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**INTERNET**  
*Commerce & Communications*  
**DIVISION**

**Mark Uncapher**  
**Senior Vice President & Counsel**

August 14, 2002

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**VIA COURIER**

Ms. Marlene H. Dortch,  
Office of the Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Room TW-A325  
Washington, DC 20054

Re: ITAA Ex Parte Presentations - CC Docket 02-33, CC Docket 01-337, & CC Docket 96-45

Dear Ms. Dortch:

Pursuant to 47 C.F.R. § 1.1206(b), this letter is to inform you that *ex parte* presentations were made yesterday at meetings regarding issues in the above-referenced proceedings.

Participating in the meetings were Commissioners Abernathy & Martin, Dan Gonzales, Chris Libertelli (Chairman's office), Matt Brill, and Jordan Goldstein (Commissioner Copps office). They met with Harris N. Miller, President of the Information Technology Association of America (ITAA); Jonathan Jacob Nadler of Squire, Sanders & Dempsey, LLP, representing ITAA; Kim Ambler, Dir, Industry & Policy Affairs of the Boeing Company and Chairman of the ITAA Telecommunication Policy Committee; and Mark Uncapher, Senior Vice President of Internet Commerce & Communications Division of ITAA.

The issues addressed in this meeting are outlined fully in the attached written *ex parte* presentation, which was provided during the meetings.

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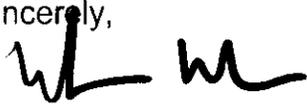
**Information Technology Association of America**

INTERNET *Commerce & Communications* DIVISION

1401 Wilson Blvd. # 1100 Arlington, VA 22209; 703-284-5344-direct, 703-525-2279 fax;  
muncapher@itaa.org; <http://www.itaa.org/isec.htm>

In accordance with Section 1.1206, an original and two copies of this letter and attachment are being submitted to the Secretary's office on this date. Please address any questions regarding this matter to me.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark Uncapher', with a stylized flourish at the end.

Mark Uncapher

Enclosure

cc:

Commissioner Abernathy

Commissioner Martin

Matt Brill

Jordan Goldstein

Dan Gonzales

Chris Libertelli

Harris N. Miller

Kim Ambler

Jonathan Jacob Nadler

**The Commission Should Continue to Require the ILECs to Provide  
Broadband Transmission as an Unbundled Telecommunications Service;  
The Commission Should Not Extend Carrier Obligations to the  
Competitive Information Services Market**

August 13, 2002

- ITAA is the Principal Trade Association of the Computer Software and Services Industry
  - 500 U.S. members, from multinational corporations to locally based enterprises
  - Many of ITAA's members are Information Service Providers, which remain critically dependent on the ILECs for broadband and narrowband telecommunications services
  - For thirty years, ITAA has participated in Commission proceedings governing the obligations of the BOCs and other ILECs to provide the telecommunications services that ISPs require to serve their subscribers
  - ITAA has launched its *Positively Broadband* initiative designed to promote "demand side" efforts necessary to facilitate greater consumer demand for broadband
- Over-view of the Presentation:
  - ITAA is concerned that the Commission may eliminate critical regulatory obligations governing the dominant local exchange carriers' obligations to provide broadband telecommunications, while imposing unnecessary regulatory obligations on the competitive information service market; ITAA believes that:
    - \* The Commission's *Computer II Rules* have been highly successful
    - \* ILECs remain dominant in the market for broadband telecommunications services that ISPs use to serve their mass-market subscribers
    - \* The Commission cannot, and should not, eliminate the ILECs' obligation to unbundle, and offer as a telecommunications service, the basic telecommunications that the ILECs use to provide information services
    - \* The Commission cannot, and should not, extend Title II obligations – including the duty to make direct payments to the Universal Service Fund – to information service providers

- The Commission's *Computer II Rules* have Fostered the Growth of a Vibrant, Competitive Market for Internet and Other Information Services
  - The Commission's *Computer II Rules* establish three fundamental principles -- each of which is fully applicable to broadband:
    - + Basic telecommunications services are subject to regulation under Title II, while information (enhanced) services are subject only to the Commission's limited "ancillary authority" under Title I
    - + Facilities-based carriers must unbundle, and offer as a telecommunications service, the basic telecommunications functionality that they use to provide information services
    - + ISPs are *users* telecommunications or telecommunications services to provide information services; they do not *provide* telecommunications services
  - The *Computer II* regime has provided significant benefits
    - + The *Computer II Rules* facilitated the creation of today's highly competitive information services market
      - \* Competition has resulted in the availability of an ever-increasing array of information services, at steadily decreasing prices
      - \* Information services have increased business and government productivity, while providing significant consumer benefits in the education, healthcare, retail, and entertainment areas
    - + The "basic/enhanced dichotomy" has provided an effective barrier against expansion of unnecessary common carrier regulation to the Internet
    - + ILECs and CLECs have benefited from the increased consumer demand for "second lines" and broadband connections

- The Basic Premise of *Computer II* Remains Valid: The ILECs Continue to have the Ability and Incentive to Discriminate Against Non-affiliated ISPs in the Provision of Broadband Telecommunications Services
  - The Commission's decisions in the current proceedings must reflect current market realities, not abstract theories about the benefits of deregulation
  - The ILECs remain dominant in the provision of wholesale mass-market broadband telecommunications services used by ISPs
    - + ILECs provide 93 percent of all mass-market wireline broadband telecommunications services
    - + The ability of *consumers* to obtain retail broadband information services from multiple sources does not alter the fact that the *ISPs* remain dependent on the ILECs for wholesale mass-market broadband telecommunications services
  - The ILECs have a significant incentive to discriminate in favor their downstream ISP operations, which are significant participants in the broadband mass-market Internet access services market
  - CLEC competition does not effectively constrain the ILECs' ability to discriminate in the provision of broadband telecommunications services
    - + Two of the three major "Data CLECs" have ceased operations
    - + Competitive provision of DSL will be virtually impossible if the Commission eliminates the line-sharing requirements
  - Cable systems, and wireless broadband providers, do not provide ISPs with an effective alternative to the ILECs' broadband telecommunications services
    - + Cable does not provide effective "inter-modal" competition
      - \* While some cable systems are "partnering" with a handful of selected ISPs, *no* cable system has offered to make broadband capacity generally available to any requesting ISP
      - \* Cable systems typically do not serve business customers
      - \* Many cable systems have not yet been "upgraded" to provide broadband
    - + Wireless broadband services remain "niche players"; they do not currently provide competitive broadband transmission services in most markets

- The Commission Should Continue to Require the ILECs to Provide Broadband Telecommunications Services on an Unbundled Basis, Subject to Title II
  - The Commission lacks legal authority to eliminate the ILECs' unbundling obligations
    - \* The Commission has repeatedly recognized that, in addition to the *Computer II Rules*, the non-discrimination requirement in Section 202 of the Communications Act requires facilities-based carriers to unbundle the telecommunications functionality that they use to provide information services (*See Interexchange Order (1995); Frame Relay Order (1995); CPE/Enhanced Services Bundling Order (2001)*)
    - \* The Commission cannot forebear from enforcing this requirement: Section 10 of the Communications Act precludes the Commission from forbearing from imposing any statutory provision necessary to ensure that a carrier's practices are not "unreasonably discriminatory"
    - \* Nor can the Commission "end run" the limits on its forbearance power by simply declaring wireline broadband telecommunications services to be private carriage, subject to the Commission's Title I authority
  - Reclassifying broadband telecommunications as a private carrier offering, and eliminating the ILECs' unbundling obligation, would have significant adverse effects
    - \* ILECs could drive non-affiliated broadband ISPs from the market by *refusing* to provide broadband telecommunications – or by providing it at higher prices, or on far less favorable terms, than those enjoyed by the ILECs' information service operations
    - \* Free of rate regulation, the ILECs also could seek to subject non-affiliated ISPs to a price squeeze
    - \* In addition, an ILEC could harm competition in the CPE market by *requiring* customers that want to purchase the ILEC's broadband telecommunications offering to also purchase ILEC-specified computer and data communications equipment
    - \* Reclassification of broadband telecommunications as a Title I offering also would erode the clear line of demarcation between regulated telecommunications and non-regulated information services

- The Commission Cannot, and Should Not, Extend Carrier Regulation to ISPs
  - The Commission should not impose “consumer protection,” interoperability, or unbundling obligations on ISPs
    - + The Commission, and the courts, have repeatedly recognized that Title I is a limited grant of authority: The Commission cannot selectively “download” Title II obligations onto entities subject to its Title I authority
    - + Continued reliance on effective competitive market forces, rather than imposition of new regulation, is the best means to promote the public interest
  - The Commission should not require ISPs to make direct payments to the Universal Service Fund
    - + The Commission does not have legal authority to require ISPs to make direct payments to the USF
      - \* Section 254 allows the Commission to require entities that “provide” interstate telecommunications to make direct payments to the USF
      - \* ISPs *use* telecommunications; they do not *provide* it to themselves or to others
    - + Concerns about “sufficiency” or “competitive neutrality” do not provide a basis to require ISPs to make direct payments to the USF
      - \* ITAA supports the Commission’s proposal to adopt a connection-based assessment methodology, which will address concerns about the sufficiency of the USF
      - \* Because ISPs do not compete against telecommunications carriers in the provision of telecommunications, the current regime is fully consistent with competitive neutrality
    - + Requiring ISPs to make direct payments to the USF would have adverse consequences
      - \* Requiring ISPs to make USF payments would contravene the congressional policy against imposing regulation on the Internet
      - \* Treating ISPs like carriers for *universal service* purposes would undermine the Commission’s long-standing policy of treating ISPs as end users for *access charge* purposes