

existing centers. Charter has heavily invested in these call centers in order to provide better technology, tools, training and performance management for its Customer Service Representatives (“CSRs”). The overall number of Charter Customer Care employees has increased from 4,600 to 5,700, an increase of 1,100 employees over the past year. In addition, Charter’s \$80 million purchase of High Speed Access Corporation (HSA) was largely to obtain the modem support and customer care infrastructure of that company.

Charter’s CSRs are trained to provide both video and cable modem customers with “Tier 1” support, such as billing, sales, and normal Radio Frequency (“RF”) troubleshooting. Even these Tier 1 cable modem calls take somewhat longer, on average, than a call about cable television service.

“Tier 2” support for cable modem customers covers the technical aspects of cable modem service, and is far more centralized. For example, all Tier 2 calls from Charter’s Eastern Region are routed from the 90 call centers to one central Tier 2 support center in Louisville, KY. A typical “Tier 2” call would complain that the cable modem service (but not the cable television service) has been out since the customer added a new driver or new application to his or her PC. The Tier 2 CSR would help isolate the problem. These calls cover the entire range of potential PC problems: software, settings, caches, equipment and more. As a matter of business necessity, Charter attempts to support customers on all of these issues, including matters that are not really Charter’s responsibility. Significant call time is devoted to customer education about PC operations generally. On average, these calls take 3 to 4 times the length of an average cable television service call. Tier 2 CSRs require much more technical training than Tier 1 CSRs.¹¹¹

¹¹⁰ Charter Communications, Inc. 2001 Summary Annual Report at 12, at http://media.corporate-ir.net/media_files/NSD/CHTR/reports/ar01.pdf.

¹¹¹ Minton Declaration at ¶ 8.

Charter recently has hired many more Tier 2 CSRs, increasing the number of these particular CSRs from 400 persons to over 1,000 persons over the past 12 months.

Cable modem service is offered in a highly competitive market that compels quality customer service. Customer expectations for cable modem support are shaped by their experiences with customer support across related industries, and their understanding that the technical support required takes more time than an ordinary call regarding cable television. The customer experience in these related businesses—such as calls to Microsoft or Dell—are benchmarked in customer care guidelines Charter utilizes to help Charter deliver customer care that meets and exceeds customer expectations. In this vein, Charter participated in an independent study to compare Charter's customer service with customer service in the computer, wireless, and other consumer and technology industries. The metrics confirmed that Charter is performing well. Charter's average speed of answering customer calls was on par with the average time spent answering customer calls in comparable industries.¹¹²

Charter is moving far beyond call centers in order to provide quality customer care. Obviously, stabilizing the physical plant through upgrades helps reduce RF outages and substantially lowers call volume. This is not a function of customer care, per se, but the system upgrades undertaken by Charter for general competitive reasons also have very beneficial customer care results.

In addition, Charter is developing several other features of cable modem customer care. Charter has deployed a web portal that instructs cable modem customers in troubleshooting and repairing performance problems, such as resetting modems or caches. Charter is developing client software that will reside on the customer's PC and will perform diagnoses when the

¹¹² *Id.* at ¶ 11.

Internet connection is down and allow the customer to restore the connection. Charter also is developing a CSR tool that will reside at the CSR desktop and allow the CSR, with the customer's affirmative consent, to detect and help correct customer settings for the customer's PC.¹¹³

B. Market Forces Produce Superior Customer Service.

The current state of customer care for the cable modem product is a product of market forces. A case in point is Charter's exemplary handling of the Excite@Home bankruptcy. When Excite@Home announced that it filed for bankruptcy, Charter made a significant advance payment to @Home and engaged in round-the-clock negotiations to continue service and provide for an orderly transition. Charter's engineering, technical, headquarters and customer care team worked 51,500 person-hours over a mere two months to build independent connections to the Internet backbone and to move customers to Charter's own broadband access service, Charter Pipeline. When the bankruptcy court ordered Excite@Home to turn off service to all customers, 90% of Charter's @Home customers already had access to Charter Pipeline.¹¹⁴ During the transition, Charter provided additional training to CSRs and hired as many additional representatives as possible to ensure a smooth transition.¹¹⁵ Other operators, such as AT&T, Cox and Comcast, also went to great lengths to quickly transfer customers to alternative providers and to minimize service interruptions.¹¹⁶ These transitions were handled in record time—all

¹¹³ *Id.* at ¶¶ 13-16.

¹¹⁴ *Response to Court's Decision to Terminate @Home's Contract with Charter* (Nov. 30, 2001), at <http://www.onlinepressroom.net/chrtr/>, 2001 press releases.

¹¹⁵ *Statement on Transition to Charter@Home Customers to Charter Pipeline* (Dec. 1, 2001), at <http://www.onlinepressroom.net/chrtr/>, 2001 press releases.

¹¹⁶ AT&T reported that it made a successful transition of virtually all its broadband customers in only six days, one week earlier than initially expected. AT&T finished its transition by early December, just two months after Excite@Home announced that it would file for bankruptcy protection. *AT&T Broadband Internet Customers Successfully Moved to New High-Speed Network* (Dec. 7, 2001), at <http://www.att.com/news/item/0,1847,4116,00.html>. During the transition process, Cox doubled its customer care

without a rulemaking, guidelines from any governmental entity, or local franchise obligations. Charter's motivation in this process was to keep customers from defecting from cable-delivered broadband to DSL or other competing services. The market provided more than sufficient motivation for Charter to invest, innovate, and provide good customer service in extraordinary circumstances.

While any new product has its learning curve, the record in this docket offers compelling evidence that cable modem customer service is quite good. Commenters representing municipal interests cited a very small number of complaints—only 105 complaints specifically regarding cable modem service¹¹⁷—when compared to the 7.2 million cable subscribers nationwide.¹¹⁸ Thus, even if cable modem service *were* subject to the highest benchmark in the Commission's customer service standards, a 95% compliance rate,¹¹⁹ customer service for cable-delivered broadband services would far exceed this benchmark.

resources, transitioning over a half a million customers in less than four weeks. *Cox Communications Transitions High Speed Internet Customers to New Cox-Managed Network*, BUSINESS WIRE (Feb. 11, 2002), at http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=cox&script=410&layout=0&item_id=257754. The Arizona Cable Telecommunications Association ("ACTA"), Insight Communications Corporation and MediaCom Communications Corporation report that the transition for Comcast, Cox and Mediacom went very smoothly in Arizona. ACTA, Insight Comms. and MediaCom Comments at 28-29.

¹¹⁷ ALOAP Comments at Exhibits 1-4; Metropolitan Area Communications Commission Comments at Section VI.A; City of Munsfreeboro, TN Comments at Attachment B; Des Plaines, IL Comments at ¶ 3; Fort Worth, TX Comments at ¶ 3; San Antonio Comments at ¶ 3.

¹¹⁸ Reuters, *FCC Challenged on High-Speed ISP Ruling*, CNET.COM (Mar. 25, 2002), at <http://news.com.com/2100-1033-868329.html> ("The industry estimates there are about 7.2 million cable-modem subscribers.")

The Sacramento Metropolitan Cable Television Commission Comments appear to cite an article discussing 2001 data on consumer satisfaction with customer service in support of its assertion that cable operators have poor customer service records. Sacramento Comments at 3 (citing *A Silver Lining For Airlines*, THE WALL STREET JOURNAL, May 20, 2002, at A2). Mr. Minton's declaration submitted on behalf of Charter provides more recent data on this subject that clearly demonstrates the pioneering progress and sizeable investments cable operators such as Charter have made in customer support for cable modem service. See Minton Declaration attached as Exhibit 1.

¹¹⁹ The Commission's customer service rule for the installation, outages and service calls for cable video services, found at 47 C.F.R. § 76.309, requires the relevant standards be met 95% of the time as measured on a quarterly basis.

C. LFAs Should Not Be Permitted To Regulate Cable Modem Customer Service.

The LFAs participating in this proceeding falsely portray themselves as sole custodians of adequate customer service and protectors of broadband subscribers.¹²⁰ Yet customer service is provided by a myriad of businesses without the supervision of local governmental entities. For example, customer service for LECs' DSL offerings is not regulated at the local level, nor is customer service for e-commerce vendors, manufacturers of information technology hardware or software, or the mail order industry.

Customer care for cable modem service is offered in an intensely competitive market in which cable is not the dominant default provider of Internet access.¹²¹ Whatever the perception of cable television customer service was that shaped the customer service rules in 1992, the offering of the cable modem product in 2002 requires cable operators to offer quality, innovative customer care to attract and retain cable modem customers in a highly competitive market. System upgrades undertaken by Charter for general competitive reasons have had very beneficial customer care results. The innovative tools that Charter is developing for customer care are tailored to an Internet and PC experience that was totally outside of the shaping of the Commission's "customer service guidelines."

1. Cable modem service does not lend itself to local regulation.

In the first place, cable modem service does not lend itself to local regulation. LFAs rely heavily on the historical basis for regulating cable television, *i.e.*, the original markets for cable video services were very localized. Cable television initially brought local, over-the-air

¹²⁰ See, e.g., City Coalition Comments at 25-29; ALOAP Comments at 10, 17-18; Michael E. Capuano, Member of Congress Comments at 2 (commenting on behalf of "a number of communities" in the Congressman's district); Fairfax County, Virginia Comments at 3; District of Columbia Office of Cable Television and Telecommunications Comments at 3; City of Fairfax, Virginia Comments at 3-4.

¹²¹ See *infra* n.142 & n.143.

television signals directly to homes. Thus, regulation of this very local service began at the local level. As cable systems expanded, however, even these original core video services came to be regulated at the federal level in certain significant aspects.¹²² Internet access via cable modems has never been a “local” service. The LFA justification for regulating video services does not apply in the heavily competitive, nationally integrated broadband market. The level of support for this new service is evolving in relation to services and industries in the PC, software, and gaming markets. These are industries and customer service benchmarks with which the LFAs have no substantial experience or expertise.¹²³

2. Technical support is highly centralized and specialized.

Second, technical support is highly centralized and specialized. Charter’s modem service customer call centers are even more centralized than its video services call centers. Regulation by each LFA will inevitably lead to inconsistencies, and the practical result that operations of regional call centers will be dictated by the unilateral ordinances passed by a handful of Charter’s nearly 5,000 franchising authorities, with no reference to one another and no grounding in the national market in which Charter is operating.

Dependence on the consent of LFAs for changes in Charter’s modem care offerings would make it very difficult to compete nationally in broadband. Moreover, operators could conceivably be required to have unique procedures for billing and customer service protections for each community. Accordingly, in some cases, it may be impossible for an operator to simultaneously comply with the requirements of all communities served.

¹²² For example, the Commission preempted local regulation of cable technical standards and oversees programming issues such as must carry. *City of New York v. FCC*, *supra* note 12 (upholding the FCC’s preemption of local technical standards); 47 U.S.C. §§ 534, 535 (imposing “must carry” obligations on cable operators).

¹²³ See Minton Declaration at ¶ 20.

3. The costs of LFA regulation of customer service can be particularly onerous.

Third, the costs of LFA regulation of customer service can be particularly onerous in the cable modem field. The Commission's customer service guidelines, for example, require that telephone answer time be 30 seconds 90% of the time under normal operating conditions. These standards were never adopted in the context of technical support required for a new, competitive offering to a PC, or for the kind of technical communications required for a customer base that is frequently mystified by the operation of that PC. Nor did the Commission have this in mind when it left room for LFAs to impose more stringent regulation.¹²⁴ The cost of more stringent standards can be exorbitant.¹²⁵

For example, moving from a service level of 90% of calls within 30 seconds to a service level of 95% increases the cost by a conservative measure of 6-8%, but only increases the average answering speed from approximately 20 to 16.5 seconds – an estimated 3.5 seconds difference. This projected time difference would be barely perceptible to customers, and such a service level is considered unreasonable and unexpected by industry benchmarks.

As another example, the Commission guidelines permit LFAs to define where a “conveniently located” office might be.¹²⁶ This is frequently used by LFAs to try to force the

¹²⁴ See *Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992, Consumer Protection and Customer Service*, Report & Order, 8 F.C.C.R. 2892, ¶ 69 (FCC 1993)(declining to adopt additional standards that would apply to different services or to address additional issues regarding the provision of cable service than the standards suggested in the 1992 Cable Act because there was no record to support additional non-statutory standards, and stating that the communities were free to tailor standards to meet the unique circumstances of the community, like *employee identification standards*)[hereinafter *1993 Customer Service Order*].

¹²⁵ Because more stringent customer service standards are expensive, the cable operator is allowed to pass on such costs to the cable consumer. See *In re TCI of Richardson*, Memorandum Opinion and Order, 13 F.C.C.R. 21690, ¶ 31 (CSB 1998)(allowing an operator to pass on the costs of meeting customer service standards that exceed federal standards).

¹²⁶ See *1993 Customer Service Order* at 2903.

placement of property-tax-paying facilities within their local borders.¹²⁷ This should have no application to regional cable modem support centers.

Likewise, the premise that “written notices” and bill inserts are the preferable way of communicating with cable service customers, and a rule that permits LFAs to require such “written” notices to cable service customers,¹²⁸ should not apply to the cable modem service.

4. LFAs have already signaled their intention to use “customer service” as a subterfuge to regulate cable modem service.

There is an even more compelling reason for the Commission to preclude LFAs from regulating cable modem customer service: the clear announcement by LFAs of their intention to use this “hook” to regulate the modem service itself, in ways that are seriously detrimental to national policy and customer choice. The City Coalition, for example, stated that continued supervision of cable modem service by local government allows LFAs to prohibit caps on speed, among other forms of regulation.¹²⁹ Such a prohibition would eliminate cable’s ability to offer “tiered” broadband service in competition with dial-up Internet access. Bandwidth on cable systems is a finite resource shared among all the subscribers on a particular system, and caps enable operators to ensure that each tier group receives the agreed-upon level of bandwidth for a corresponding price paid. As such, the operator can offer lower-priced packages to subscribers who, for example, only send email, while ensuring that higher-capacity users will have enough bandwidth and will not slow down the entire system. Charter’s lower-priced tiered product is a

¹²⁷ See, e.g., Cable Television Franchise Ordinance for Charter Communications Properties, LLC, Caldwell County, North Carolina § 5(5)(Feb. 9, 2001)(requiring an office in the County); Franchise Agreement to Provide Cable Services Between the City of Signal Hill, California and the Long Beach Acquisition Corporation d/b/a Charter Communications, § 24(A)(requiring an office within 10 miles of the City limits).

¹²⁸ See 47 C.F.R. § 76.309(c)(3)(i)(requiring notifications in writing).

¹²⁹ City Coalition Comments at 25.

consumer benefit, but it must rely on bit caps. However, the commenters who want to ban caps also complain about higher-prices on higher speed services.¹³⁰

Prohibiting caps also would severely hamper operators' ability to effectively manage bandwidth usage on their systems. Caps are effective tools to prevent peer-to-peer applications from consuming excessive amounts of capacity. Effective bandwidth management also is a critical factor in determining an operator's ability to support such services as streaming video, IP telephony, and video conferencing because these packets must be given priority in order to ensure that the flow of the voice conversation or video stream is smooth and uninterrupted.¹³¹ The Commission must preserve the operators' ability to effectively manage bandwidth use on their systems to prevent groups of users from crowding out other users and additional services, and to allow operators to offer service packages that vary in price.

¹³⁰ See, e.g., CFA Comments at 16.

¹³¹ As the Commission explained in the NPRM:

The IP-based data transmission of cable modem service, with a connectionless, "best effort" delivery model, does not guarantee the delivery of packets in any specific order, in a timely manner, or at all. In order to deploy real time applications over IP networks with an acceptable level of quality, certain bandwidth, latency, and jitter requirements, known as Quality of Service ("QoS"), must be guaranteed and met in a fashion that allows multimedia traffic to coexist with traditional data traffic on the same network. *Applications such as video streaming, IP telephony, and video-conferencing are extremely bandwidth-and delay-sensitive, imposing unique QoS demands on the underlying networks that carry them.* See NEWTON'S TELECOM DICTIONARY 562 (17th Ed. 2001). *QoS guarantees network bandwidth and availability for applications.* Any real time media stream that crosses a DOCSIS cable modem-compatible access link needs to be given prioritized traffic management treatment in order to assure the best user-perceived quality end-to-end. DOCSIS 1.1 provides several potential methods for classifying traffic and several access-link traffic management functions, which could be applied to the traffic of unaffiliated ISPs to provide and improve QoS. See Glossary - DOCSIS 1.1 at http://www.cablelabs.com/news_room/glossary2.html (visited Dec. 18, 2001).

NPRM at n.126 (emphasis added). See generally David MacIntosh, *Building a PacketCable Network: A Comprehensive Design for the Delivery of VoIP Services*, SCTE Cable Tec-Expo 2002, Cable Television Laboratories at 7 available at http://www.packetcable.com/downloads/SCTE02_VOIP_Services.pdf (visited July 8, 2002) (explaining how the PacketCable product assists in bandwidth management necessary to offer Voice over Internet Protocol over a cable system).

Consumer groups also have offered an example of how they would use consumer regulatory authority in a recent report advocating forced access. In that report, CTC called upon cable operators to deploy fiber to the curb systems, to install small nodes, to construct survivable redundant physical architecture, and to construct larger headend sites to allow third party ISPs to co-locate at cable operator headends, all to accommodate forced access.¹³² By any name, this is regulation prohibited by Title VI.

Allowing LFAs or others to manage “customer service” would frustrate the actual service offering.

5. The Commission should preclude LFAs from regulating cable modem customer service.

As the Commission recognized in the NPRM,¹³³ the development of broadband must be encouraged through a national deregulatory policy, unhampered by a balkanized system of local rules.¹³⁴ Permitting a different set of rules on a city-by-city basis would make national roll-outs of and changes in broadband services extremely inefficient, and would create extensive operational problems. The LFAs have clearly shown an intent to regulate cable-delivered broadband Internet access, regardless of the effects on broadband deployment. Charter urges the Commission to make an unambiguous policy statement against such a patchwork of inconsistent,

¹³² See Technology Analysis of Open Access and Cable Television Systems, Prepared for the American Civil Liberties Union, Columbia Telecommunications Corporation, at 8, 13, 15, 40 (Dec. 2001).

¹³³ *Cable Modem Order and NPRM* at ¶ 97 (“We would be concerned if a patchwork of State and local regulations beyond matters of purely local concern resulted in inconsistent requirements affecting cable modem service, the technical design of the cable modem service facilities, or business arrangements that discouraged cable modem service deployment across political boundaries.”).

¹³⁴ Moreover, as Charter’s initial comments explained in detail, the customer service standards developed for video cable services do not apply to cable modem service. Charter Comments at 33-35. Section 632, which governs customer service for cable video services, was enacted in the 1984 Cable Act and revised in 1992. The applicable premise for the video customer service standards—that cable television in 1992 did not face effective competition—is inapplicable to modem service. Quite to the contrary, cable modem service faces serious competition in the broadband Internet access market, principally from DSL as well as wireless and satellite-delivered broadband services. Charter Comments at 5-8.

local rules, in favor of a coherent national policy, consistent with the Congressional mandate to encourage the deployment of broadband services.

IV. LOCAL REGULATION OF CONSUMER PRIVACY IS INCONSISTENT WITH FEDERAL PRIVACY LAWS AND POLICY OBJECTIVES.

Similar to their posturing on customer service, the LFAs misleadingly claim to be the only protectors of consumers' privacy rights.¹³⁵ However, as was discussed at length in Charter's initial Comments, Congress has already provided more than adequate protections for cable modem subscriber privacy rights in the Cable Act, the Electronic Communications Privacy Act ("ECPA") and the Patriot Act.¹³⁶ These three Acts provide for a harmonized, national privacy policy for cable modem subscribers, in which Congress demonstrated its intent to provide for extensive privacy protections.¹³⁷ Regulation of privacy at the local level is therefore inconsistent with the Commission's and Congress' regulation of information services and federal privacy protections. Moreover, allowing each community across the nation to individually

¹³⁵ See, e.g., ALOAP Comments at 68; Washington Association of Telecommunications Officers and Advisors Comments at 2; City of Seattle Comments at 3. In fact, the City of Seattle adopted an ordinance that prohibits the use of certain personally identifiable information that would otherwise be permitted under the Cable Act, as was discussed in more detail in Charter's initial comments. Charter Comments at 20-21.

¹³⁶ Charter Comments 36-39.

¹³⁷ The FBI and DOJ contend that cable modem service is subject to the Communications Assistance for Law Enforcement Act ("CALEA"). Department of Justice and Federal Bureau of Investigation Comments at 1. This is incorrect because CALEA only applies to "telecommunications carriers," and cable modem service is not a "carrier" activity. See 47 U.S.C. § 1001(8). To the contrary, cable modem service is an information service, as the Commission has found. In this regard, CALEA's definition of "carrier," like the general Communications Act definition, looks to the common law to determine the status of a particular entity or service. See Communications Assistance for Law Enforcement Act, *Second Report and Order*, 15 F.C.C.R. 7105, ¶¶ 9-18 & nn. 45-46 (1999) (referencing traditional common law tests for "carrier" status under CALEA); *USTA v. FCC*, 2002 U.S. App. LEXIS 14320 (D.C. Cir. July 16, 2002) ("telecommunications carrier" in 47 U.S.C. § 153 is defined by reference to common law); *Virgin Islands Tel. Co. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999) (same). Law enforcement agencies that need access to information from a cable operator in its capacity as an ISP can obtain such access under ECPA, 18 U.S.C. § 2701 *et seq.* In this regard, the USA PATRIOT Act amended the Cable Act to harmonize its privacy provisions (Cable Act § 631, 47 U.S.C. § 551) with ECPA so that the same standards would apply to access to email and similar services provided by cable operators and other ISPs. Finally, where cable operators may choose to use the high speed data capabilities of their systems to act as carriers, the cable industry has a technical specification for CALEA compliance. See <http://www.askcalea.net/programs/> (PacketCable® electronic surveillance specification is a "Lawfully-Authorized Electronic Surveillance Standard"). The Commission, therefore, should not and need not address CALEA in this proceeding.

impose separate (and possibly directly conflicting) privacy rules on cable operators' Internet access services would make it impossible for operators to comply, which would eventually detrimentally impact the consumer. Accordingly, a patchwork of local privacy regulations would hinder the innovation in broadband services and the Commission's goal of encouraging broadband deployment.

V. FORCED ACCESS REGULATION IS UNNECESSARY AND WOULD BE COSTLY TO CABLE MODEM SERVICE INNOVATION.

Despite the plethora of rhetoric calling for "open access," nothing but speculation, innuendo, and a rallying cry of "parity" has been offered in justification for such an intrusive regime.¹³⁸

A. "Regulatory Parity" Does Not Support Imposing Forced Access.

Some commenters argue that the Commission should impose forced access regulations on cable operators for the sake of "regulatory parity," suggesting that cable operators providing Internet access must be subjected to forced access rules because telephone companies are currently subject to unbundling and wholesale price regulation in their provision of DSL. As Charter explained in its Comments to the *Wireline NPRM*, the vast differences in the histories of the two industries rightly led to very different regulatory regimes.¹³⁹ Cable's position in the market has always been very different from that of telecommunications carriers. Common carrier regulations are imposed on telephone companies because "telephone service was effectively a complete, integrated monopoly for essentially all of the 20th Century," while the

¹³⁸ See CFA Comments at 24 (stating that forced access is necessary for information to stimulate innovation); American Civil Liberties Union Comments at 1-3; Center for Digital Democracy Comments at 7; Earthlink Comments at 3; Office of the Attorney General of the State of Texas Comments at 4-5 (contending that forced access is necessary because cable modem service is dominant in the provision of high speed service to residential users); amazon.com Comments at 2-4 (arguing that forced access would permit multiple ISPs to provide consumers with unfettered access to all the information, products, and services of the Internet); State of California and California Public Service Commission Comments at 5; City Coalition Comments at 4, 27 (arguing for local imposition of forced access).

cable industry's share of its core services, video services, has never exceeded 67.3 percent.¹⁴⁰ In 1996, while Congress affirmatively stated a need to open the telecommunications market to competition, it simultaneously found that rate regulation of many cable services was becoming unnecessary.¹⁴¹

Moreover, cable-delivered Internet access services face competition from DSL as well as satellite and wireless broadband Internet access providers. There is no need to regulate cable modem service like DSL due to extensive competition in cable's core video services as well as in broadband Internet access services.¹⁴² Regulation should be imposed only to correct a market failure, particularly in broadband services in light of the Congressional mandate to preserve the free market that presently exists for Internet services "unfettered by Federal or State regulation"¹⁴³ and to encourage broadband deployment by employing various regulatory methods, including deregulatory policies that hinder infrastructure development.¹⁴⁴ Imposing common carrier regulations on cable operators to appeal to some commenters' cries for "fairness" rather than continuing a deregulatory policy that is best for consumers would violate Congress' mandate to the Commission.

B. Commenters' Defenses Of Forced Access Are Pure Speculation.

Some commenters paint a foreboding picture of "market failure" in the broadband industry, contending that cable operators are leveraging their position in the broadband market to engage in anti-competitive behavior. However, these allegations – such as claims of unfair

¹³⁹ Charter Comments submitted in CC Docket Nos. 02-33, 95-20, 98-10 at 18-27 (May 3, 2002).

¹⁴⁰ *Id.* at 21.

¹⁴¹ *Id.* at 21 & n.69.

¹⁴² For a more extensive discussion of the competitive nature of the broadband Internet access services, see Charter's initial Comments. Charter Comments at 5-8.

¹⁴³ 47 U.S.C. § 230(b)(2).

¹⁴⁴ 47 U.S.C. § 157 nt.

dealing for access¹⁴⁵ or controlling the content received by the cable modem subscriber¹⁴⁶ – do not withstand scrutiny.

Cable modem service providers possess no market power in the Internet business. Cable modem service only has about an eight percent penetration rate¹⁴⁷ and narrowband providers continue to dominate the way consumers access the Internet.¹⁴⁸ Moreover, in the Internet access business, narrowband and broadband connections are seen as substitutes.¹⁴⁹ The pricing of narrowband and other broadband provider services constrain the pricing of cable modem service as well.¹⁵⁰ In the pure broadband access market, DSL and cable broadband providers vigorously compete and both expect additional competition in the future from other facility providers such as wireless and satellite broadband providers.¹⁵¹

In this competitive marketplace, there is no evidence of any websites being blocked by access providers. To the contrary, Charter Pipeline service continues to permit access to any website (or any ISP) with a click of the mouse.

Charter has gone still further: at this writing, it is negotiating an agreement with third party ISPs to offer a choice among multiple ISPs on test Charter systems. Thus, the top five

¹⁴⁵ See Earthlink Comments at 8-9.

¹⁴⁶ See amazon.com at 2 (suggesting that cable operators wrongfully push content onto PCs).

¹⁴⁷ As of last year, the penetration into homes passed by cable plant that can provide cable modem service was approximately 8%. See *Third 706 Report* at ¶ 45.

¹⁴⁸ See *Study: Broadband Connections to Surge*, MULTICHANNEL NEWS.COM (June 26, 2002) at <http://www.tvinsite.com/index.asp?layout=story&articleId=CA231184&pubdate=06/26/2002&stt=001&display=searchResults> (stating that broadband service penetration was only about 25% of Internet homes).

¹⁴⁹ See M. Pastore, *Cable or DSL? Consumers See Little Difference*, Cyberatlas (Dec. 1, 2000) at http://cyberatlas.internet.com/markets/broadband/article/0,1323,10099_523681,00.html (citing Harris Interactive Consumer TechPoll); Verizon Comments at 2, 7.

¹⁵⁰ As Charter explained previously, this price constraint is one reason why Charter offers tiered broadband services.

¹⁵¹ Verizon Comments at 2, 7 (Verizon also provides a study demonstrating that the broadband market is very competitive); United States Telecom Association Comments at 2; Comcast Corp. Comments at 6; SBC Comments at 25; High Tech Broadband Coalition Comments at 5; see also Motorola Comments at 4 (stating that investment and competition in the broadband Internet service area is well documented).

MSOs will offer imminently multiple ISPs as a commercial matter, without the need for elaborate regulatory intervention.¹⁵²

Nor is there any rationale to justify radical intervention to reshape dynamic evolution in the market, such as Amazon.com's call for government to declare that only "pull" technology is allowed in the Internet market.¹⁵³ Advertising currently is pushed in and is a driving force of the Internet.¹⁵⁴ Pushing of content to subscribers is typical in the video and Internet industry. For instance, DBS plans to push content into set top boxes to make such content available as VOD.¹⁵⁵ Customers subscribe to services that push content onto desktops.¹⁵⁶

Similarly, contrary to allegations in comments, there are no "restrictions on equipment" attached to cable modems.¹⁵⁷ The allegations about "equipment" restrictions are nothing more than complaints that cable operators provide different products to the commercial and residential markets. Cable operators do provide high speed data services that allow corporate servers to have symmetrical high speed access, but these commercial services are not provided to individuals at residential rates. Residential use agreements that prohibit the operation of home PCs as commercial servers merely reflect this market segmentation.

¹⁵² See *infra* note 195.

¹⁵³ See amazon.com Comments at 2, 5.

¹⁵⁴ See, e.g., Stefanie Olsen, *Yahoo Relaunches With Streamlined Look*, CNET.com (July 2, 2002) at <http://news.com.com/2100-1023-9411301html> (stating that the changes in the website were fueled in part by advertisers' increasing demand for greater exposure on the web portal and with the pronounced decline in advertising revenues, Internet publishers are now catering to these revenue providers).

¹⁵⁵ See MONICA HOGAN, *DirectTV to Test Starz on Demand*, MULTICHANNEL NEWS at 26 (June 3, 2002)(reporting that DirectTV will stage a six-month test of Starz video-on-demand services by placing Starz content on TiVo set top boxes).

¹⁵⁶ By subscribing to either the New York Times or the Washington Post on-line, content is pushed onto the desktop in the form of advertising and email notifications, even when the subscriber is not visiting the website.

¹⁵⁷ See High Tech Broadband Coalition Comments at 9, 11-12.

Also absent in the record is any evidence of ISPs being denied opportunities to innovate.

In fact, industry press reports that even in local markets that offered “open access,” no ISPs applied.¹⁵⁸

On examination, proponents of forced access are basing their case on speculation about what might happen—not about any market “failure.” For example, Media Access Project’s cited essay, H. Feld, “Whose Line is it Anyway? The First Amendment and Cable Open Access,”¹⁵⁹ includes speculation run rampant. It speculates (1) that non-cached streaming video “could be limited using QoS”;¹⁶⁰ (2) that cable has the “ability to favor its own proprietary content”;¹⁶¹ or (3) that Ford could pay @Home to block all access to a critical website.¹⁶² Nonetheless, it admits that these possibilities have not occurred.¹⁶³ However, from that speculation, it advocates an intrusive regime as a prophylactic solution. Theoretical concerns that the Internet will be used to avoid cable franchising are unfounded as well.¹⁶⁴ There is no evidence that cable operators

¹⁵⁸ See Ted Hearn, *AOL-Time Warner Lesson: Don't Ask for Regulations* (January 22, 2001) available at <http://www.tvinsite.com/multichannelnews/index.asp?layout=story&articleId=CA60483&pubdate=01/22/2001&stt=001&display=searchResults> (stating that local regulators said it is far too early to judge the real-world impact of the merger on forced access and that none could name an ISP that sought access during the “open” access debate).

Moreover, contrary to CFA’s speculation, the commercial deals being struck for third party access balance the infrastructure investment risks taken and the division of responsibilities between the parties. For example, in the Time Warner Third Party Access Term Sheet cited by CFA, the (regulated) cable operator is responsible for disconnecting a subscriber for nonpayment of service because the operator is in the best position operationally to make this disconnection. Another cited term distinguishes between a price for best efforts IP transmission and QoS prioritization of packets for more demanding applications. Another handles partial payments on combined bills. The privacy provision requires compliance with ECPA and the Cable Act. Finally, the term of the agreement may be shortened if the ISP has done so little marketing as to have negligible penetration. See CFA Comments at 36-40; Time Warner Access Term Sheet, §§ 8, 11, 13, 15 at http://www.isp-plant.com/news/tw_term_sheet.html (last visited July 15, 2002). CFA seems not to understand the terms it is critiquing, nor is there evidence that these commercial deals are undermining the competitive broadband market.

¹⁵⁹ 8 *CommLaw Conspectus* 23, 28, 33 (Winter, 2000).

¹⁶⁰ *Id.* at 37.

¹⁶¹ *Id.* at 28.

¹⁶² *Id.* at 37.

¹⁶³ *Id.* at 38.

¹⁶⁴ New Jersey Board of Utilities Comments at 4-5 (contending that there is a troublesome potential if programming is migrated from television to the computer and that if this were to occur, programming would be unavailable or unregulated); Metro Cities Comments at 21 (stating that the Commission should regulate IP video); Girard Township, PA at 1.

are migrating all their video to Internet Protocol to evade franchising. In fact, such a strategy would likely fail as most customers still watch TV on the TV, and not on the PC.¹⁶⁵

Likewise, a new regime of forced access is entirely unnecessary to address the parade of horrors about which Amazon.com speculates. If competitive issues do arise, there are ample tools presently available to handle such issues. For example, "framing," redirection, and fraudulent website issues can be subject to Intellectual Property litigation, WIPO arbitration, and recourse to the courts.¹⁶⁶ The outcomes under these existing processes will be tailored to the particular facts and circumstances at hand. Predictions of "inevitable" abuse are conjectural.¹⁶⁷ If they arise, there are ample tools to address anti-competitive actions without the creation of a new regulatory regime.¹⁶⁸ Accordingly, the need for a complex regulatory regime does not exist.

¹⁶⁵ "At the AOL-Time Warner Wedding, Visions of Better and Worse" THE NEW YORK TIMES, at Money and Business 4 (Jan. 16, 2000)(quoting William H. Dutton, Professor of Communications at the University of Southern California and stating that "people will still watch television on television, which will be much like it is today, though in a few years it will have many more links and times and references to the Internet").

¹⁶⁶ See Civil Action No. 02-904-A *Washingtonpost.Newsweek Interactive Company v. Gator Corp.* Eastern District of Virginia, Alexandria (filed June 25, 2002)(seeking redress in federal court for an advertising pop-up scheme where it is alleged that Gator Corp sold advertising for placement on the Washington Post's websites without the website's permission); Stefanie Olsen, "Judge: See ya later, Gator," CNET news.com (July 12, 2002) at <http://news.com.com/2100-1023-943515.html> (granting the preliminary injunction against Gator and requiring the company to temporarily stop displaying pop-up advertising over web-publisher's pages without their permission); *Kelly v. Arriba Soft Corp.* 280 F.3d 934 (9th Cir. 2002)(dealing with the linking and framing of pictures on the Internet and related copyright issues); "Pfizer Statement on New York County District Attorney Indictments and Asserts on Viagra Counterfeiters," PR Newswire (May 17, 2002)(concerning fraudulent websites selling prescription drugs and legal actions taken against fraudulent products using the Viagra name); "PayPal Accused of Fraud, Defamation and Breach of Contract in Lawsuit Filed by Bidville.com Online Auctions" PR Newswire (July 11, 2001)(reporting on a case filed by Bidville.com against PayPal, which is the world's largest web-based payment network allowing individuals to send and receive money online). The Comments of amazon.com wrongly contended that these issues must be regulated by the Commission. See amazon.com Comments at 9-10.

¹⁶⁷ See CFA Comments at 16; City Coalition Comments at 4, 26-27; PCTA at 36; Metro Cities Comments at 20.

¹⁶⁸ For example, the Federal Trade Commission already maintains oversight of Internet business issues. Since 1994, the FTC has brought 222 Internet-related law enforcement actions against 688 defendants, stopping consumer injury estimated at more than \$2.1 billion. See FTC Press Release, *FTC Testimony Portends Increase in Privacy Protection Efforts And Aggressive Antitrust Law Enforcement* (March 19, 2002), available at <http://www.ftc.gov/opa/2002/03/muristestimony.htm>.

C. Proposed Forced Access Regimes Would Be Costly To The Commission, To The Industry, And To Consumers.

The forced access scheme proposed by some commenters would be heavily regulatory and would punish investment. Further, there is no basis in law or policy for the appropriation that is sought under the label of “open access.” Cable systems are private networks, built with private investments, at a sizeable risk. Quite apart from Constitutional concerns over converting private operators into common carriers,¹⁶⁹ the assumption that a regulatory body could “minimally regulate” access to cable facilities, while assuring recovery of the costs and fair value associated with any taking, is naïve.¹⁷⁰ Such regulation is extremely complicated and imposes its own costs and distortions on the market.

The most detailed portrait of what would likely emerge from such a regime was provided by CFA.¹⁷¹ CFA included eighteen principles for forced access including very contentious policies regarding network design principles, the pricing of access, and the customer service relationship.¹⁷² For example, CFA states that any legitimate network management policies must be free of anticompetitive intent and effect.¹⁷³ Although this appears innocuous, it would require

¹⁶⁹ The government is not free to appropriate these systems for use by others. It is well settled that the Commission cannot force a network owner to offer services over its network on a common carrier basis. Such an appropriation also would constitute a taking under the Fifth Amendment to the Constitution. *See, e.g., Brazonsport Saving and Loan Ass'n v. American Savings and Loan Ass'n*, 342 S.W.2d 747, 750 (Tex. 1961); *Texas Power & Light Co. v. City of Garland*, 431 S.W.2d 511, 516 (Tex. 1968); *GTE Southwest Incorp. v. Public Utility Comm'n of Texas*, 10 S.W.3d 7, 11 (Tex. App. 1999); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1177 (Fed. Cir. 1994).

¹⁷⁰ *See infra*. Section VC. Innovation is continuous and spurred by risk capital, facilities-based competition and marketplace negotiation. Ultimately, even a “narrow” forced access regime poses a substantial risk to continued investment in advanced networks and technologies. The adoption, or even suggestion, of a massive appropriation of cable operators’ systems would virtually guarantee a freeze on investment in technology, innovation, and even system upgrades all to the detriment of consumers and the public.

¹⁷¹ Earthlink proposes that the Commission set up a forced access regime where the operator must give nondiscriminatory access to competitors for transmission service if the operator chooses to provide cable modem service itself or through an affiliate, and where the rates, terms and condition for such transmission would be publicly disclosed. However, under this regime, there would be little incentive to provide cable modem service if providing that service empowered competitors to access one’s proprietary plant. *See Earthlink Comments at 10.*

¹⁷² CFA Comment at 41-49.

¹⁷³ *Id.* at 44.

the Commission to sanction network management configurations. Cable networks are under constant change and innovation. The standards of today are currently being improved upon.¹⁷⁴ The Commission would undermine this innovation if it became necessary to get Commission approval for network configurations. Approved configurations could quickly become obsolete, stunting innovation. By contrast, the Commission has consistently resisted efforts to dictate the engineering of cable plant.¹⁷⁵

CFA proposes that the Commission require the network operator to support as many ISPs as technically possible and to commit to the research, development and deployment of technologies to maximize the functionalities available and the number of ISPs that can be supported by the network.¹⁷⁶ Such a suggestion demonstrates the idealism of forced access proponents who believe that privately funded advanced networks will appear even if investment risks are not rewarded.

CFA also asks for the Commission to conduct a cost basis proceeding for the establishment of ISP transmission rates.¹⁷⁷ Under the Commission's explicit statutory requirement to provide access to and to price network elements of common carriers networks by competitive carriers,¹⁷⁸ these issues have taken years to determine and costly, complex litigation

¹⁷⁴ The cable industry jointly funds CableLabs, a scientific industry association that provides specifications for the industry to ensure that cable equipment can be deployed on proprietary networks. CableLabs is constantly working on improved standards for cable plant.

¹⁷⁵ See *City of New York*, *supra* note 12 (upholding the FCC's preemption of local technical standards); see also *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Report and Order, 14 F.C.C.R. 5296 ¶¶ 137, 141 (1999); *In the Matter of Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, CS Docket No. 96-85 ¶¶ 12, 14 (Apr. 22, 2002).

¹⁷⁶ CFA Comments at 45.

¹⁷⁷ *Id.* at 48. In the alternative, CFA contends that the Commission may rely either on the existing leased access rates for cable channels or on publicly available retail rates taking a percentage of the lowest price for broadband Internet service offered to the public to price ISP transmission service. *Id.*

¹⁷⁸ See 47 U.S.C. §§ 251, 252.

heavily in such relationship with its own risk capital. The insertion of a third party ISP into this relationship warrants careful consideration and implementation on the part of the operator. Moreover, to impose a regime like the one proposed by CFA would punish and discourage investment by the cable operator in cable modem service, and would embroil the Commission in extremely controversial issues, which the Commission still grapples with in the common carrier industry.¹⁸²

There is no justification for embarking on such a path for broadband services that have officially been determined not to be essential services like other common carrier services.¹⁸³ The Federal-State Board has found that the Commission's policy of not impeding the deployment of plant capable of providing access to advanced or high speed services is more appropriate to the promotion of advanced services than directly supporting these services through universal service funds.¹⁸⁴ This correct decision demonstrates that common carrier regimes do not "fit" broadband and other advanced services, and that promotion of advanced services should come from deregulatory policies and not from government-backed subsidization.

Furthermore, regulatory machinery is more costly to the Commission, to the industry, and to consumers than allowing the market, which is functioning properly and competitively, to determine the terms of access to the cable plant. History has demonstrated this point even in core video, where cable price increases moderated *after* sunset of cable rate regulation in

¹⁸¹ *Id.* at 49.

¹⁸² Considering the difficulties in determining rules of access, it is evident that local authorities cannot compel forced access regimes because they do not have the expertise to address these issues. See City Coalition Comments at 4 (proposing forced access imposed on a local level).

¹⁸³ See *In re Federal-State Board on Universal Service*, Recommended Decision, FCC 02J-1, CC Docket No. 96-45 ¶ 12 (July 10, 2002).

¹⁸⁴ *Id.* at ¶ 18.

1999.¹⁸⁵ There is a general consensus that the costs of cable rate regulation from 1993-1999 were not justified by the consumer benefits.¹⁸⁶

The potential for regulatory intervention to upend the salutary operation of the market is already evident in content providers' requests that the Commission excuse content providers from privately negotiating carriage with cable operators.¹⁸⁷ Bandwidth intensive businesses (such as movie services, applications vendors, and gaming providers¹⁸⁸) seek to ride investment made by cable without providing opportunity for ordinary business negotiations that allow recovery and profit from that investment. This proposition is a recipe to chill investment.

D. Cable Operators Will Continue To Innovate With Broadband Networks So Long As Regulation Does Not Squelch The Incentives To Innovate.

The intellectual premise for forced access advocacy is singular blindness to the sources of innovation in broadband, and an astonishing lack of confidence in marketplace competition. The often cited Lawrence Lessig, for example, opines that innovation can only occur in ISPs and edge devices,¹⁸⁹ and that the cable industry has built and should build only dumb, "simple and

¹⁸⁵ See *Implementation of Section 3 of the Cable Television and Consumer Protection and Competition Act of 1992*, Report on Cable Industry Prices, 15 F.C.C.R. 10927, ¶ 4 (FCC June 15, 2000)(stating that there was a trend in the industry, first noted in 1998, that the pace of cable rate increases were slowing.).

¹⁸⁶ See Ted Hearn, "Powell: Cable Rates Seem Reasonable," MULTICHANNEL NEWS (Apr. 30, 2001)("If one were to look back at the health of cable companies at the height of regulation, and looked at the staleness in innovation and the prices you were paying for limited service, I [Powell] do not believe you could make an objective case that that was a better environment than the one that exists today").

¹⁸⁷ See, e.g., Earthlink Comments; amazon.com Comments. This position reverses such entities' usual position on government regulation. Amazon.com recently testified before the Senate Committee on Commerce, Science and Transportation regarding the Hollings Online Personal Privacy Act and reiterated previous Congressional testimony that there is no inherent need for privacy legislation for typical website companies because these companies are already self-regulating. See <http://www.ita.gov/isec/ita042502Misener.pdf> (April 25, 2002).

¹⁸⁸ See http://www.larta.org/LAVOX/ArticleLinks/020415_broadband.asp (last visited July 10, 2002)(stating that movie services and other gaming programs will depend on broadband to deliver their large files, which being in the 500 MB range, will take even with a high speed connection anywhere from 30 minutes to an hour to download).

¹⁸⁹ Edge devices are physical devices which are capable of forwarding packets between legacy inter-working interfaces and ATM interfaces based on data-link and network layer information but which does not participate in the running of any network layer routing protocol. See NEWTON'S TELECOM DICTIONARY 240 (17th ed. 2001).

cheap”¹⁹⁰ pipes. Like regulated telephone monopolies, he posits, cable will “stick to what they know how to do,” blinded by legacy business models, core competencies, and established research paths.¹⁹¹

Reality does not agree. The cable industry hired the engineers, took the risk, capitalized the business, and built the “always on” broadband pipes that Lessig adores but trivializes as “certain updates” to the cable network.¹⁹² To take just one of his examples of innovation, fully-featured Internet telephony would not exist without the packet prioritization of DOCSIS 1.1, invented by cable as just one of many steps in its never-ending process of innovation. In contrast, not one ISP has risen to Lessig’s frequent predictions that ISPs will be the “engines of innovation.”¹⁹³ Indeed, his various predictions have proven as wrong as his premise. His predictions that cable companies are “closing off access to ISPs”¹⁹⁴ have been belied by contracts for multiple ISP access and by click-through access.¹⁹⁵ His predictions that cable operators would suppress marketing and try to limit cable modems to “a certain minimum subscriber base”¹⁹⁶ has been refuted by healthy growth in subscriptions and by inventive engineering of bandwidth and nodes to accommodate growth. His prediction that “innovation will be chilled if a potential innovator believes the value of the innovation will be captured by those who control

¹⁹⁰ M. Lemley and L. Lessig, “The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era,” 48 UCLA L. Rev. 925, 932 (April, 2001), cited in Center for Digital Democracy *et al.* Comments at 12.

¹⁹¹ Lessig at 937, 962.

¹⁹² *Id.* at 927.

¹⁹³ *Id.* at 941.

¹⁹⁴ *Id.* at 940, 953.

¹⁹⁵ See AOL Time Warner Comments at 23-24 (pointing out that both Time Warner Cable and ISPs have embraced the multiple ISP approach and that in 35 of 39 divisions, Time Warner provides consumers with a choice of at least three national ISP services); Comcast Corporation Comments at 11-13 (remarking that it has begun offering Net Zero and Juno high speed service over its networks in Nashville, Tennessee and Indianapolis, Indiana, that it will honor AT&T Broadband access arrangements with multiple ISPs, and that Cox has entered into multiple ISP trials); Cablevision Comments at 7 (stating that Cablevision is working to assess partnerships with ISPs that make sense in the marketplace); Cox Comments at 3, 45 (stating cable operators have added and will continue to add additional ISPs to the cable modem platform under reasonable but individually negotiated terms and conditions); AT&T Comments at 3, 10, 14 (providing examples of AT&T’s third party ISP access trials).

the network and have the power to behave strategically”¹⁹⁷ was thoroughly discredited in the cable programming network market.¹⁹⁸

Who should be rewarded for taking this more-than-ordinary risk and deploying and continuously improving such innovative networks? Lessig and his devotees seem to abhor the idea of permitting cable innovators to reap the rewards of marketplace risk. He treats profits as “special incentives,”¹⁹⁹ the market’s ability to allocate resources as “ideological vogue,” and a “fundamentally misguided assumption;”²⁰⁰ and reliance on facilities-based competition as “unwise.”²⁰¹ He dismisses the entire economic premise of the cable television industry – in which the relative value of content and of distribution networks is negotiated through marketplace transactions and revenue splits – as creating too much risk of monopoly abuse by an industry that should just get out of the way of content providers and ISPs.²⁰²

In place of the market and the dual revenue stream that built cable television, he would place the (discredited) theorems of academics and government regulation. He even pretends that such regulation would be “light” – a simple matter of “technical interconnection”²⁰³ – rather than the absurdly complex, distorting, and expensive regime which has been proven to emerge in the

¹⁹⁶ Lessig at 949.

¹⁹⁷ *Id.* at 932.

¹⁹⁸ The cable programming market has expanded rapidly, and programmers have proven themselves quite adept at capturing value. *See e.g.*, R. Thomas Umstead, *NBA or No, TNT's Rate Will Rise*, MULTICHANNEL NEWS (Sept. 9, 2001) at <http://www.tvinsite.com/index.asp?layout=story&articleID=CA155388&pubdate=09/10/2001> (reporting on the power of sports networks to get carriage on cable systems even where these networks insist on greater license fees); Kent Gibbons, *MSOs, Net Execs Stage Sit-Down*, MULTICHANNEL NEWS (May 6, 2002) available at <http://www.tvinsite.com/multichannelnews/index.asp?layout=story&articleId=CA21587> (reporting on an informal discussion between MSOs and programmers regarding programming carriage negotiations and the competitive issues involved for both players); *Allbritton, Cox Extend Retrans Talks*, MULTICHANNEL NEWS (Nov. 2, 2001) available at <http://www.tvinsite.com/multichannelnews/index.asp?layout=story&articleId=CA181261>; Jim Forkan, *Fox, Cox Move Past Retrans Dispute*, MULTICHANNEL NEWS (Aug. 27, 2001) available at <http://www.tvinsite.com/multichannelnews/index.asp?layout=store&articleId=CA154085>.

¹⁹⁹ Lessig at 959.

²⁰⁰ *Id.* at 933, 947.

²⁰¹ *Id.* at 952.

²⁰² *Id.* at 942-43.

²⁰³ *Id.* at 957, 965.

common carrier context and has already been requested in every Commission “open access” docket.²⁰⁴ Asymmetric regulation is no “curious”²⁰⁵ “historical accident,”²⁰⁶ as he would have one believe: it arose as a deliberate choice to allow marketplace incentives to stimulate facilities-based competition, and it has worked.

It is not cable that is trying to undo core “design principles,” as Lessig puts it.²⁰⁷ It is Lessig who is attempting to undo the core design principles of marketplace competition, and who seeks to replace innovation, risk-capital, facilities-based competition, and marketplace negotiation, with a fanciful world in which networks magically appear and third party programmers reap the exclusive rewards. In this Charter agrees with Lessig: “We know less than we should about how this market functions.”²⁰⁸ However, no one should adopt a forced access policy based on Lessig’s dismissive view of cable’s inventiveness or his unbridled faith in the power of ISPs and edge devices to invent new networks. The communications industry has witnessed this phenomenon before, in which marketplace realities are shunted aside in favor of untested faith in the Internet and the inventiveness of dot coms. This dot com bubble burst,²⁰⁹

²⁰⁴ See, e.g., Earthlink Comments in Gen. Docket No. 00-185 at 52-54 (Dec. 1, 2000)(calling for forced access); Consumer Union, Consumer Federation of America, Center for Media Education, and Media Access Project Comments in Gen. Docket No. 00-185 at 20-22 (Dec. 1, 2000)(same); New Hampshire ISP Association Comments in Gen. Docket No. 00-185 at 4 (Dec. 1, 2000)(requiring unbundling of transport and rates for transport to be published and subject to audit); Mindspring Enterprises Inc. Comments in CS Docket No. 99-251 at 5 (Aug. 23, 1999)(requesting that Title II unbundling requirements be imposed as part of the AT&T/MediaOne merger); Qwest Communications Corporation Comments in CS Docket No. 98-178 at 15-16 (Oct. 10, 1998)(calling for 251 obligations on AT&T/TCI in their provision of broadband as a part of merger conditions); SBC Comments in CS Docket No. 00-30 at 29, 35-36 (Dec. 29, 2000)(suggesting that broadband transport service must be unbundled from cable modem service as a condition of the AOL-Time Warner merger).

²⁰⁵ Lessig at 927.

²⁰⁶ *Id.* at 928.

²⁰⁷ *Id.* at 929.

²⁰⁸ *Id.* at 971.

²⁰⁹ See NY Times Editorial, *The Dot-Com Bubble Bursts* (December 24, 2000) available at:

<http://www.nytimes.com/2000/12/24/opinion/24SUN3.html>; Laura Lorek, *Dotcom Bubble Bursts; Layoffs Begin* (Sept. 27, 2000) available at <http://www.zdnetindia.com/print.html?iElementId=3187>.

and the industry is still living with its consequences. The industry and its regulators should not repeat that error again in cable television policy.

VI. CONCLUSION

The Commission should resist the pleas of those who seek to harvest the cable investment in broadband infrastructure for their own self-interested purposes, and affirmatively restrain these efforts to derail innovation in cable modem service. Commission deviation from the current deregulatory policy in broadband would deter and destabilize broadband investment and would undermine innovation in cable communications services as well. Accordingly, the Commission should maintain the regulatory course it has followed throughout the deployment of cable modem service, which has lead to the successful growth of cable modem service.

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