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January 20, 1999

BY HAND DELIVERY
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Secretary
Federal Communications Commission
1919 M Street, N.W.
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Washington, D.C. 20554

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JAN 20 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Deployment of Wireline Services Offering, Advanced Telecommunications Capability, CC Docket No. 98-147

Ex Parte Communication

Dear Ms. Salas:

On behalf of the Internet Service Providers' Consortium (ISP/C), and pursuant to Section 1.1206(b)(2) of the Commission's Rules, I am filing the original and one copy of this letter to report an oral ex parte communications in the above-referenced proceeding.

Yesterday Roxanne Loveday, President of ISP/C, and I met with Kevin Martin and William Trumpbour of Commissioner Furchtgott-Roth's office. The substance of our presentation is set out below, supplemented with background information drawn from ISP/C's pleadings.

Summary

An ILEC advanced-services affiliate that provides advanced services (such as DSL) to an ISP affiliated with the ILEC should be required to make available the same advanced services to competing ISPs on a nondiscriminatory basis. ISP/C argued earlier in this proceeding that the advanced services affiliates of the RBOCs and GTE should be subject to the same applicable Computer III safeguards as the parent companies. **The Commission should also affirm that an affiliate's discriminatory provision of advanced services in favor of an ILEC-affiliated ISP is a prima facie violation of Section 202(a) of the Communications Act.**

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In addition, the Commission should prohibit joint marketing between the advanced-services affiliate and the parent ILEC.

About Independent ISPs

Today most subscribers reach the Internet through Internet service providers (ISPs), which are in the business of providing retail-level access to the Internet to anyone with a computer and a phone line (or other means of connection).[1] Without the ISPs, only entities large enough to maintain their own networks could have Internet access. ISPs make the Internet universal and ubiquitous.

Independent ISPs are companies whose primary business is providing Internet services. The independents are ISPs *other than* divisions of telephone companies like the RBOCs and GTE, on-line content providers like AOL and CompuServe, or software companies like Microsoft. In addition to serving consumers, independent ISPs typically work with the small businesses of their communities — companies and organizations that lack their own information services personnel and Internet expertise, and hence often demand considerable attention and resources from their ISPs. Together, small-business subscribers and individuals average about 85% of an independent ISP's customers.

Independent ISPs are a small-business success story in their own right. From only a handful of ISPs in 1995, the industry has grown to between 5,000 and 7,500 independent ISPs in the United States today. About 85% are themselves small businesses, with average revenues of about $375,000. Most have between one and ten employees, and are growing. Collectively, all independent ISPs account for 50 percent of the U.S. ISP market. They also create an increasing number of highly skilled technical positions in the United States and abroad. Everywhere, the independent ISPs contribute more than their share of the vitality and diversity that enables millions of people to use the Internet daily to improve and enrich their lives.

About the Internet Service Providers' Consortium. The ISP/C is the largest trade association for small to mid-size ISPs and other members of the Internet services industry. Founded in 1996, the ISP/C now includes about 285 company members, up 200 percent in the last year alone. ISP/C members provide local and backbone Internet access, online content, and hardware and software for the industry. Members of ISP/C have well over 1 million subscribers in the aggregate, with headquarters in more than 42 U.S. states and 10 countries. Most members

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[1] The Commission sometimes uses the abbreviation ISP to mean "information service provider." In this letter, ISP/C adopts a narrower meaning, "Internet service provider."

serve local or regional markets, including many in rural and smaller markets. Many ISP/C members provide service to consumers, business, schools and libraries in areas that otherwise lack competition for ISP services.[2]

Risk of Improper Discrimination

The Commission has proposed to permit the ILECs to avoid the strict terms of their Section 251 unbundling and resale obligations by providing advanced services through a structurally separate affiliate.[3] The affiliate would operate much as a CLEC does, and would stand in line with other CLECs for access to the ILEC's facilities. The goal is primarily to promote a competitive market in advanced services by ensuring that the ILEC cannot misuse its facilities monopoly to squeeze out competing transport providers.

Even if these provisions adequately protect the CLECs, they will do nothing to safeguard the independent ISPs — ISPs that are not also CLECs. Independent ISPs must compete with the ILEC-affiliated ISPs that operate in most markets. But they are also dependent on the same ILECs for the facilities that they need to reach their customers and the Internet backbone. The ILECs thus have every incentive — and every opportunity — to misuse their facilities monopoly to discriminate against independent ISPs in order to build up their own ISP businesses.

In the absence of competition from CLECs, an advanced service affiliate has exactly the same opportunity and incentive to discriminate against independent ISPs as its parent does. The affiliate profits the same stockholders as the parent. And the affiliate will be the sole source of advanced services for years to come in many of the areas served by ISP/C members, where the markets are not big enough to attract CLECs.

Today, any such discrimination by an RBOC or GTE in favor of its own ISP service is constrained by the Computer III rules. The Commission's creating the option of advanced services affiliates, however, will inadvertently provide the RBOCs and GTE with a mechanism to bypass Computer III and favor their own ISP services with impunity, simply by favoring their own ISP from the affiliate instead of from the parent company. For that reason, the ISP/C filed comments in this docket requesting that the Computer III safeguards be made applicable to the advanced services affiliates of the RBOCs and GTE.

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[2] Additional information about the ISP/C is available at http://www.ISPC.org.

[3] Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91, CCB/CPD No. 98-15, RM 9244, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, FCC 98-188 at ¶¶ 85-117 (released Aug. 7, 1998).

Applicability of Section 202(a)

In the alternative, ISP/C asks the Commission to affirm that discrimination by an ILEC advanced services affiliate against independent ISPs and in favor of the ILEC-affiliated ISP provider is a prima facie violation of Section 202(a) of the Communications Act. That section provides:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication services, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.[4]

ISP/C requests the Commission to affirm that an ILEC advanced services affiliate is a common carrier subject to Title II of the Communications Act, and is required to make available the same advanced services to competing ISPs on a nondiscriminatory basis. The Commission should declare in this proceeding that discrimination by such an affiliate in favor of the ILEC-affiliated ISP and against an independent ISP will constitute an "unjust or unreasonable discrimination in [advanced] services," an "undue or unreasonable preference or advantage" to the ILEC-affiliated ISP, and an "undue or unreasonable prejudice or disadvantage" to the independent ISP. The ISP/C further asks the Commission to require the advanced services affiliates to tariff their offerings to provide a means of detecting such discrimination. In the absence of tariffs, independent ISPs will find it all but impossible to detect even flagrantly unlawful discrimination.

Joint Marketing

Although the Commission did not originally propose a ban on joint marketing between the affiliate and the parent ILEC, several parties requested such a ban in their comments. A ban on joint marketing becomes all the more important if the Commission decides not to apply Computer III rules to the affiliate, because joint marketing would enable the affiliate to exploit the parent's name recognition and goodwill for the benefit of the parent-owned ISP. Today, some ILECs routinely forward calls asking about high-speed data telecommunications services to their

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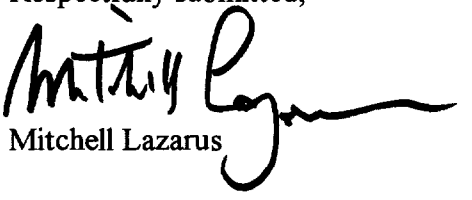
[4] 47 U.S.C. § 202(a).

own ISP. Some even misinform callers that such services are obtainable only through the ILEC's ISP. Abuses of this kind will only worsen under a regime that permits joint marketing between the ILEC and its advanced-services affiliate.

■ ■ ■ ■

If there are any questions about this filing, please call me directly at the number above.

Respectfully submitted,



Mitchell Lazarus

cc: Kevin Martin, Office of Commissioner Furchtgott-Roth
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Ms. Deb Howard, ISP/C
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