

July 17, 2008

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554



RE: WC Docket No. 07-52
Notice of Oral *Ex Parte* Presentation

Dear Ms. Dortch:

On July 16, 2008, Harold Feld, Senior Vice President, Media Access Project, Elizabeth Broomfield, Intern, Media Access Project, Michael Calabrese, Director of the New America Foundation Wireless Futures Program, Jeffery Pearlman, Equal Justice Works Fellow, Public Knowledge, and Jon Law, Intern, Public Knowledge, met with Chairman Kevin Martin, Catherine Bohigian, Chief, Office of Strategic Plans and Policies, and Aaron Goldberger, Wireless Advisor to the Chairman, with regard to the above captioned proceeding. Mr. Feld made the following points with regard to the nature of the Commission's authority in the complaint against Comcast.

Pursuant to Sections 201(b) and 202(a) of the Communications Act, any "unjust and unreasonable practice" or any practice which would "subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage" is inherently unlawful. Accordingly, if the Commission determines that Section 201(b) or Section 202(a) apply, then there can be no requirement for a rulemaking. Rather, as with the Commission's obligation to sanction indecent broadcasts, adjudication is the appropriate means by which conduct is determined to violate Section 201(b) or Section 202(a).

The operative question, then, is whether Section 201 or 202 apply. The statutes speak directly to "common carriers," a class which excludes broadband access providers regulated at Title I "information service providers." However, under *United States v. Southwestern Cable*, 392 U.S. 157 (1968), and its progeny, the Commission can and should apply Sections 201 and 202 to Title I providers under the following circumstances:

- a) Where necessary to carry out the responsibilities of the Commission under the Communications Act, *see Southwestern Cable*, 392 U.S. at 173-75 (determination that exercise of ancillary authority is "imperative" to carrying out responsibility to foster expansion of UHF television service and preserve localism); or
- b) To further the goals of the Communications Act, *see United States v. Midwest Video Corp.*, 406 U.S. 649, 665 (1972) ("*Midwest I*") ("to define the Commission's power in terms of the protection, as opposed to the advancement, of broadcasting objectives would artificially constrict the Commission in the achievement of its statutory purposes").

In addition, the Commission may also apply Section 201 and 202 to those portions of broadband transmission that qualify as telecommunications services, but are not easily separable from the non-telecommunications elements. *See Computer and Communications Industry Association v. FCC*, 693 F.2d 198, 210 (D.C. Cir 1982) (“*CCIA*”) (permitting treatment of mixed Title II and non-Title II “enhanced services” under ancillary jurisdiction rather than requiring the Commission to distinguish between the two, given “the peculiar nature of communications and data processing industries”). The Commission has already previously determined, and the D.C. Circuit has twice affirmed, that the Commission may regulate the telecommunications component of broadband separately. *See Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1241 (D.C. Cir. 2007) (rejecting argument that Commission may not isolate transmission element where appropriate under the Act); *American Council on Education v. FCC*, 451 F.3d 226 (D.C. Cir. 2006).

With regard to this last point, it is useful to note that the Sixth Circuit recently found that Section 201(b) conveys upon the Commission a general authority to determine what practices are “just and reasonable” regardless of the Title under which the Commission exercises its authority. *Alliance for Community Media v. FCC*, 529 F.3d 763, 774 (6th Cir. 2008) (Section 201(b) provides a general grant of authority applicable to Title VI). Further, the blocking behavior does not take place as part of the “offer,” but rather during the transport/telecommunications aspect of the service. As such, the application of Section 201 and 202 of applies only to the services provided under Title II. *Vonage Holdings Corp.*, 489 F.3d at 1241 (information service may also be a “provider of telecommunications”). *See also FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 at n.9 (1979) (“A cable system may operate as a common carrier with respect to a portion of its service only”).

Accordingly, if the Commission determines that application of Section 201(b) or 202(a) is necessary to fulfill its responsibilities to administer networks subject to Title II, or that applying Section 201(b) and 202(a) would advance the broad purposes Title II specifically and the Act generally, or that the Commission cannot adequately regulate the underlying telecommunications component without also regulating the information service component, it can and should apply Section 201(b) and Section 202(a), which would make any unjust, unreasonable or discriminatory conduct with adverse effects on specific individuals *inherently* unlawful, without the need for any specific rulemaking.

The evidence in the record provides persuasive evidence that all three rationales for applications of Sections 201 and 202 exist here. First, there is a clear connection between the functioning of broadband services and the functioning of the PSTN. While, as in *Southwestern*, the precise scope of this relationship is difficult to define, that does not deprive the Commission of the authority, or relieve it of the responsibility, to act. *Southwestern*, 392 U.S. at 176-77 (Although the FCC “could not predict with certainty the consequences of unregulated CATV” the Court agreed that “its statutory responsibilities demand that it ‘plan in advance of foreseeable events, instead of waiting to react to them’”). The Commission has sufficient information to recognize the complicated relationship between the adoption of broadband, the impact of broadband adoption on the public switched telephone network (for example, by increasing reliance on dial up or delaying the development of competitive alternatives to the PSTN, such as VOIP). As the Supreme Court instructed in *Southwestern*: “in this

area of rapid and significant change, there may be situations in which its generalized regulations are inadequate, and special or additional forms of relief are imperative.” *Id.* at 180.

Similarly, the Commission has sufficient evidence at this stage to determine that applying Section 201(b) and 202(a) to Comcast’s unreasonable and prejudicial, and therefore inherently unlawful, would further the goals of Title II, of the Communications Act generally, and of the First Amendment. *See* 47 U.S.C. §§ 218 (policy to make “new inventions and developments” available to “the people of the United States”), 257(b) (defining policy goals of Act). Thus, under *Midwest I*, the Commission should apply Section 201(b) and 202(a) “with a view not merely to protect but to promote the objectives for which the Commission had been assigned jurisdiction.” *Midwest I*, 406 U.S. at 667.

Finally, because the blocking behavior clearly impacts the telecommunications component of broadband service, and the Commission cannot easily segregate the underlying telecommunications component, it may apply Section 201(b) and Section 202(a) via its Title I ancillary authority under *CCIA*. As *CCIA* spoke directly to the question of information services (known at the time as “enhanced services”), the grant of jurisdiction in *CCIA* is impossible to distinguish from the instant case. Addressing the application of *Southwestern* to the Commission’s ancillary authority under Title II, the D.C. Circuit stated:

Several parties attack the validity of this assertion of ancillary jurisdiction by the Commission. In *United States v. Southwestern Cable Co.*, 392 U.S. 157, (1968), ***it was settled beyond peradventure that the Commission may assert jurisdiction under section 152(a) of the Act over activities that are not within the reach of Title II.*** In that case, however, the Supreme Court limited the Commission's jurisdiction to that which is "reasonably ancillary to the effective performance of the Commission's various responsibilities." One of those responsibilities is to assure a nationwide system of wire communications services at reasonable prices.

In *Computer II* the Commission found that the exercise of ancillary jurisdiction over both enhanced services and CPE was necessary to assure wire communications services at reasonable rates. . . . Given this potentially symbiotic relationship between competitive and monopoly services, the agency charged with ensuring that monopoly rates are just and reasonable ***can legitimately exercise jurisdiction over the provision of competitive services.***

CCIA, 693 F.2d at 212-213 (emphasis added)(footnotes omitted). By the same rationale, the Commission, in order to “ensure a nationwide system of wire communication at reasonable prices,” may apply Section 201(b) and 202(a) to Comcast’s actions blocking P2P and “can legitimately exercise jurisdiction over the provision” of Title I broadband services by finding its actions unreasonable, discriminatory and therefore inherently unlawful.

Mr. Feld also pointed out that, at this stage, the Commission may act on less than perfect information. As Comcast recently reminded the Commission, the Commission’s next step in this

proceeding is not to proceed to final judgment, but to issue a show cause order and accompanying temporary injunction until Comcast has the hearing to which it claims it is entitled under Section 312(c). Although the Supreme Court in *Southwestern* expressed skepticism whether Section 312(c) genuinely limited the Commission's ability to enter a permanent injunction in such situations, 392 U.S. at 179 n.46, it would appear more prudent to grant Comcast the procedural rights requested. The Commission will still retain full authority to order that Comcast cease and desist its practices until resolution of the hearing following the show cause order. *Id.* 180-81.

A hearing will also allow the Commission to better develop the relationships described in the show cause order. Because the show cause order is not a final agency action, Comcast will have no right of appeal until completion of the hearing, where Comcast will enjoy all the procedural protections it desires. In addition, the Commission may require Comcast officials testify under oath, subject them to cross examination at public hearing, and require the production of all information necessary for the Commission to adequately resolve the matter. *See* 47 U.S.C. §§ 218, 409(e). To the extent Comcast disputes the initial findings of the Commission, therefore, the Section 312(c) hearing invoked by Comcast will allow the Commission a far better opportunity to develop the record, prior to any review by a federal court. It is also instructive to note that, while the burden of proof lies with the Commission, 47 U.S.C. §312(d), the Commission need *not* prove that Comcast knew that its actions violated the Communications Act. *See* 47 U.S.C. §312(f)(1). It is sufficient to show that the commission or omission of any act is "conscious and deliberate . . . irrespective of any intent to violate any provision of this Act."

Finally, as Comcast has reminded the Commission that its authority under Title III is also implicated, it is worth noting that Comcast's actions in blocking p2p likewise impinge on the Commission's responsibilities under Title III and Title VI to foster competitive video services. In addition, the Commission should consider, independent of any complaint filed, whether to suspend Comcast's CARS licenses under the authority of Section 303(m)(1). Section 303(m)(1) authorizes the Commission, on evidence sufficient to satisfy the Commission, to suspend the license of any operator that "willfully or maliciously interfered with any radio communications *or signals*." (Emphasis added.)

In accordance with Section 1.1206(b) of the Commission's Rules, this letter is being filed with your office.

Respectfully submitted,

/s/

Harold Feld
Senior Vice President

cc: Chairman Martin
Catherine Bohigian
Aaron Goldberger