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DIVISION

Mark Uncapher
Senior Vice President & Counsel

September 26, 2002

VIA COURIER

EX PARTE OR LATE FILED

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 a meeting regarding issues in the above-referenced proceedings.

Participating in the meeting were: Micelle Carey, Wireline Competition Bureau (WCB); Cathy Carpino, WCB; Shanti Gupta, OET/NTD; Richard Hovey, OET/NTD; Bill Maher, WCB; Carol Mattey, WCB; Jeremy Miller, WCB; Brent Olson, WCB; Claudia Pabo, WCB; Jerry Stanshine, OET/TAPD; Rob Tanner, WCB; Kathy Tofigh, WCB; Julie Veach, WCB; and Elizabeth Yockus, WCB.

They met with; Kim Ambler, Dir, Industry & Policy Affairs of the Boeing Company and Chairman of the ITAA Telecommunication Policy Committee Jonathan Jacob Nadler of Squire, Sanders & Dempsey, LLP, representing ITAA; 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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List ABCDE

Information Technology Association of America
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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,

Mark Uncapher

Enclosure

cc:
Micelle Carey, WCB;
Cathy Carpino, WCB;
Shanti Gupta, OET/NTD;
Richard Hovey, OET/NTD;
Bill Maher, WCB;
Carol Mattey, WCB;
Jeremy Miller, WCB;
Brent Olson, WCB;
Claudia Pabo, WCB;
Jerry Stanshine, OET/TAPD;
Rob Tanner, WCB;
Kathy Tofigh, WCB;
Julie Veach, WCB;
Elizabeth Yockus, WCB.
Kim Ambler, Boeing
Jonathan Jacob Nadler, Squire Sanders & Dempsey

Ex Parte Presentation of the Information Technology Association of America – CC Docket 02-33, CC Docket 01-337, & CC Docket 96-45

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

September 26,2002

- 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, including all aspects of the ***Computer Inquiries,*** governing the obligations of the BOCs and other ILECs to provide the telecommunications services that ISPs require to serve their subscribers

- Overview of the Presentation

  -- Today's competitive ISP market provides significant consumer benefits

  -- Elimination of the ILECs' unbundling obligations would create a duopoly, in which most consumers would be forced to choose between an ILEC-affiliated and a cable-affiliated ISP

  -- The Commission lacks legal authority to eliminate the ILECs' unbundling obligations

  -- Concerns about "regulatory symmetry" between ILECs and cable system operators do not justify a radical departure from well-established Commission policy

  -- Until ISPs have a meaningful choice of broadband transmission providers, the Commission should not seek to eliminate the ILECs' obligation to unbundle, and offer as a telecommunications service, the basic

telecommunications functionality that the ILECs use to provide information services

- The Commission cannot and should not require ISPs to make direct payments to the Universal Service Fund

- Today's Competitive ISP Market Provides Significant Consumer Benefits
  - ISPs are not fungible "conduits" to information
  - ISPs compete based on a variety of factors, such as: price; service availability and scalability; service performance, reliability and speed of service restoration; adequacy of customer support services; effectiveness of network security; adequacy of privacy protection and filtering services; ability to provide a range of addressing options; quality and variety of proprietary applications, content, and hosting services; and accuracy, clarity and timeliness of billing services
  - Competition has led to lower prices, increased quality, and significant innovation

- Elimination of the ILECs' Unbundling Obligations Would Create a Duopoly, in Which Most Consumers Would be Forced to Choose Between an ILEC-affiliated and a Cable-affiliated ISP
  - The ILECs remain dominant in the provision of wholesale mass-market broadband telecommunications services used by ISPs
    - The 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 of their downstream ISP operations, which are significant participants in the broadband mass-market Internet access services market
  - Eliminating the ILECs' unbundling obligation would replace today's competitive information services market With an effective duopoly
    - If the unbundling obligation is lifted, 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

+ The end-result would be to create a broadband ISP duopoly, in which most customers are forced to choose between an ILEC-affiliated and a cable-affiliated ISP

-- 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 do 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

- The Commission Lacks 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 should the Commission seek to "end run" the limits on its forbearance power by declaring wireline broadband telecommunications services to be private carriage, and then developing an a new regulatory regime pursuant to the Commission's Title I authority

+ The D.C. Circuit rejected a similar effort in ***ASCENT***

+ 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

+ Reclassification of broadband telecommunications as a Title I offering would inevitably lead to imposition of regulations on ISPs

  * The "basic/enhanced dichotomy," established in ***Computer II***, created a clear line of demarcation between regulated transmission services and non-regulated offerings that ***use*** telecommunications to provide value-added services

  * If the Commission classifies broadband telecommunications as a Title I service, but seeks to impose selected Title II or other regulations, demands for "regulatory symmetry" could lead the Commission to impose identical regulations on currently non-regulated information services, which also are subject to the Commission's Title I authority

  * This would undermine congressional policy opposing the extension of regulation to the Internet

- Concerns About "Regulatory Symmetry" Between Cable and the ILECs Do Not Provide a Basis for Eliminating the ILECs' Unbundling Obligations

  -- The Communications Act establishes fundamentally *different* regulatory regimes for cable system operators and telecommunications carriers; each provider has its own unique benefits and burdens

  -- **As** common carriers, the ILECs must provide telecommunications service on request at just, reasonable, and non-discriminatory terms

  -- The fact that cable system operators are not legally obligated to provide unbundled transmission service on request – and because, in practice, they do not do so – makes it ***more*** important to ensure that the ILECs fulfill their common carrier obligations

- Until ISPs Have the Ability to Obtain Broadband Transmission Services, on Reasonable Commercial Terms, From Multiple Providers, the Commission Should Not Seek to Remove the Existing Regulatory Obligations Applicable to the ILECs' Provision of Broadband Telecommunications Services

- The Commission Cannot and 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

    + Adoption of a connection-based assessment methodology 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