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June 11, 2003

VIA HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation by
The American ISP Association in CC Docket Nos. 02-33, 95-20, 98-10

Dear Ms. Dortch:

Yesterday, Sue Ashdown and I, on behalf of the American ISP Association ("AISPA"), met with Simon Wilkie, Donald Stockdale, Jr., William Sharkey, and J. Scott Marcus of the Office of Strategic Planning and Policy Analysis to discuss the above-referenced proceeding and to distribute the attached written presentation. During this meeting, AISPA explained the importance of Title II regulation and the core *Computer Inquiry* requirements to fostering competition in the information services marketplace. Competitive ISPs must be able to obtain underlying transmission capacity on the same rates, terms and conditions as ISPs affiliated with facilities-based common carriers, or else consumers – including residential and small businesses – will not experience the benefits that result from a vigorous competitive environment that includes independent and smaller ISPs. These benefits include the freedom to choose an ISP based not only on price but also on service quality, features (anti-spam and privacy protection) and customer service. Competition from numerous independent and smaller ISPs is also crucial to ensuring that all consumers have access to all content providers, including those who are not affiliated with any ISPs or carriers. If only a few ISPs gain control of the ISP marketplace, independent content over the Internet will be in jeopardy.

AISPA urged the Commission to improve the ability of competitive ISPs to monitor compliance with the core *Computer Inquiry* requirements. AISPA also expressed support for the rules proposed by Earthlink, MCI and AOL/Time Warner on April 30, 2003 to streamline the

current requirements, but explained that the proposed rules lack sufficient protection against anticompetitive pricing behavior, including price squeezes and cross subsidization. Therefore, AISPA urged the Commission to adopt a rebuttable pricing presumption to prevent facilities-based carriers with affiliated ISPs from executing predatory price squeezes or engaging in other anticompetitive behavior that distorts market performance.

The pricing presumption could be similar to the condition that applies to U.S.-licensed carriers providing facilities-based service to foreign markets in which they have an affiliate: A carrier has distorted market performance if any of the carrier's tariffed collection rates on the affiliated route are less than the carrier's average variable costs on that route, where the proxy for average variable costs is equal to the carrier's net settlement rate plus any originating access charges.[1] To prevent anticompetitive behavior in the information services market, the Commission could adopt a rebuttable presumption that a facilities-based carrier has distorted market performance if the price of the carrier's information service offering (*e.g.*, bundled DSL and ISP services) is less than the carrier's average variable costs for that service. For the purposes of this presumption, the Commission could adopt a proxy for average variable costs that is equal to the carrier's wholesale transmission offering plus either (1) certain costs that all ISPs must incur to provide the service (*e.g.*, the cost for bandwidth to the Internet) or (2) a fixed percentage that the Commission deems reasonable for the purposes of the proxy. In either case, the information needed to establish the presumption must be publicly available.

The pricing presumption that AISPA proposes is intended to facilitate monitoring of compliance with requirements that currently exist. The presumption would not increase the regulatory burden of any parties. Rather, it would simply require facilities-based carriers with affiliated ISPs to justify their pricing if their wholesale transmission rates are higher – or suspiciously close – to their retail information service rates. If the carrier can justify its prices, then it will be able to rebut the presumption. The important point, however, is that the presumption will discourage facilities-based carriers with affiliated ISPs from executing predatory price squeezes or engaging in other anticompetitive behavior that distorts market performance, which is crucial to protect competition. The Commission cannot reasonably rely on independent and smaller ISPs that are the victims of anticompetitive behavior to bear the burden of investigating other carrier's costs and bringing formal complaints to the Commission to stop illegal acts.

As required by Section 1.1206(b), this *ex parte* notification is being filed electronically for inclusion in the public record of the above-referenced proceedings, and a copy is being submitted via e-mail to Mr. Wilkie.

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1 *See, e.g., International Settlement Rates*, 14 FCC Rcd 9256, ¶¶ 25-27 (1999).

Please direct any questions regarding this matter to the undersigned.

Sincerely,

Todd D. Daubert
Counsel to AISPA

Attachment

cc: J. Scott Marcus
William Sharkey
Donald Stockdale, Jr.
Simon Wilkie

Promoting Competition in the Information Services Marketplace

The American ISP Association

Ex Parte Presentation – CC Docket Numbers 02-33, 95-20, 98-10

June 10, 2003

The Commission's Goals for Imposing the *Computer Inquiry* Obligations Remain Valid Today

- The Commission articulated dual goals: (1) permitting carriers to make enhanced services available to the public in the most efficient manner possible and (2) promoting the continued development of competition in the enhanced services marketplace.
- "The achievement of the latter goal could be jeopardized if, in the furtherance of the former goal, a carrier were permitted to offer an efficient enhanced service integrated with its basic network facilities, while withholding from its competitors the opportunity to interconnect similar services with its network on a comparably efficient basis."

The Basic *Computer Inquiry* Requirements are Still Necessary

- Facilities-based common carriers must offer to competitive ISPs underlying transmission capacity on the same rates, terms and conditions as to affiliated ISPs.
- The technical characteristics of transmission service must be equal for all ISPs.
- The time periods for installation, maintenance and repair must be the same for affiliated and competitive ISPs.

Any Amendments to the *Computer Inquiry* Obligations Must Preserve these Basic Requirements

- Any amendments should improve the ability of competitive ISPs to monitor compliance with the *Computer Inquiry* obligations.
- The rules proposed by Earthlink, MCI and AOL/Time Warner on April 30, 2003, with some adjustments, provide a good basis for improving the current requirements.
- The proposed rules lack sufficient protections against anticompetitive pricing behavior (*e.g.*, price squeezes and cross-subsidization).

The Commission Should Adopt a Rebuttable Pricing Presumption

- It is difficult under the Commission's current rules for a competitive ISP to demonstrate that a carrier is violating the prohibition on cross-subsidization and price squeezes.
- The Commission should adopt a rebuttable presumption that a carrier has violated the Commission's rules if the carrier's retail information service offering (for example, bundled DSL and ISP services) is priced less than the carrier's average variable costs for that service.
- For the purposes of this presumption, a carrier's average variable costs would include expenses that a carrier would not incur in the short term if it stopped providing the retail information service.
  - With respect to bundled DSL and ISP services, for example, the Commission could use a proxy for average variable costs that equals the wholesale transmission offering to competitive ISPs – the wholesale DSL service – plus the expense for bandwidth to the Internet, which the carrier would not incur in the short term if it stopped providing bundled DSL and ISP services.
- Competitive ISPs must have access to all of the information relevant under the presumption and the proxy.