

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities)	
)	CS Docket No. 02-52
Internet Over Cable Declaratory Ruling)	
)	
Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities)	

COMMENTS OF

CENTER FOR DIGITAL DEMOCRACY
CONSUMER FEDERATION OF AMERICA
MEDIA ACCESS PROJECT
ASSOCIATION OF INDEPENDENT VIDEO AND FILMMAKERS
NATIONAL ALLIANCE OF MEDIA ARTS AND CULTURE
AND
THE UNITED CHURCH OF CHRIST, OFFICE OF COMMUNICATION, INC.

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ERS, NATIONAL ASSOCIATION OF MEDIA ARTS AND CULTURE, AND THE UNITED
CHURCH OF CHRIST, OFFICE OF COMMUNICATION, INC.**

The Center for Digital Democracy (CDD), the Consumer Federation of America (CFA), the Media Access Project (MAP), the Association of Independent Video and Filmmakers (AIVF), the National Association of Media Arts and Culture (NAMAC), and the United Church of Christ, Office of Communications, Inc. (UCC) (collectively, “CDD, *et al.*” or “Commentors”), respectfully submit the following comments in the above captioned proceeding.

At the outset, Commentors state that the Commission has erred as a matter of law in the Declaratory Ruling portion of the item. That matter, however, is on appeal before the United States Court of Appeals for the Ninth Circuit.

Notwithstanding the Commission’s flawed premise, CDD, *et al.* address the questions raised in the *NPRM*. As set forth below, Commentors will demonstrate in these comments: (a) that there is no First Amendment or Fifth Amendment bar to imposing open access – to the contrary, open access serves First Amendment values; (b) the Commission possesses ample ancillary authority under Title I to impose open access safeguards; and (c) policy dictates that the Commission should impose open

access safeguards, to encourage innovation, preserve competition and protect the diversity of voices now speaking freely on the Internet. In response to the specific question raised in the *NPRM* Commentors assert that (1) the Commission's tentative conclusion that it should forbear from applying Title II requirements in the Ninth Circuit is legally insufficient, and (2) that the Commission should apply the privacy requirements of Section 631 to Internet access provided via cable systems, and nothing in Section 631 prevents the Commission from enacting regulations to effectuate Congress' intent in passing 631.

EXECUTIVE SUMMARY

Although the Commission has erred as a matter of law in declaring Internet access provided over cable systems to be an "information service" rather than a "telecommunications service," the Commission has recognized that simply handing the keys to the emerging broadband Internet to incumbent monopolists to divide between them may not, after all, serve the public interest. Accordingly, the Commission asks whether it has authority to impose safeguards under its Title I authority and, if it has such authority, whether it should impose safeguards and what safeguards to impose.

The Commission errs in tentatively concluding that it should favor imposing no safeguards. The Commission bases this on its misreading of Sections 230 and 706 of the Communications Act, and by ignoring other sections of the Act that require the opposite conclusion – that the Commission should act affirmatively to protect the public interest and facilitate deployment by imposing an open access regime similar to that which now exists in the narrowband Internet.

The companion comments submitted by the Consumer Federation of America, *et al.* ("*Consumer Comments*") focus on the errors of the Commission's approach to broadband policy, the economic harm the public will suffer as a result of the Commission's proposed policies, and economic

principles that the Commission should employ to construct an open access regime for the broadband Internet.

These comments, submitted by independent content producers and those who engage in First Amendment speech potentially disfavored by the incumbent monopolists, focus on the First Amendment aspects of the Commission's mistaken broadband policy. The Commission has narrowly construed the "public interest" to mean deployment and completely ignored the Commission's statutory and Constitutional mandate to consider the public's "paramount" First Amendment right "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." *See Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 390 (1969); 47 USC §257(b); Cable Consumer Protection and Competition Act of 1992, P.L. 102-385 §§2(a)(6), 2(b)(1). Thus, even if the Commission's broadband policy were one which would encourage deployment – a fallacy disproved in the companion *Consumer Comments* – it would remain deficient for its failure to safeguard and encourage diversity in the "electronic agora" of the Internet, a medium "as diverse as human thought." *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

Despite receiving a wealth of information in the course of the *Notice of Inquiry* demonstrating that no First Amendment or Fifth Amendment bar exists to imposing an open access regime, the Commission has once again sought comment on this matter. *NPRM* ¶¶ 80-81. The only new law since the filing of comments in the *NOI* has re-affirmed the value of the Internet as a forum for non-commercial, educational, and political speech. *See, e.g., American Library Assoc. v. United States*, ___ F.supp.2d ___, 2002 WL 1126046 (E.D.Pa.) (May 31, 2002). The arguments regarding the use of the First Amendment as a shield by the incumbent cable companies have been rejected by the courts, *see AT&T Corp. v. City of Portland*, 43 F.Supp.2d 1146, 1154 (D. Ore 1999), and scholars. *See* Mark

A Lemley and Lawrence Lessig, “The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era,” 48 UCLA L. Rev. 925 (2001). As to the Fifth Amendment, the Supreme Court has consistently affirmed that requiring those with the potential to monopolize communications media to interconnect with others does not violate the Fifth Amendment, provided they receive adequate compensation for any physical invasion of property. See *Verizon Communications, Inc. v. FCC*, 122 S.Ct. 1646, 1680-81 (2002) (rejecting takings argument against TELRIC); *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987) (rejecting takings claim against FCC rate for cable pole attachment).

The *Consumer Comments* set forth the principles the Commission should apply in fashioning suitable protections. Since the Commission erroneously insists it can only address cable Internet access via its Title I ancillary authority, the Commission asks whether Title I conveys sufficient authority.

Title I provides the Commission with more than adequate authority to regulate Internet access via cable systems, even if the Commission has erroneously classified such services as “information services.” Even before the classic statement of *United States v. Southwest Cable*, 392 U.S. 157 (1968), that Title I confers on the FCC with “not niggardly, but expansive powers,” *Id.* at 173 (quoting *NBC v. United States*, 319 U.S. 190, 219 (1943)), it was accepted that the Commission has sufficient power to implement the goals of the Communications Act. Although the Commission has disclaimed application of Title II to this service, the Commission may take proper action pursuant to its ancillary authority under Titles I and II to implement the policy goals of Title II and the Communications Act generally. This includes the policy of the Communications Act to promote diversity of voices, encourage innovation, and ensure broad and timely deployment to the American people. 47 USC §157 nt; §257(b).

Accordingly, under the authority of Title I, the Commission should implement the principles set forth in the *Consumer Comments*.

As to specific applications of statutory provisions, the Commission's tentative conclusion that it should forbear from application of Title II regulation in the Ninth Circuit, where the United States Court of Appeals has held that cable Internet access is a telecommunications service, *NPRM* ¶95, falls short of the statutory requirements for forbearance. The Commission has not even attempted to apply the three-prong analysis required by the statute. Instead, the Commission has simply set forth several unsupported platitudes regarding the nascent state of broadband and its desire for a national policy. This lack of rigor stands in sharp contrast to previous Section 10 forbearance proceedings, where the Commission explicitly applied the three statutory requirements and made appropriate and specific findings supported by extensive citations to the record.

The Commission's inability to satisfy the statutory requirements demonstrates the fallacy of the Commission's broadband policy. If the permission remains deaf to considerations of policy, however, it cannot afford to ignore the requirements of law and its own long-standing interpretation of what Section 10 requires. Accordingly, the Commission should, at the least, reverse its tentative decision as regard to forbearance in the Ninth Circuit. If the Commission desires a uniform policy, it should re-evaluate its erroneous classification of cable Internet access.

Finally, the Commission asks whether Section 631 of the Communications Act, 47 USC 551, applies to cable Internet access. *NPRM* ¶112. Section 631 prohibits a cable company from collecting unnecessary personal information from subscribers, requires subscriber notification and consent for the collection of personal information necessary for operation of cable or "other services," and creates other significant protections for subscriber privacy. The Commission tentatively concludes that

Section 631 and these important subscriber privacy protections apply to broadband Internet access provided by cable system operators.

CDD, *et al.* support the Commission's tentative conclusion that Section 631 applies to cable companies providing Internet access service. The use of the term "other service" in the statute clearly indicates an intent by Congress to include any service provided through the cable plant, including those not defined as "cable services" by the Act.

Congress' actions here make a great deal of sense. The operator of the network has an ability to collect information from subscribers. Congress did not want Americans to waive their privacy rights as a condition of subscribing to cable services or utilizing new, non-cable services offered by cable system operators. Accordingly, Congress enacted the provisions of Section 631.

Commentors note that while the courts traditionally enforce Section 631, nothing by its terms prevents the Commission from enacting regulations necessary to implement Section 631 and the Congressional intent behind it. The Commission's language, however, gives the impression that the Commission considers itself without authority to enforce Section 631 or to issue regulations to effectuate it.

This mis-impression has no basis in law. Nothing in Section 631 indicates that Congress intended to prohibit the Commission from enforcing Section 631 as part of the Communications Act. Accordingly, the Commission should disclaim any doubt that it has authority to act under Section 631. Furthermore, the Commission should consider whether to initiate a separate rulemaking under Section 631, or what other regulations may prove necessary to ensure that the protections promised to the public by Section 631 remain real rather than illusory in the cable broadband environment.

ARGUMENT

I. THE FIRST AMENDMENT AND FIFTH AMENDMENT PRESENT NO BAR TO OPEN ACCESS: TO THE CONTRARY, THE FIRST AMENDMENT MANDATES OPEN ACCESS PROTECTIONS.

The Commission asks whether the First Amendment prohibits the Commission from imposing open access, and, if not, under what level of scrutiny the federal courts will review such regulations. The Commission also asks whether open access would constitute a taking under the Fifth Amendment.

Interconnection requirements such as open access do not raise First Amendment concerns, accordingly, courts should scrutinize such rules under the deferential “rule of reason” generally applied to Commission decisions. *See Verizon Communications*, 122 S.Ct. 1646 (2002) (affirming TELRIC). The High Court and lesser courts have also rejected the principle that requiring interconnection constitutes a taking, providing rates for physical access are not set so low as to be confiscatory. *Verizon Communication*, 122 S.Ct. at 1680-81 (rejecting takings argument for TELRIC); *NCTA v. Gulf Power Co.*, 436 U.S. 775 (2002) (upholding Commission’s pole attachment rules); *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987) (same); *Amsat Cable Ltd. v. Cablevision of Connecticut, Ltd.*, 6 F.3d 867, 874-75 (2nd Cir. 1993) (state statute mandating access to multiple dwelling units by competitive MVPDs does not constitute takings if owner receives compensation for physical invasion of property).

Two cases the Commission cites in Paragraph 80 n.303, *SBCA v. FCC*, 275 F.3d 337 (4th Cir. 2001) and *Time Warner Ent. Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001), have no bearing on the matter before the Commission. As an initial matter, *SBCA* declined to determine an appropriate level of scrutiny, content that even under intermediate scrutiny, it could adequately resolve the question before it. *SBCA*, 275 F.3d at 355 (because rule would survive intermediate scrutiny, court “need not address the FCC and its intervenors’ argument that the rule should be evaluated under a more lenient

standard”). More importantly, these cases involved the delivery of video programming and a perceived prohibition on directly speaking to a chosen audience: either through the inability to purchase a system that connected to the desired audience, *TWE* 240 F.3d at 1129, or through use of limited channel capacity, *SBCA* 275 F.3d at 352-53.

By contrast, as discussed at length in *CU, et al.*’s filing in GN 00-185, nothing prohibits the cable provider from speaking with whomever wishes to hear it. An open access rule does not preclude the owner of the cable system from offering Internet access service, or even from offering unique content. It does prevent the cable operator from excluding others from speaking to subscribers, but the First Amendment does not protect the right to deny others an audience through monopoly means. *Red Lion*, 395 U.S. at 387 (“[t]he right of free speech...does not embrace a right to snuff out the free speech of others”); *Amsat*, 6 F.3d at 874.

A. The Commission Must Consider the Negative Impact On The First Amendment If It Takes No Action.

Commentors Center for Digital Democracy (CDD),¹ Consumer Federation of America (CFA),² Media Access Project (MAP),³ the Association of Independent Video and Filmmakers (AIVF),⁴ the

¹CDD is committed to preserving the openness and diversity of the Internet in the broadband era, and to realizing the full potential of digital communications through the development and encouragement of noncommercial, public interest programming.

²CFA is the nation's largest consumer advocacy group, composed of two hundred and eighty state and local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power and cooperative organizations, with more than fifty million individual members.

³MAP is a 30 year-old non-profit, public interest telecommunications law firm which represents civil rights, civil liberties, consumer, religious and other citizens groups before the FCC, other federal agencies and the Courts.

⁴AIVF is a 25-year-old professional organization serving international film- and videomakers from documentarians and experimental artists to makers of narrative features. AIVF represents a national

National Alliance for Media Arts and Culture (“NAMAC”),⁵ and the Office of Communication of the United Church of Christ, Inc. (UCC),⁶ share several common interests in this proceeding. Commentors and their members rely upon ISPs and the networks that service them to communicate, publish content, gather information, and conduct business. All have enjoyed the fruits of the Commission’s and Congress’ decisions to open the telephone networks and mandate non-discrimination. All would suffer under a regime that allows owners of networks to discriminate against rivals or to discriminate among content providers.

As a previous paper from the Office of Plans and Policies recognized:

The Internet is a community, and users need to move in and out of that community with ease. The Internet has grown up over this country’s telephone lines, a technological development that has made it possible for virtually any American to join the online community. Because of the vast expanse of telephone penetration in this nation, and because of the openness of that network, the Internet has exploded. Every American with a phone line and a computer can be part of the Internet. The phone network has

membership of 5,000, of whom 4,000 are active independent producers. AIVF provides services to the field including: informative seminars and networking events, trade discounts and group insurance plans, advocacy for media arts issues, a public resource library, advice and referral support, and publication of books and directories.

⁵NAMAC is a nonprofit association composed of diverse member organizations who are dedicated to encouraging film, video, audio and online/multimedia arts, and to promoting the cultural contributions of individual media artists. NAMAC's regional and national members collectively provide a wide range of support services for independent media, including media education, production, exhibition, distribution, collection building, preservation, criticism and advocacy. NAMAC’s member organizations include media arts centers, production facilities, university-based programs, museums, film festivals, media distributors, film archives, multimedia developers, community access TV stations and individuals working in the field. Combined, the membership of these organizations totals around 400,000 artists and other media professionals.

⁶UCC is a non-profit corporation, charged by the Church's Executive Council to conduct a ministry in media advocacy to ensure that historically marginalized communities (women, people of color, low income groups, and linguistic minorities) have access to the public airwaves. The United Church of Christ has 1.4 million members and nearly 6,000 congregations. It has congregations in every state and in Puerto Rico.

historically been open in two senses: phone customers are permitted to access any Internet service provider of their choosing, and those customers are permitted to attach their own equipment to the phone line, allowing them to use modems to transform their phone lines into their own information superhighways.

Jason Oxman, *The FCC and the Unregulation of the Internet*, OPP #31.

The Commission's continued policy of entrusting the primary residential broadband network in the hands of monopoly providers (or, at best, a duopoly where the local ILEC deploys) threatens the very foundation of this openness that drives deployment and development.

Commentors depend on broadband for a number of purposes. For Commentors such as NAMAC and AIVF, whose members produce independent movies or audio presentations and wish to distribute them over the Internet, access to competitive broadband providers is the *sine qua non* of distribution in a genuinely competitive market, where merit rather than market power decide the outcome. Likewise, for members of UCC who wish to have "suitable access to social, political, esthetic, moral, and other ideas and experiences," *Red Lion*, 395 U.S. at 390, access to open and competitive broadband remains essential.

The members of these organizations and the public depend on broadband as a way to bypass monopoly cable providers and the few other media gatekeepers, such as television networks, that control the distribution of material through the mass media. Because of the high levels of concentration in the media marketplace, independent video artists and musicians remain at the mercy of a few powerful interest that can set the contract terms and prevent any competing independent video or music products from reaching more than a fraction of the market.

Broadband promises to change this. Subscribers to broadband services should be able to cut out the "middle man" and reach artists directly. Video producers and musicians, with unobstructed

access to broadband pipes, can market their products directly to willing viewers and listeners. Perhaps more exciting, broadband potentially allows the artist and the audience to interact in a way never before possible.

Instead of nurturing this promise, grounded in the narrowband experience and more than 30 years under the Commission's *Computer* proceedings, the Commission proposes to turn unfettered control over to those with the greatest incentive to preserve the status quo, the current dominant providers of mass media entertainment in the marketplace. The First Amendment and competitive harm of such a decision is incalculable, and the Commission should reverse its tentative decision to leave broadband content to the discretion of cable monopolists.

The threat to political speech, which lies at the core of the First Amendment, is as potent as the threat to arts, entertainment, and innovation. Organizations such as CDD and CFA engage in controversial political speech and seek broad dissemination of their ideas and information. Often they have taken positions contrary to the cable system operators, or to their major clients. Given the technical capacity of network operators to slow down access to specific websites, or prevent access to particular sites entirely, it takes little imagination to see how First Amendment expression of the kind engaged in by Commentors is placed at risk by the Commission's actions.

Even if cable operators take no explicit action, the threat of cutting off or restricting access to subscribers will cause many potential speakers to self-censor. If the Commission makes the right to speak freely over broadband Internet a matter of grace, rather than a matter of right, the existing Internet will be reduced from a diverse marketplace of ideas to a monotonous shopping mall.

- 1. Unregulated Cable Networks Would Have the Ability and Incentive To Discriminate Against Rival Service Providers, to Discriminate Against Disfavored Content, and to Extort Concessions From "Favored" Content**

or Service Providers.

As Commentors have explained at length numerous times to the Commission and elsewhere, the technology currently deployed to make the Internet possible gives those who maintain the networks the ability to control what traffic flows through those lines and at what speeds. *See, e.g.,* Comments of CU, *et al., Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GEN Docket No. 00-185 (filed December 1, 2001) at 9-11; *Letter of Andrew Schwartzman to FCC Chairman William Kennard*, December 6, 1999 at 4; *Letter from Jeffrey Chester, Center for Media Education, Mark Cooper, Consumer Federation of America, Gene Kimmelman, Consumers Union, Andrew Jay Schwartzman, Media Access Project, Patrice McDermott, OMB Watch, to FCC Chairman William Kennard*, (July 29, 1999).

Congress, the Commission and the Courts have long recognized that where the holder of a network has the technical ability to discriminate and control traffic, absent laws prohibiting otherwise, it will inevitably abuse this power. *See* 47 USC §251(g) (leaving Commission's open access regime in place); *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC.2d 384 (1980) (*Computer II Final Decision*); *United States v. Western Electric Co., Inc.*, 673 F. Supp. 525, 585-86 (D.D.C. 1987); *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 184-85 *aff'd sub nom Maryland v. United States*, 460 U.S. 1001 (1983). *See also* Mark A Lemley & Lawrence Lessig, *The End of End to End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L.Rev. 925, 940-46 (2001) (“*End to End*”); Harold Feld, *Whose Line Is It Anyway? The First Amendment and Cable Open Access*, 8 CommLaw Conspectus 23, 34-40 (2000) (“*Whose Line*”).

This is not an academic exercise in projecting possible motivations. As the Wall Street Journal

recently reported, rival cable companies have declined to permit AOL Time Warner to offer AOL's service on their systems because rival cable companies wish to "own" the customer and fear AOL's ability to deliver competing content and services. *AOL Rethinks Its Game Plan*, Wall Street Journal A3 (April 19, 2002). Cable companies have already taken steps to limit the range of services available to customers where these services potentially threaten cable's core video programming business. *See Whose Line*, 8 CommLaw Conspectus at 34 n. 115 (citing limits on streaming media).

It takes little predictive judgment to foresee that, if permitted, cable MSOs will actively discriminate against rival content and rival access providers.

2. Commentors And The Public Would Suffer In A Deregulated Regime.

This course of events would prove disastrous. Commentors NAMAC and AIVF represent independent producers of video and other media. Broadband platforms offer not merely a new medium, but a new mechanism for reaching willing viewers. Especially in light of the continued consolidation permitted by the Commission and the courts, broadband Internet remains the only possible conduit through which these members can hope to reach a broader audience than that found in their local neighborhood.

If the Commission persists in its current course of allowing incumbent cable monopolies to control access through the contrivance of declaring broadband access via cable an unregulated information service, AIVF and NAMAC members will find themselves reduced to the same position they now occupy *vis-a-vis* cable and the broadcast programming networks: subject to the whims of the few media gatekeepers who hold the keys to audiences AIVF and NAMAC members wish to reach.

Even worse, AIVF and NAMAC members will lose an entire new medium of production.

Unregulated cable broadband prohibits subscribers from operating servers and receiving streaming media. *Whose Line*, 8 CommLaw Conspectus at 38 & n.153. As such, AIVF and NAMAC members find the very nature of the content they wish to offer restricted. If the Commission permits DSL to follow the closed cable model, where the network provider rather than technology dictates the limits of innovation, AIVF and NAMAC members will literally lose the ability to create new, interactive art. This would harm not merely AIVF, but members of the public at large (represented here by Commentors UCC), who have a paramount First Amendment right “to receive suitable access to social, political, esthetic, moral, and other ideas and experiences.” *Red Lion*, 395 U.S. at 391.

Commentors CDD and CFA engage in controversial speech often disfavored by large corporate interests, particularly telecommunications interests. As such, these Commentors would face the specter of seeing reception of their information degraded. For example, if CDD issued a report critical of media consolidation, the handful of broadband gatekeepers could slow delivery of packets from the CDD website and otherwise make it difficult for people to find or read the material.

Similarly, if CFA issued a report critical of an auto manufacturer such as Ford, Ford could use its power as an advertiser to persuade cable MSOs to interfere with subscribers trying to reach CFA’s website. These subscribers would likely never even discover the interference. Because the technology that manages the network allows the network operator to manage network traffic, it is a simple matter for the cable MSO to slow packets to and from a disfavored website such as CFA’s., and to do it in a way that the subscribers assume the problem lies with CFA. If sites favored by the MSO, such as those affiliates, download quickly, subscribers will attribute problems in connection to the target website rather than to the network operator.

Even without deliberate discrimination, all Commentors face the danger of higher prices and

poorer service denying them the benefits of broadband. Cable already distinguishes between “residential” and “commercial” customers by charging a hefty price increase for commercial customers, although there is no difference in cost to the cable provider to provision one over the other. In a world of competition, such distinctions would only occur if there were genuine issues of cost or if a provider included real value added services in the “commercial” package. Without competition, subscribers must simply accept what is offered to receive any broadband benefit whatsoever.

Thousands of small businesses and home-based businesses use broadband connections, and would benefit from increased competition. In particular, those customers that have access to cable broadband, but not DSL or some other intermodal competitor find themselves at the mercy of a monopoly provider. This has become a significant element of the U.S. economy (as well as vitally important to members of AIVF, NAMAC, and UCC). The Commission’s continued refusal to take action places this important engine of economic expansion in jeopardy.

Finally, ISPs themselves offer innovative services that further the “diversity of media voices” Congress instructed the Commission to promote with its policies. 47 USC §257(b). For example, ISPs exist that advertise enriched content and server-based filtering that matches one’s religious preferences. See <http://www.christianliving.com> (advertising itself as “a Christian AOL”); <http://site.safelines.net/> (advertising “Koshernet” and promising Jewish-based content controls). These and other services provided by ISPs are discussed at length in the companion *Consumer Comments*.

Members of UCC have a First Amendment right to avail themselves of such services. As representatives of the general public, whose First Amendment rights to receive information are “paramount,” *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 390 (1969), Commentors maintain that the Commission cannot ignore its responsibility to ensure that the Internet remains a

medium of communication “as diverse as human thought.” *ACLU v. Reno*, 521 U.S. 844, 870 (1997). This diversity does not flow from handing control of broadband competition to a few monopoly gatekeepers that control the means of access. It comes from genuine competition among a multiplicity of providers – a fact Congress recognized when it instructed the Commission to use regulation to eliminate barriers to entry and promote competition. 47 USC §257(a)-(c).

II. EVEN UNDER THE MISTAKEN CLASSIFICATION OF “INFORMATION SERVICE,” THE COMMISSION HAS ADEQUATE AUTHORITY TO IMPOSE NECESSARY SAFEGUARDS.

The Commission explicitly asks whether it has authority to impose open access protections on cable systems providing broadband Internet access classified as an “information service,” whether as a policy matter it should do so, and what shape those safeguards should take.

For the reasons stated above, as well as the reasons given in the companion *Consumer Comments*, the Commission should forthwith take steps to adopt an open access regime along the principles set forth in the *Consumer Comments*. The Commission has adequate authority under its Title I “ancillary” jurisdiction.

It is well established that the Commission has broad powers to accomplish its statutory goals. *United States v. Southwestern Cable*, 392 U.S. 157, 167-74 (1968). While these powers are not without limit, *see FCC v. Midwest Video Corporation*, 440 U.S. 689 (1979), the current case does not come close to straining the Commission’s powers.

There can be no doubt that if the Commission refuses to classify Internet access over cable as a Title II telecommunications service, it may regulate such service as ancillary to Title II. The Commission itself recognizes that this transmission takes place via “telecommunications,” even if it errs in not finding this offering a telecommunications service. *NPRM* ¶40. Furthermore, the offering

of services identical to that telecommunications services, and the ability to offer converged services, invoke the same reasoning the Supreme Court found compelling in *Southwestern Cable*. 392 U.S. at 173-76.

That the service is offered via a cable system does not alter the analysis. Congress understood that many types of services would be offered over cable networks, but that these services would not be “cable services” within the meaning of the act. *See, e.g.*, 47 USC §541 (recognizing that cable system operators will offer telecommunication services). By the same logic, broadband Internet access does not become ancillary to cable services merely because cable MSOs offer these services via the cable plant.

III. THE COMMISSION’S DETERMINATION TO FORBEAR WHERE THE NINTH CIRCUIT HAS DETERMINED THAT INTERNET OFFERED OVER CABLE SYSTEMS IS A TELECOMMUNICATIONS SERVICE IS LEGALLY DEFICIENT AND WRONG AS A MATTER OF POLICY.

The Commission attempts to actually employ Section 10 forbearance in the area covered by the Ninth Circuit’s opinion in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (2000), which found Internet access over cable to be a telecommunications service. Its inability to meet the statutory requirements for Section 10 forbearance demonstrates why the Commission has attempted this definitional shell game. The Commission’s forbearance determination in Paragraphs 94-95 fails to make an adequate showing under the statute, based on both a plain reading of the statute and based on the standard employed by the Commission in past forbearance cases. Consequently, it fails as a matter of law.

To the extent the Commission feels it would serve the public interest to have a uniform national policy, the sole public interest justification offered by the Commission for forbearance, the Commission

should comply with the law rather than seek to circumvent it. By properly classifying cable broadband access as a telecommunications service, the Commission will comply with the Communications Act and will not need to resort to artifices such as this attempt at forbearance. To the extent that there are geographic markets where sufficient “intermodal” competition exists to warrant forbearance, the Commission can conduct proper Section 10 proceeding.

Section 10 lays out a specific three-prong test that the Commission must apply when deciding whether or not to exercise forbearance authority. First the Commission must determine that enforcement is not necessary to ensure “just and reasonable and not unjustly or unreasonably discriminatory” ... “charges, practices, classifications, or regulations.” Second, the Commission must determine that enforcement of the regulation is not necessary for consumer protection. Third, the Commission must determine that forbearance is in the public interest. The statute instructs the Commission to consider whether forbearance “will promote competitive market conditions” as a factor in determining if forbearance is in the public interest. (47 U.S.C. § 160(a)(1)-(3)).

The Commission offers the same reasons under each prong to justify forbearance: “cable modem service is still in its early stages; supply and demand are still evolving; and several rival networks providing residential high-speed Internet access are still developing.” *NPRM* ¶ 95. In addition, under the public interest prong of the test the Commission “tentatively conclude that the public interest would be served by the uniform national policy that would result from the exercise of forbearance to the extent cable modem service is classified as a telecommunications service.” *Id.* The Commission points to no record evidence to support these conclusions; only its intuition that no regulation is better than some. Such unsupported assertions do not support a finding in favor of forbearance under the standards set forth by the Commission and the statute.

The Commission requires that petitioners seeking forbearance "support...[their] requests with more than broad, unsupported allegations." *In the Matter of Hyperion Telecommunications, Inc. Petition Requesting Forbearance*, 12 FCC Rcd 8596 (1997) at ¶ 1. The Commission itself adheres to the same standards when tentatively concluding forbearance is justified when initiating forbearance. *See, e.g., In the Matter of 2000 Biennial Regulatory Review*, 15 FCC Rcd 20008 (2000).

It is instructive to compare this proceeding with a more standard Section 10 proceeding. For example, when the Commission tentatively concluded to forbear from the application of tariff filing requirements to non-dominant interexchange carriers, the Commission carefully considered each prong of Section 10, made assertions based on cited evidence, and showed a nexus between the assertions and the tentative conclusion that the prong required. *See In the Matter of Policy and Rules Concerning Interstate, Interexchange Marketplace Implementation of Section 254(g) of the Communications Act of 1934*, 11 FCC Rcd 7141, 7157-7164 (1996) (supporting forbearance decision with citations to numerous reports, orders, decisions, records and extensive findings)(*"Tariff NPRM"*).

By contrast, here the Commission has made "broad, unsupported allegations" to justify forbearance that it has rejected elsewhere. *NPRM* at ¶ 95. The Commission failed to explain the basis for its assertions that "cable modem service is still in its early stages; supply and demand are still evolving, and several rival networks providing residential high-speed Internet access are still developing." Nor did the Commission explain how this observation supported its tentative conclusion that forbearing from enforcement of statutory interconnection requirements and Commission open access regulations would ensure just, reasonable, and non-discriminatory practices as required by the statute. 47 USC §160(a)(1).

Indeed, given the wealth of evidence in the record, the Commission could not possibly make

such a finding. Because the Commission utterly failed to articulate the relationship between its observation on the emerging nature of the market and the mandatory statutory finding that enforcement of the Title II statutes and regulations is no longer necessary to prevent unjust, unreasonable and non-discriminatory behavior by cable MSOs offering broadband access in the Ninth Circuit, the Commission's tentative determination fails as a matter of law.

Continuing the comparison with the *Tariff NPRM* further highlights the deficiencies in the Commission's analysis here. With regard to the second statutory prong, that "enforcement...is not necessary for the protection of consumers," the *Tariff NPRM* found "that the imposition of tariff obligations in these circumstances stifles price competition and service and marketing innovations" and "these conclusions remain valid in today's more competitive domestic, interexchange market." *Tariff NPRM*, 11 FCC Rcd 7141 at 7159. Again, the Commission supported this finding by citing to previous reports and orders.

Here the Commission has failed to explain how its assertions that "cable modem service is still in its early stages; supply and demand are still evolving, and several rival networks providing residential high-speed Internet access are still developing" meets the second statutory prong. The Commission did not point to any facts or evidence to justify how these factors demonstrate that consumers will have sufficient protections if the Commission forbears from enforcement of Title II regulations here.

Nor can it. To the contrary, all available evidence demonstrates that where cable companies have no requirement to negotiate in good faith, they simply refuse to do so. As a result, subscribers face few choices, high prices, and other abuses of market power, while providers of rival services face discrimination and must face anti-competitive behavior. *See, e.g.*, Complaint of Texas.net, 00-30.

See also Julia Angwen and Martin Peers, “AOL Rethinks Its Game Plan on Internet Access,” Wall Street Journal, April 19, 2002, A3 (noting refusal of cable companies to deal with AOL Time Warner).

Turning to the third prong, the public interest prong of the statute, the same pattern exists. In the Tariff *NPRM* the Commission supports its belief that forbearance would promote competition and deter price coordination by citing findings from the Sixth Report and Order. *See Tariff NPRM*, 11 FCCRcd at 7159-60. The Commission also explained how forbearance would promote competitive market conditions thereby promoting the public interest. *Id.* at 7160.

Here, the Commission has failed to illustrate how the cited factors (“cable modem service is still in its early stages; supply and demand are still evolving; and several rival networks providing residential high-speed Internet access are still developing” and “the public interest would be served by the uniform national policy that would result from the exercise of forbearance to the extent cable modem service is classified as a telecommunications service”) will promote the public interest. *NPRM* ¶95. The Commission also failed to support these assertions with evidence. *Id.*

Indeed, the notion that the need for a national policy supports a Section 10 forbearance proceeding is contrary to the plain language of the statute. The statute explicitly instructs the Commission to consider specific geographic markets. 47 USC §160(a).

Again, if the Commission truly feels that a national policy is in the public interest, the answer is not to forbear from enforcement in a 9-state region while imposing a different set of legal obligations (derived from the Commission’s erroneous classification of cable modem service as an “information service”). Rather, the Commission should accept the decision of the Ninth Circuit and apply the proper definition of “telecommunications service” to broadband access over cable, and then determine

where sufficient competition exists to support Section 10 forbearance.

Accordingly, the Commission should reject the tentative conclusion to forbear and should instead meet its goals of a uniform broadband policy by classifying broadband access over cable as a telecommunications service.

IV. THE COMMISSION’S TENTATIVE CONCLUSION THAT SECTION 631 APPLIES IS CORRECT, AND THE COMMISSION SHOULD CONSIDER A RULEMAKING TO ENSURE THAT SUBSCRIBERS ENJOY THE BENEFITS INTENDED BY CONGRESS.

The Commission correctly concludes that Congress’ use of the language “cable service or other service” demonstrates an intent to apply the protections of Section 631 to all subscriber services offered over the cable network. Congress has consistently anticipated that cable system operators may offer non-cable services over their cable networks. *See, e.g.*, 47 USC §541 (anticipating that cable operators will offer telecommunications services).

Wisely, Congress chose to make the privacy provisions contingent on the operation of the network, rather than on the nature of the service. The operator of a network sits in a unique position to gather personal information. Not only information necessary for the operation of the network, but private information pertaining to the personal preferences of the subscriber. Congress clearly did not intend for the American people to chose between availing themselves of services offered by cable operators and forfeiting their personal privacy. Indeed, it appears that this is precisely the kind of “other service” which Congress intended to include within Section 631.

The Commission appears to suggest, however, that the Commission has no independent jurisdiction to enforce Section 631. *NPRM* ¶112. While it is true, as the Commission observes, that Section 631 provides aggrieved subscribers with a private right of action, nothing suggests that this

forecloses Commission action where the public interest demands.

Given the complexities of application of Section 631 to broadband Internet access, Commentors urge the Commission to consider the necessity of issuing a notice of proposed rulemaking, or at the very least a notice of inquiry, on proper safeguards to effectuate the protections Congress extended to the American people in Section 631.

At the least, the Commission should disclaim any suggestion that it lacks the power to enforce Section 631, or issue rules implementing Section 631 where necessary. The existence of a private right of action does not suggest that Congress intended to deprive the Commission of jurisdiction. As a general rule, when Congress incorporates a statute into the Communications Act of 1934, it intends that the Commission shall have the power to issue rules and enforce its provisions. *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378-80 (1999). In the absence of any explicit language prohibiting enforcement by the Commission, the Commission has its traditional power to enforce the statute and make rules to effectuate it.

CONCLUSION

The Commission begins with a false premise, that cable companies offering broadband Internet access offer an “information service” rather than a “telecommunications service.” Even within this context, however, the Commission can and should take steps to open these incumbent monopoly networks to competition.

The open access regime proposed in the companion *Consumer Comments* will encourage competition and preserve the diversity of voices and innovation currently the hallmark of the narrowband Internet. No statutory or Constitutional bar prohibits the Commission from adopting this regime. To the contrary, adopting the framework proposed in the *Consumer Comments* will further

the First Amendment and statutory goals the Communications Act entrusts to the Commission.

As to specific points questions raised in the NPRM, the Commission has failed to justify its tentative decision to forbear from enforcing Title II in the states governed by the Ninth Circuit's decision in *AT&T Corp. v. City of Portland*. Furthermore, while CDD, *et al.* agree with the Commission's tentative conclusion that Section 631 applies to broadband access services offered via cable systems, the Commission should disclaim any implication from the language of the *NPRM* that the Commission lacks jurisdiction to enforce Section 631. This statute provides vital privacy protections to subscribers by sharply restricting the ability of cable system operators to use personal information collected from subscribers. Nothing in the statute indicates that Congress intended to preclude the Commission from enforcing these privacy provisions, or prohibit the Commission from making rules that would protect subscriber privacy.

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