

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

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

**COMMENTS OF THE
HIGH TECH BROADBAND COALITION**

**Business Software Alliance
Consumer Electronics Association
Information Technology Industry Council
National Association of Manufacturers
Semiconductor Industry Association
Telecommunications Industry Association**

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Summary

The High Tech Broadband Coalition (“HTBC”) supports the Commission’s conclusion that cable modem service is an interstate information service that does not involve a separate offering of telecommunications. To the extent that any cable operator is offering unaffiliated Internet service providers (“ISPs”) stand-alone transmission service, that offering is private, not common, carriage. Thus, cable modem service is outside the bounds of Title II regulation, and the Commission cannot, and should not, require multiple ISP access. Maintaining the current deregulatory environment for cable modem service will spur continued investment and innovation in broadband technologies.

The history of the Internet has been characterized by open and unfettered consumer access to an unprecedented array of content, services, and applications, accessible through an ever-increasing diversity of products. Nevertheless, members of HTBC have become aware of certain restrictions by some cable ISPs on consumers’ use of their services. HTBC recognizes that cable facilities are not limitless, but cable ISPs should allocate limited resources through tiered pricing, rather than through restrictions on the use of their service having no direct correlation to bandwidth limitations.

The Commission should vigilantly monitor the emerging cable modem (and DSL) marketplace and take appropriate action to ensure that consumers are not being deprived of the full benefits of the Internet and unrestricted use of the full bandwidth to which they have subscribed.

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The High Tech Broadband Coalition (“HTBC”)¹ submits these Comments in response to the Notice of Proposed Rulemaking (“NPRM”) in the above-referenced proceeding.² For the reasons set forth below, the Commission should stay the deregulatory course it has charted in the Declaratory Ruling and NPRM, and take a generally hands-off approach to cable modem service, allowing the market for broadband over cable to develop without heavy-handed regulatory intervention. The Commission should be guided by the goal of ensuring that consumers can realize the full benefits of the Internet, and it should remain vigilant for signs of anti-consumer behavior on the part of network operators that

¹ The Members of the High Tech Broadband Coalition include the: Business Software Alliance, Consumer Electronics Association, Information Technology Industry Council, National Association of Manufacturers, Semiconductor Industry Association, and Telecommunications Industry Association.

² *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*, GN Dkt. No. 00-185, CS Dkt. No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77 (released March 15, 2002), 67 Fed. Reg. 18848 (April 17, 2002).

interferes with consumers' realization of those benefits. If it detects such behavior, it should take appropriate action to preserve or restore consumers' rights.

I. CABLE MODEM SERVICE IS AN EMERGING INFORMATION SERVICE THAT SHOULD BE SUBJECT ONLY TO MINIMAL REGULATION.

The Commission's determination that cable modem service is an interstate information service³ is not only legally sound, it is good public policy. In the past, HTBC has recommended to the Commission an environment of minimal regulation for broadband services. HTBC has advocated reliance on competitive market forces with respect to other services, and it has found that this approach enhances facilities-based competition, promotes deployment, and improves consumer welfare.

Consistent with that position, as well as with the Commission's traditional approach to information services,⁴ and Congressional intent, as expressed in the Telecommunications Act of 1996,⁵ cable modem service should be subject only to minimal regulation.

³ Declaratory Ruling at ¶ 33.

⁴ See *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 (April 10, 1998) at ¶¶ 23-27, 73-82.

⁵ In Section 230(b) of the Communications Act, 47 U.S.C. § 203(b), which was added by the 1996 Act, Congress expressed the goals of "promot[ing] the continued development of the Internet and other interactive computer services and other interactive media" and of "preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." Similarly, in Section 706 of the Communications Act, 47 U.S.C. § 157 nt, Congress required the Commission to "encourage the deployment . . . of advanced telecommunications capability to all Americans . . . by utilizing [among other things] regulatory forbearance . . . or other regulating methods that remove barriers to infrastructure investment."

A. Providers of Cable Modem Service do not Offer a Common Carrier Telecommunications Service.

The Commission has correctly observed that cable modem service is not a cable service, and that there is no separate telecommunications service offering to subscribers or Internet service providers (“ISPs”).⁶ Thus, application of Title II common carrier regulation to cable modem service would be inappropriate.

This conclusion is appropriate in light of the Commission’s finding that no cable modem service provider “has made a stand-alone offering of transmission for a fee directly to the public, or to such classes of users as to be effectively available directly to the public.”⁷ Moreover, the Commission has not required any provider of cable modem service to make such an offering. Under these circumstances, cable modem service, as provided today, does not satisfy any of the requirements for common carriage, as enunciated in *National Association of Regulatory Utilities Commissioners v. FCC*.⁸

B. The Commission Should Not Regulate Cable Modem Service Under Title II and Should Not Require Providers to Offer Multiple ISP Access.

The Commission has asked whether it should forbear from applying Title II of the Act or other aspects of common carrier regulation to cable modem service, to the extent that it may be classified as a telecommunications service. NPRM at

⁶ Declaratory Ruling at ¶ 33.

⁷ *Id.* at ¶ 40 (paraphrasing standard for common carriage).

⁸ 525 F.2d 630, 640 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976) (NARUC I); NARUC v. FCC, 533 F.2d 601, 608-09 (D.C. Cir. 1976) (“NARUC II”) (cited in Declaratory Ruling at ¶ 55 & nn. 206-07); see Pitsch & Bresnahan, “Common Carrier Regulation of Telecommunications Contracts and The Private Carrier Alternative,” 48 Fed. Comm. L. J. 447 (1996).

¶ 95. HTBC believes the Commission need not address this issue, given its finding that cable modem service does not involve the provision of a separate telecommunications service, and certainly not on a common carrier basis.

Since it first established the “information services” classification, the Commission has taken a hands-off approach to regulating those services, and there is no reason for it to change direction with respect to cable modem service. Indeed, as the Commission has recognized, its statutory authority to regulate information services is limited.⁹ In keeping with this limited authority and its traditional approach to (de)regulation of information services, HTBC believes that the Commission cannot, and should not, require multiple ISP access over cable systems. As the Commission has noted, cable providers are voluntarily entering into open access arrangements based on commercially negotiated rates.¹⁰ Not only does the Commission lack the statutory authority to do so, given its classification of cable modem service as an information service, but multiple ISP access is neither necessary nor appropriate to promote the Commission’s public interest goals.¹¹

For example, as noted in Section C below, intermodal broadband competition is developing, and the Commission should focus on encouraging

⁹ See NPRM at ¶¶ 75-79 (discussing and seeking comment on limits of Commission’s authority over cable modem and other information services); see also *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Dkt. No. 96-149 (Order on Remand), 16 FCC Rcd 9751 at 9758-59 (2001) (information service providers are not subject to common carrier regulation under Title II of the Communications Act).

¹⁰ Declaratory Ruling at ¶¶ 48-50 & n.185.

¹¹ See NPRM at ¶ 85.

competition among multiple platforms. HTBC believes that a minimally regulated broadband marketplace will best produce competition and consumer choice while enabling consumers to realize the full economic benefits of innovative information technologies. At this stage of the broadband marketplace, the Commission must proceed cautiously to ensure that its regulatory regime does not disrupt the development of competition in broadband markets or skew economically efficient decision-making by both potential providers and consumers of broadband services.

For these and other reasons the Commission has already identified,¹² the Commission should not require cable operators to provide access to unaffiliated ISPs at this juncture.

C. A Clear Deregulatory Signal Is Needed to Encourage Continued Investment in Broadband Infrastructure.

The rapid deployment of broadband services is essential to maintaining the pace of technological progress and the nation's economic expansion. HTBC believes that the Commission's broadband policy must encourage continued deployment of infrastructure and services on multiple platforms and foster an environment of investment and innovation in competing technological alternatives for broadband services.

The deregulatory approach the Commission has taken to date with respect to broadband services is reaping benefits in the form of continued investment in multiple platform infrastructure. Massive investments are being

¹² See NPRM at ¶¶ 72-74, 80-83.

made in competing technologies. As cable providers invest in upgrading their systems for high-speed Internet access, so too do incumbent and competitive local exchange carriers invest in the deployment of xDSL services and other high-speed technologies. In addition, wireless Internet access providers are investing millions in new facilities. In short, the Commission's approach to cable broadband services is working, and the broadband services market is expanding. A clear signal that the Commission will maintain its minimally regulatory approach is needed to encourage continued investment in all these facilities.

II. AS CABLE MODEM SERVICE EVOLVES, THE COMMISSION SHOULD MONITOR MARKET DEVELOPMENTS TO ENSURE CONSUMER CHOICE.

As the result of the Commission's deregulatory, market-based approach to information services, the Internet has exploded. The history of the Internet has been characterized by open and unfettered subscriber access to sites and subscriber freedom to choose equipment and applications used on, or in conjunction with, the Internet. Today, consumers have access to an unprecedented array of content, services, and applications, accessible through an ever-increasing diversity of products.¹³ The future of the digital revolution is limited only by our imaginations, and as technology improves, consumers' choices should continue to widen.

Despite the vibrant history and promising future of the Internet, some of HTBC's members have observed troubling evidence of restrictions on broadband consumers' access to content, applications and devices. These restrictions may

¹³ HTBC's constituents include some of the world's leading creators of the products, services, and applications the Internet has spawned.

have been imposed by some cable companies in order to manage customer usage of bandwidth on a shared facility and they may disappear as superior business and technical arrangements can be implemented, or in response to competitive pressures. Some cable companies have not adopted these practices. Others have implemented capacity-based tiers of service, which allow them to use price to manage access to their facilities efficiently, but also give consumers more freedom to use the capacity provided in any particular tier as they see fit. HTBC believes the Commission should vigilantly monitor these developments. Should the Commission determine that these restrictions represent a substantial threat to consumers' free use of their broadband service, it should take appropriate action.

A. The Commission Should Protect Important "Connectivity Principles" That Have Made the Internet What It Is Today.

The Commission should vigilantly monitor the development of the market for consumer broadband services – including cable modem and DSL services¹⁴ -- and take appropriate action, if necessary, to protect these four important consumer interests:

1. Consumers have a right to meaningful information regarding technical limitations of their service.

Providers of consumer broadband services should give their customers clear disclosures regarding the bandwidth and functional limitations of each of their service offerings. For example, before consumers select a service plan and agree to price and term commitments, providers should inform them of the

¹⁴ HTBC plans to file reply comments with similar recommendations in the *Wireline Broadband* rulemaking, CC Dkts. Nos. 02-33, 95-20, and 98-10.

upstream and downstream bandwidth limitations, and on any capacity limits on content transfers, that apply to the various plans available to them. Consumers require this information to make informed choices from among different broadband services.

2. Consumers should have unrestricted access to their choice of Internet content using the bandwidth capacity of their service plan.

Once a consumer has selected a broadband service plan with full knowledge of the plan's bandwidth limitations, the service provider should impose no restrictions on the sites the consumer can reach within those limits. Nor should a service provider degrade a consumer's ability to reach a site within the bandwidth limits of the plan the consumer has chosen. Of course, consumers should remain free to select service filtering, if they so desire, and broadband providers who are also ISPs should be permitted to provide enhanced access to their own content, through, e.g., caching. One of the great achievements of the Internet is the ability of consumers to access any information, at any time, from any place. It is important that consumers of cable modem services have this ability.

3. Cable modem customers should be allowed to run applications of their choice, as long they do not harm the provider's network and are within the bandwidth limits of their service plans.

Not only should consumers be able to reach any sites that are within the bandwidth limitations of their service plan, they should also be allowed to use the bandwidth to which they subscribe to run whatever applications they choose, provided that those applications are within their bandwidth limits and do no harm

to the provider's network and equipment. In other words, broadband providers should not restrict consumers from running an application unless it exceeds the capacity paid for by the user. As an example, cable ISPs broadband providers should not be permitted to restrict consumers from running a virtual private network ("VPN") or similar application merely because it involves inbound access to the user, appears to be "server-like," or is otherwise unconventional.

4. Consumers should be permitted to attach any devices they choose, without prior permission, to their ISP connection, so long as they operate within the agreed bandwidth, do not harm the provider's network, or enable theft of services.

Consumer freedom to attach devices to providers' networks is a longstanding tenet of Commission jurisprudence.¹⁵ In keeping with this tradition, consumers should be able to attach devices of their choosing to their cable modem service used for Internet access as long as they do not harm the network or enable theft of service. For example, consumers should not face restrictions on the IP address configuration of their home networks. Nor should they be charged for multiple device addresses in an IPv6 environment where addresses are no longer a limited resource.

¹⁵ See, e.g., *Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420 (1968), *recon. denied*, 14 F.C.C.2d 571 (1968); *Implementation of Section 273 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996*, CC Docket No. 96-254, Notice of Proposed Rulemaking, FCC 96-472 (released December 11, 1996) (one of Commission's goals is "to encourage robust competition for manufactured products").

[

B. Providers of Cable Modem Services Should Be Allowed to Use Pricing to Allocate Network Bandwidth, but Should Not Otherwise Restrict Consumers' Use of the Full Capacity and Functionality to Which They Subscribe.

HTBC recognizes that the consumer interests detailed above must be considered in the context of the realities of the network. Cable broadband facilities are not limitless, and cable modem service offerings may be dictated by technical realities; however, we believe that providers should be able to accommodate the entire range of consumer interests and needs – from basic to advanced – by using pricing tiers to allocate bandwidth. HTBC does not oppose tiered pricing that would allow a cable provider to recoup the costs of higher bandwidth usage; but within the capacity constraints of any given tier customers should be free to access content and use applications and devices. Pricing flexibility can create a market-based mechanism that would balance the interests of both consumers and providers with minimal regulation or interference with marketplace functions.

C. Some Cable ISPs Are Imposing Troubling Restrictions on their Subscribers' Use of Devices and Access to Applications and Sites.

Although the market for cable modem service appears to be functioning well without regulatory intervention, HTBC is aware of specific, troubling restrictions imposed by certain cable ISPs. Because the Commission has requested comment on such activity,¹⁶ we list specific examples below. In brief, there are limitations on use of the network (e.g., VPN or enterprise services); additional charges for access to certain content, such as gaming sites; and

¹⁶ NPRM at ¶ 87.

restrictions on the types of equipment subscribers can attach to their ISP connection, without regard to the effect of the connection (or lack thereof) on the ISP's facilities.

Based on our review of subscriber agreements available on cable ISPs' websites, we have identified the following examples:¹⁷

1. Restrictions on type of data subscribers can send or receive.
 - **"You agree not to use the Service** for operation as an Internet service provider, or **for any other business enterprise, including, without limitation, virtual private network usage**, IP address translation, or similar facilities intended to provide additional access." (Provider Acceptable Use Policy, Section 5.)
 - **"Customer agrees not to use the Service for** operation as an ISP, a server site for FTP, Telnet, **Rlogin, e-mail hosting, "web hosting" or other similar applications, for any business enterprise, or as an end-point on a non-[Provider] local area network** or wide area network, **or in conjunction with a VPN** or a VPN tunneling protocol." (Provider Subscriber Agreement, Subsection 6(viii).)
 - **"Prohibited uses include**, but are not limited to, **using the [Provider] Equipment** (as defined in the Subscriber Agreement) or the Service **to run programs or servers from the Premises** which provide network content or any other services to others. **Examples of prohibited programs include**, but are not limited to, mail, ftp, http, **game, newsgroup, proxy, IRC servers** and multi-user interactive forums." (Provider Frequently Asked Questions)
2. Additional charges for sending or receiving certain content.
 - **"You may incur charges, including without limitation, charges relating to** the purchase of "premium " services, such as additional web space, business class services, or

¹⁷ HTBC will provide the Commission with additional information regarding its findings in this regard upon request.

access to certain gaming sites in addition to those billed by [Provider].” (Provider Subscriber Agreement, Section 2.)

- **Provider requires users who desire to use broadband service for virtual private network uses to obtain a separate service**, which costs more.
3. Restrictions on attachment of equipment.
- “[**Provider**] **does not allow servers to be connected to the cable modem.** This means that **no computer in a personal network can be used** as a server.” (Provider Frequently Asked Questions)
4. Reservation of right to impose discriminatory restrictions in future.
- “Management of Network. [**Provider**] **reserves the right to manage its network** for the greatest benefit of the greatest number of subscribers **including**, without limitation, the following: rate limiting, rejection or removal of spam or otherwise unsolicited bulk email, **traffic prioritization, and protocol filtering.** You expressly accept that such action on the part of [Provider] may affect the performance of the Service.” (Provider Subscriber Agreement, Section 15.)
 - “Bandwidth, Data Storage and Other Limitations. **You must comply with** the current bandwidth, data storage and **other limitations on the Service. You must ensure that your activities do not** improperly restrict, inhibit, or degrade any other user's use of the Service, nor **represent (in the sole judgment of [Provider]) an unusually large burden on the network** itself. In addition, you must ensure that their activity does not improperly restrict, inhibit, disrupt, degrade or impede [Provider]'s ability to deliver the Service and monitor the Service, backbone, network nodes, and/or other network services. [**Provider**] **may terminate, suspend, or require you to upgrade the Service and pay additional fees if [Provider], in its sole discretion, determines that that you are using excessive bandwidth.**” (Provider Acceptable Use Policy, Section 15.)
 - “Facilities Allocation: [**Provider**] **reserves the right to determine, in its discretion, and on an ongoing basis,**

the nature and extent of its facilities allocated to support the Service, including, but not limited to, the amount of bandwidth to be utilized in conjunction with the Service.” (Provider Cable Subscriber Agreement, Section 9(e).)

- D. The Commission Should Monitor Provider Conduct and Take Action, If Appropriate.

It is too early to tell whether these occurrences are isolated or whether they are indicative of broader, more systemic problems; however, HTBC is concerned that such provider conduct could limit innovation and consumers’ freedom, which have been the engines of the information age. Because of the important roles cable modem (and DSL) service providers play in delivering consumer broadband services, the Commission should vigilantly monitor these providers and services, and ensure that consumer interests are protected.

CONCLUSION

HTBC supports the Commission’s determination that cable modem service is an information service for which a deregulatory approach is appropriate. Nevertheless, the Commission should monitor the cable broadband market as the service develops to ensure that consumer choice is not being restricted. So long as a customer’s use of broadband Internet access service is consistent with any bandwidth capacity limitations which are disclosed, and for which he has paid, and provided the customer does no harm to the cable ISP’s

facilities, he should be free to use his cable broadband service with any applications or equipment, or to access any Internet sites, the customer desires.

Respectfully submitted,

HIGH TECH BROADBAND COALITION

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I, Michaeleen I. Williams, hereby certify that true and correct copies of the preceding Comments of the Information Technology Industry Council were served this June 17, 2002 via the FCC's Electronic Comment Filing System and via First Class mail upon the following parties:

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