toward offering consumers a choice of ISPs. For example:

- **AT&T Broadband.** In March, 2002, AT&T Broadband and EarthLink entered into an agreement under which EarthLink will offer high-speed cable Internet service over AT&T Broadband's networks in Seattle and Boston later this year, and in additional markets in 2003.[5] AT&T Broadband has also signed agreements

(…footnote continued)

Warner would have a "unique concentration of assets (vast narrowband membership and the product that created it, access to Time Warner cable systems, and extensive Time Warner content assets)." *Id.* ¶ 54; *id* ¶ 55 (noting that "this merger would place AOL Time Warner in a unique position").

4 *See Competition and Mergers in the TV Cable Industry: Hearings before the Senate Judiciary Subcommittee on Antitrust, Business Rights, and Competition*, 107th Cong. 30 ("*Hearings*") (testimony of Brian Roberts, President and CEO, Comcast) ("[W]e have said for some time we want to do business with as many connective points as possible so that consumers have the choice that they want, because if they don't take it from us, they're going to take it from DSL, our competitor. Every one of our products is competitive today, including high-speed modems with DSL and wireless.").

5 *See* Statement of C. Michael Armstrong before the Senate Judiciary Subcommittee on Antitrust, Competition, and Business and Consumer Rights, at 11 (Apr. 23, 2002) (also describing the $20-million six-month trial AT&T Broadband conducted in Boulder, Colorado with four ISPs).

with two regional ISPs, is negotiating with other ISPs, and plans to offer consumers additional choices in the future.[6]

- **Comcast.** In February, 2002, Comcast announced an agreement with United Online to offer high-speed Internet service over Comcast's cable systems.[7] United Online launched the service through its NetZero and Juno brands in Indianapolis, Indiana and Nashville, Tennessee on May 30, 2002.[8] Comcast has indicated that the agreement provides a template for a subsequent national rollout of United Online's service to anyone who can get Comcast cable.[9]

- **AOL Time Warner.** Time Warner Cable offers consumers in its 20 largest markets the choice of Road Runner, AOL, and EarthLink,[10] and has also struck agreements with Juno as well as numerous local and regional ISPs.[11] Time Warner Cable expects to offer multiple ISPs in all of its 39 divisions by the end of this month.[12]

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6 *See AT&T Broadband and Seattle-Based ISP Internet Central Forge Choice Agreement*, AT&T Broadband Press Release (May 2, 2002) (noting agreements with Massachusetts-based Net1Plus and Seattle-based Internet Central).

7 *See Comcast and United Online to Offer NetZero and Juno High-Speed Internet Service*, Comcast Press Release (Feb. 26, 2002).

8 *See United Online Launches Inaugural High-Speed Internet Service*, United Online Press Release (May 30, 2002).

9 *See Comcast and United Online to Offer NetZero and Juno High-Speed Internet Service*, Comcast Press Release (Feb. 26, 2002). *See also Hearings* at 30 (testimony of Brian Roberts) ("[I]t's absolutely our intention, because we think it's good business, to get multiple ISPs in commercially reasonable ways throughout our company."). *See also* Morgan Stanley Dean Witter, *Broadband Update: Raising Longterm Modem Forecast*, Apr. 8, 2002, at 41 (noting that arrangements between the MSOs and unaffiliated ISPs "will allow the cable industry to accelerate its unit growth while improving the overall economics").

10 *See Time Warner Cable: Key Company Facts*, *at* http://www.aoltimewarner.com/companies/time_warner_cable_index.adp (visited June 10, 2002).

11 *See* Letters from Donald Clark, FTC, to Robert Joffe, Counsel for AOL Time Warner, filed in FTC Dkt. No. C-3989 (May 8, 2002; Feb. 26, 2002; Dec. 21, 2001) (detailing agreements with various unaffiliated ISPs).

12 *See* Monica Hogan, *Multiple ISPs Help Ops Market Broadband*, Multichannel News, May 13, 2002. According to company officials, the marketing support of multiple ISPs has

(footnote continued…)

- **Cox.** Cox launched its six-month technical trial of EarthLink and America Online services in El Dorado, Arkansas on November 6, 2001, and hopes to begin offering multiple ISP choice in some markets this year.[13]

These initiatives provide substantial evidence of the cable industry's commitment to establishing a multiple ISP environment, and argue strongly against the imposition of any government-mandated access requirement. This conclusion is particularly compelling in light of the solid and well-documented level of investment and facilities-based competition occurring in the broadband Internet services arena.[14]

(…footnote continued)

boosted Time Warner Cable's high-speed Internet subscriber additions 20-25% in initial launch markets. *See Time Warner Cable Touts Multi-ISP Upside*, Cable Datacom News (May 1, 2002), *at* http://www.cabledatacomnews.com/may02/may02-3.html.

[13] *See Cox, AOL and Earthlink Launch High-Speed Service Trial*, Cox Press Release (Nov. 6, 2001).

[14] *See, e.g.*, *Third 706 Report* ¶¶ 61-78 (detailing broadband investment in, and competition in the deployment of, high-speed Internet services across various facilities-based platforms); NCTA, *Cable & Telecommunications Industry Overview: 2002 Mid-Year*, at 1-2 (2002) ("*NCTA Industry Overview*"), *available at* http://www.ncta.com/pdf_files/Mid'02Overview.pdf (noting that the cable industry invested almost $14.3 billion in 2001 alone on infrastructure upgrades and facility improvements to deliver high-speed Internet and other advanced services, and anticipates an additional $12.9 billion investment this year); Morgan Stanley Dean Witter, *Broadband Update*, *supra* note 9, at 7 (noting that cable broadband availability is projected by some industry analysts to climb to 88.4 million U.S. homes (or nearly 90% of homes passed by cable) by the end of the year); Goldman Sachs, *Telecom Services: United States*, at 1 (June 11, 2002) (estimating that the Bells will add roughly 8,400 subscribers per day in 2002, a 17% hike from 2001 levels). Although some have credibly suggested that broadband deployment is not occurring quickly enough, any such delays in the broadband rollout or dampening of investment incentives are largely due to uncertainty created either by threatened government regulation or the retention of unnecessary regulations on broadband services or equipment. *See, e.g.*, *infra* note 28 (noting effects of possible government regulation on broadband deployments). In this regard, Motorola applauds the recent statements by President Bush and various members of Congress committing to develop additional ways to further stimulate both the supply and demand for high-speed Internet access. *See* Adam Entous, *Bush Promises 'Aggressive' Expansion of Broadband*, Reuters (June 13, 2002) (quoting broadband-related statements of President Bush and leading members of Congress).

B. Government Regulation Of Cable Modem Service, Such As Mandated ISP Access Requirements, Would Harm Consumers By Deterring Investment, Impeding Innovation, And Delaying And Impairing The Provision Of Broadband Services.

As the Commission observed in the *Notice*, the cable modem service business is still nascent,[15] and regulation in the absence of any demonstrable market failure would only harm consumers. A forced access requirement would deter investment. Cable companies have invested billions of dollars in private risk capital upgrading their networks. Imposing access obligations on cable companies would undermine the industry's incentives to make such upgrades. Chairman Powell has made this very point, noting that: "Substantial investment is required to build these networks and we should limit regulatory costs and uncertainty."[16] As leading investment analysts have previously indicated on these issues: "Not only would [regulatory] uncertainty diminish the ability of corporate entities to plan new buildouts, but it would effectively kill the public equity market for financing."[17]

In addition, government regulation would impede innovation. As the Commission emphasized in the *Notice*, "business relationships among cable operators and their service offerings are evolving."[18] Cable modem service providers continue to experiment with various

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15 *See Notice* ¶ 83.

16 Remarks of Michael K. Powell, Chairman, Federal Communications Commission, at the National Summit on Broadband Deployment, at 12 (Oct. 25, 2001) ("*Powell Broadband Remarks*").

17 Letter from Laura Martin, Credit Suisse, Dennis Leibowitz, DLJ Securities, Jessica Reif Cohen, Fenner and Smith, and Thomas Eagan, Paine Webber, to William Kennard, Chairman, FCC (Dec. 18, 1998).

18 *Notice* ¶ 83. The Commission has recognized that "the multiple-ISP environment requires a re-thinking of many technical, operational, and financial issues including

(footnote continued…)

models in order to meet the needs and demands of their customers. Under some arrangements, for example, the ISP may provide certain facilities and equipment necessary to provide the retail service to customers as well as marketing and billing support, while under other models, the ISP provides the retail service while the cable operator furnishes the facilities and equipment and is also involved in marketing and billing.[19]

Forcing all providers to conform to a predetermined model would undermine this process of experimentation. Even assuming there were a consensus on what regulations the government might impose on cable modem service providers, which there is not,[20] imposing a single regulatory "solution" on the industry would be harmful because (1) some of the untried business models and technologies may be superior to the option ultimately chosen by the government,

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(…footnote continued)

implementations of routing techniques to accommodate multiple ISPs, Quality of Service, and the compensation, billing, and customer service arrangements between the cable operator and the ISPs." *Id.* ¶ 29 (footnotes omitted). All of these concerns, the Commission recognized, "center around the difficulties of trying to modify a service designed to be provisioned by a single cable modem service provider to allow the provisioning of cable modem service by multiple service providers." *Id.*

[19] *See, e.g.*, *Ex Parte* Letter from AT&T to FCC, filed in GN Dkt. No. 00-185 (Dec. 18, 2001) (describing possible business models for multiple ISP choice); NCTA Comments, filed in GN Dkt. No. 00-185, at 63-64 (Dec. 1, 2000) ("NCTA Forced Access Comments") (describing different business models that have arisen in the Internet marketplace); Comcast Comments, filed in GN Dkt. No. 00-185, at 38 (Dec. 1, 2000) ("Comcast Forced Access Comments") (same).

[20] *See Broadband Today*, Cable Services Bureau, Rept. No. CS 99-14, at 40 ("*Broadband Today*") (noting that the inability of "open access" advocates to agree upon a "single workable definition of the term . . . speaks volumes about the difficulties and appropriateness of establishing a regulatory regime at this early stage in broadband's history").

and (2) no one model can meet all of the needs of the industry or consumers.[21] Although much has been accomplished by the cable industry in the area of ISP choice over the last two years, much uncertainty still exists. The imposition of forced access regulation in this environment would cause an abrupt halt to the considerable and pro-consumer progress that has already been achieved. As Chairman Powell has concluded, "very substantial questions remain about consumer demand for new applications" and "[i]nnovation is critical and can be stifled by constricting regulations."[22]

Finally, government regulation would impose substantial costs and burdens on the cable industry and the Commission.[23] A government-mandated access requirement would likely involve complex price and other regulations of cable modem service, the implementation of which would drain substantial Commission resources. Indeed, the Commission, which has the most experience dealing with the type of "non-discrimination" regulation advocated by forced access proponents, has warned against such a regime.[24] Moreover, as various commenters have pointed out in the earlier phase of this proceeding, the Canadian experience in regulating cable

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[21] *See, e.g.*, AT&T Comments, filed in GN Dkt. No. 00-185, at 69-70 (Dec. 1, 2000) ("AT&T Forced Access Comments") (describing harms associated with government regulation).

[22] *Powell Broadband Remarks* at 12. *See also Notice* ¶ 73 ("[W]e are mindful of the need to minimize both regulation of broadband services and regulatory uncertainty in order to promote investment and innovation in a competitive market.").

[23] *See, e.g.*, AT&T Forced Access Comments at 66-85 (providing detailed explanation of the enormous costs associated with forced access).

[24] *See Broadband Today* at 46-47 ("Even if a regulatory scheme could be devised at this early stage, such a scheme would likely be very complex and burdensome. The Commission's experience from implementation and enforcement of the Title II 'non-discriminatory' interconnection and access requirements teaches us that a complex regulatory and tariffing scheme would likely accompany broadband access requirements.").

modem service access demonstrates the fallacy of arguments that mandated access can be accomplished with only "light touch" regulation.[25]

In short, market participants are better equipped than the government to work with ISPs to resolve the various challenges associated with multiple ISP access. Cable operators and ISPs have a far better understanding of the technical and operational requirements of their networks as well as the possible business models to implement ISP choice. Indeed, the existing industry deployments of ISP choice capabilities demonstrate this process is already occurring, and the Commission should therefore continue to refrain from interfering in these market-based efforts.

C. Allowing States And Local Authorities To Regulate Cable Modem Service Would Not Serve The Public Interest.

The Commission also invites comment on whether and to what extent it should permit state and local governments to regulate cable operators in their provision of cable modem service and related equipment.[26] Motorola shares the Commission's concerns about the effects of such state and local regulation on broadband investment, innovation, and deployment, and urges the Commission to broadly preempt such regulation as part of this rulemaking.[27]

The imposition of divergent, conflicting, or duplicative regulatory requirements at the federal, state, and local levels would disserve the Commission's broadband policies in numerous ways. First, such a regulatory scheme would impose unnecessary costs and disincentives on

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25 *See* AT&T Forced Access Comments at 85-88 (detailing Canadian experience); NCTA Forced Access Comments at 80-81 (same). *See also Broadband Today* at 47 (describing problems associated with Canadian regulation of cable modem service).

26 *See Notice* ¶¶ 96-105.

27 *See id.* ¶ 97 (noting concerns about effects of state and local regulation of cable modem service).

broadband infrastructure investment and innovation. As noted, cable operators are investing billions of dollars of private risk capital in their broadband networks and services, and permitting state and local governments to impose access or other regulations on cable modem service would chill such investment.[28] Second, state and local regulation would create a patchwork of regulations that discourages deployment of cable modem service across jurisdictional boundaries. There are over 30,000 LFAs in the U.S., and there would be chaos if each LFA imposed different regulatory structures or different technical standards for cable modem service.[29] Finally, state and local regulation would plainly undercut Congress' and the Commission's goal of developing and implementing a *national* broadband policy.[30] Indeed, the Commission has previously underscored this concern, noting that "[i]nconsistent local regulation potentially can disrupt the Commission's national broadband policy and keep broadband technologies out of the hands of many Americans."[31] In light of these concerns, Motorola urges

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28 *See* Comcast Forced Access Comments at 41 & n.112 (noting that uncertainties created over forced access proposals delayed introduction of cable modem service in Montgomery County, Maryland for at least six months); *id.* n.112 (noting that "AT&T declined to deploy its cable Internet service in both Portland, Oregon, and Broward County, Florida, until forced access requirements were struck down").

29 The Commission suggested as much in the *Notice*. *See Notice* ¶ 97 ("We would be concerned if a patchwork of State and local regulations beyond matters of purely local concern resulted in inconsistent requirements affecting cable modem service, the technical design of the cable modem service facilities, or business arrangements that discouraged cable modem service deployment across political boundaries.").

30 *See* 47 U.S.C. § 230(b)(2) (stating that it is the policy of the U.S. "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation"); Pub. L. No., § 706, 110 Stat. 56, 153 (1996) (directing the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans").

31 *Broadband Today* at 45-46.

the Commission to exercise its authority under the Communications Act to broadly preempt state and local regulation of cable modem services and related equipment.[32]

II. CONCLUSION

Based on the foregoing, Motorola respectfully urges the Commission to continue to refrain from imposing regulations on cable modem service and to broadly preempt state and local regulation of such service. Such an approach is not only justified by marketplace developments -- most notably the launch of ISP choice by leading MSOs and the significant level of investment and facilities-based competition in the broadband arena -- but is also necessary in order to promote the continued innovation and investment in cable modem networks and equipment and the further deployment of broadband services to consumers and businesses.

Respectfully submitted,

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32 *See Notice* ¶ 98 (citing bases for preemption authority under Title I and VI of the Communications Act).