

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
)
Broadband Industry Practices) WC Docket No. 07-52
)

**Comments of Computer & Communications Industry Association (CCIA)
On Broadband Industry Practices**

CCIA has been a consistent advocate for open networks, open systems and competition in telecommunications since before the antitrust case that broke up AT&T in 1984. CCIA appreciates this opportunity to explain the importance of neutral broadband access to the Internet. We are more convinced than ever that to achieve the great technological, social and economic benefits which our industry can continue to provide, these foundational principles of openness and competition are essential. Neutral end user access is the most important public policy that must be defended against broadband industry practices that might compromise it.

Historical Perspective

The FCC’s Four Freedoms of the Internet are solid principles for neutral “last mile” access, connectivity and competition among service providers.¹ These principles are rooted in nearly 100 years of common carrier utility style regulation of the underlying public telecommunications networks upon which the Internet operates. The Internet was

¹ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 FCC Rcd 14986 (2005) (*Policy Statement*).

born on traditional phone lines and rapidly expanded under a regulatory regime of open access with no network gatekeepers. The Internet still depends largely on wireline telephone networks that were built using monopoly ratepayer money, government subsidies, and to a lesser extent originally, private investment capital. Regardless of regulatory or bureaucratic flaws that may be criticized with regard to essential carrier obligations, the underlying public interest principles for Internet access remain essential and must be meaningfully enforceable. Residential users rely on wireline telephone networks or cable television platforms, which were built under government-sanctioned monopoly franchises, to access broadband Internet services.

Current Market Realities

Recently, however, in the 21st century, AT&T and Verizon have declared they would prefer to operate as deregulated private companies with control over what services transit their own pipes.² Cable companies earned this status as a result of the *Brand X* decision.³ All this private control would be just fine, except for the market failure that has left us with monopoly and duopoly in most broadband access markets. No company or pair of companies has any more right than the government does to control what Internet applications or services are available without surcharges in any given region or market.

² “At SBC, It’s All About Scale & Scope”, Interview with former AT&T Chairman Ed Whitacre regarding proposed speed and price discrimination, *Business Week*, November 7, 2005, at http://www.businessweek.com/@@n34h*IUQu7KtOwgA/magazine/content/05_45/b3958092.htm

³ National Cable & Telecommunications Association et al. v. Brand X Internet Services et al. certiorari to the United States Court of Appeals for the Ninth Circuit, No. 04-077, argued March 29, 2005- decided June 27, 2005.

Competition in Broadband Access is Inadequate

But for the large telephone and cable companies' real market dominance, the comments of AT&T's CEO would have been dismissed. The sobering fact is that a few national telephone companies, who choose not compete against each other,⁴ and a few cable companies currently do have the market power to wreck havoc on Internet access for most ISPs and end users.⁵ Two of the largest wireless broadband providers, Verizon Wireless and AT&T are affiliates of dominant ILEC DSL providers. This concentration of control over broadband access by one or two companies in most U.S. markets is a risky situation for end users and the economy in general.

Fortunately, no blatant discrimination or signal degradation is occurring yet. AT&T's declaration in late 2005 immediately got the attention of users, ISPs, regulators, legislators and the media across America who are all now watching the telephone companies like hawks. But the massive and shrill public relations and lobbying campaign to block net neutrality legislation is itself tempting evidence that the blueprints for business models likely to run afoul of enforceable principles exist, and are being further developed. In some cases, net neutrality principles can be enforced by public scrutiny. For example, a few companies such as Microsoft and Google are big enough and so widely used that if a broadband network operator made them a target of aggressive new business practices, that effort might fail due to a combination of massive consumer outcry and corporate protests.

⁴ Bell Atlantic Corp. et al. v. Twombly et al. certiorari to the United States Court of Appeals for the Second Circuit, No. 05-1126, p.21, argued November 27, 2006—decided May 21, 2007.

⁵ It is ironic that the telcos rely on nondiscriminatory program access rules to compete with the cable TV companies for video delivery services.

Therefore, the FCC's public interest focus of concern should be for content providers who are not so big, popular, or powerful and for their customers and end users. The tremendous innovation that takes place at the application level should also be protected by FCC rules. In addition to making the four Internet freedom principles enforceable and adopting the safeguards recommended below, the FCC, and perhaps the Federal Trade Commission (FTC), should require that broadband access providers comply with specific disclosure requirements and inform end users of both download and upload speeds, latency, and other quality factors.⁶ The FCC NOI in this proceeding asks many good questions in paras. 8 and 9 about industry practices involving network management and tiered pricing. Unfortunately, without increased disclosure, the ILECs are the only ones who are able to answer these questions.

The Internet is Open

The Internet is really a network of networks, both private and public, that route traffic or bit streams across each other's networks on a contractual basis. Large carriers exchange traffic on a settlement-free basis known as peering. CCIA finds nothing wrong with intelligence in the networks. Carrier contracts may involve Quality of Service agreements providing packet prioritization for volume customers.

However, carriers do not directly charge customers of other carriers' networks for access. No end users or online content providers have to pay twice for access and full connectivity. Abandoning this model would cause fragmentation of the Internet, with sections of proprietary toll roads, inaccessible to most users.

⁶ FTC forum presentation, February 13, 2007, p.70 at <http://www.ftc.gov/opp/workshops/broadband/index.shtml>

Network Operators Can Limit Access

Network operators both cable and telco have the ability and incentive to restrict availability of broadband capacity so they can charge more for bandwidth and priority service. This may be one reason for the slow deployment of fiber networks by some carriers in the U.S. Verizon is building far more fiber optic network facilities to customer premises than any of the others, but is still leaving many communities within its home regions unserved.

More critically for this FCC proceeding, these network operators also have the ability and incentive to use their market power to favor vertically integrated services and content of their own. MCI learned this anticompetitive reality the hard way in the late 1970s when its fledging long distance services were sabotaged by AT&T.⁷

Today's telephone companies and cable companies have both the technical capacity and a commercial incentive to control and limit broadband access. They are financially motivated to leverage their market position in last-mile local access connectivity into an advantage for delivery of services and content in which they have a proprietary interest. No "free-market" check against such practices exists.

Recommended Safeguards

The best model for detecting and preventing anticompetitive discrimination is structural separation rules that require network operators to provide neutral local broadband access on a nondiscriminatory wholesale basis. The 1984 break-up of AT&T and spin off of local operations resulted in vigorous competition in the long distance telephone industry for nearly 15 years. Competition failed only when the Bell offspring,

⁷ United States v. AT&T, 552 F.Supp. 131 (DDC 1982).

cobbling themselves back together through mergers, also began re-entering the long distance business, slipping out from under the separate subsidiary provisions of the 1996 Telecom Act, and ultimately bought up their largest long distance competitors, AT&T and MCI WorldCom. The separate subsidiary model has worked well in the United Kingdom, where British Telecom's local access subsidiary is required to provide last-mile connectivity to ISPs at reasonable and nondiscriminatory rates.⁸

Absent structural separations, the next option is less intrusive, but may seem more regulatory. This option would involve ground rules to prohibit anticompetitive practices that are de facto discriminatory and limit consumer choice. Such practices must be proscribed before they are adopted by incumbent broadband providers in monopoly and duopoly situations. Otherwise, by the time end users figure out they've been locked into bad deals for Internet access, and then organize a class action or antitrust suit, it's too late. They might not even have an alternative choice of providers at the end of their contract term. Anticompetitive practices of dominant network operators, once adopted in mass markets, would be entrenched and difficult to reverse. The network operators could argue it would be too disruptive to upset their business models in mid-course, when they had no clear advance notice that a particular practice would not be acceptable to the FCC.

CCIA recommends that, at a minimum, the FCC extend the AT&T/BellSouth merger conditions to incumbent ILECs and cable companies in all 50 states for the same time period as the merger conditions apply.⁹ The Commission could schedule a revisiting of these rules before expiration and decide whether extension is necessary. The AT&T

⁸ *Digital Future of the United States: Part IV, Broadband Lessons from Abroad*, U.S. House of Representatives Subcommittee on Telecommunications and the Internet, 110th Congress, (April 24, 2007), at http://energycommerce.house.gov/cmtes_mtgs/110-ti-hrg.042407.dig.future.partIV.shtml

⁹ *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 06-74, FCC 06-189, at 154 (rel. Mar. 26, 2007).

rules include 1) a prohibition on tying broadband access to local telephone service, 2) neutral routing of applications and content without regard to source, ownership or destination, and 3) divestiture of unused wireless spectrum for use by new entrants for wireless broadband facilities. The first two rules essentially mirror the status quo, so that residential and small business end users are not disadvantaged in favor of higher volume customers, and access to lawful content and services on the Internet may not be blocked. The third rule encourages independent investment in wireless broadband facilities, a goal clearly supported by this Commission in other dockets.¹⁰

Antitrust Law Does Not Provide Timely or Adequate Safeguards

Antitrust law may be used to prove egregious cases of anticompetitive misconduct, but in various ways our antitrust laws have been weakened and shown to be less effective in recent years. Antitrust litigation consumes many years. Even if violations are eventually proved, antitrust remedies can be further delayed and even if drastic measures are finally imposed to prevent future harms, the damage to original competitors and consumers cannot be undone. In a dynamic and innovative networked industry subject to tipping point economics, antitrust law alone cannot be relied upon to deal with abusive conduct by owners of bottleneck access facilities. Americans deserve ubiquitous, affordable neutral broadband access with little or no risk that it could evaporate any day.

¹⁰ Further Notice of Proposed Rulemaking, FCC, (WT Docket No. 06-150; WT Docket No. 06-169; PS Docket No. 06-229; WT Docket No. 06-86).

Intermodal Competition Might Reduce the Risk to Internet Access for End Users and ISPs

The FTC held a forum earlier this year which focused on “Broadband Connectivity Competition Policy.”¹¹ The FCC is working on new innovations to encourage competitive broadband access deployment in other proceedings. If these efforts to promote competition are eventually successful, the public interest need for neutral broadband access rules may diminish or be eliminated. Until that time arrives however, ISPs and end users in the U.S. cannot rely on vague predictions about improved wireless broadband or the potential for broadband over power lines.

Conclusion

Today, no widespread broadband industry practices compromise neutral access to the Internet via wireline networks. However the near total dominance of cable operators and telephone companies over broadband access infrastructure is a market failure that puts neutral nondiscriminatory end user access at risk. Therefore, the Commission should strengthen its Internet freedom principles to make them enforceable and applicable to both cable and telco broadband network operators.

¹¹ FTC Broadband Connectivity Competition Policy forum, February 13-14, 2007, at <http://www.ftc.gov/opp/workshops/broadband/index.shtml>

Respectfully submitted,

A handwritten signature in black ink that reads "E J Black". The letters are cursive and somewhat stylized.

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A handwritten signature in black ink that reads "Catherine R. Sloan". The signature is written in a cursive, flowing style.

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