

COALITION OF BROADBAND USERS AND INNOVATORS

October 1, 2003

FILED ELECTRONICALLY

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

**Re: CS Docket No. 02-52; CC Docket Nos. 02-33, 98-10 & 95-20;
GN Docket No. 00-185
Notice of *Ex Parte* Presentation**

Dear Ms. Dortch:

Submitted herewith pursuant to Section 1.1206(b)(2) of the Commission's rules is a notice regarding a permitted *ex parte* presentation in the above-captioned proceedings. On September 30, 2003, John Scheibel of Yahoo!, Harold Feld of Media Access Project, Mark Uncapher of ITAA, Paula Boyd of Microsoft, Dan Horowitz of DiMA, and the undersigned on behalf of the Coalition of Broadband Users and Innovators met with Commissioner Michael Copps and his Legal Advisor Jessica Rosenworcel to discuss the importance of preserving the ability of consumers to access their choice of Internet information, content, and services and attach nonharmful devices to the network in the broadband era. A copy of our written presentation is attached.

The Commission has determined that: (i) broadband network operators have the ability to discriminate,¹ and (ii) the market for the delivery of broadband services to consumers is "very highly concentrated" and not competitive.² In light of these facts, the parties emphasized

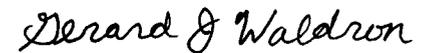
¹ See *In re* Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798, 4845 (2002) ("[I]t is technically feasible for a cable operator to deny access to unaffiliated content or to relegate unaffiliated content to the 'slow lane' of its residential high-speed Internet access service.").

² *In re* Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands; Part 1 of the Commission's Rules - Further Competitive Bidding Procedures; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint (continued...)

the need for safeguards to protect consumers and promote investment in new content and new services. It is therefore incumbent upon the Commission to preserve the public interest by taking measured steps to ensure that consumers have unfettered access to Internet content, applications, and services and the right to attach all nonharmful devices to the network, until such time as meaningful competition emerges.

Kindly address any questions to the undersigned.

Sincerely,



Gerard J. Waldron

Attachment

cc: Ms. Jessica Rosenworcel
Mr. Harold Feld
Mr. Dan Horowitz
Mr. John Scheibel
Mr. Mark Uncapher
Ms. Paula Boyd

Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, 18 FCC Rcd 6722, ¶ 123 (2003) (“[T]he typical broadband internet market is very highly concentrated.”); *see also Ex Parte* submission of the Coalition of Broadband Users and Innovators in CS Docket No. 02-52; CC Docket Nos. 02-33, 98-10 & 95-20; GN Docket No. 00-185 (Aug. 28, 2003).

Discrimination On The Broadband Network: Why Action Is Needed To Preserve Unfettered Consumer Access To The Internet

Coalition of Broadband Users
& Innovators

Broadband Users & Innovators

- The Coalition was formed due to a shared concern that broadband consumers may be unable to access all lawful Internet content and use the devices they want without network approval.
- Innovation will be stifled if content and equipment providers are uncertain whether their new offerings will be accessible on the Internet.
- The Coalition is broad, encompassing consumer groups and providers of content, equipment, and software/hardware. Members include Amazon.com, Yahoo!, eBay, Apple, CEA, Earthlink, Media Access Project, and others.

Consumers' Connectivity Will Be Harmed

- Citizens have expectations about what “the Internet” means: open and unfettered access to the content they want, using the devices they want.
- Ability to connect to an open, neutral network has directly resulted in growth of the Internet, yielding profound social and economic benefits.
- Interference (real or threatened) leads to less investment and innovation at the edges of the network.
- Compelling content and services will drive broadband deployment, but failure to preserve connectivity will curb consumer broadband demand.

The FCC Has Found That The Broadband Market Is Not Competitive

- Earlier this year, in its ITFS/MDS/MMDS Order, the Commission found: “[T]he typical broadband internet market is very highly concentrated.” The HHI for the residential broadband market “ranges between approximately 5500 and 5800,”¹ and “a market with [an HHI] that exceeds 1800 is considered highly concentrated.”²
- It determined that the broadband duopoly is firmly entrenched, as just 200,000 of approximately 10 million broadband subscribers rely on an alternative to cable modem or DSL service.³ Other transmission modes, like satellite, “are not only nascent, in nearly every case they are months, if not years, away from public availability.”⁴
- In light of these findings, it would be arbitrary and capricious for the FCC to assume that the market for delivering broadband services is competitive and that therefore no safeguards are needed.

Network Operators Have The Incentive And Ability To Impair Consumer Access

- There is evidence in the record that broadband providers have incorporated restrictive provisions into subscriber agreements.⁵
- The FCC stated in the *Cable Modem Notice* that technology is available (e.g., routers) to enable network operators to interfere and bit discriminate.⁶
- The cable industry will not commit affirmatively to not interfere in the future, and incentive not to interfere is strongest now because world is watching.
- Current law bars telcos from discriminating.

Network Operator Control Of Devices Harms Innovation

- The Commission has concluded that *Carterfone* has been a success: The concept that consumers can attach their choice of nonharmful devices to the network has unleashed tremendous innovation and investment.⁷
- This simple concept has led to billions of dollars of R&D and consumer benefit.
- The telco network has thrived in this environment, and the broadband world, whether run by a cable company or a telco, should similarly ensure consumer choice.

Prof. Larry Lessig Endorses Preservation Of Net Neutrality

“There are two reasons the Commission should care about maintaining a neutral network, both reflecting the Commission’s interest in ‘stimulat[ing] investment and innovation in broadband technology and services.’ First, guaranteeing a neutral network eliminates the risk of future discrimination, providing greater incentives to invest in broadband application development today. Second, a neutral network facilitates fair competition among applications, ensuring the survival of the fittest, rather than that favored by network bias.”⁸

Media Ownership Decision Underscores Importance Of Net Neutrality

- At a Senate Commerce Committee hearing earlier this year, Chairman Powell explained that he was unconcerned about media concentration in the context of the Internet because, “When I sit down at the Internet, I can go anywhere I choose.”⁹
- That is the case today. But will it remain true tomorrow?
- As Powell’s testimony attests, there are profound policy implications if net neutrality, which has ensured the openness of the Internet, is not carried forward into the broadband era.

Precedent For Action Is Well-Established

- Program Access¹⁰
- Computer Inquiries¹¹
- Video Dialtone¹²
- SDARS¹³
- EchoStar/DirecTV Merger¹⁴

What A Safeguard Would Not Do

- A safeguard would not prevent a provider from managing its broadband network in a technically efficient manner or implementing reasonable measures to prevent unlawful conduct.
- A safeguard would not prevent a provider from including links to some companies but not others on its first page.
- A safeguard would not apply to tiered pricing schemes that differentiate among consumers based on bandwidth use.
- A safeguard would sunset when the market for broadband services becomes competitive.

FCC Action Is Needed

- The FCC should ensure that longstanding principles of network neutrality, which have been the hallmark of the narrowband world, carry forward into the broadband era.
- The FCC can and should be proactive and act in anticipation of future harm by adopting a simple safeguard to prohibit a broadband service provider from, on a discriminatory or unreasonable basis, interfering with or impairing subscribers' ability to use their broadband service to access lawful Internet content or services, use applications or services in connection with their broadband service, or attach nonharmful devices to the network.

Endnotes

- 1 *In re* Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands; Part 1 of the Commission's Rules - Further Competitive Bidding Procedures; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, 18 FCC Rcd 6722, ¶ 123 (2003).
- 2 *In re* Application of EchoStar Communications Corporation, (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations) (Transferors) and EchoStar Communications Corporation (a Delaware Corporation) (Transferee), *Hearing Designation Order*, 17 FCC Rcd 20559, 20614 (2002) ("*EchoStar/DirecTV Order*").
- 3 *In re* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Ninth Annual Report*, 17 FCC Rcd 26901, 26924 (2002).
- 4 *EchoStar/DirecTV Order*, 17 FCC Rcd at 20566 n.27.
- 5 *Ex Parte* Submission of CBUI in CS Docket No. 02-52; CC Docket Nos. 02-33, 98-10 & 95-20; GN Docket No. 00-185, at 9-10 (July 17, 2003).
- 6 *In re* Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798, 4845 (2002) ("[I]t is technically feasible for a cable operator to deny access to unaffiliated content or to relegate unaffiliated content to the 'slow lane' of its residential high-speed Internet access service.").
- 7 *See In re* Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices, *Report and Order*, 13 FCC Rcd 14775, 14778 (1998) ("The *Carterfone* decision enabled consumers to purchase modems from countless sources, to install and use the modem *without permission from the telephone company*, and to use these modems to take advantage of an array of data services offered by a diverse assortment of service providers over their home telephone service. Without easy and inexpensive consumer access to modems, the Internet would not have become the global medium that it is today.").

Endnotes (cont'd)

- 8 *Ex Parte* Submission of Lawrence Lessig & Timothy Wu in CS Docket No. 02-52, at 3 (Aug. 22, 2003).
- 9 *FCC Oversight: Hearing Before the Senate Comm. on Commerce, Science & Transportation*, 108th Cong. 157 (2003) (response by Michael K. Powell, Chairman, Federal Communications Commission).
- 10 *In re* Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Provision, *Report and Order*, 17 FCC Rcd 12124 (2002).
- 11 *In re* Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, *Final Decision and Order*, 28 FCC 2d 267, 284 (1970) (requiring common carriers to offer data processing services only through a separate affiliate and to treat affiliated and unaffiliated data processing providers equally) (“*Computer I*”); *In re* Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry), *Final Decision*, 77 FCC 2d 384, 419-20 (1980) (deregulating computer-enhanced services while continuing to regulate “basic” telecommunications services provided by common carriers) (“*Computer II*”); *In re Computer III* Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of *Computer III* and ONA Safeguards and Requirements, *Further Notice of Proposed Rulemaking*, 13 FCC Rcd 6040, 6114 (1998) (replacing the *Computer I* separate affiliate requirement with a series of nonstructural safeguards intended to prevent cross-subsidization through cost accounting measures, prevent discriminatory network interconnection or access practices, and regulate joint marketing practices by protecting consumer proprietary network information so that common carriers could offer enhanced services on an integrated basis).
- 12 *In re* Telephone Company-Cable Television Cross Ownership Rules, Sections 63.54-63.58, *Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd 5781 (1992).
- 13 *In re* Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, *Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 5754 (1997).
- 14 *EchoStar/DirectTV Order*, 17 FCC Rcd at 20559.