

**Before the  
Federal Communications Commission  
Washington, DC 20054**

In the Matter of	)	
	)	
Appropriate Framework for	)	
Broadband Access to the Internet	)	CC Docket No. 02-33
Over Wireline Facilities	)	
	)	
Universal Service Obligations of	)	
Broadband Providers	)	
	)	
Computer III Further Remand	)	CC Docket Nos. 95-20, 98-10
Proceedings: Bell Operating Company	)	
Provision of Enhanced Services; 1998	)	
Biennial Regulatory Review – Review	)	
Of Computer III and ONA Safeguards	)	
and Requirements	)	
	)	

**REPLY COMMENTS OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS**

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## **Executive Summary**

The National Association of Broadcasters (“NAB”) submits these reply comments in the FCC’s proceeding seeking comment on the appropriate legal and policy framework under the Communications Act of 1934 (the “Act”) for broadband access to the Internet provided over the traditional telephone network. NAB emphasizes that the Commission’s failure to adopt access and nondiscrimination requirements will inevitably produce a broadband marketplace characterized by minimal competition, a lack of innovation, and severely restricted consumer choice.

Regardless of the regulatory label the Commission places on the provision of broadband Internet access over wireline facilities, NAB urges the Commission not to lose sight of the important underlying policy goals. Whether provision of broadband Internet access over wireline facilities is ultimately categorized as a “telecommunications service” under Title II of the Act, or an “information service” under Title I, the Commission must insure that consumers have meaningful choices among competing service and content providers in the broadband environment. Because no commenter in this proceeding presented a convincing rationale for departing from the regulatory principles of access and nondiscrimination that have kept the narrowband Internet marketplace competitive, accessible and devoid of entry barriers, the Commission should adopt similar policies in the broadband environment to insure that consumers have nondiscriminatory access to the broadband service and content providers of their choice, rather than just the broadband services favored by the owners of bottleneck distribution platforms.

History has shown that network owners inevitably control access to consumers so as to minimize competition, and commenters in this proceeding stressed that the owners

of bottleneck transmission facilities (including incumbent local exchange carriers or “ILECs” and cable operators) have both the ability and the incentive to discriminate against unaffiliated Internet service providers that depend upon the network owners’ facilities for access to consumers. As a representative of content providers, NAB additionally agrees with those commenters who pointed out that the owners of gatekeeper facilities also have every incentive to engage in content-based discrimination favoring affiliated content providers and disfavoring unaffiliated content and its providers. The removal of safeguards preventing the owners of bottleneck facilities from blocking or encumbering the access of unaffiliated service and content providers to consumers clearly would not promote competition, innovation or consumer choice, but would produce an uncompetitive broadband marketplace dominated by one, or at best two, gatekeeper platform owners. The Commission and the courts have previously found duopolies to be uncompetitive and inefficient, and NAB agrees with those commenters who explained that a broadband ILEC/cable duopoly would not provide vigorous price competition or service innovations.

For all these reasons, NAB urges the Commission to prevent the owners of bottleneck facilities – whether ILECs or cable operators – from exercising their control of the essential pathway into consumers’ homes so as to silence the voice of competing speakers in the broadband marketplace. The Commission should therefore retain the access and nondiscrimination policies that have been consistently applied in the narrowband Internet marketplace, and continue to apply them to high speed Internet access services provided over wireline facilities.

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TO: The Commission

**REPLY COMMENTS OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (“NAB”)<sup>1</sup> submits this reply to certain comments on the Commission’s *Notice of Proposed Rulemaking* in this proceeding.<sup>2</sup> In the *Notice*, the Commission sought comment on the appropriate legal and policy framework under the Communications Act of 1934 (the “Act”) for broadband access to the Internet provided over the traditional telephone network. Comments were submitted in response to this *Notice* by numerous local and long distance telephone companies, Internet service providers (“ISPs”), cable and satellite operators, trade associations, and state regulatory bodies. The comments

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<sup>1</sup> NAB is a nonprofit, incorporated association of television and radio stations and broadcast networks which serves and represents the American broadcast industry.

<sup>2</sup> *Notice of Proposed Rulemaking* in CC Docket No. 02-33 and CC Docket Nos. 95-20, 98-10, FCC 02-42 (rel. Feb. 15, 2002) (“*Notice*”).

expressed a wide range of opinions on the Commission's proposals, but a considerable majority strongly disagreed with the Commission's tentative conclusion to classify the provision of Internet access over wireline facilities as an "information service" under Title I of the Act, rather than as a "telecommunications service" under Title II. These commenters argued that the access and nondiscrimination requirements consistently applied to incumbent local exchange carriers ("ILECs"), due to their control of transmission facilities regulated under Title II, remain necessary to insure competition among ISPs and to prevent the leveraging of control over bottleneck transmission facilities onto downstream markets.

In this reply, NAB agrees with the many commenters who concluded that the owners of bottleneck transmission facilities have both the ability and the incentive to discriminate against unaffiliated ISPs that depend upon the network owners' facilities for access to consumers. As a representative of content providers, NAB additionally agrees with those commenters who pointed out that the owners of gatekeeper facilities also have every incentive to engage in content-based discrimination favoring affiliated content providers and disfavoring unaffiliated content and its providers. Regardless of the regulatory label the Commission ultimately places on the provision of broadband Internet access over wireline facilities, NAB urges the Commission not to lose sight of the underlying policy goal – how to insure that consumers have meaningful choices among competing service and content providers in the broadband environment. The removal of safeguards preventing the owners of bottleneck facilities from blocking or degrading the access of unaffiliated service and content providers to consumers clearly would not promote competition, innovation or consumer choice, but would inevitably produce an uncompetitive broadband marketplace dominated by one, or at best two, gatekeeper platform owners.

**I. Whatever The Regulatory Classification Ultimately Adopted, The Commission Must Ensure That Consumers Have Unencumbered Choices Among Competing Broadband Service And Content Providers.**

Dozens of commenters have already submitted detailed analyses of the applicable regulatory framework for wireline broadband Internet access services. NAB will refrain from adding to this extensive debate about the regulatory label that should attach to these services. Instead, NAB urges the Commission to focus primarily on the underlying policy goal in this proceeding – how to ensure that consumers have meaningful choices among competing service and content providers in the broadband environment. Although the classification ultimately adopted will undoubtedly have real regulatory consequences, NAB also notes that, regardless of the regulatory label placed on wireline broadband Internet access services, the Commission has the flexibility to adopt the safeguards necessary to guarantee that consumers have access to the offerings of competing service and content providers.<sup>3</sup> As the representative of content providers, NAB particularly stresses the importance of ensuring that the owners of bottleneck transmission facilities do not discriminate against unaffiliated service and content providers, especially by encumbering their access to consumers.

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<sup>3</sup> See *Notice* at ¶¶ 30 *et seq.* (if wireless broadband Internet access services are classified as information services under Title I, FCC noted that it must “then determine what regulations, if any, should apply to the provisions of these services,” and specifically inquired about “access safeguards”). See also Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*, 7 *CommLaw Conspectus* 37, 41 (1999) (explaining that many forms of Internet-enabled communications do not fit neatly into existing regulatory categories, and urging regulators to “examine the underlying purposes and policy goals behind existing regulatory categories” to inform their “regulatory efforts”). And even if the Commission ultimately determined to classify wireless broadband Internet access services as telecommunications services under Title II, this decision would not definitively settle all regulatory questions, as the Commission could forebear from imposing the full range of common carrier-type regulations on these services if a lighter regulatory approach were warranted. See 47 U.S.C. § 160 (permitting FCC to forbear from applying any regulation or provision of the Communications Act to a telecommunications carrier or service or a class of carriers or services). Given the flexibility inherent within the existing regulatory categories, NAB submits that the substance of the regulations ultimately applied to broadband Internet access services matters more than the regulatory label attached to those services.

## II. The Development Of Narrowband Internet Demonstrates The Importance Of Nondiscriminatory Access.

Virtually all observers agree that narrowband Internet has flourished because of its “openness.”<sup>4</sup> Specifically, the narrowband Internet has an “end-to-end” architecture that maintains a simple, nondiscriminatory network with intelligence placed in the networks’ applications, or “ends” of the system. One primary benefit resulting from this architecture is innovation. Because a neutral network cannot discriminate against new applications or content, the burden placed on innovation is kept small, and, consequently, innovation booms.<sup>5</sup> Moreover, the government has played a significant role in insuring the openness of narrowband Internet by breaking up the AT&T telephone monopoly and imposing nondiscrimination and access requirements on the telephone networks. Because of this governmental policy intervention, consumers of telephone service have always had the right to select the ISP of their choice, rather than the ISP favored by any telephone company, and considerable competition developed among ISPs.<sup>6</sup>

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<sup>4</sup> See, e.g., *Trying to Connect You*, *The Economist* at 69 (June 24, 2000) (article observed that the “success of the Internet has shown the value of open standards and a neutral platform on which everybody can compete on equal terms. Had the Internet been dominated by any one company, it would not be where it is today.”); *No Chokeholds Allowed*, *Los Angeles Times*, Metro Section (Sept. 22, 2000) (editorial commented that “openness” has been the “key” to the Internet’s success and that it “should stay that way”); Jerome H. Saltzer, “*Open Access*” *Is Just the Tip of the Iceberg* (Oct. 22, 1999) at <http://mit.edu/Saltzer/www/publications/openaccess.html> (Internet is now “being used in ways completely undreamed of at the time of its design” because of its open design principle).

<sup>5</sup> A number of articles discuss the importance for innovation of the Internet’s open, end-to-end architecture. See, e.g., Saltzer, *Open Access*; Mark Lemley and Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 *UCLA L. Rev.* 925, 930-33 (2001); Jim Chen, *The Authority to Regulate Broadband Internet Access over Cable*, 16 *Berkeley Tech. L.J.* 677, 714 (2001); L. Lessig, *Innovation, Regulation and the Internet*, *The American Prospect Online* (March 27-April 10, 2000).

<sup>6</sup> Many commentators and scholars agree that the wave of innovation and competition produced by the Internet resulted, not from “unregulation” of the Internet, but from regulatory policies of the FCC and Congress that kept access to the telephone network open and neutral. See, e.g.,

For the broadband market to flourish as narrowband Internet has done, policy makers must similarly act to insure that consumers have nondiscriminatory access to the broadband service and content providers of their choice, rather than just the broadband services favored by the entity that controls access to consumers through a bottleneck distribution platform. At the very least, the burden should be placed on those who would change past governmental policies favoring openness and nondiscrimination to show that these successful policies can be abandoned without endangering competition and innovation in the broadband environment.<sup>7</sup> Certainly no commenter in this proceeding has presented a convincing rationale for departing from the regulatory principles that have kept narrowband Internet services competitive, accessible and devoid of entry barriers.<sup>8</sup> In sum, the Commission must recognize that refraining from acting to insure nondiscrimination in the provision of broadband services would not only constitute a “fundamental policy reversal” (Bar, *et al.*, *Defending the Internet Revolution* at 3),

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Chen, *The Authority to Regulate Broadband Internet Access* at 714-15; Lemley and Lessig, *The End of End-to-End* at 934-36; Rosemary Harold, *Cable Open Access: Exorcising the Ghosts of “Legacy” Regulation*, 28 N. Ky. L. Rev. 721, 722, 753 (2001); T.R. Roycroft, Ph.D. *Tangled Web: The Internet and Broadband Open Access Policy* at 1-5, The Public Policy Institute AARP (Jan. 2001); F. Bar, *et al.*, *Defending the Internet Revolution in the Broadband Era: When Doing Nothing Is Doing Harm* at 1, 3, 7-8, E-conomy Working Paper 12 (Aug. 1999); F. Bar, *et al.*, *Access and Innovation Policy for the Third-Generation Internet* at 490, Telecommunications Policy 24 (2000); Lessig, *Innovation, Regulation and the Internet* at 5.

<sup>7</sup> See, e.g., Lessig, *Innovation, Regulation and the Internet* at 6 (the principles of openness and neutrality distinguishing the narrowband Internet from earlier, less successful networks “should guide us in choosing rules to govern networks in the future”); Roycroft, *Tangled Web* at 28-29 (FCC needs to extend principles of open access applicable to narrowband Internet to broadband so as to encourage competition and innovation); Bar, *et al.*, *Access and Innovation Policy* at 497 (the “successful policy trend of the past 30 years has been to force competition and assure open access to the incumbent infrastructure,” and that successful policy should not now be reversed); Bar, *et al.*, *Defending the Internet Revolution* at 30 (“[r]eversing the set of policy innovations that have led to broad American communications leadership would be unwise, at best”).

<sup>8</sup> Indeed, commenters such as AT&T noted that vigorous competition, especially between ISPs, exists in the narrowband marketplace “only because” of the FCC’s access rules “and the competitive opportunities that they create.” Comments of AT&T Corp. at 49 (emphasis in original).

but could also “fatally undermine” the openness that spurred the competition and innovation in narrowband Internet services.<sup>9</sup>

### **III. In The Absence Of Nondiscrimination And Access Requirements, Network Owners Will Inevitably Control Access To Consumers To Minimize Competition.**

The unwillingness of network owners historically to open their networks to other service and content providers (especially unaffiliated ones) is well documented.<sup>10</sup> Network owners in the past have even insisted that they alone controlled the “right to innovation” on their networks.<sup>11</sup> If the FCC fails to establish the principles of openness and nondiscrimination in the broadband environment, then the entities controlling the broadband distribution platforms will behave “just as every network owner in history has behaved” – they will “control access and use architecture to minimize competition.” Lessig, *Innovation, Regulation, and the Internet* at 5. In

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<sup>9</sup> *Upgrading the Internet*, *The Economist Technology Quarterly* at 36 (March 24, 2001) (“The demise of the end-to-end principles that have served the Internet so well would be a tragedy . . . . Were that to happen, the last decade of the 20<sup>th</sup> century might come to be seen as an all-too-brief golden age of openness and innovation”).

<sup>10</sup> See, e.g., Bar, *et al.*, *Access and Innovation Policy* at 495 (in surveying government policy toward telephone networks since 1960’s, study observes that “owners of communications infrastructure strongly resisted opening their network to other service providers”); Bar, *et al.*, *Defending the Internet Revolution* at 7-9 (in discussing how government policy forced owners of the “basic phone network” to open their networks to new service and content providers, thereby leading to the success of the Internet, this study describes how AT&T for decades “resolutely” resisted “regulatory requirements to allow interconnection with its network”); L. Lessig, *Will AOL Own Everything?* *Time* at 106 (June 19, 2000) (“we have never seen the owners of a large-scale network voluntarily choose to keep it open” and “we should not expect” owners of broadband networks to act any differently); *The Slow Progress of Fast Wires*, *The Economist* at 57-59 (Feb. 17, 2001) (article describing how British Telecom has refused to cooperate in the unbundling of local loops, thereby delaying the arrival of DSL service in Britain).

<sup>11</sup> L. Lessig, *The Internet Under Siege*, *Foreign Policy* (Nov./Dec. 2001) (explaining that permission to innovate on the telephone platform was historically vigorously controlled worldwide by the telephone monopolies, and that AT&T even persuaded the FCC in 1956 to block the use of a plastic cup on the telephone receiver, designed to block noise from the telephone microphone, “on the theory that AT&T alone had the right to innovation on the telephone network”).

light of the historical behavior of network owners generally and the record in this proceeding specifically, there is no reason to believe that network owners in the broadband environment will suddenly “see the light” and allow consumers to access, on a nondiscriminatory basis, the services and content offered by unaffiliated providers or other disfavored entities.

Indeed, numerous commenters in this proceeding recognized the capability and incentive of network owners to favor affiliated service and content providers and to disfavor unaffiliated ones. Because network owners (including ILECs) control the facilities that ISPs and other service and content providers need to reach consumers, these owners have power over both who may offer services that are transmitted over those facilities and the content that is transmitted. In this manner, bottleneck control over physical transmission facilities can easily be leveraged into control of downstream markets, such as the provision of broadband Internet access or other services.<sup>12</sup> Commenters also provided specific examples of ILECs favoring their affiliated ISPs and impeding competition from independent ISPs.<sup>13</sup> Although the instant proceeding does not directly concern high speed Internet access provided over cable modems, NAB stresses that the courts, the Commission, Congress and industry observers have all recognized that the owners of cable platforms have similarly acted to control access to consumers, discriminate against or

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<sup>12</sup> See, e.g., Comments of AT&T at 40-43; WorldCom, Inc., *et al.* at 5, 24-25, 30; Cbeyond Communications, *et al.* at 4-5, 30-31; Big Planet, Inc. at 4-5, 36-37; California Internet Service Providers Ass’n at 4, 18-19; Attachment to Comments of WorldCom, Decl. of Daniel Kelly at 26-27; Attachment to Comments of AT&T, Decl. of Robert Willig at 8.

<sup>13</sup> See, e.g., Comments of California Internet Service Providers Ass’n at 72-73; DirecTV Broadband, Inc. at 9-12; Arizona Consumer Council, *et al.* at 89-101; Ohio Internet Service Providers Ass’n, *et al.* at 63-65; American ISP Association at 4-6. This discrimination against independent ISPs is likely to be particularly harmful to innovation in the emerging broadband marketplace, given the important innovative role that competing ISPs have played in the development of the narrowband Internet. See, e.g., Lemley and Lessig, *The End of End-to-End* at 943-44; Earl Comstock and John Butler, *Access Denied*, 8 CommLaw Conspectus 5, 21 (2000); Attachment to Comments of WorldCom, Decl. of Daniel Kelly at 29; Comments of Ohio Internet Service Providers Ass’n at 49-50; AOL/Time Warner, Inc. at 23; WorldCom, *et al.* at 25-29.

exclude entirely unaffiliated service and content providers, and inhibit competition in both the analog and digital environments.<sup>14</sup>

Of particular concern to content providers, commenters in this proceeding additionally pointed out that ILECs with affiliated ISPs have every incentive to engage in content-based discrimination of Internet content.<sup>15</sup> For example, these ILEC-affiliated ISPs can channel consumers to affiliated services or sites in a number of ways, such as by speeding access to favored sites or by giving affiliated content preferred caching treatment. *See, e.g.*, Comments of

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<sup>14</sup> In the 1992 Cable Act, Congress expressly found that vertically integrated “cable operators have the incentive and ability to favor their affiliated programmers,” thereby making “it more difficult for noncable-affiliated programmers to secure carriage on cable systems.” Section 2(a)(5) of Cable Act, 47 U.S.C. § 521 nt. The courts have also recognized that entities owning both distribution systems and content have a particularly strong incentive to disfavor unaffiliated content providers seeking distribution to consumers. *See, e.g., Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 198-202 (1997); *Time Warner Entertainment Co., L.P. v. U.S.*, 211 F.3d 1313, 1322 (D.C. Cir. 2000). Certainly cable operators have on a number of occasions illustrated their ability and incentive to discriminate against unaffiliated service and content providers trying to obtain distribution to consumers, such as by removing the signals of broadcast television stations from their systems or by moving unaffiliated programs to less advantageous channel positions on their systems. In its order on the merger of Time Warner and America Online, the Commission itself explicitly recognized the harms to consumers likely to result from the ability and incentive of the merged entity to discriminate against unaffiliated ISPs on its cable network and against unaffiliated video programming networks in the provision of interactive television services. *See Memorandum Opinion and Order* in CS Docket No. 00-30, FCC 01-12 at ¶¶ 86, 217 (rel. Jan. 22, 2001). Cable operators have also been unwilling to allow unaffiliated ISPs access to their broadband systems and reluctant to permit their customers to choose among competing ISPs. *See Eighth Annual Report* in CS Docket No. 01-129, FCC 01-389 at ¶ 46 and notes 136, 137 (rel. Jan. 14, 2002). A number of cable system operators have additionally taken action to restrict the amount of programming that cable programming networks can stream directly to consumers over the Internet, thereby protecting their ability to charge premium rates for streaming video to television. *See* B. Orwall, D. Solomon and S. Beatty, *The Bigger Picture: Why the Possible Sale of AT&T Broadband Spooks “Content” Firms*, Wall St. J. at A-1 (Aug. 27, 2001); S. Schiesel, *Charter Removes ESPNews from Some Cable Systems in Dispute*, The New York Times, Section C, Page 2 (July 2, 2001); L. Moss, *Operators Back Charter in Web Dispute*, Cable World at 1 (June 4, 2001); R.T. Umstead and S. Donohue, *Making Tense Times Worse*, Multichannel News at 1 (June 4, 2001).

<sup>15</sup> *See, e.g.*, Comments of WorldCom, *et al.* at 30-31; Arizona Consumer Council, *et al.* at 71-73; Vermont Public Service Board at 3-14; Attachment to Comments of WorldCom, Decl. of Daniel Kelly at 29-30.

WorldCom, *et al.* at 30-31; Attachment to Comments of WorldCom, Decl. of Daniel Kelly at 29-30. Indeed, broadband communications systems have been purposefully designed to permit network owners to use technology to discriminate against unaffiliated or other disfavored content.<sup>16</sup> Equipment designers even market their system products by touting their ability to “circumscrib[e] access to a defined range of approved Web pages” and “store content” so as to “allow[] for greater control over” it.<sup>17</sup> It is no wonder then that so many commenters in this proceeding, especially independent ISPs, expressed great concern about ILECs’ control over “bottleneck” facilities and the power this gave ILECs to impede access to consumers and thwart competition.<sup>18</sup> Content providers that do not have their own distribution facilities are similarly gravely concerned about the ability of platform owners to control whether independent content can reach consumers.<sup>19</sup>

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<sup>16</sup> For example, Cisco Systems has routers that give Internet and cable companies “the ability to change the quality of the access” depending upon the type of content being accessed. An “ISP could provide faster service to one Web site that it had a content affiliation with than to a very similar Web site.” T. Hearn, *Senators Wonder About Cisco Web Gear*, Multichannel News at 38 (May 15, 2000).

<sup>17</sup> ICTV Inc., White Paper, *The ICTV Digital System* at 2, 9 (2001) (describing the company’s digital interactive television delivery platform and how it would allow cable operators to create “highly controlled” “walled gardens” and “walled jungles” of television content, as well as “fenced prairies,” which would restrict consumer access to a limited range of approved “content partners on the Web”).

<sup>18</sup> *See, e.g.*, Comments of General Communication, Inc. at 2-9; KMC Telecom and Nuvox Communications at 29-31; Sprint Corp. at 3-4; Cbeyond Communications, *et al.* at 4-5; California Internet Service Providers Ass’n at 72; Big Planet, Inc. at 36-38; US LEC Corp. at 13-14; Ohio Internet Service Providers Ass’n at 64; State of California and California Public Utilities Commission at 1-2; AT&T at 40-41; WorldCom, *et al.* at 3-5; Time Warner Telecom at 18.

<sup>19</sup> *See, e.g.*, R. Grover and T. Lowry, *For Media Giants, How Big Is Big Enough?*, Business Week at 38 (July 30, 2001); Orwall, Solomon and Beatty, *The Bigger Picture* at A1; D. Carney, *The FTC Should Open The Broadband Gates*, Business Week at 46-48 (Oct. 23, 2000) (all citing concerns of content providers that platform owners will restrict their access to consumers). *See also Upgrading the Internet* at 33-34 (because many broadband providers offer content to their

However the Commission chooses to classify the provision of wireline broadband Internet access, one point is clear. Given the clear ability and incentive of networks owners who control the essential pathway into consumers' homes to exclude independent service and content providers, the Commission's failure to adopt access and nondiscrimination requirements will inevitably produce a broadband marketplace characterized by minimal competition, a lack of innovation, and severely restricted consumer choice.<sup>20</sup> If broadband services offered over wireline facilities are to develop to their fullest potential, the Commission must in particular restrain platform owners from leveraging their control over the bottleneck facilities needed to reach consumers into control over downstream markets, including the provision of broadband Internet access. As has been noted specifically, one danger presented by the 1996 Telecommunications Act "is that existing monopolies, such as the BOCs or cable operators, will leverage their current power either to *gain an unfair advantage in a competitive market*, or to retain their advantage in the local arena." M.I. Myerson, *Ideas of the Marketplace: A Guide to The 1996 Telecommunications Act*, 49 Fed. Comm. L.J. 251, 287 (1997) (emphasis added). This danger "will have to be averted in order for the [1996] Act to be successful," *id.*, and the Commission should help assure the success of the 1996 Act by preventing the leveraging of ILECs' control over bottleneck facilities into the market for broadband Internet access and other broadband services.<sup>21</sup>

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subscribers, broadband "providers have no incentive to supply rapid access to competing providers' content," and because broadband providers generally "own the physical connections into their subscribers' homes," they are "in a position to place limits on the kinds of services that can be provided over their connections").

<sup>20</sup> See *Time Warner Entertainment*, 211 F.3d at 1321 (in cable context, court found that facilities' owners have a true "bottleneck monopoly" that constitutes "a physical and economic barrier" to competition).

<sup>21</sup> See Editorial, *Things We Don't Like*, Business Week at 114 (March 18, 2002) (FCC's proposals for wireline broadband Internet access services will not "boost[] competition," but will

#### **IV. A Monopolized Or Duopolized Broadband Market Would Stifle Competition and Innovation, Discourage The Development Of Diverse Broadband Content, And Constrict Consumer Choice.**

If the ILECs and cable companies that own bottleneck transmission facilities are permitted to behave “just as every network owner in history has behaved,” Lessig, *Innovation, Regulation, and the Internet* at 5, then the result would be an uncompetitive broadband marketplace dominated by a single, or at best two, gatekeepers controlling access to consumers in nearly all areas.<sup>22</sup> Commenters emphasized that virtually no consumers are served by more than two broadband providers, and a large percentage of consumers today have only one provider of broadband service available to them.<sup>23</sup> Cable modem broadband systems do not, moreover, generally serve businesses, so the ILECs alone dominate the provision of broadband services to businesses. *See* Comments of WorldCom, *et al.* at 36-37; Sprint at 9; Attachment to

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only give “more monopoly power in new markets” to ILECs); Carney, *The FTC Should Open the Broadband Gates* at 46 (FTC or FCC must “develop an industrywide policy for open access” so that broadband Internet “remain[s] open to competition – and free of stifling monopolies”); A. Klein, C. Stern and F. Ahrens, *Comcast-AT&T Deal Spotlights Bigger Drama*, Washtech.com at A01 (Dec. 21, 2001) (expressing concern that government is increasingly allowing network owners to exercise control over the kind of innovation and content carried on their “pipes”).

<sup>22</sup> In any particular geographic area, the local telephone company and the local cable franchisee generally control “last mile” access into consumers’ homes. The provision of high speed Internet access is consequently dominated by the DSL service offered by ILECs and the modem service offered by cable companies. Satellite and wireless technologies offering high speed Internet services control a very small percentage of this market and “are not expected to increase market share over the next several years.” *Eighth Annual Report* in CS Docket No. 01-129, FCC 01-389 at ¶ 44 (rel. Jan. 14, 2002). *See also* Comments of WorldCom, *et al.* at 34-36; Attachment to Comments of AT&T, Decl. of Robert Willig at 16-17 (explaining technical, cost and other inadequacies of wireless and satellite technologies for delivering broadband services).

<sup>23</sup> *See, e.g.*, Comments of State of California and California Public Utilities Commission at 1 (in California, 45% of residents living in locales with access to broadband service have DSL service as sole broadband option); Arizona Consumer Council, *et al.* at 59 (according to J.P. Morgan analysis, almost 20% of country has no broadband supplier, close to 50% of country “is subject to a facility monopoly,” and the remaining one-third has a “facility duopoly”); Attachment to Comments of AT&T, Decl. of Robert Willig at 18 (about 40% of all U.S. zip codes have only a single high-speed service provider or no high-speed service provider at all).

Comments of AT&T, Decl. of Robert Willig at 13-15. In the absence of nondiscrimination and access requirements, the ILEC and cable facilities' owners would be free to discriminate against – if not exclude from their networks entirely – independent ISPs, as well as other unaffiliated service and content providers. *See supra* discussion at 7-8. Commenters in this proceeding and industry observers agree that the resulting broadband marketplace would be an uncompetitive “limited contest among sector monopolies.” Comments of Covad Communications Co. at i, iii (arguing that proposals in the *Notice* “abandon the effort to promote competition in local telecommunications markets, and instead promote a new monopoly” or “a duopoly”).<sup>24</sup>

Even assuming the “best case” scenario of a duopoly in the provision of broadband services, the result will be an uncompetitive broadband marketplace that discourages innovation and restricts consumer choice. As a general matter, NAB observes that the Commission and the courts have previously found duopolies in a variety of industries to be uncompetitive and inefficient. For example, the Commission just recently refused to grant the assignment of a radio station in Charlottesville, Virginia because the “proposed transaction would eliminate the major third competitor and create an effective duopoly” in the Charlottesville radio market. *Hearing Designation Order*, File No. BALH-20000403ABI, MM Docket No. 02-38, FCC 02-53 at ¶ 27 (rel. March 19, 2002). Because the Commission found duopolies to be “conducive to coordinated behavior that facilitates market division and inefficient price discrimination,” it declined to approve the proposed transaction. *Id.* Given the Commission’s view that the proposed sale of a single radio station in a market could produce “potential adverse competitive effects,” *id.*, NAB cannot see how the Commission could accept a broadband marketplace

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<sup>24</sup> *Accord* Comments of Sprint at 9 and WorldCom, *et al.* at 37 (FCC’s proposals in wireline proceeding would lead to creation of uncompetitive ILEC/cable duopoly in provision of broadband services). *See also* Steve Rosenbush, *Broadband Policy: Did Somebody Say Oligopoly?*, *Business Week* at 40 (March 18, 2002); Comstock and Butler, *Access Denied* at 10 (FCC’s present policies will result in ILEC/cable oligopoly in broadband services).

dominated by an ILEC/cable duopoly as sufficiently competitive or efficient. The antitrust authorities and the courts have agreed that duopolies (and even oligopolies) create serious competition problems,<sup>25</sup> and the record in this proceeding certainly reflects the FCC's and the courts' concerns that "duopolized" markets are inherently uncompetitive.<sup>26</sup>

More specifically, independent service and content providers lacking their own distribution facilities would, in a duopolized broadband market, be completely dependent on two (at best) bottleneck platform owners to reach consumers. And if the ILEC and cable gatekeepers are permitted to discriminate against – or even to exclude entirely – unaffiliated ISPs and other service and content providers, then the broadband marketplace would consequently suffer from a lack of innovation and consumer choice. Only if broadband service and content providers are assured of a "clear and uninterrupted path to the ultimate consumer free of any potential disruption or discrimination" by ILEC and cable gatekeepers would these providers have the optimal incentives to invest in and develop new and innovative broadband services.<sup>27</sup>

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<sup>25</sup> See, e.g., *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 717-18 (D.C. Cir. 2001) (granting FTC's request to enjoin "a merger to duopoly" in baby food market because FTC established *prima facie* case that merger would be anticompetitive); *Hospital Corporation of America v. FTC*, 807 F.2d 1381, 1387 (7<sup>th</sup> Cir. 1986) (upholding FTC's decision that hospital chain's purchase of two hospital corporations violated antitrust laws because the acquisition reduced the number of competitors in the local hospital market to four, and this "reduction in the number of competitors" would affect the "competitive vitality" of the market by making it "easier" for the remaining competitors to "coordinate their pricing").

<sup>26</sup> See, e.g., Attachment to Comments of WorldCom, Decl. of Daniel Kelly at 24 (citing evidence from cellular telephone market before entry by PCS carriers to show that "a duopoly does not provide competitive performance"); Comments of WorldCom, Attachment A, R. Chandler, A.D. Kelly and D. Nugent, *The Technology and Economics of Cross-Platform Competition in Local Telecommunications Markets* at 82-84 (April 4, 2002) (explaining why "a facilities duopoly" is inadequate for "ensuring consumer choice" and why the "duopoly performance by the ILECs and cable companies can be expected to be poor"); Comments of Sprint at 9 ("vigorous price competition and service innovations are simply not characteristics" of duopolies).

<sup>27</sup> *The Future of the Interactive Television Services Marketplace: What Can the Consumer Expect?*, Hearing Before the Subcomm. on Telecommunications, Trade and Consumer

Conversely, if the ILEC/cable gatekeepers are permitted to control the distribution platforms so as to encumber or disrupt the “path to the ultimate consumer,” then service and content providers would be less inclined to invest in new and innovative services. Innovators are simply less likely to spend time and money developing products and services for a market where one or two actors have “the power to control whether that innovation will ever be deployed.” Lemley and Lessig, *The End of End-to-End* at 945. In this way, consumer choice will also be constricted, as a less diverse range of services, applications and content will ultimately be developed for the broadband marketplace.<sup>28</sup>

## **V. Conclusion.**

For all the reasons set forth above, NAB urges the Commission to prevent the owners of bottleneck facilities – whether ILECs or cable operators – from exercising their control of the “essential pathway” into consumers’ homes to “silence the voice of competing speakers” in the broadband marketplace. *Turner Broadcasting System v. U.S.*, 512 U.S. 622, 656 (1994). Regardless of the regulatory label the Commission ultimately attaches to high speed Internet access services provided over wireline facilities, the Commission must ensure that (1) unaffiliated service and content providers are able to reach consumers without unreasonable

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Protection of the House Commerce Committee (Sept. 27, 2000) (statement of Rep. Rick Boucher). Representative Boucher, a recognized expert on Internet policy matters, also stated in this hearing that the “time has come” to “assure content providers access” by making “open access the uniform national policy, and to make it applicable to all Internet transport platforms.”

<sup>28</sup> And even assuming that unaffiliated entities would still undertake the development of new and innovative broadband services and content, these products might not be allowed to reach consumers in an unencumbered manner, given the ability and incentive of gatekeeper platform owners to block, delay or degrade unaffiliated services and content. *See supra* 8-9. For all these reasons, the existence “of competition in broadband services coming from cable” does not imply that the FCC’s access and nondiscrimination requirements applicable to ILECs are no longer necessary. *U.S. Telecom Association v. FCC*, Nos. 00-1012, 00-1015 (May 24, 2002) (remanding FCC decision requiring “unbundling of the high frequency spectrum of copper loop so as to enable CLECs to provide DSL services,” due to failure to consider “competition in

disruptions and encumbrances; and (2) consumers have meaningful choices among competing services and content in the broadband environment. Allowing the gatekeeper ILEC and cable platform owners to “duopolize” the broadband marketplace by controlling access to consumers will not promote these goals, but will result in an uncompetitive market characterized by a lack of innovation and constricted consumer choices.

NAB emphasizes that no commenter in this proceeding has presented a convincing rationale for departing from the regulatory principles of access and nondiscrimination that have kept the narrowband Internet marketplace competitive, accessible and devoid of entry barriers. Indeed, the record clearly demonstrates the technical ability of network owners to delay, degrade or block any unaffiliated or other disfavored services and content, as well as the natural “incentive” of any network owner to “favor its affiliated” services and content at the expense of “the consumers’ interests.” *Time Warner Entertainment*, 211 F.3d at 1322. NAB therefore urges the Commission to retain the access and nondiscrimination policies that have been consistently applied in the narrowband Internet marketplace, and continue to apply them to high speed Internet access services provided over wireline facilities.

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broadband services coming from cable”). As shown above, a duopolized broadband marketplace dominated by ILEC/cable platform gatekeepers would be uncompetitive and inefficient.