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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

November 5, 1998

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Ex Parte Presentations
CC Dkt. No.s 98-147, 95-20, 98-10

Dear Ms. Salas:

In accordance with the Commission's *ex parte* rules, this letter is to notify you that the Commercial Internet eXchange ("CIX") met today with several FCC staff persons to discuss CIX's positions in the above-referenced dockets. Representatives for CIX at the meeting were Barbara Dooley, Richard Whitt (MCI WorldCom), Nat Clarke (IBM), Charles Kennedy (attorney for Verio), Ronald Plesser, and I. FCC staff persons in attendance included: Dr Robert Pepper (OPP); Johnson Garrett (OPP); Jennifer Fabian (CCB); Elizabeth Nightengale (CCB); Staci Pies (CCB); Jason Oxman (CCB); Gregory Cooke (CCB).

During the meeting, CIX presented its positions on the issues presented in the above-referenced dockets, which was consistent with CIX's comments and reply comments in those proceedings, as well as the attached bullet-sheet and "Consumers Need ISP Choice" statement. The bullet sheet and the "Consumers Need ISP Choice" statement were provided to each FCC staff person at the meeting. CIX explained its position on ISP choice, and the need for the FCC to take a comprehensive approach to advanced services regulation by revamping the ISP protections (such as in the Computer III FNPRM) at the same time that it establishes a regulatory model for advanced services. CIX articulated its view on the separate subsidiary model, as explained in the attached

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bullet sheet and CIX's comments. Finally, CIX discussed with Mr. Cooke and Mr. Oxman its position on the NPRM proposal for interLATA modifications. In CIX's view, RBOC entry into the interLATA market through LATA modifications would tend to preclude vigorous competition, and may establish RBOCs as dominant providers of integrated local and interexchange data services. CIX recognizes that, if a "truly" separate subsidiary were established, the interLATA competition issue may be diminished; however, Section 271 of the Communications Act would preclude "affiliates" of RBOCs from obtaining early interLATA entry.

Please find attached five copies of this letter for inclusion in each of the above-referenced dockets. Should you have any questions, please contact the undersigned.

Sincerely,

Mark J. O'Connor
Counsel for the Commercial Internet
eXchange Association

cc: Dr Robert Pepper (OPP)
Johnson Garrett (OPP)
Jennifer Fabian (CCB)
Elizabeth Nightengale (CCB)
Staci Pies (CCB)
Jason Oxman (CCB)
Gregory Cooke (CCB)

I. Regulatory Safeguards to Ensure a Competitive ISP Market Must Be In Place As ILECs Pursue an Integrated Approach to Advanced Services

* Most ILECs may choose an integrated approach, and not a separate subsidiary approach, to deployment of advanced telecommunications and ADSL. However, FCC's framework for ISP regulatory safeguards under the integrated approach – Computer III FNPRM – remains unresolved.
  - Better access to underlying telecom elements will improve ISP choice.
  - Decentralized nature of Internet and quick response to market demand necessitate unbundling.
    -- "All or nothing" access to ILEC's is contrary to decentralized nature of Internet.
    -- The Internet separates services from physical networks, allowing industries to grow and innovate independently. Unbundling allows independent industry to offer quick response/roll-out of consumer products.
  - Strengthened ONA standards and functional access or collocation for ISPs will prevent anti-competitive and discriminatory behavior and will promote efficient use of network.
  - Computer III reform must move forward together with Section 706 proceeding for strong ISP protections/access to eliminate discrimination and allow ILECs to participate in deregulated markets with the protections of competitive safeguards against ILEC abuses.
  - Because ILECs' rate of future advanced services deployment may be slow, ISP rights to underlying telecommunications would spur advanced services deployment to consumers.

II. Separate Subsidiary Requirements Must Ensure That the ILEC Affiliate is Divorced From ILEC Monopoly Advantages.

* CIX believes in the emergence of multiple providers of local high-speed telecommunications services. The separate subsidiary approach advances consumer interests only if the ILEC-affiliate is truly another competing provider in the market, with no market advantages due to its affiliation.

* *Marketing Advantages*: Use of the ILEC's brand-name or CPNI, as well as joint marketing, should be prohibited. If separate subsidiary resells ILEC voice service, then all CLECs should have the same rights.

* *Ownership*: Parent holding company should not be able to finance separate subsidiary on terms that are less than "arm's length." Rather, parent company should be subject to the same credit/financing restrictions as the ILEC vis-à-vis the separate subsidiary. To better ensure "arm's length" transactions and to minimize discriminatory pricing by the separate subsidiary, the separate subsidiary should have minority ownership share (i.e., 10% or 20%) held by third-party.

* *ILEC Transfers to Affiliate*: Separate subsidiary should have to pay market value for all transfers of facilities or other property from the ILEC. Equipment transferred should be limited to DSLAMs, packet switches.

* *Unbundled Access to Separate Subsidiary's Facilities*: FCC should establish a transition period so that CLECs can continue to use UNEs of the separate subsidiary. Otherwise, customers may experience dislocation, or competition may be derailed, in transition to new rules.

III. ISP Choice is Essential Under Both the Integrated and Separate Subsidiary Approaches

* Consumers must maintain their ability to choose their preferred ISP as ADSL and other technologies are deployed, regardless of whether the ILEC offers services in an integrated manner or through a separate affiliate.
  - Independent ISPs have been a primary factor in the proliferation of the Internet. Today there are over 6,500 ISPs.
  - The vast majority of consumers continue to get their Internet services from independent ISPs, and not the offerings of the ILECs.

* The intense competitiveness of the ISP market offers consumers a diverse array of services and service providers, and must be preserved.
  - The diversity of Internet services offered by ISPs provides consumers with a broad range of real service choices.
  - Over 95% of the U.S. population has local access to at least 4 or more ISPs in a market.

* Technological advances in the telecommunications underlying Internet access or regulatory changes (e.g., separate data subsidiary) should not be leveraged by ILECs to eliminate consumer choice of Internet services or force ISPs to assert CLEC status to avoid discrimination.
  - ILEC marketing and technology practices threaten ISP choice and competition: bundling CPE, ISP and ADSL services; ISP "partner" programs.
  - "Separate subsidiary" model should provide protection for consumer choice of ISP.

* ISP choice means that consumers should be able to choose their ISP on terms equivalent to those of the ILEC affiliated ISP.

* ISPs should be able to obtain connectivity from ILECs, or their affiliates, in a non-discriminatory and efficient manner.
  - ILECs should not be permitted to bundle transport services with ADSL offerings.
  - ILEC marketing practices should not discriminate against independent ISPs.

IV. RBOC InterLATA Entry Into the Internet InterLATA Services Market Must Follow the Statutory Scheme of Sections 271 and 272

* Level of demand for Internet bandwidth demonstrates that the Internet works well, there is no showing of network congestion or market "failure" to be resolved through government intervention or LATA modifications.

* Carriers demonstrate significant deployment/investment in backbone capacity.
  - Internet industry is experiencing period of unprecedented growth.
  - Number of Internet hosts increased from 1.3 million in 1993 to 36.7 million in 1998.
  - There are over 6,500 ISPs in the U.S. and over 79 million Internet users.
  - One survey estimates that investment to the Internet's network infrastructure increased by 125% between 1996 and 1997.

* LATA modifications for RBOCs to enter the interLATA market would conflict with the Section 271 process of incentives for RBOC compliance with local competition obligations.

* LATA modifications are inappropriate where RBOC essentially wants to enter the interLATA services market. The Commission's authority to provide LATA "modifications" does not extend to granting premature entry into the interLATA markets.

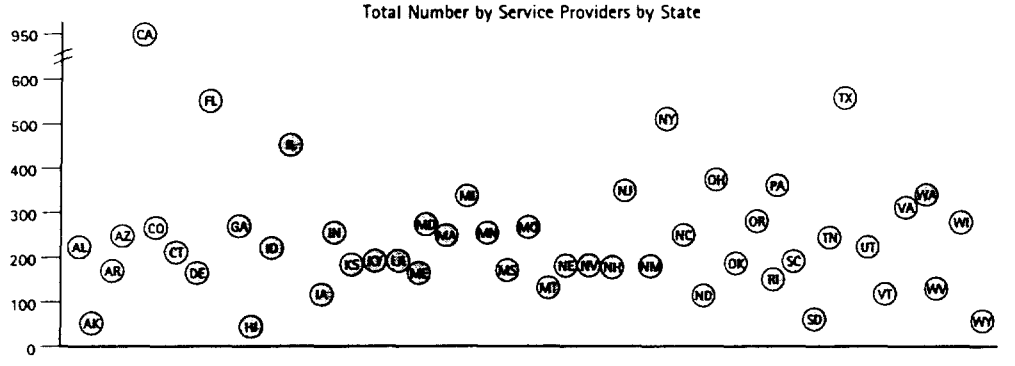
Consumers Need ISP Choice

Internet Service Providers (ISPs) give individual consumers, small office/home office users, and businesses of all types affordable access to the Internet and its ever-increasing range of services. As the Internet continues its rapid growth, an emerging competitive environment has allowed ISPs to pursue innovative ways to provide faster access, more applications and services, and improved customer service. For Internet growth, innovation, and deployment of advanced services to continue, customer ISP choice is essential. Maintaining and encouraging competition and choice requires that ISPs have efficient and reasonable access to incumbent local exchange carrier (ILEC) facilities, just as the Telecommunications Act of 1996 envisioned. The ILECs must not be permitted to foreclose customer choice by bundling their own branded ISPs with their underlying telecommunications services.

ISP Choice Fosters Customer Service and Competition

Currently there are over 6,500 independent ISPs. These ISPs have been a primary factor in the proliferation of the Internet. The vast majority of the more than 79 million U.S. Internet users continue to get their Internet services from independent ISPs rather than through services offered by ILECs.

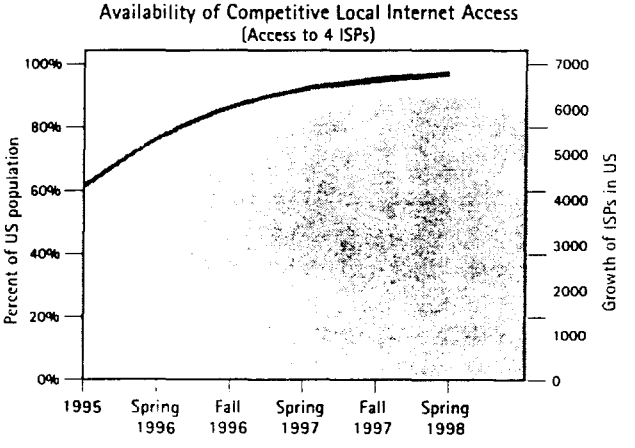
The ISP industry is robustly competitive, providing customers with abundant choices.



Over 96% of the U.S. population has local call access to at least 4 ISPs[1]. Access to several ISPs fosters intense competition in the ISP market, offering customers a diverse array of services and a spur to innovation. For example, Internet transactions are anticipated to rise dramatically, from $10.4 billion in 1997 to $204.1 billion in 2001. Consumer choice, including reasonable and efficient access by ISPs to underlying telecommunications networks, will allow the dynamic ISP industry to provide more advanced services for all consumers.

Over 96% of the U.S. population has local access to at least 4 ISPs[1].

As advanced technologies are deployed for Internet access, customer choice of a preferred ISP is essential to maintain competition, improve customer service, and increase value for ISP users. Similarly, the customer must be afforded an opportunity to select its service provider whether the ISP is independent, a division of an ILEC, or an ILEC affiliate. Choice is essential, whether a customer is an individual consumer, a telecommuter, or a small business. ILEC proposals that will reduce their obligations to afford access to their



facilities will diminish customer choice and competition, and will accrue to the interest of the ILECs.

The threat to competition: ILEC marketing practices that aim to leverage the ILECs' market power in the local loop to advantage their own affiliated ISPs.

ILEC marketing and deployment practices already threaten ISP choice and competition. Some ILECs are unfairly "bundling" their ISP service with telecommunications service and/or customer equipment to make it difficult and uneconomic for consumers to have separate ISP choices. To maintain ISP choice, customers should be able to select their preferred ISP, and then have ILEC telecommunications services provided on the same terms the ILEC-affiliated ISPs offers to its customers. ILECs have also announced plans to deploy ADSL service in ways that stifle competition by independent ISPs. ILEC partnering programs, for example, offer ISPs access to underlying ADSL telecommunications at a price that eliminates ISPs' ability to offer a variety of high-speed Internet services at a competitive rate. ILECs also bundle local transport services (ATM and Frame Relay) with ADSL, so that ISPs must buy both services from the ILEC in order to offer customers the benefits of high-bandwidth DSL. This bundled service raises costs for independent ISPs and precludes CLEC competition for transport services.

The Section 706 and Related Proceedings and Computer III Reforms Must Be Considered Together for More Efficient and Reasonable ISP Access to Advanced Telecommunications

Policymakers must combat this threat to competition by enforcing the law: demand ILEC compliance with the rules requiring unbundling of the local loop.

More efficient access to the underlying telecommunications elements that customers and ISPs use to communicate with each other will greatly improve ISP choice. Currently, ILECs offer customers and ISPs "all or nothing" access to their networks: ISPs must buy into the transport service and customers must purchase the ILEC DSL offering. The Internet is a living demonstration that an "all or nothing" access regime is not optimal. The decentralized Internet separates services from physical networks, allowing growth and innovation, independent from owners of the physical network. Unbundling yields innovation based on market demand, and allows independent industry to offer quick response/roll-out of consumer products.

ILECs roll out new products such as ADSL only when forced to respond to marketplace challenges such as the deployment of cable modems.

Section 706 of the Telecommunications Act of 1996 requires the FCC to encourage the deployment of advanced telecommunications. ILEC and ISP incentives to deploy Internet services may be different, and the regulatory framework should allow both industries to co-exist for the benefit of consumers. Although ISPs have the ability and incentive to develop a myriad of advanced services to stay ahead of their competition, ILECs do not have the same incentives when seeking to control both the network and the services offered. ILECs are slow to deploy advanced services and deployment of these services is a response to competition rather than action to stay ahead of it. For example, ILECs have deployed ADSL in reaction to cable companies' rollout of high-speed Internet access. Fostering ISPs' innovative ability encompasses allowing non-discriminatory and efficient access to ILEC facilities, thereby permitting ISPs to provide cost-effective, high-speed access and to continue to develop advanced services.

The FCC's proceedings on Section 706 of the '96 Act and Computer III are perfect opportunities to reinforce the robust competitiveness of the ISP market.

The FCC Section 706 and related initiatives must encompass a comprehensive approach to the issues of advanced services for all Americans. It must have as a fundamental goal to enhance ISP competition and choice. Several precepts will ensure competitive and nondiscriminatory behavior and promote efficient use of ILEC networks. The FCC's Computer III decision advances several important procompetitive policies, including ISP access to network elements and nondiscrimination obligations. Federal action finalizing the Computer III reforms will deter ILEC discrimination against independent ISPs, and allow the ILECs to participate in a deregulated market. In addition, strengthened federal ONA standards and functional access or collocation are effective means to ensure a competitive environment.

This should not mean ISP regulation. The ISP industry today is highly competitive and does not need direct regulation to protect consumers' interests. ILEC control of access to the customer is a separate and distinct regulatory issue. It emanates from a monopoly environment, where networks were financed by ratepayers, not by competitive forces. ISP regulation would force ISPs into becoming CLECs or partnering with CLECs to gain access to the unbundled network elements. Such a requirement would raise barriers to entering the ISP market and eliminate competition from smaller ISPs. Moreover, such a scheme would not serve the goals of providing faster Internet access and more customer choice to places were CLECs do not exist, including rural areas. ISP regulation, rather than allowing easier access to ILEC facilities, does nothing to further customer choice and a competitive environment.

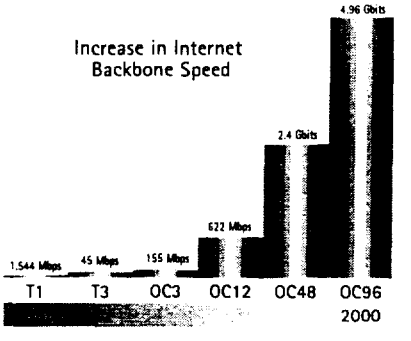
Regulation of ISPs is unneeded and unwarranted.

Internet Backbone Regulation Would Be Counterproductive to Deploying Advanced Services

As the current level of demand for Internet bandwidth from businesses and other customers demonstrates, the Internet responds well. The market has reacted positively to circumstances where additional capacity is needed. In fact, the Internet industry is experiencing a period of unprecedented growth. Bandwidth doubles every four to six months, as compared to three years ago when it doubled every year. Furthermore, Internet backbone providers have demonstrated a significant investment in backbone capacity. One survey estimates that investment to the Internet's network infrastructure increased by 125% between 1996 and 1997. In addition, Internet service providers are continually upgrading their networks to meet network demands and offer innovative services. As this statistical data underscores, regulation of the backbones, as a means to enlarge capacity, would be counterproductive.

The market is operating smoothly and well to respond to increases in demand for bandwidth on the Internet backbones.

Regulation of Internet backbones would add confusion, cost, and inflexibility to Internet arrangements that work well today. Congestion on the Internet is a complex issue to which the industry has responded with solutions without government intervention. There has been tremendous additional capacity and investment in backbone services. The industry is well positioned to provide even more efficient and innovative services arrangements in the future.



ILEC Relief Under Section 706 and Related Proceedings Is Not Warranted

An ISP's ability to deploy advanced services is limited by access to the ILEC's "last mile" —the connection that ultimately reaches the customer's location, whether that location is a residence or a business. Currently, ILECs control this connection, and the terms and conditions of access offered by the ILECs to competitors, including ISPs, stifles advanced services deployment. ILEC's boast of their control of the last mile.

ILEC relief under Section 706 and related proceedings is unwarranted; their requests for relief are at odds with the goals of the Act.

There is no public policy served, and advanced telecommunications will be deterred, by providing ILECs relief from their obligations to open their local markets through access to their facilities. The competitive safeguards of the 1996 Telecommunications Act are soundly premised on opening local markets to competition, which will yield lower prices and more service choices for customers. These objectives complement the Act's advanced services goal because only with new entrant competition will ILECs invest in and rollout new advanced services to the public. Many of the ILECs' requests for regulatory relief, however, are fundamentally at odds with these objectives and the purpose of the Act. Experience indicates that these obligations have not hampered the ILECs from deploying advanced services, including ADSL, where necessary to meet competition. Further implementation and enforcement of the Act will continue to advance the Act's objectives, and hasten the day of a competitive advanced services market for all Americans.

- ISP is a competitive industry and ISP choice must be maintained. Access to the telecommunications networks by the over 6,500 ISPs across the country drives innovation, quality services, and deployment of advanced telecommunications services, and accrues to the benefit of businesses and individual consumers.
- ILEC practices threaten the competition ISPs provide and the choice they offer. There is an attempt to use their dominance in the local market and leverage it in the ISP market, which will harm competition.
- The FCC's Section 706 initiative must encompass a comprehensive approach, including Computer III reforms, to the deployment of advanced services.
- ILEC relief from the obligation to open networks is not warranted.
- Regulation of Internet Backbones would be counterproductive.

An affiliated ISP is a service provider that is owned or controlled by, or is under common ownership or control with, an ILEC.

The Internet backbones are a set of paths that local or regional networks or ISPs connect to pass Internet traffic to locations for which they do not have a direct connection.

The FCC's 1986 Computer III decision provided for a number of competitive incentives as a condition of ILEC integrated entry into the enhanced or information services business. Computer III established nondiscrimination obligations, open network architecture, reporting requirements, and access provisions designed to preserve a vibrant and competitive information service industry. Further review of the Computer III is currently pending before the FCC, after it was remanded from the U.S. Court of Appeals for the Ninth Circuit.

[formerly known as ESP (Enhanced Service Provider)] An Information Service Provider is a company that offers its users the capability to generate, acquire, store, transform, process, retrieve, utilize or make available information via telecommunications.

An Internet host is a term used to describe any computer that has full two-way access to other computers on the Internet. Generally, this term refers to a device or program that provides services to some smaller or less capable device or program.

(Internet Service Provider) An ISP is a company that provides individuals, small businesses, and other organizations with access to the Internet and other related services such as email accounts, Web site building and hosting.

(Open Network Architecture) As part of Computer III, the FCC requires the Bell Companies and GTE to provide open access to the unbundled elements that make up telecommunications services for use by competing information service providers, including ISPs. ONA was intended for competing providers to use the ILEC network in innovative ways and to require competing providers to pay for only those parts of the ILEC network that they need to use.

[1]Shane Greenstein, The Tale of Two Frontiers, (October 1998) found at <http://skew2.kellogg.nwu.edu/~greenste/research.html>.

MAXIMUM COMMUNICATIONS: It's What Follows a Tough Act

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