Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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

REPLY COMMENTS OF TELECOMMUNICATIONS FOR THE DEAF, INC.

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Dated: August 6, 2002

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I.

SUMMARY

Not surprisingly, cable operators and cable modem providers encourage the Commission to affirm its finding that cable modem service is an information service not subject to Title II regulation. These entities want freedom from regulation and, at the same time, the ability to limit users' and competitors' access or require access with specific content or as part of a bundled Internet package. They do not offer a special public interest benefit in return. In addition, while cable operators are urging the Commission to permit them to escape franchise fee obligations and other fees to which their competitors are subject, they are also claiming that being required to provide access to multiple ISPs will be costly. TDI urges the Commission to reject these arguments and retain or adopt appropriate mechanisms to protect the availability of a choice of broadband Internet access services to persons with disabilities.

Unlike the cable operators, TDI and other consumer groups urged the Commission to adopt measures to ensure that all consumers have access to the broadest range of providers, features, and services. As TDI noted in its Initial Comments, the availability of broadband Internet access has encouraged the development of new and innovative services and equipment that can provide significant benefits to individuals with speech or hearing disabilities. Indeed, the Commission has recognized the importance of these services to persons with disabilities. However, these individuals may be unable to obtain access to these valuable services at all or at a reasonable cost if they are unable to obtain broadband access over cable without having to subscribe to a particular cable-operator-favored ISP or purchase what may be redundant ISP services from the cable operator. Therefore, TDI urges the Commission to implement appropriate safeguards to protect consumer access to cable modem Internet access services, including, at a minimum, a requirement that, in order to take advantage of exemption from

franchising requirements, such as franchise fees, and other regulatory requirements, cable modem providers be required to offer cable modem transport service on an open access basis.

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REPLY COMMENTS OF
TELECOMMUNICATIONS FOR THE DEAF, INC.

Telecommunications for the Deaf, Inc. ("TDI"), through undersigned counsel, hereby submits these reply comments in response to the above-captioned notice of proposed rulemaking.[1]

As stated in its initial comments,[2] TDI is a national advocacy organization actively engaged in representing the interests of the twenty-eight million Americans who are deaf, hard of hearing, late-deafened, and deaf-blind. TDI's mission is to promote equal access to broadband facilities, media, and telecommunications for these constituency groups. Given the importance of high-speed access to the Internet for persons with speech and/or hearing disabilities, TDI urges the Commission to ensure that the final rules it adopts in this proceeding adequately protect the ability of cable subscribers to obtain "pure" access through a basic, broadband cable-

[1] *Declaratory Ruling and Notice of Proposed Rulemaking*, FCC 02-77 (rel. March 15, 2002) ("*NPRM*"). Rather than commenting on all of the issues raised by parties filing initial comments, TDI's reply comments focus on several issues that are particularly significant for TDI and its constituents.

[2] Comments of Telecommunications for the Deaf, Inc., June 17, 2002 ("TDI Comments").

based gateway without having to purchase other content-based services or subscribe to a particular Internet Service Provider ("ISP").

I. REPLY COMMENTS

A. The Commission Should Reject The Cable Operators' Comments.

1. The Marketplace Does Not Provide Sufficient Incentives to Protect the Availability of a Choice of Broadband Internet Access Services to Consumers.

Many of the cable operator commenters assert that the marketplace can and does provide sufficient incentives to warrant deregulation.[3] These commenters claim, incorrectly, that marketplace incentives promote the development of ways to stimulate customer demand for high-speed Internet services, and that, for cable operators, partnering with third-party ISPs is one way to do so.[4] Cable operators also claim entitlement to franchise and similar fee exemptions for revenues from both value-added content offered to subscribers and the transport and customer gateway access made available to favored ISPs. In effect, cable demands a free ride on the right-of-way for their cable modem service. However, contrary to the cable operators' claims, the marketplace does not currently, and certainly will not in a deregulated environment, provide sufficient incentives for cable operators to provide consumers nondiscriminatory access to all ISPs. As a number of commenters noted, cable operators are, even now, discriminating against third-party, unaffiliated ISPs by, among other things: (1) selecting a small number of ISPs that may sell services and restricting the set of services they may sell; (2) directing what ISPs can and cannot sell; (3) controlling customer relationships with ISPs; and (4) placing independent ISPs in

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[3] *See, e.g.*, Comcast Corporation Comments at 5-13.

[4] Comcast Corporation Comments at 10-13.

a price squeeze by charging them toll access charges.[5] Such conduct can only worsen if proper safeguards are not in place.

The only way to ensure that consumers have a choice of access is to require cable operators to provide it. As TDI noted in its Initial Comments, the Commission has the jurisdiction, either through its Title II jurisdiction over telecommunications services or its ancillary jurisdiction under Title I, to implement important equal access requirements for cable modem providers. For instance, the Commission can and should determine, as it recognized in the *Wireline Broadband NPRM*,[6] that cable modem service includes a transmission component that remains subject to Title II. In such case, the safeguards of Section 255 would continue to apply to this aspect of cable modem service to ensure that persons with disabilities have access to cable modem service to reach the Internet, and all of the unique, valuable services available in that environment.

Alternatively, if the Commission decides to retain its information service classification for bundled cable modem service, the Commission can and should implement appropriate Section 255-like safeguards under its Title I ancillary jurisdiction. Under this alternative, the Commission could reduce significantly the level of regulation to which cable modem providers are subject, but retain the essential protections of Section 255 – that cable modem services are made accessible to and usable by persons with disabilities. In this way, the Commission can fill the void left by the the absence of market incentives for open access and protect consumers from

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[5] Texas Office of Public Utility Counsel, *et al.*, Comments at 30-41.

[6] *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, Notice of Proposed Rulemaking, CC Docket Nos. 02-33, 95-20, 98-10, FCC 02-42, at ¶¶ 43-53 (rel. Feb. 15, 2002)("*Wireline Broadband NPRM*").

potential abuses that may arise in a deregulated environment. Such a solution offers greater freedom to cable operators but also protects consumers' ability to obtain a choice of reasonably priced Internet access, thereby promoting the Commission's goals of bringing broadband service to a larger percentage of the population. Deregulation alone will not provide the same benefits or promote the Commission's goals.

2. Cable Commenters Have Not Demonstrated That an Access Requirement Will Be Costly to Implement.

Cable commenters claim that establishing greater regulation will impede innovation and lead to increased, time consuming rulemakings, dispute resolution proceedings and other state and federal proceedings.[7] These commenters also claim that a multiple ISP access requirement will increase the costs of providing cable modem service that will outweigh the benefits of such access choice.[8] These assertions are wrong and should be rejected.

Cable operators have not offered sufficient evidence that a multiple ISP access requirement would be significantly more costly than their current ability to restrict consumer access to ISPs.[9] Cable commenters claim that a multiple access requirement will increase their cost of providing service as a result of increased regulatory compliance issues, necessary technology revisions, and other requirements.[10] Cable operators argue that these increased costs will, in turn, increase the cost of cable modem service to consumers or put cable modem

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7 *See, e.g.*, Cablevision System Corporation Comments at 6-11.

8 *See, e.g.*, AOL Time Warner Inc. Comments at 17-24; National Cable and Telecommunications Association ("NCTA") Comments at 13-33; Comcast Corp. Comments at 5-27; Motorola, Inc. Comments at 6-8; American Cable Association ("ACA") Comments at 7-15.

9 *See* NCTA Comments at 13-27.

10 *Id.*

operators at a competitive disadvantage *vis-à-vis* their wireline competitors.[11] The commenters do not provide specific numbers, only vague assertions that their costs will increase as a result in a change in the manner in which they are regulated.[12]

A change in the manner in which an industry is regulated can change the cost of doing business for members of that industry; however, in most cases, including cable modem service, is the price to be paid for having a substantial market share, controlling market entry or otherwise having the ability to discriminate against competitors, harm consumers, or affect the public interest. Incredibly, the industry commenters claim without any factual support that these unspecified, unquantified costs far outweigh the clear public interest benefits to consumers and to competition of an access requirement for cable modem service. The cable providers have simply not proved that this is so. Moreover, the open access approach favored by TDI would not impose new regulatory costs – cable modem service would be franchise (and similar) fee-exempt in return for having enabled open access to supply marketplace incentives for consumer choice.

B. Cable Modem Providers Should Be Required To Offer A Public Interest Benefit – An Access Gateway -- In Exchange For The Significant Benefits They Will Receive If Cable Modem Service Is Classified As An Information Service.

In contrast to the lack of specific examples from the cable operators of the increased cost of an access requirement on their operations, the record includes substantial evidence of the benefits cable operators will receive in a deregulated environment. Indeed, in focusing on the potential, but unspecified costs of an access requirement, the cable commenters ignore their own

[11] NCTA Comments at 41-42; Charter Communications Comments at 8-14; Cablevision Systems Corporation Comments at 7.

[12] Significantly, the cable modem providers' own statements parading their "voluntary" arrangements with unaffiliated ISPs contradicts their argument that such access would be costly.

position,[13] and the Commission's preliminary conclusion, that cable modem service be exempt from state and local franchise regulations, including franchise fees.[14] As a number of state and local government commenters noted, exempting cable modem service from franchise fee requirements will cause cities to lose millions of dollars in revenue each year.[15] This translates into millions of dollars in cost savings/avoidance for cable modem providers.

In addition, while supplying transport, cable operators will escape the regulatory burdens, including franchise fees and other requirements, to which telecommunications carriers are generally subject. As a result, cable operators will be able to offer their cable modem service without some of the additional costs their broadband competitors are required to incur, as well as the corresponding rights-of-way compensation and other restrictions to which these competitors are subject. This factor is significant given the cable operators' own statements that wireline broadband Internet access providers are their direct competition,[16] as well as the fact that cable modem service providers have a significantly larger share of the broadband Internet access market than their next closest broadband competitors. Consequently, under the Commission's proposal and the cable operators' position, cable operators would be subject to fewer regulatory burdens and lower costs than their competitors.

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[13] *See* AOL Time Warner Comments at 17-24; NCTA Comments at 13-33; Comcast Corp. Comments at 5-27; ACA Comments at 7-15.

[14] *NPRM*, at ¶¶ 96-108.

[15] *See* Comments of Alliance of Local Organizations Against Preemption at 4; National League of Cities, *et al.* Comments at 20; City Coalition Comments at 22-23.

[16] *See, e.g.*, NCAT Comments at 29-30, 41-42; Charter Communications Comments at 8-11; Comcast Corporation Comments at 8. Indeed, the cable operators' argument that the existence of wireline broadband Internet access providers is evidence of a sufficiently competitive market to warrant deregulation of cable modem service is misleading given the significant market share held by cable operators.

Moreover, as a number of the telecommunications carrier commenters stated,[17] and indeed as the cable operators admit, cable modem service is the broadband market leader, significantly exceeding other broadband media in its share of the market.[18] Indeed, SBC Communications, Inc. noted that wireline broadband providers would have to spend billions of dollars to match the capabilities of cable networks.[19] Also, as noted above, wireline broadband providers would remain subject to franchise fee requirements. As a result, under the deregulatory regime the cable operators promote, they would obtain substantial cost savings and remain free of any access requirements, while the entities they identify as their direct competitors would be required to bear additional costs and provide nondiscriminatory access to multiple ISPs. Nonetheless, the cable operators apparently believe that such a one-sided situation is perfectly acceptable and thus are not willing to offer any public interest benefits, such as an offer of basic access service – providing a plain vanilla, neutral access-only gateway to the Internet -- to offset the reduction in regulation and costs they are likely to receive under the Commission's proposal. In fact, the cable operators urge the Commission to do just the opposite and remove any conditions on their otherwise unfettered ability to limit consumer access. To put it bluntly, the cable operators want the best of both worlds so they can increase their profits and retain the ability to limit customer access to the detriment of consumers, the public interest, and the Commission's goals.

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17 SBC Communications, Inc. Comments at 4; Verizon Comments at 3; BellSouth Comments at 4.

18 *See* SBC Communications, Inc. Comments at 4; Comcast Corporation Comments at 8; Verizon Comments at 3.

19 SBC Communications, Inc. Comments at 5.

The Commission should be treating delivery technologies comparably rather than providing significant benefits to one technology – cable modem service—at the expense of its competitors and the public interest. Therefore, the Commission should require cable operators to provide a public interest benefit in exchange for this benefit to the operators and their shareholders. At a minimum, in exchange for obtaining substantial costs savings and reduction or elimination of regulatory oversight, cable operators should be required to offer consumers a "stripped down" version of cable modem Internet access service that provides access only without a corresponding obligation to purchase content or other features or services. In this way, cable operators can return to consumers some of the benefits they will receive as a result of the complete deregulation of their cable modem service offerings.[20] One significant aspect of cable modem service that makes it an information service is that it bundles access to the Internet, *i.e.*, transport, with content. If the Commission treats the transport as a telecommunications service, it can still allow an exemption from franchising requirements and fees if the cable modem provider offers pure access to the Internet, while ensuring that customer have a reasonably-priced Internet access option. Such a determination does not make a cable modem provider a common carrier if it is offering or providing a plain vanilla access service only for those customers that request the service and are willing to pay a fee for it.

Indeed, as many of the telecommunications carrier commenters noted, the Commission should establish similar regulatory regimes for both cable modem and wireline broadband Internet access service, but in TDI's view, the appropriate symmetrical treatment is not complete

[20] As noted above, cable operators will likely argue that the cost of such a requirement would be significant; however, such arguments ignore the fact that the service would undoubtedly not be provided without charge. Consumers would likely be willing to pay some amount for pure access service, as they have demonstrated a willingness to pay for DSL service. The important thing is that cable operators be required to provide the service at

deregulation. Rather, the public interest and consumer welfare dictate that both cable modem and wireline broadband providers be required to offer consumers a basic access service, unbundled from content, at a reasonable cost in order to ensure that consumers have the ability to obtain high-speed access to the Internet and the corresponding ability to access any ISP, feature or service thereby made available without redundant fees for unwanted services impeding their ability to obtain access to specialized services they do need.[21] The Commission recognized the importance of this basic access requirement in its *Wireline Broadband NPRM*, and requested comment on the continued application of that requirement to wireline broadband Internet access service.[22] The same issues the Commission identified with respect to wireline broadband service are equally applicable to cable modem service, and those issues warrant the same conclusion – continued regulatory oversight of cable modem service, including a basic access requirement, is necessary to ensure that consumers, and in particular individuals with speech or hearing disabilities, are able to obtain reasonably-priced access to the Internet and the myriad of unique, specialized advanced services currently available and likely to become available in the future.

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a reasonable cost such that consumers have a cost-effective option for access to the content, information, products or services they choose to access.

[21] The Commission has previously adopted a regulatory regime in which a service provider could take advantage of reduced regulatory requirements in exchange for offering access to the public. Specifically, in adopting its Open Video Systems regulations, the Commission noted that "[I]f a telephone company agrees to permit carriage of unaffiliated video programming providers on just, reasonable and non-discriminatory rates and terms, it can be certified as an operator of an 'open video system' and subjected to streamlined regulation under Title VI." *In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996*, Second Report and Order, CS Docket 96-46, 11 FCC Rcd 18223, at ¶ 1 (1996). In other words, by agreeing to provide a gateway for unaffiliated video programming providers, an open video system applicant could take advantage of reduced regulatory requirements. The Commission can and should provide a similar opportunity for cable modem providers – reduced regulation in exchange for offering a basic cable modem access service -- in lieu of completely deregulating provision of cable modem service.

[22] *Wireline Broadband NPRM*, at ¶¶ 43-53.

C. Cable Operators' Claims Regarding The Prevalence Of Multiple ISP Arrangements Are Misleading And Do Not Demonstrate That Further Regulation Is Unwarranted.

The cable operators claim that mandatory access requirements are not necessary because the marketplace is currently creating incentives for them to enter into arrangements with multiple ISPs and that they are, in fact, doing so.[23] These claims misleadingly give the impression that cable modem providers are voluntarily entering into numerous agreements with unaffiliated ISPs. The fact is that with limited exceptions cable operators only enter into agreements with third-party ISPs when required to do so as a result of regulatory proceedings or other pressure. Contrary to their claims, cable operators do not voluntarily enter into arrangements with third-party ISPs because doing so would reduce their ability to control customer access. Given that there are currently hundreds if not thousands of ISPs providing services to consumers, the existence of a few, high-profile cable operator agreements with a handful of unaffiliated ISPs does not demonstrate that cable modem providers are currently providing consumers access to multiple ISPs. Therefore, the arrangements the cable operators have touted as examples of their willingness to provide nondiscriminatory access to third-party ISPs are the result of pressure from competitors, regulators, or other factors and are not evidence that the marketplace promotes nondiscriminatory access.[24]

On the contrary, the cable operators historic and ongoing practices demonstrate that in the absence of a requirement to do so, cable operators will not enter into agreements with competing ISPs. In fact, the current regulatory regime and the broadband marketplace provide substantial

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[23] *See, e.g.*, Comcast Corporation Comments at 10-13; Cablevision Systems Corporation Comments at 6-9; AOL Time Warner Comments at 22-24; Charter Communications Comments at 2-4.

[24] Significantly, as noted in the Texas Office of Public Utility Counsel, *et al.*'s Comments, even when cable operators do voluntarily enter into agreements with unaffiliated ISPs as a result of regulatory or other pressures, the

incentives for cable modem providers to discriminate against third-party ISPs and limit consumer access to alternative providers.[25]

The existence of arrangements with multiple ISPs does, however, demonstrate one significant fact -- that, contrary to the cable operators claims,[26] multiple ISP access is technically feasible and can be provided when the cable operators are subjected to sufficient regulatory or other pressures or other financial incentives, such as obtaining approval of a merger, acquiring additional customers, or, as in this case, when the cable operators want to create the appearance of providing nondiscriminatory access. Therefore, that cable operators do not voluntarily enter into agreements with multiple ISPs, but when required to do so can and do provide such access demonstrates that a multiple access requirement is both feasible and necessary to safeguard consumer choice and promote the availability of a wide range of providers, features and services.

D. The Comments Of Consumer Groups Demonstrate That A Multiple Access Requirement Is Necessary.

TDI supports the comments of other pro-consumer commenters that demonstrate the need for a requirement that cable operators provide consumers access to multiple ISPs. Unlike the self-serving comments of the cable modem providers, who stand to gain financially and through decreased regulatory oversight, the comments of those entities that represent consumers demonstrate that the freedom to choose among a variety of Internet-based information, products, and services is fundamental to the development and viability of the Internet and related advanced services and promotion of the Commission's broadband public interest goals. This freedom of choice is particularly critical for persons with speech or hearing disabilities who utilize and rely

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terms of those agreements are often remain anticompetitive and discriminatory. Texas Office of Public Utility Counsel, *et al.* Comments at 32.

[25] *See* Texas Office of Public Utility Counsel, *et al.* Comments at 30-41.

upon the many products and services specifically tailored to their unique needs and which, in many cases, are only available from a small, discrete group of providers.

Indeed, the cable operators comments ignore that a cable franchise gives such providers unique near-monopoly customer access that allows them to exert leverage on both unaffiliated or unfavored ISPs and consumers. The reality is that cable modem providers have the ability to increase the cost of their near-exclusive access service to limit the ability of consumers to reach many of the broadband services they desire, or, in the case of individuals with disabilities, the specialized they need to take advantage of the digital ages. Given that an increase of even $1.00 in the monthly cost of accessing a particular service may be enough to keep consumers out of the market, the cable modem providers unique position alone warrants implementation of appropriate safeguards or other requirements to ensure that cable modem providers do not have the ability to limit or impede consumer access to the Internet. When combined with the ability to change the very nature of the Internet, this fact compels implementation of an access requirement.

In its comments, Amazon.com pointed out that the defining characteristic of the Internet is that, once consumers have access to the Internet, they can "pull" information from any of millions of sources, rather than being feed information selected by the provider, as with traditional mass media.[27] Permitting cable modem or other broadband Internet access providers to limit this unique aspect of the Internet experience by restricting consumers ability to access particular ISPs or by requiring that consumers utilize only one or a few favored ISPs, reduces both the quality of the consumer's experience and the usefulness of the Internet to the consumer.

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26 *See* SBC Communications, Inc. Comments at 17.

27 Amazon.com Comments at 4.

Under such circumstances the cable modem subscriber would be limited to the information, products and services the subscriber's provider selected for him, and would be unable, or only at additional cost be able, to access other unique, potentially beneficial or even essential products or services. In addition, the hundreds of ISPs or other providers that offered these unique, innovative services would be cutoff from their prospective customers and would eventually be driven from the marketplace. Consequently, only the cable modem providers and their selected content providers would benefit, at the expense of their customers, their competitors, and the public interest.

As the Rehabilitation Engineering Research Center on Telecommunications Access ("RERC-TA") noted, both Congress and the Commission have affirmed the need to safeguard the ability of persons with disabilities to access communications technology and services and to ensure "the ubiquitous availability of broadband to *all* Americans."[28] Indeed, these goals are more important from a public interest standpoint than establishing an appropriate environment for the development of competition in the broadband marketplace. If consumers do not have reasonable, cost-effective broadband access to the Internet, no level of competition or infrastructure will provide the ubiquitous availability of broadband to all Americans. Thus, it is essential that cable modem providers be required to make available to consumers a form of basic, low-cost cable modem access service that will enable consumers to choose the information, services or features they wish to access.

As TDI stated in its comments, the availability of such an access service is especially important to persons with speech or hearing disabilities who rely upon a number of unique products and services that are either designed specifically for or offer unique benefits to such

[28] RERC-TA Comments at 5 (*citing NPRM*, at ¶¶ 4, 73 (emphasis in original)).

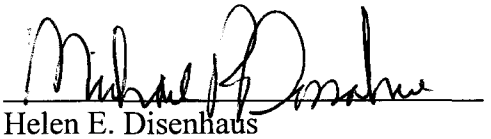
individuals.[29] In some cases, these products and services are offered by only a few or even a single provider. If access to those providers is limited or made prohibitively expense by the cable modem providers, consumers with disabilities will be deprived of not only the access to which the Commission has stated every American is entitled, but will also lose valuable services that enable them to communicate freely with friends and relatives, take advantage of greater education, employment or other opportunities, and improve their daily lives. The Commission can ensure that this does not happen by requiring cable modem providers to make available to all consumers basic cable modem access service. Whether or not the Commission chooses to affirm its information service classification for cable modem service, it must ensure that consumers, and in particular, those consumers with disabilities, are not limited in or denied the ability to access all of the information, products and services available on the Internet.

[29] TDI Comments at 3-4.

II. CONCLUSION

For the forgoing reasons, if the Commission affirms its decision to classify cable modem Internet access service as an information service, TDI urges the Commission to implement appropriate safeguards to ensure that cable modem providers are required to make their services accessible and usable to individuals with speech and hearing disabilities, if readily achievable. At a minimum, TDI urges the Commission to require cable modem providers to make available to consumers basic cable modem Internet access service separate from content or from any required ISP, so that cable modem subscribers can obtain, at reasonable cost, access to all of the information, services, features or capabilities offered by third-party providers. Such a requirement is essential to further the Commission's goal of bringing broadband Internet access, and all of the resulting benefits, to all Americans.

Respectfully submitted,



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Dated: August 6, 2002