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May 1, 2003

VIA ELECTRONIC FILING

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room TWB-204
Washington, DC 20554

Re: Ex parte, CS Docket No. 02-52, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities

On Wednesday, April 30, 2003, Bob Quinn, Dina Mack and the undersigned of AT&T and David Lawson of Sidley Austin Brown & Wood, representing AT&T, met with Kyle Dixon, Eric Bash, Peter Corea, Peggy Greene, Alison Greenwald, Jamila Beth Johnson, John Kiefer, Priscilla Lee, and John Norton of the Media Bureau. The purpose of the meeting was to discuss the concept of "regulatory parity'" as outlined in the cable modem notice of proposed rulemaking (Cable Modem NPRM at ¶ 85). Attached is an outline that was distributed at the meeting.

As discussed in the outline, there is no basis simply to assume, as the wireline carriers suggest, that access regulation of cable modem providers and DSL providers must be symmetrical. Rather, there is an established framework for assessing the need for access regulation that focuses on the risk of market power abuse and, where such risks exist, the expected costs and benefits of regulation of the particular network in question. And it is clear that if one believes that both cable modem and DSL providers have some market power as a result of monopoly in some local markets and duopoly in others, application of this established framework may nonetheless lead to the conclusion that there is a strong need for continued access regulation of wireline carriers but not for the creation and implementation of new cable access regulation.

In this regard, the relative risks of market power abuse are very different. Wireline carriers' unbundling and nondiscrimination obligations are warranted for reasons that simply have no analog in the cable environment. A wireline carriers' unique position as the dominant provider of local telephone facilities used to provision narrowband internet access services (and second telephone lines used to access such services) and legacy broadband services such as T1 service gives them anticompetitive incentives to resist deployment of newer, cost-based broadband

services. The nature of these incentives was described by the wireline carriers themselves in comments filed with this Commission in the Triennial UNE Review proceeding:

> "Third, advanced services are increasingly likely to cannibalize the traditional services offered by ILECs. For example, the advent of digital subscriber line ("DSL") technology has applied the brakes on ILECs' 'second line' service, and dedicated high-speed connections to packet networks are steadily replacing modem-based connections to circuit-switched networks, while delivering services of equal or better quality to customers. In this environment, ILECs have to carefully fine tune the sequence in which they introduce their new services, and the timing with which they do so. That is, even as competitive developments compel them to shorten the life cycles of existing revenue-earning services in order to introduce replacement services, ILECs have to balance the opportunity cost of failing to introduce those replacements against the need to recoup the significant investments that go into developing successive generations of services."[1]

Cable modem services, in contrast, are cable companies' first Internet offerings. As a result, increasing broadband deployment and revenues is much more unambiguously positive for cable companies. The tension that exists in a wireline environment to "carefully fine tune the sequence in which they introduce new services" so as to balance the costs of cannibalizing older services in favor of newer ones simply does not exist in this context for cable companies.

Moreover, any rational analysis of the continuation or introduction of access regulation must take into account the costs and benefits of doing so. Although there is no basis to conclude that the much heralded intermodal competition from three or more competing networks will become a widespread reality in only two to three years, if the Commission determines that such intermodal competition is likely in five or so years, that should inform any consideration of imposing an entirely new access regulatory framework on cable. As experience with the initial implementation of the *Computer Inquiries* regime (and of network element unbundling) illustrate, it inevitably takes years from the announcement of new access regulation to actual implementation in the marketplace. Much time and money would have to be expended to apply any access regime (including the existing Computer Inquiries regime) to cable. Thus, even if the Commission decided today that access regulation was the right course for cable, it would be a long time before that became a reality in the marketplace. The period between actual implementation and effective intermodal competition could thus be quite short, and thus the public interest benefits associated with that regulation would be limited (and would have to be balanced against the relatively high costs of applying access regulation to facilities that have never been subject to such regulation).

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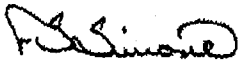
[1] Reply Declaration by NERA on Behalf of BellSouth Corp., CC Docket No. 01-338 (filed July 17, 2002) at 108.

Conversely, the upfront work of implementing access regulation for wireline carriers has already been undertaken. That means that, relative to cable, the costs of regulation are much lower and the the associated public interest benefits are much greater (because they are already accruing and need not await a lengthy and costy implementation period). Relieving the wireline carriers of their unbundling and nondiscrimination obligations in advance of the intermodal competition envisioned by the Commission would simply give license to the wireline carriers to act on the anticompetitive incentives described above, to discriminate against all but a few favored internet service providers ("ISPs") and to ensure that the carriage available to those favored ISPs was structured in a way that furthered the wireline carriers' interests in profit maximization and not the public interest in competitive market outcomes.

Finally, the Commission is surely correct in its brief before the United States Court of Appeal for the Ninth Circuit in Brand X Internet Services, et. al. v. FCC[2] that there is no merit to arguments that the Telecommunications Act of 1996 (and specifically section 706 of the Act) requires the Commission to treat all broadband services alike. As the Commission stated, "In particular, section 706 does not address whether all broadband services must receive the same regulatory treatment. Nor does any other part of the Communications Act speak to the subject."

One electronic copy of this Notice is being submitted to the Secretary of the FCC in accordance with Section 1.1206 of the Commission's rules.

Sincerely,



cc: K. Dixon
E. Bash
P. Corea
P. Greene
A. Greenwald
J. Johnson
J. Keifer
P. Lee
J. Norton

[2] Brand X Internet Services, et al. v. Federal Communications Commission, Nos. 02-70518, 02-70684, 02-70685, 02- 70686, 02-70879, 02-71425 and 02-72251, brief filed (9th Cir. Oct. 10, 2002).

CS Docket No. 02-52
Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities

Regulatory Parity

- The 1996 Act itself establishes different regulatory structures for wireline carriers and cable television providers; Title II and Title VI

- Section 706 offers no support for "regulatory parity" as it speaks to the deployment of advanced telecommunications services NOT the extent of its regulation
  - FCC has consistently found that deployment is "reasonable and timely"

- Arguing that identical regulatory requirements are mandatory as a matter of law ignores prior FCC orders, appellate court reviews of those orders and the unique market power and anticompetitive incentives of ILECs in this regard
  - Computer III decision remanded by the 9th Cir. Ct. holding that the FCC requirements failed to adequately safeguard the public

- That an ILECs DSL offering might face competition from a cable company could not by itself be grounds for concluding that wholesale access regulation of the ILECs network is no longer appropriate

CS Docket No. 02-52
Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities

Incentives

The FCC Must Consider Incentives to Abuse Market Power by Network Owners

- Regulatory parity exists in the retail market.
- Considerable evidence that ILECs and cable companies have radically different incentives with regard to granting unaffiliated ISPs access to their networks and that differential regulation is appropriate
  - 2nd line revenue in the mass market and T1 revenue in business market vs. DSL
  - ILECs can be *worse* off when an existing narrowband subscriber switches to DSL
- Due to the risk of "cannibalization" of 2nd/T1 lines, ILECs have a strong incentive to set DSL prices above competitive levels and promote DSL only enough to dampen migration in markets where cable modem service is available
- Cable companies have no legacy data line revenue to protect
- Increased cable modem sales mean only greater return on their investment to upgrade their networks
- Unlike the ILECs core telephone service, cable's video services are subject to substantial, nationwide competition from satellite competitors *without* viable broadband Internet offerings