USTELECOM
UNITED STATES TELECOM ASSOCIATION

Walter B. McCormick, Jr.
President and CEO
Responses to questions for the record
"Communications Laws: Ensuring Competition and Innovation"
Senate Judiciary Committee

Senator Specter

Do you believe that case-by-case adjudication of competitive issues that arise in the market for broadband internet service would be adequate? What if Congress provided the FTC and DOJ with guidelines for applying the antitrust laws in this market? If Congress were to provide such standards, what would they consist of?

I agree that case-by-case adjudication of any competitive issues that may arise in the area of broadband internet services would make sense. It would also put such services on the same footing as the vast majority of goods and services in the American economy, which are subject to the antitrust laws and enforcement of those laws by antitrust agencies and private parties. There is an established body of statutory and case law in the antitrust arena that has protected consumers and competition for over 100 years and is applicable to all industries. For that reason, there is no need for industry-specific guidelines for broadband Internet services. Rather, they are and should be subject to the existing antitrust laws, just as is the remainder of American industry.

Senator Feingold

1. Question to the panel, but particularly to Mr. McCormick:

You have taken a position against net neutrality, at least partly on the grounds that you need to collect funds from Internet content providers to pay for further roll-out of Internet and video service. Yet at the same time you have opposed build-out requirements as part of the national video franchise proposed in the House. How is this consistent? There isn't a requirement that the money from content providers be reinvested in underserved areas, is there?

USTelecom supports the High Tech Broadband Coalition internet access principles incorporated in Chairman Stevens' reported bill. We oppose heavy-handed net neutrality regulations and build-out requirements on new video entrants because they are anti-consumer and serve as a disincentive for investment in the deployment of advanced networks.

Net neutrality requirements as proposed in various legislative proposals would dictate that consumers alone pay for the deployment of the next-generation Internet. These advanced networks hold virtually unlimited promise to enhance our nation's economic opportunities and quality of life. They will deliver not only movies and entertainment, but telemedicine advancements that can improve the accessibility, affordability and quality of health care, particularly in rural communities; telecommuting opportunities that can enhance our environment, reduce America's dependence on foreign oil and give us more time with our families; educational advancements that make a range of learning opportunities widely accessible; and other innovations that our best minds have yet to imagine.

To take this next step in the Internet's evolution requires <u>vast</u> investment in new networks with substantial bandwidth capacity. These networks will require multi-<u>billion</u>-dollar investments that must be paid for by someone.

All sides of the net neutrality debate agree that consumers should be in control of their Internet experience. Where we differ is on whether consumers alone should foot the bill for the advanced networks that drive the Internet's growth and evolution. USTelecom believes that businesses that seek to profit from the use of next-generation networks should not be relieved of all financial responsibilities associated with the increased capacity that is required for delivery of the advanced services and applications they seek to market.

Build-out requirements serve as a disincentive to enter a market, thereby delaying the benefits of competition. In light of the fact that the video business has entrenched incumbents, if regulatory barriers are too high and too costly, companies may be forced to skip whole franchise areas.

While "consumer groups" argue that when cable entered the business it was required to build out its systems, what is often forgotten is that when cable entered the video business it was a monopoly—the only game in town. Cable had a guaranteed customer base for any one who wanted video service. New entrants must win customers away from cable and satellite providers.

When phone companies bring competition, it does not make sense to subject them to similar rules as when incumbents operated as monopolies. In fact, build-out requirements are the anomaly for competitive services. As part of the 1996 Telecom Act, Congress did not impose build-out requirements on competitors entering the voice business. Telecom CLECs and Cable VoIP providers have no build-out requirements when entering the voice market. The same incentives should be maintained for competitors entering the video business.

2. Question to the panel, particularly to Mr. McCormick and Cohen:

You have urged us not to act until there are widespread abuses of your duopoly power - essentially taking the position that net neutrality is premature. Yet we have a long history of putting conditions on mergers to preemptively prevent possible anti-competitive *practices. Why shouldn't we follow the model we have set for mergers and place limits where the situation would be clearly susceptible to anti-competitive actions?*

Up to now the Internet has experienced significant growth and innovation precisely because the government has maintained a virtual hands-offs approach. However, the so called "net neutrality" regulation, and I take strong exception to the name because I believe it is extremely misleading, would dramatically alter the way the Internet works today— replacing the freedom to innovate and the American entrepreneurial spirit with heavy-handed government interference. This regulation would have significant harmful unintended consequences.

I would also take exception to the notion that the high-speed market is a duopoly, susceptible to anti-competitive actions. Today, consumers have a variety of choices in obtaining high speed internet access. They can choose high speed internet access from cable, from DSL, from wireless, from satellite, and in some areas from new technologies such as wi-fi and wi-max systems or Broadband Over Power Line. According to the FCC, as of June 2005, consumers living in 75% of zip codes have three or more high speed lines in service to choose from, 60% of zip codes have four or more high-speed lines to choose from, and 17.5% of zip codes have ten or more high-speed lines to choose from. In the Washington, DC, area, 100 percent of zip codes have a choice of two providers, 92 percent have a choice of three providers, and 88 percent have a choice of eight or more broadband providers.

Across the nation, the number of broadband providers is exploding due to the fact that anyone who is willing to invest has the ability to enter the business free of archaic, stifling, and discriminatory economic regulation. Indeed, the number of high speed providers in the United States nearly tripled, from 485 to 1,270, between June 2004 and June 2005. This is extraordinary growth, given the fact that in June 2001 there were just 160 such providers around the country. One of the biggest investors in high-speed internet access is Google, which has found it easy to enter the market through investments in both wireless and BPL technologies.

As a result of this broad choice and intense competition, prices for internet access have fallen and penetration has increased. On May 28th, the Associated Press reported that "Middle and working-class Americans signed up for high-speed internet access in record numbers in the past year, apparently lured by a price war among phone companies."

Clearly, consumers are benefiting from the free market environment. According to the Associated Press, citing a survey by the Pew Internet and American Life Project:

- Broadband adoption increased 59 percent from March last year to March 2006 among U.S. households with incomes between $30,000 and $50,000.
- It increased 40 percent in households making less than $30,000 per year
- It increased 121 percent among blacks.

- Overall, 42 percent of adult Americans, or 84 million people, have broadband, compared to 30 percent a year ago.

Therefore, it is clear that the marketplace is working. There is no problem that requires Congressional action. Telephone and cable companies have stated that they will not block, impair or degrade access to any website, and they are not doing so. If they did, the Chairman of the FCC has said that he has the authority to stop them, and that he will use it. And, with so many choices available today, consumers would clearly go elsewhere.

But, all this investment, all this innovation, could come to an end if the government begins adding new regulation. Wall Street has warned that enacting "net neutrality" regulations in the absence of a definable problem would be premature and could trigger substantial, negative unintended consequences. As Craig E. Moffitt, a VP and senior analyst at Sanford C. Bernstein and Co., told the Senate Commerce Committee in March:

> Mandated "net neutrality" would further sour Wall Street's taste for broadband infrastructure investments, making it increasingly difficult to sustain the necessary capital investments. It would also likely mean that consumers alone would be required to foot the bill for whatever future network investments that do get made. That would result in much higher end-user prices, much steeper subsidies of heavy users by occasional ones, and, in all likelihood, a much sharper 'digital divide.' … The United States as a whole would, in all likelihood, fall further behind other countries in broadband availability and reliability.

Many of the leading telecom manufacturers, such as 3M, ADC and Cisco, have all expressed similar reservations about prematurely enacting "net neutrality" regulations.

The Internet is the success it is today because the government has maintained a vigilant, hands-off approach that has allowed companies to innovate in direct response to the evolving wants and needs of their customers. The marketplace today is competitive, and as the barriers to entry are low, the market is also contestable. Regulatory or legislative solutions wholly without justification in marketplace activities would stifle, not enhance the Internet. Laws can be inflexible and difficult to fine-tune—particularly when applied to technologies that are rapidly evolving.

3. Question to the panel, particularly to Mr. McCormick and Cohen:

I understand that some high speed internet providers are now offering consumers tiered options for higher than normal access speeds at a premium price. These are often marketed to users who use data intensive applications such as on-line interactive games and streaming video. One of your arguments against net neutrality is that you need to be able to charge these high usage application providers. Aren't you arguing that you should be paid twice for the same premium content?

There are today, voice networks, data networks, and various managed networks and virtual private networks that provide increased level of security and reliability for financial, governmental, and healthcare purposes that all operate on Internet protocol and involve various levels of prioritization. We are not proposing to change the Internet experience. We have stated that we will not block, impair or degrade access to any legal website. The internet experience that the consumer has today, and that those who operate websites have today, they will have tomorrow. The consumer will be in control of making his or her own choices with regard to the amount of speed and bandwidth purchased. This is as it should be. Consumers should not be forced to purchase a higher level of speed simply because a Google, or an Amazon, or some other company wants to profit from offering a new service that would benefit from a higher speed.

Companies that are satisfied with the performance of the public Internet will continue to have the option of just making their content available to consumers on the Internet also as they do today. However, Internet companies who wish to purchase a level of service beyond today's "best efforts" may want to enter into commercial agreements with broadband providers.

For example, a hospital may need increased reliability for medical home monitoring. Other companies may choose to purchase additional bandwidth capacity to speed movie downloads for those of its customers who do not opt for a higher bandwidth service. This might, for example, allow an entry-level broadband customer who pays just $14.95 a month to download the occasional movie at a speed commensurate with a $49.95 monthly service. Why should the government bar a company from investing in enhanced customer service? This investment would have no impact on competing websites. Consumers will continue to have unfettered access to the entire World Wide Web at the speed they purchase.

The bottom line is that no Internet company will be required to pay a network operator for its web presence. They will simply have the additional option to pursue a customized service.

Senator Kohl

1. The phone industry claims "net neutrality" is not a problem right now that we need to worry about, arguing that legislative proposals to mandate net neutrality is a "solution in search of a problem." Yet, last December, the Washington Post reported that the Chief Technology Officer for BellSouth stated that BellSouth should be allowed to strike deals to give certain web sites priority in reaching computer users. Likewise, Ed Whitacre, CEO of AT&T told Business Week that he would seek to have internet sites who use his "pipes" "pay for the portion they're using."

> *(a) Don't these statements show that your industry is planning to cut deals right now that will threaten the neutrality of the internet?*

Absolutely not. Our members have repeatedly stated they will not block, degrade or impair anyone's access to the Internet. Further, allowing Internet companies the option to enter into commercial arrangements to differentiate their service works to the benefit of consumers. What "net neutrality" advocates pejoratively label as "discrimination," the rest of us benefit from every time we use the Internet. This network management flexibility, also known as "optimization," allows your online banking transactions to be secure. It allows millions of Americans to telecommute from home over private company networks. It ensures the reliability of home health care monitoring for countless Americans. Private companies invest all the time today in special customized network service. This custom optimization would largely become illegal under a "net neutrality" regime.

Many of the so-called "net neutrality" advocates are actually attempting to legislate business advantages for themselves at the expense of consumers, broadband network investors and the next wave of Internet innovators.

> *(b) To your knowledge, have any of your member companies reached deals with internet content providers to give them preferential treatment, or are in negotiation to reach such deals?*

Not to our knowledge.

2. Do you believe that strengthened antitrust enforcement is appropriate to address problems that those concerned about net neutrality have identified?

No. We believe that traditional antitrust analysis should be the one applied to this market. Current antitrust laws are very explicit with regard to illegal restraints of trade and anti-competitive behavior. The anti-trust departments and agencies overseen by the Committees on the Judiciary – the Federal Trade Commission and the Department of Justice – are very aggressive in their enforcement.

3. Would you have any objections to the repeal of the common carrier exemption from FTC jurisdiction as it relates to telecommunications? If so, please explain the reasons why.

Our members should not be subject to double jeopardy. If there is enforcement at the FCC and you follow the dictates of the FCC, then you should not be subject to a separate level of enforcement pursuant to the antitrust laws. If there is concern over whether legislative language contained in the recently House passed bill and committee-cleared Senate telecom bill would affect the application of antitrust laws, we propose simply letting antitrust laws govern this market as they govern every other segment of the American market.

4. How important to the phone companies' entry into video is access to programming carried by the cable incumbents? Do you support closing loopholes to program access rules so that cable companies cannot deny needed content to your member companies?

USTelecom belongs to the Coalition for Competitive Access to Content (CA2C) and fully supports the coalition's advocacy. As you may know, the CA2C worked with Senator John Ensign to win the inclusion of language in S.1504, the Broadband Choice Act, to close the terrestrial loophole in Sec. 628 and to treat other anti-competitive uses of programming by vertically integrated cable incumbents. Similar language was included in early drafts of S.2686, the Stevens-Inouye bill, but was dropped shortly before mark-up. A critical remaining provision in the Commerce Committee's bill would extend current program access rules to 2012 (under current law, these expire in 2007). For a detailed discussion of USTelecom's views, please refer back to my responses to your questions following the Anti-Trust Subcommittee's hearing of October 19, 2005.

For your information, our CA2C coalition also includes:

AT&T BellSouth Broadband over Power Line Industry Association (BPLIA) Broadband Service Providers Association (BSPA) DirecTV	Echostar Independent Telephone and Telecommunications Alliance (ITTA) Media Access Project (MAP) National Hispanic Media Coalition (NHMC)	Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) RCN Verizon Wide Open West (WOW)