

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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<i>In the Matter of</i>)	
)	
Inquiry Concerning High-Speed)	GN Docket No. 00-185
Access to the Internet Over)	
Cable and Other Facilities)	
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To: The Commission

COMMENTS OF CABLE & WIRELESS

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SUMMARY

Cable & Wireless believes that Open Access¹ – whether provided by the market or, if necessary, through regulation – is a desirable policy goal, as it would bring benefits to consumers in terms of price and quality competition. Without Open Access, consumers' choice of ISPs will be limited in any area in which the cable operator has market power in underlying transmission, as non-affiliated ISPs will be less able to compete effectively with affiliated ISPs.

Even in areas where DSL access is also available, there is a risk of coordinated action between the exclusive suppliers of the only two commercially viable technology platforms suitable at present for high-speed Internet access (within a particular geographic market). This coordination could mitigate any incentive for either network operator to provide open access.

It is important that the FCC's *Notice* evaluate whether there are sufficient incentives on cable operators to offer Open Access to ISPs on a non-discriminatory basis through commercial negotiations. From a marketing perspective, access to non-affiliated ISPs should enable the cable operators to attract and retain more customers, as they will be able to offer a greater choice of ISP service. If the ISP market is competitive, access to cable networks for other ISPs may provide stability to the network operators' profits, since the network operator will gain profit from network usage by the ISP, even if it loses the Internet customer. Therefore, the value of the network infrastructure may be enhanced by the lower profit risk.

¹ Consisting of access to transmission capability and customers directly from the incumbent cable operator, under non-discriminatory terms and conditions.

Circumstances may arise (and, indeed, may already be the case) where the incentives for cable network operators to offer Open Access are distorted, particularly where the cable operator has unilateral or coordinated market power with respect to the underlying transmission capability. Where a vertically integrated cable operator holds a dominant market position in the upstream access market (since, for example, DSL provides insufficient competition or the DSL provider and the cable provider seek to limit third party ISP competition), it could attempt to leverage that dominance into the downstream ISP market. It could try to do this either by refusing to supply access to non-affiliated ISPs, or by only offering access on less favorable terms than offered to its own ISPs. In such a situation, regulatory intervention to mandate Open Access will be warranted.

Cable & Wireless believes, therefore, that the FCC should carefully examine the record of this inquiry to determine whether there is sufficient incentive for incumbent cable operators to provide true Open Access, with consequential competitive benefits for consumers. If not, the FCC should stand ready to mandate Open Access through a rulemaking. In any event, Cable & Wireless urges the FCC to monitor developments so that it would be in a position to move quickly to mandating access in the light of strong evidence of market failure. This would mirror the approach currently being adopted in Europe (which is, nevertheless, mostly at an earlier stage of development of its cable industry compared to the United States).

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COMMENTS OF CABLE & WIRELESS

I. INTRODUCTION

Cable & Wireless PLC and Cable & Wireless USA, Inc. (together, “Cable & Wireless”) hereby submit their comments in the above-captioned proceeding.² Cable & Wireless is a major global telecommunications company, focused on the provision of high performance global Internet protocol (“IP”) and data services to business customers. Cable & Wireless has a strong presence in the key business markets around the world: Europe, Japan, and the United States. To capitalize on this, in 1999, Cable & Wireless announced an aggressive growth strategy that focuses on providing our business customers in these markets with the services that are in increasing demand from the business community—data and IP-based services. Today, Cable & Wireless is one of the

² See Notice of Inquiry (rel. Sept. 28, 2000) (“*Notice*”).

top global IP providers to business customers, and one of the largest Internet backbone carriers in the world.

To implement our global strategy, we have invested several hundred million dollars to develop the most advanced IP infrastructure in the world. We have begun replacing the MCI infrastructure that we acquired in 1998 with a new network that offers sixteen times the capacity.

Cable & Wireless offers a wide array of IP-based products and services to business customers. Indeed, Cable & Wireless is an application service provider (“ASP”), and operates a number of data and web hosting centers worldwide. Our first ASP offering, a-Workspace, combines Cable & Wireless Internet access, Compaq Internet PCs, and Microsoft Corp. applications and support services, to deliver to small- and medium-sized businesses an end-to-end, fully managed, collaborative IT solution.

Given our focus on the provision of IP-based products and services, Cable & Wireless is concerned about all issues involving access to the Internet.

Customer access is critical to the availability of Internet services. In order for Internet services to become widespread and provide the consumer services and benefits to which they have potential, access must be both affordable and available at speeds that enable the applications consumers will increasingly value. A vital pre-condition to achieving these goals is competition in the supply of high-speed Internet access. This, in turn, raises important policy issues of how best to foster competition in these activities.

Cable & Wireless, therefore, is pleased for the opportunity to comment on the issues identified by the FCC in the *Notice* concerning high-speed access to the Internet over cable and other facilities.

Cable & Wireless's comments, as far as possible, follow the structure of the FCC's *Notice*. First, comments are provided on the background to the high-speed Internet access technologies and markets, considering all technology options potentially available to the consumer. Second, a discussion is provided, focusing on the policy issues for regulation or forbearance of regulation of cable and other Internet access technologies, and the role of Open Access within any policy framework. In order to provide additional insights, reference is made to related policy developments in other countries.

II. BACKGROUND

Because it is important to analyze the economic and market structure issues correctly without trying to force the analysis into pre-existing and possibly archaic legal classifications, C&W focuses on the economic and market structure issues rather than legal issues.

As the Commission points out in the *Notice*, high-speed access to the Internet can, in principle, be provided to the consumer through a number of technology platforms. Therefore, it is not appropriate to formulate a policy for access over cable network facilities before considering how this particular technology differs from, or is a direct alternative to, other platforms available to consumers. If high-speed Internet access over other technology platforms are direct substitutes for high-speed Internet access over cable networks, all available to consumers, then competition should, in theory, reduce the likelihood of a need for regulatory action focusing on cable networks. This is because the cable network would not possess market power in the underlying transmission. It may be, on the other hand, that cable networks provide a unique access medium to the Internet

for a significant group (or market) of consumers, offering (for example) affordability, availability and quality that can not be matched by any other technology. If that is the case, then the ability of Internet Service Providers (“ISPs”) to compete for those consumers is critically dependent on the terms and conditions under which they are able to use the cable network facilities.

At present (and in the prospective future), the following Internet access technology platforms may be available to at least some consumers:

- *Cable Modem Service*, provided over a cable network facility, in which the available bandwidth of the cable distribution network is shared between all subscribers.
- *Digital Subscriber Line* (“DSL”) access on copper loops, almost always owned by the incumbent local exchange carrier (“ILEC”), but with unbundling providing potential for access to be provided through other ISPs. Each DSL subscriber has a dedicated transmission path onto the Internet.
- *Fiber access*, generally owned by the ILEC, apart from urban areas where competitive local exchange carriers (“CLECs”) may also compete.
- *Fixed wireless access*, provided by owners of the relevant spectrum.
- *Broadband mobile wireless access*, sometimes referred to as Universal Mobile Telecommunications Systems (“UMTS”), or 3rd Generation (“3G”) networks.
- *Direct-to-home satellite*. These systems will be particularly powerful in providing downstream access (i.e. transmitting data back to the user). The upstream link (i.e. data sent by the user, for example, requesting information) may be provided in tandem with another technology (e.g. a standard or DSL telephone line). A newer generation of direct-to-home satellite systems provides an integrated up-stream and down-stream capability.

This list does not attempt to be exhaustive. Other future technology platforms may include, for example, lasers. However, these are unlikely to be significant within the consumer market for the foreseeable future.

This submission will not attempt to describe each technology platform in detail, but it is helpful to list characteristics that will be relevant in distinguishing them from a market perspective. These are:

- *Geographic availability.* Is access available in each geographic market across the USA?
- *Bandwidth capability.* What is provided in terms of speed of access and also, importantly, consistency of speed of access, to the consumer? This will determine the quality, and consistency of quality, perceived to be available to the consumer for different applications.
- *Cost of deployment.* Is the cost such that it will only address a particular segment of the market (e.g. the business community)?
- *Added value.* Does the technology have any additional attributes that may be valued by consumers (e.g. the ability to use the service while mobile)?

Table 1 summarises the status of each technology platform in relation to each of the listed characteristics.

Table 1: Fast Internet Access Technology Platforms

	Geographic Availability	Bandwidth Capability	Cost of deployment	Added value
DSL on copper loops	Generally available (subject to network constraints)	Access speed guaranteed	Low	-
Fiber access	Competitive provision only available in business districts. Otherwise only available from incumbents	Virtually unlimited access guaranteed	High	-
Fixed wireless access	Limited availability by geographical factors and roll-out programs	Access speed guaranteed	Medium	-
3G wireless access	Limited by network rollout	Access speed guaranteed, but initially may be limited to 384kb/s	Medium	Mobile
Direct-to-home satellite	Universal (but service is affected by adverse meteorological conditions, and so may be unsuitable in some areas)	Only downstream broadband capability, and not guaranteed speed (because use of a shared resource)	Low	-
Cable	Focused on residential areas	Access speed not guaranteed (because use of a shared resource)	Low	-

Note: This table does not attempt to give an exhaustive list of potential high-speed Internet access technologies.

It is necessary to analyze how each technology platform differs from, or potentially substitutes for, high-speed Internet access over cable networks:

DSL. In principal, DSL will become available in all areas served by cable networks and may, therefore, provide a substitute for high-speed Internet access over cable networks. In practice, however, this substitutability will be reduced by three principal factors:

- Frequent constraints exist on the local telephone network, that make deployment of DSL technology impossible (e.g. excess local loop lengths).
- The costs of conditioning certain local loops to carry DSL may make the cost of the service uneconomic compared to cable networks.
- In general, DSL costs will be above those of cable modem services. Estimates by the UK consultancy, OVUM, put the cost of upgrading a subscriber line to ADSL at \$993 (falling to \$284 by the year 2005), compared to \$355 for a cable modem upgrade (falling to \$106 by the year 2005).³ Clearly DSL provides additional benefits corresponding to the higher cost. Principally this will be guaranteed access speeds through a dedicated path in the access network (in contrast to access over cable networks where users share available bandwidth, and so may suffer reduced access speeds at peak usage times).

Fiber access. Deployment of fiber access (by ILEC or CLEC) is commercially viable only for business customers. Furthermore, deployment by CLECs is commercially viable only in business districts where there is a sufficient potential customer base to justify network construction costs). By contrast, cable networks reach residential consumers in suburban and, sometimes, rural areas). Estimates by OVUM put the cost of

³ “Fixed Wireless Access: the New Environment,” *OVUM*, February 2000. Sterling costs estimated by OVUM have been converted to US\$ amounts using an exchange rate of £1=\$1.4192, corresponding to the London closing rate at November 28, 2000 (see *Financial Times*, November 29, 2000).

a typical fiber access line at \$2,555 (falling to \$1,987 by the year 2005), compared to \$355 for a cable modem upgrade (falling to \$106 by the year 2005).⁴

Fixed wireless access. Fixed wireless networks could, in future, provide an alternative means of high-speed Internet access. For the foreseeable future, however, the ability of fixed wireless networks to provide an alternative to cable networks is limited by the following:

- The inevitable delays in rolling out these networks (compounded by current difficulties in securing financing). For example, in the UK, despite well publicized difficulties in securing unbundled local loop access,⁵ the sale of spectrum for the provision of fixed wireless for broadband services (including high-speed Internet access) resulted in successful bids for only 16 out of 42 available licenses.
- Economic limitations on service provision (that is, less densely populated areas will not be commercially viable for network build). Taking again the example of the recent UK spectrum auctions, bids were received only for densely populated regions around London, Manchester and Birmingham. Less densely populated areas, including Wales, the South West and even much of South East England, were ignored by bidders.⁶
- Overall, the costs of fixed wireless access will be significantly above those of cable modem upgrades. Estimates by OVUM put the cost of a typical broadband wireless connection at \$2,129 (falling to \$1,064 by the year 2005), compared to \$355 for a cable modem upgrade (falling to \$106 by the year 2005).⁷
- Geographical limitations on service provision (that is, line of sight or other technical restrictions on the service) will mean that some geographies will be unsuitable for fixed wireless services.

⁴ OVUM, *supra*.

⁵ See "Leaving the Opposition out of the Loop," *Financial Times*, Wednesday, September 20, 2000.

⁶ See *id.*; *Telecoms Markets, supra*.

⁷ See OVUM, *supra*.

Broadband mobile wireless access. This will be intrinsically more expensive than other forms of high-speed Internet access due to the mobility feature (involving hand-over between cells, home local registers and look-ups, etc.).

Direct-to-home satellite. This will be a universally available high-speed Internet access technology platform. However, compared to access over cable networks, it will suffer very significant drawbacks. Most direct-to-home satellite provides only downstream broadband capability (from the network back to the user). Ideally, upstream broadband capacity would be provided by using the direct-to-home satellite in combination with DSL – but this would increase the cost significantly. Alternatively, a narrowband telephone modem could be used, but this would both reduce the utility of the service, and cause inconvenience by making the telephone line unavailable for voice calls while the Internet is being accessed. Furthermore, whatever system is used, direct-to-home satellites suffer lower quality (especially in adverse meteorological conditions such as heavy rainfall, wet snow and high winds that can dislodge the dish alignment).⁸

The basic conclusion from this analysis is that DSL alone may provide an effective alternative to cable networks for high-speed Internet access. Even this technology platform, however, fails to provide a universal alternative given that:

- There are some geographical areas where the local telephone network is unable to support DSL (because, for example, of excessive line lengths).
- DSL access is often a somewhat more expensive product, providing the additional benefit of guaranteed access speeds.

⁸ See “No Cable? No D.S.L.? Try Satellite,” *New York Times*, Thursday, November 23, 2000.

Finally, it is instructive to look at evidence for the relative penetration rates for the high-speed Internet access over cable networks, relative to DSL. It has been estimated that there are a total of 1.6 million DSL subscribers in the US at 30 September 2000.⁹ This compares to 3.8 million cable modem subscribers in North America at the same date.¹⁰ Just as important, however, are the following:

- Growth in North American cable modem subscribers for the quarter to September 2000 was reported to be 775,000 (or 22% growth over the previous quarter). Indeed, this quarter was the largest single quarter growth on record.¹¹
- By contrast, the largest two suppliers of DSL access (SBC Communications and Qwest) both suffered declines in subscriber growth numbers over the same period.

This data suggests that high-speed Internet access over cable networks has achieved (and is consolidating) a leading market position relative to DSL. A likely explanation is that cable access for high-speed Internet access competes in a differentiated (and more extensive) market than DSL access over telco networks. Cable access offers a slightly lower quality product at an often slightly lower price, as well as potentially being offered in areas in which DSL is not available.

⁹ *Isp-planet*, “DSL ISPs in the United States,” http://www.isp-planet.com/research/rankings_dsl_usa.html, visited November 22, 2000.

¹⁰ *Cable Datacom News*, <http://www.cabledatacomnews.com/nov00/nov00-2.html>, visited November 23, 2000.

¹¹ *See id.*

III. DISCUSSION

A. The Classification of Cable Modem Service And/Or the Cable Modem Platform

Cable & Wireless believes that the Commission should look first at the appropriate economic and market structure, and whether cable operators will possess market power, rather than technical issues of legal classification of cable modem services and/or the cable modem platform. Cable modem service shares similarities to other forms of high-speed Internet access to the extent suggested in the previous section. There is, therefore, a need to ensure technology neutrality, in the sense that the same policy framework is applied to each.

B. Issues Surrounding Open Access

1. What Is Open Access?

Open Access is a tool that allows competition over a network access facility, either by agreement between the parties (facility operator and access seeker), or by regulatory mandate. The application of Open Access to cable facilities needs clear definition. Cable & Wireless agrees with the FCC that Open Access should allow non-affiliated ISPs, first, to purchase transmission capability, and second, to access customers directly from the incumbent cable operator.

It is also important, however, that Open Access, if applied, should ensure that non-affiliated ISPs have non-discriminatory access to both customers and transmission capacity where the provider of the platform (e.g. cable facilities operator or DSL

provider) has market power.¹² Where no alternative access providers exist (or the only feasible providers are able to coordinate their action), non-discriminatory access is essential for effective competition between ISPs. If ISPs were to have access to cable facilities only on less favorable conditions to affiliated ISPs of cable facility operators, any pro-competitive benefit of Open Access would be lost.

It needs to be acknowledged, however, that the technical operation and administration of Open Access is complex. Much detailed work would need to be done in order to ensure an efficient and viable model (and associated rules) for any implementation of Open Access.

2. Is Open Access A Desirable Policy Goal?

Cable & Wireless believes that Open Access, driven by the market or when necessary by regulation, is a desirable policy goal. Indeed, without it, consumer choice will be limited, given that not all platforms are available and suitable to all consumers. As the analysis in the Background section shows, residential (and small business) customers have two main methods of obtaining access to high-speed Internet services: either through cable or DSL services. This is likely to stay the case for the foreseeable future.

Without Open Access, consumers will have a limited choice of ISPs. In the worst case, where DSL is not available, the only provider may be an affiliated ISP of the local

¹² Where the provider does not have market power, any discrimination between affiliated and non-affiliated ISPs would not be a concern as alternative providers of access would be available. In itself, this would limit the extent to which any one provider of access could discriminate between customers.

cable operator (or, even, if the local cable operator does not provide service, no provider at all).

Even when DSL access is available, there is a risk of coordinated action between the cable network and ILEC – the exclusive suppliers of the only two commercially viable technology platforms suitable at present for high-speed Internet access (within a particular geographic market) – to deny Open Access. This coordination could mitigate any incentive for either network operator to provide Open Access.

Open Access is necessary to allow non-affiliated ISPs to properly compete, and provide consumer benefits of:

- *Price competition and price package innovation.* Competition between different ISPs (including when services are provided over the same network facility) will result in more innovative price packages being offered, and consumers will benefit from being able to choose the price package that best meets their needs.
- *Service innovation.* Similarly, Open Access will stimulate ISPs to compete for cable subscriber's custom by innovating new service offerings. Site accessibility offered is one possible example, where different ISPs (possibly using the same network facility) will offer different combinations of site accessibility.
- *Quality levels offered.* Where there are a number of competing ISPs (on one or more technology platform), there will be a greater incentive to provide a good quality service than in the absence of such competition. Consumers will have the ability to switch to an alternative ISP if they are dissatisfied with the quality of service offered by its existing ISP. They will also be able to choose an ISP that best meets its preferred price and quality combination.

3. *What Are The Most Appropriate Means Of Achieving That Objective?*

Whenever possible, Open Access should be achieved through commercial negotiation (as proposed by AOL and Time Warner MoU of February 29, 2000).¹³ Indeed, where competition exists between functionally equivalent access facilities, there should be an incentive for cable operators to provide access to all ISPs, whether affiliated or not, as this will generate additional revenue for them.

There are some circumstances, however, where the incentives on cable operators to provide access to all ISPs, on a non-discriminatory basis, may break down and where regulatory intervention will then become warranted. The main potential for incentives to break down is where a cable operator is vertically integrated with an ISP, and where it has market power at the upstream (cable facility) level. In such circumstances, the cable operator could attempt to leverage that market power into the downstream ISP market, by refusing to supply access to non-affiliated ISPs or by supplying access on less favorable terms than it supplies to its affiliated ISP.

It appears that most cable operators have an ownership interest in at least one ISP. AT&T has a majority voting stake in Excite@Home, the largest ISP in the United States, and currently maintains some ownership of RoadRunner.¹⁴ Time Warner is also

¹³ Memorandum of Understanding Between Time Warner and AOL (February 29, 2000), available at <http://www.fcc.gov/csb/aoltw/aoltw.html>.

¹⁴ AT&T's ownership of RoadRunner is a result of its merger with MediaOne. It is required to divest this interest by December 31, 2001. *See MediaOne Group, Inc. and AT&T Corp.*, 15 FCC Rcd. 9816, ¶¶ 116-23 (2000).

affiliated with RoadRunner. There appear to be few, if any, major cable operators that are not affiliated with an ISP.¹⁵

When this vertical integration is combined with market power, this may affect the ability of non-affiliated ISPs to obtain access on non-discriminatory terms. Where a vertically integrated cable operator does not have market power at the upstream level, any discrimination between affiliated and non-affiliated ISPs may be benign, given that the lack of market power means that there are alternatives available to non-affiliated ISPs. Indeed the very presence of alternatives should act as a restraint on the ability of a cable operator to discriminate.

Cable operators, however, will have market power when there is a lack of effective competition from alternative technologies, such as DSL. The analysis in the previous section showed that the penetration of DSL is currently just under half that of cable, and that it is also experiencing slower growth rates in new subscribers compared to cable.

The ability of DSL operators to gain new customers may be affected if customers become locked into using cable modems. Cable operators could attempt to tie-in customers through formal long-term contracts (which could, for example, take the form of special deals whereby the customer is provided with a “free” modem in return for signing up to a minimum contract term). Once signed up to a cable operator and with specific equipment installed, customers may be reluctant to switch to a DSL platform even when there are no formal obstacles to them doing so. This could reinforce the first mover advantage of cable operators and strengthen their control over the high-speed

¹⁵ Even where cable operators do not have affiliated ISPs, there could be concern where the cable

Internet access market. The extent to which DSL providers will represent effective competition to the cable operators will then depend, to a large extent, on the proportion of potentially new customers that remain for the DSL providers and cable operators to compete over.

Some cable operators have argued that forcing Open Access to non-affiliated ISPs will jeopardize existing investment in the cable infrastructure, and will also make future upgrades unprofitable.¹⁶ Cable & Wireless believes that such concerns are unjustified. It should be in the interests of the cable operators to provide access to all ISPs, whether affiliated or not, as this will generate additional revenue for the cable operators. Provided that the cable operator is able to charge a price that reflects its costs, including a return on its capital investment costs (taking account of the investment risk), provision of Open Access (whether mandated or not) will not undermine investment incentives in the underlying cable infrastructure.

Indeed, some commentators have argued that the investment risk associated with cable infrastructure will be reduced through Open Access, as cable operators will be able to offer their customers a greater choice of ISPs, offering different quality and price combinations.¹⁷ This should make Internet services delivered over cable a more attractive prospect to customers, with the result that a cable operator's revenue should increase compared to the situation where it can only offer the Internet services of

Continued . . .

operator negotiates exclusive long term agreements with a particular ISP.

¹⁶ See, for example, the arguments presented by AT&T in the TCI merger proceeding and the FCC's analysis of these arguments in *Tele-Communications, Inc. and AT&T Corp.*, 14 FCC Rcd. 3160, ¶ 89 (1999).

affiliated ISPs. In any event, a cable operator that has its network used by more than one ISP will have greater security of revenue since, if subscribers decide to quit service with one, they may take up service with another ISP on the same cable network. Either way, the cable network retains the revenue from use of its facility.

The benefits to cable operators of Open Access may be judged by the experience of Canada, where Open Access has been required since January 1996. The cable operators have been investing rapidly in broadband facilities and the Canadian Cable Television Association, which represents the interests of the Canadian cable operators, has gone on record to say that Open Access is in the cable companies' financial interest.¹⁸ It argues that non-affiliated ISPs help to bring more subscribers to the cable network, which in turn allows the fixed cost of broadband facilities to be spread over a larger customer base.

4. *Should A Uniform Framework Apply To All Providers Of High-Speed Services?*

Policymakers should apply the same analytical framework to the services provided by all technologies, and take full account of the market linkages (if any) between them. The relevant question to ask here is the extent to which particular forms of access represent a separate product market over which some operators hold dominant market power. This requires analysis of the extent of substitutability between the

Continued . . .

¹⁷ See Professor Jeffrey K. MacKie Mason, "Investment in Cable Broadband Infrastructure: Open Access is not an Obstacle," November 1999 (available from jmm@umich.edu).

¹⁸ See Reply Comments of the Canadian Cable Television Association in PN 98-14, 10/30/98, p. 2 (available at <http://www.crtc.gc.ca/internet/1998/8697/c12/02/ccta/981030fc.doc>). This is also reported in MacKie Mason, *supra*.

different access technologies from both a demand and supply perspective. It also requires the market to be considered from a geographical perspective.

Cable & Wireless has set out above some of the evidence to suggest that cable and DSL technologies are substitutable from the demand side. Other technologies may not currently represent close enough substitutes to these technologies although this may change over time.

From a geographical perspective, the high-speed Internet access market is likely to be fairly narrow given that cable operators tend to operate within exclusive franchise areas, and the only provider of DSL services in that area is likely to be the incumbent local telephony company. Supply-side substitution from local operators located in other areas is unlikely to happen sufficiently quickly to act as a competitive constraint. Furthermore, both networks are constrained by geographical factors. For example, a LEC can not make DSL available in an area where its local network is not capable of supporting the technology (because, for example, loop lengths are too long).

An Open Access framework should be applied to all technologies that are substitutable. Where an operator has a dominant market position and is abusing that position by not offering access on a non-discriminatory basis to both affiliated and non-affiliated ISPs, there may be a requirement for regulation to mandate such access.

5. Approaches Adopted Outside The United States Towards Achieving The Objective Of Open Access.

We provide below some details of how the Open Access debate has developed in countries outside the United States.

The European Union is in the process of establishing a new regulatory framework for all electronic networks and services. It is planned that the new regulatory framework will consist of five new directives, one of which will contain provisions on access to, and interconnection of, communications networks.¹⁹ It will take considerable time before definitive directives will be established, however, and it is too early to say whether they will contain specific measures for Open Access to cable facilities.

Nevertheless, there has been some discussion of the issue in individual countries of the European Union. In the Netherlands, for example, Open Access has been subject to considerable debate. The Government's current expectation is that the market will deliver Open Access voluntarily within the next two years and, during this time, it will rely on the provisions contained in the Dutch Competition Act²⁰ to ensure that ISPs are able to obtain access to cable networks under reasonable tariffs. It has also asked the general Dutch competition authority, the Nederlandse Mededingingsautoriteit or "Nma," to actively monitor the market for Internet access over this period.²¹

The Government of the Netherlands has announced that it would introduce specific sectoral legislation mandating access to cable networks for ISPs if it appeared that there were structural concerns with respect to Internet access. The expectation seems to be that, if the market has failed to deliver Open Access during the two year time

¹⁹ Proposal for a Directive of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services. COM(2000) 393 final. Brussels 12.7.2000.

²⁰ Mededingingswet, or "MW."

²¹ This monitoring will be done with the co-operation of the specific telecommunications regulator, OPTA.

period, legislation will be introduced to mandate it. The Dutch government will also take account of any developments in EU legislation.

In the UK, the question of Open Access was raised briefly in the joint OFTEL/OFT study of competition in e-commerce.²² This study stated that it was too early to judge whether Open Access arrangements would emerge voluntarily, or whether developments in the cable market would result in any operator obtaining a position of market power sufficient to warrant Open Access regulation. It would be necessary to assess the extent to which the new bandwidth technologies, when they emerge, would be in direct competition with each other. It concluded, however, provided that consumers will have a choice between different technologies (including cable, DSL and fixed broadband wireless), this should constrain prices and promote innovation, even if some of these networks are closed and vertically integrated. It should be noted, however, that the UK cable industry is in a less developed state of network build-out than is the case in the United States or, for that matter, the Netherlands.

In Israel, it has just been announced that the major cable companies have accepted an Open Access mandate from the Ministry of Communications in return for temporary licenses that will allow them to start offering high-speed Internet access over their broadband networks.²³

In Hong Kong, the Office of the Telecommunications Authority (OFTA) issued two industry consultations on the regulatory framework for broadband interconnection in

²² “Competition in e-commerce: a joint OFTEL and OFT study,” Consultation Document April 2000.

²³ See <http://www.cabledatacomnews.com/nov00/nov00-8.html>.

November 1999 and June 2000 respectively.²⁴ This was followed by a Statement in November 2000, in which OFTA re-affirmed the policy of Open Access to Hong Kong Cable Television Ltd (HKCTV)'s hybrid fiber coaxial network, on the basis that this had been enshrined in the conditions of its license.²⁵

IV. CONCLUSION

The FCC should stand ready to initiate a rulemaking procedure if, from the evidence of this Inquiry, it appears that the goal of Open Access will not be achieved through commercial negotiations.

In any event, the FCC should be ready to impose regulatory measures quickly should circumstances show that market power is being exercised by cable facility operators to the detriment of competition and, in particular, to the detriment of non-affiliated ISPs' ability to fairly compete in the downstream ISP market. In particular (and in any event), Cable & Wireless respectfully suggests that the FCC monitor carefully any attempts by cable operators to discourage consumers from switching between affiliated and non-affiliated ISPs. This should include increases in the minimum contract term, or more attractive terms being offered (possibly for a bundle of services) if a customer signs up with an affiliated ISP.

²⁴ "Broadband Interconnection – an Industry Consultation Paper," Telecommunications Authority of Hong Kong, 3 November 1999, "Broadband Interconnection – Analysis of Comments Received, Preliminary Conclusions and Further Industry Consultation," Telecommunications Authority of Hong Kong, 14 June 2000.

²⁵ "Broadband Interconnection," Statement by the Telecommunications Authority of Hong Kong, 14 November 2000.

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December 1, 2000

CERTIFICATE OF SERVICE

I, Colette D. Owens, do hereby certify that copies of the foregoing pleading have been sent by hand delivery, on this first day of December, 2000, to the following:

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