

**Before the American Legislative Exchange Council  
Telecommunications and Information Technology Task Force  
Statement of Ronald Binz  
President, Competition Policy Institute  
Annapolis, Maryland  
January 7, 2000**

Delegate Klima and members of the Committee, thank you for the opportunity to comment on the important public policy issue of open access to cable facilities used to provide high-speed Internet access. It has been my pleasure to testify before this Committee and Senator Nething's Subcommittee on several occasions and I appreciate being invited back.

When it comes to this issue, I'm reminded of the story of the legislator who said of a controversial bill, "Some of my friends support this legislation and some of my friends oppose it. Whenever I run into a controversial issue, I always go with my friends."

The cable "open access" (or "forced access") issue has split the industry, politicians, regulators, opinion leaders and even consumer representatives. I've got friends in each of these sectors on each side of this issue.

Let me start with our conclusion. After a lot of thought and analysis, we have concluded that it is too early to know whether requiring "open access" to cable Internet facilities is a necessary or even desirable regulatory policy. In the absence of such knowledge, we think policy makers should refrain from imposing an "open access" condition at this time, especially in view of the important connection of this issue to growth in competition for local telephone service. I'd like to outline a few thoughts that inform our position on this issue.

1. First, whatever the correct policy on this issue, the decision needs to be made for the nation as a whole. It will be damaging to public policy, disruptive to the industry and, not least of all, extremely inefficient, to continue a city-by-city plebiscite on the question of cable broadband access. The decision will affect billions of dollars of investment, the pace of development in both Internet access markets and local telecommunications markets and

will realign competitive positions. These effects should not be the province of city councils and county governments.

2. This debate is not about a choice between an “open” and “closed” Internet. Those who cast this issue this way are being rhetorical and are not contributing to the debate. No policy maker I know wants a “closed” Internet (whatever that is) to develop. The proper question is this: What outcome will the free market deliver if it is unaided by “common carrier” regulation of new access technologies? Stated another way, what are the relative costs and benefits of regulation applied to companies entering this market?
3. Some people are tempted to default to common carrier-style regulation for every new technology that delivers broadband access to consumers. We’re not convinced that policy is viable anymore. Here are some facts that give me pause:

- First, it seems highly likely that there will soon be multiple high-speed connections to the Internet competing with cable companies. First, there are the incumbent local exchange companies (ILECs). Where I live, USWest is the leader pushing DSL service. I’m a customer myself. But there are more: there are probably five competitive local exchange carriers (CLECs) providing DSL service in Denver in addition to USWest. Providers of fixed wireless services-- “wireless loops” -- such as Winstar and Teligent are offering high-speed Internet access. Direct broadcast satellite (DBS) providers are getting into the act. Echostar, headquartered in Denver, soon plans to offer a broadband service, as does Direct TV. Other wireless spectrum is coming into play: a consortium of rural electric companies in Colorado is planning a broadband wireless network using LMDS spectrum. Their objective is to bring broadband Internet access to underserved areas. Next we have low earth orbit satellites (LEOs) like Teledesic, the “Internet in the Sky,” and the Israeli satellite company Gilat. In some areas, fiber to the neighborhood from both traditional LECs and CLECs will add even more capacity. Then there’s the electric utilities. [Mention recent Scientific American article.]

- Cable providers apparently will offer the first widespread facilities-based competition for local telephone service including residential service. Many of us remember the discussions during the debate on the Telecommunications Act of 1996. The working assumption was that competition for local telephony from the cable industry was just around the corner. Following passage of the Act, we went into a sort of Competitive Dark Ages, during which not much happened, especially in the area of residential competition. With luck, we're about to emerge into a renaissance, with the cable industry finally delivering on the promise of facilities-based competition to the ILECs.

There is, of course, an important linkage between cable Internet access and local telephony. The upgrades to a two-way system necessary to provide cable modem service are also needed to provide cable telephony. I share the concern expressed by others that an abrupt change in the technical and economic calculus for cable internet access will spill over into cable telephony, sending us back into those dark ages.

- We are at a very early stage of development of this market. It's so early, we don't even know yet exactly what "this market" is. An important unanswered question is, for example, will narrowband access service remain competitive with broadband service? Some would have you believe that broadband over coaxial cable will snuff out all other technologies and competitors. If that's true, what about the emergence of wireless Internet appliances? Do we really expect people to drag around a coaxial cable? The Wall Street Journal thinks not. They dedicated an entire section last week to wireless Internet connections, narrowband as well as broadband.

- Before changing our policy, we should look at the results to date, albeit a very early date, in this market. The entry of cable companies into the broadband access market has had undeniable consumer benefits. 1) high speed Internet access at pretty good prices for consumers choosing the service; and 2) a competitive response from the ILECs and UNE-based DLECs. I'm especially impressed by the price war going on in the USWest region. I suspect that cable's growth has also stimulated others to accelerate their plan for

capturing a chunk of the broadband Internet market.

- The assumption that cable companies intend to keep the system entirely to themselves is incorrect. Wall Street analysts, including Dan Reingold of Merrill Lynch and Anna Marie Kovacs of Janney Montgomery Scott expect that AT&T, for example, will be required by market forces to permit either real or virtual access to cable Internet facilities. AT&T CEO Michael Armstrong has stated that his company will not renew the exclusive contract with @Home and Roadrunner when those contracts expire in two and a half years. While not true of other cable companies, AT&T professes to have little interest in Internet and cable content, preferring instead to provide high-speed Internet access as one element in its telecommunications package, bundled with wireless, LD and local telephony.

4. To the extent possible, we shouldn't make policy on the basis of personalities. I don't know about you, but I'm not interested in any more John Malone stories, Sumner Redstone stories or even Bill Gates stories. Unfortunately, much of the rhetoric in this debate seems stirred by war stories. It's unwise to premise one's arguments on what an entire industry, or its captains, did in the past. Any company that hopes to succeed in tomorrow's information economy will change its behavior in response to consumer demand and will abandon old strategies in a minute.
5. Similarly, policy decisions in this arena should be driven by the effect on consumers, not on competitors. The Portland city council, for example, seemed to be swayed by the argument that the city council needed to require AT&T to open its broadband Internet facilities, not to benefit consumers, but to preserve jobs at ISPs in the Portland area. Others argue that cable operators will have an "unfair advantage" if they are allowed to vertically integrate the operation of their cable plant with Internet service. But we should not confuse anti-competitive actions with aggressively competitive actions. Unless cable operators use their market position in anti-competitive and illegal ways, regulation should not intervene to shape this market. Certainly not before we have a better sense of how it develops.

On the subject of ISPs, I share the agnosticism of Commissioner Michael Powell on the future of that sector of the Internet industry. ISPs fulfill an indispensable role in providing Internet access to customers using dial-up Internet service. ISPs own and operate both modem pools and Internet servers, making the translation between analog signals and digital packets. Dial up Internet service seems likely to persist for a quite a while. In any event, public policy in this area should not be shaped by the goal of keeping all ISPs in business, especially when (for some of them) their reason for being has disappeared.

6. It is not credible that any single player or owner of any single technology could succeed in limiting consumer access to the Internet. There's an adage that the Internet interprets censorship as damage and routes around it. I think the same is true of consumer demand. Every attempt to create a less-than-full-internet access has failed and I suspect will continue to fail. (How you gonna keep them down on the farm after they've seen gay Paris?) I don't know about you, but the first thing I do when I get a new browser is change the default first page to whatever I want to see. If my ISP doesn't allow this, I'll shop around for one that does.
7. Now, having staked out a position in favor of regulatory caution, what happens if things *do* go wrong? First, the FCC's decision not to regulate is not irreversible. I take the Commission at its word that it remains vigilant with this developing market. Second, nobody is suggesting we repeal the antitrust laws. The Department of Justice did not shy away from taking on Microsoft when it thought Microsoft was engaging in illegal restraint of trade. Neither would it ignore misdeeds by Time Warner, Cox Cable or AT&T.
8. Once we get past the proprietary interests of some of the players (I refer here to the cable companies, the ISPs, the incumbent LECs and the CLECs) the real question is "How much do you trust market forces?" Stated backwards "How confident are you that regulation of this industry will produce the best results for consumers? In my opinion we should be humble about the ability of regulation to produce economically efficient results and maximize consumer choices. I agree with whoever said: "The choice is often between

imperfect markets and imperfect regulation.” When a tiebreaker is needed, I respectfully suggest that we should lean toward market solutions, even if imperfect. In conclusion, I think the FCC has got it right, at least for now, by deciding not to impose open access requirements on the cable companies’ provision of high-speed Internet access.

Thank you again for inviting me to participate on this panel.