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FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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DEC 18 2001

Federal Communications Commission
Office of Secretary

In the Matter of)
)
Inquiry Concerning High-Speed)
Access to the Internet Over)
Cable and Other Facilities)

GN Docket No. 00-185

COMMENTS OF THE
UNITED STATES INTERNET
INDUSTRY ASSOCIATION ("USILA")
AND IADVANCE

To the Commission:

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SUMMARY OF FILING

The US Internet Industry Association ("USIIA"), a trade association of companies engaged in Internet commerce, content, and connectivity; and iAdvance, a coalition of computer companies, public interest groups, high-tech organizations, Internet companies, telecommunications companies and others engaged in promoting policies that encourage the deployment of broadband and backbone facilities, jointly submit these comments in response to the questions posed by the Federal Communications Commission in its Notice of Inquiry of September 28, 2000.

The convergence of technologies has rendered both the organizational structure of the FCC and much of its existing regulatory regime obsolete. In a matter of less than a decade, policies that have contributed to the public interest and the growth of telecommunications have become a hindrance to those goals.

The mission of the Federal Communications Commission is expressed not in terms of the product-line structure of the existing bureaus, but rather in terms of its core services to the public. That mission states, "the Federal Communications Commission exists to encourage competition in communications and to promote and support access for every American citizen to existing and advanced telecommunications services."¹

The clear lines that once delineated telecommunications networks and services no longer exist. The trends of adoption of the Internet Protocol, flat-rate pricing, convergence of services

and the rapid deployment of all of these services make differentiation between “existing” and “enhanced” telecommunications services virtually impossible. And the worst may be yet to come, as new technologies permit the creation of new wireless networks, networks based on electrical utility grids, and even networks composed of organic matter.

The purpose of this Notice of Inquiry must not be restricted to the relatively trivial legal definition of “open access,” but rather how the Commission may best define and implement a national telecommunications policy that meets the mission of the FCC for the 21st Century.

STANDING

USIIA is a national trade association of competitive companies engaged in Internet commerce, content and connectivity. Its 400 members constitute a cross-section of the Internet industry, providing consensus on policy issues that breach the competitive interests of any single member or segment of the industry.

USIIA members, through their annual dues and membership status, entrust the Association to represent their interests before regulatory and legislative bodies at the international, national and local levels. The Association’s positions on issues represent a consensus of the opinions of its members, expressed through the USIIA Public Policy Committee, membership in which is open to all members in good standing; and through its Board of Directors, elected from among the membership. As the appointed representative of its members charged with advancing their

¹ Mission Statement, Federal Communications Commission's Strategic Plan For FY 1997 - FY 2002.

economic interests and assisting in achieving and maintaining their legal and competitive parity, USIA has standing to file these comments.

iAdvance is a coalition of computer companies, public interest groups, high-tech organizations, Internet companies, telecommunications companies and others, including the USIA, who see the overriding need to improve the quality and speed of the Internet. The coalition promotes policies that encourage the deployment of broadband and backbone facilities that will bring faster, affordable, higher quality Internet and data services to all Americans. Members of the coalition have authorized iAdvance to represent their interests with respect to this issue.

Neither USIA nor iAdvance have any financial interest in the outcome of the proceedings. The comments presented are based on a consensus of the best interests of the Internet industry and its members, and are not subject to change or withdrawal due to any contracts, agreements, competitive pressures, market valuations or corporate strategies.

STATEMENT OF FACTS AND BACKGROUND

On September 28, 2000, the Federal Communications Commission announced an Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities. This inquiry was the result of several initiatives and actions during the period of 1996 to 2000:

- The Telecommunications Act of 1996, which attempted to bring competition to diverse telecommunications markets.

- The merger of AT&T and TCI, which encountered difficulty at the local level when some communities refused to approve the transfers of franchises without some guarantee of competition for Internet and other services.
- The merger of AT&T with MediaOne, which has raised not only community concerns about competition but also raised flags at the Department of Justice over the potential for anti-competitive behaviors.
- The proposed merger of AOL and Time Warner. Though the FCC has elected to take no action until competitive concerns are addressed by the Federal Trade Commission, there exist substantial points of interest that directly affect the question of cable Internet open access.
- The decision of the United States Court of Appeals for the Ninth Circuit, which ruled that cable Internet services should, under the definitions and rules of the Federal Communications Commission, be classified as telecommunications services subject to the competitive access requirements of other common carriers.
- The petition of the US Internet Industry Association requesting that the FCC take responsibility for the decision; that it declare cable Internet to be a telecommunications service; and that it begin the process of establishing tariffs for the interconnection of unaffiliated ISPs to cable facilities.

The stated purpose of the Notice of Inquiry is to determine what regulatory treatment, if any, should be accorded to cable modem service and the cable modem platform used in providing this service. The Commission also seeks comment on the impact of its approach on other providers of high-speed services.

In these comments, the US Internet Industry Association focuses on this stated purpose, rather than on the legion of topics and questions included in the NOI. This is done in order to maintain appropriate focus on the most critical considerations, and because it is the belief of the Association that fundamental policy flaws require correction before suitable answers can be created for the questions posed.

COMMENTS OF THE USIIA AND iADVANCE

Convergence has demolished the traditional lines of demarcation between telephone, cable, wireless and other communication networks even as the content and services carried on those networks has become largely indistinguishable. Moreover, this convergence is accelerating: within the year, we may expect to see the Internet Protocol become the dominant protocol for the widest range of communications services. And the entry of electrical utilities into the market for high-speed Internet will force the Commission to choose between creating a new Electrical Bureau or beginning the work of goring the regulatory sacred bulls that have been the hallmark of the Commission's work for 65 years.

This convergence within the communications technologies and industries has in turn rendered the structure and the regulatory regime of the Federal Communications Commission obsolete. As Chairman Kennard noted in his testimony to the Congress in 1999, "In such a world where old industry boundaries are no longer and competition is king, we need a new FCC. As detailed in my attached written testimony, a report entitled, 'A New Federal Communications Commission for the 21st Century,' we expect the FCC to focus on three core functions: consumer protection, including universal service; enforcement; and spectrum management. With

these as our mission, the traditional boundaries delineating the FCC's current operating bureaus will cease to be relevant.”²

Though the Commission recognizes these facts in the abstract, its continuing actions with respect to the convergence of cable with Internet and telephony services completely ignores them. The result is that the question of cable open access has been left to the discretion of each local franchise authority; regulation has become a patchwork of contradictory court rulings³; and the Commission, contrary to its own stated policy of technological neutrality, by electing to regulate some technologies and not regulate others, has replaced the actions of a free and competitive marketplace with its own selections for technology winners and losers.

ARGUMENTS

The Commission does not have the legal right to forbear on this issue. 47 USC. Sec 160 (a), states that “In making the determination under subsection (a)(3) of this section, the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public

² Oral Testimony of William E. Kennard, Chairman, Federal Communications Commission, before the House Subcommittee on Telecommunications, Trade, and Consumer Protection, March 17, 1999

³ Compare *AT&T Corp. v. City of Portland*, 216 F.3d 871, 877 (9th Cir. 2000) (*City of Portland*) (holding that cable modem service comprises both a “telecommunications service” and an “information service.”) with *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1275-78 (11th Cir. 2000) (holding that Internet service is neither a cable service nor a telecommunications service) and *MediaOne Group, Inc. v. County of Henrico*,

interest.” Absent such a determination, which must quantify the extent to which forbearance will promote competition, the Commission has no grounds on which to forbear.

Inquiries regarding delineation of services are counter-productive. Nearly a dozen pages of the NOI concern themselves with questions regarding cable and other broadband services. Specifically, it inquires as to the definition of open access, whether cable Internet is a “telecommunications service,” and how best to define a requirement that cable systems “voluntarily” open their networks. But since these questions are designed primarily to shoehorn future telecommunications services into the inadequate Bureau regulatory regime, spending time and energy on these issues is counter-productive.

Since there are no meaningful technical differences between identical or similar services carried over an IP network – except where technologies or network architecture have been specifically selected and installed in order to thwart competition – the only differences in delineation must be artificial and arbitrary. Debating these differences will do nothing to advance the deployment of broadband services or the interests of the public.

As convergence continues to meld technologies, the artificial differences between each must yield. When this happens, the courts or the Congress will be forced to implement a clear and consistent national policy -- unraveling much of the current work of the Commission. And there is no guarantee that this process will be conducted in a manner to stimulate competition, or even in the public interest.

There is not sufficient competition and consumer choice in broadband. The commission has concluded that it is unnecessary to regulate cable-delivered broadband access so long as consumers can choose among various alternative broadband access providers, such as DSL, wireless and satellite. This conclusion is flawed on two counts. First, it relies on the future emergence of competitive technologies that are as yet unproven and are generally not accessible by the greatest number of consumers. Second, it assumes that competition between alternative industries is the equivalent of competition within an industry. That is to say, under the FCC's current approach, it is not necessary for there to be competition among airlines so long as railroad and shipping services are available. Or that there is no need for competition among makers of soft drinks so long as there is competition among tea and coffee producers. Competition in the broadband markets must address both inter-network and intra-network competition if it is to provide effective choices for consumers.

The Commission's policies actively interfere with the operation of a free marketplace. The Commission claims jurisdiction over all interstate communications services, including the high-speed services offered by such providers. In exercising this jurisdiction, the Commission purports to have sought to reduce barriers to entry, encourage investment, and facilitate the deployment of high-speed services. In point of fact, its policies have acted to over-rule the workings of a free and competitive marketplace and limit the choices available to consumers.

In an industry in which all entrants are subject to the same rules and regulations, eliminating regulatory restraints would have the effect of facilitating competition and investment. But since cable, telephony, wireless and other networks are already regulated to differing degrees,

forbearing from further regulation simply ensures disparity, not competition. In selective cases, the Commission has elected to permit anti-competitive behavior in order to stimulate growth and investment in new technologies and services. The continuation of such policies can not and will not spontaneously create competition after the fact.

In the case of cable networks, the policies that ensured rapid deployment of cable television services – access to public rights of way, monopoly positions within each community, and the erection of closed and proprietary systems – now act as a substantial barrier to new entrants. At the same time, these policies ensure that investment in DSL facilities will return only transport revenues while investments in cable facilities will earn larger returns from e-commerce, advertising and other fees. Finally, these policies have allowed mergers that place the majority of cable customers under the direct control of two companies, further stifling competition.

The aggregate effect of the Commission's regulatory disparity among broadband providers is to determine via regulation which segments of the industry will yield higher returns on investment and thereby limits competition. This, in turn, restricts the choices of consumers and serves to pre-select which industry segments will be successful and which will not. The mechanics of a free and competitive market are stifled by government mandate.

CONCLUSION

The Federal Communications Commission must execute its mission by establishing a clear and consistent national policy with respect to broadband services. The Commission is faced with a convergence that has rendered its structure and its regulatory regime obsolete. Specifically

with respect to the deployment of broadband services, the existing regulatory regime has served to penalize some segments of the market and reward others. The policies implemented with respect to broadband services have raised barriers to entry and limit consumer choices in cable Internet. They have created financial disincentives to investment in and deployment of DSL services. Finally, these policies and regulations have been implemented by the FCC in direct violation of the Telecommunications Act of 1996, which unequivocally states that telecommunications services are to be regulated in the same manner “regardless of the facilities used.”

This means that the policies and regulations of the Commission have created an environment that is confusing and hostile, and one in which further delay will only serve to further damage competition and the industry.

It is incumbent upon the Commission to execute its primary mission by implementing a clear and consistent national policy with regard to broadband access. This policy must provide regulatory parity among the differing delivery networks in order to ensure vibrant competition and consumer choice.

USIIA and iAdvance ask that the Commission implement this national policy by declaring that all providers of broadband services meet the obligations of “telecommunications carriers” to the extent to which they offer Internet access. Broadband Internet services would therefore be designated telecommunications services, subject to regulation under Title II. This solution offers

the benefits of expedience and simplicity, while providing the means at a future date to consider which, if any, of the requirements of Title II should be removed to further stimulate competition.

Respectfully submitted,

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Dated: December 1, 2000