

Comments of Senators Byron L. Dorgan and Olympia J. Snowe in the Federal Trade Commission's Proceeding on Broadband Connectivity Competition Policy Workshop -- Project No. V070000

Chairman Majoras and Commissioners:

As you know, we are the sponsors of S. 215, the "Internet Freedom Preservation Act," which is the leading Senate legislation that addresses the increasingly important and high-profile issue known as "net neutrality." The debate over net neutrality has quickly become the dominant telecommunications and Internet policy debate in Washington. It has raised concerns among hundreds of millions of Internet users, small and large Internet companies, consumer electronics manufacturers, software publishers, and countless public interest groups ranging from the Christian Coalition to MoveOn.org. In fact, it is hard to imagine a broader and more diverse coalition working together on any other policy debate in Washington.

Consequently, it is appropriate that the Federal Trade Commission, with its roles in protecting consumers and guarding against anti-competitive behavior, is conducting this workshop on "Broadband Connectivity Competition Policy."

Today, it is difficult to conceive of a world without the Internet. In only a few short years, this medium has revolutionized the way we communicate with each other. People all over the world can share ideas, information, goods, and services with only a few strokes on a keyboard and a click of the mouse.

The Internet has provided the oxygen for a new, robust economic engine of electronic commerce among both businesses and consumers. It provides a worldwide, egalitarian platform where the marketplace picks the winners and losers, rather than previous barriers to entry or success such as capitalization, geography, or size.

This revolutionary shift created by the Internet is largely attributable to the open architecture that defines it. As the Senate Commerce Committee heard last year from Vint Cerf, who is credited with largely creating the Internet and the TCP/IP protocols that govern it, the open architecture of Internet allows Internet users, content creators, and service providers to communicate without having to seek permission from broadband providers for special deals or access.

Appropriately, this open design has resulted in the Internet being described as the most democratic tool ever invented. Unfortunately, this same tool that serves our free-market structure and democratic ideals is now at risk of being manipulated into something that is costly, slow, or even potentially oppressive by broadband providers. Broadband providers are now technologically capable and financially incentivized to exercise considerable control over how, when, and even if information can be viewed and shared.

Furthermore, in addition to the technical ability and financial incentives to discriminate, the Federal Communications Commission recently has enabled broadband providers to exert such control over content. It did not take long for large broadband access providers to announce they would take advantage of the FCC's action.

On November 7, 2005, now-AT&T CEO Ed Whitacre was quoted as saying, "They don't have any fiber out there. They don't have any wires. They don't have anything.... They use my lines for free---and that's bull. For a Google or Yahoo! or a Vonage or anybody to expect to use these pipes for free is nuts!"

Last year, a Cablevision executive stated, "So, anyone who buys Vonage on our network using our data service doesn't really know what they are doing.... Our service is better, its quality of service. We actually prioritize the bits to so that the voice product is a better product."

Such anticompetitive conduct is the very issue that the Federal Trade Commission should actively investigate and oppose. The FTC's congressionally authorized mandate is to prohibit business practices that are anticompetitive, deceptive, or unfair. Furthermore, the FTC is appropriately positioned to assert its role in this area through its jurisdiction over broadband Internet access services that are offered on a non-common carrier basis.

Although legislation is needed to ensure that broadband service providers abide by non-discrimination rules, the FTC can and should use its existing authority to bring enforcement actions under the antitrust laws to protect consumers from anticompetitive behavior relating to the control of content by broadband providers.

Today, vigorous antitrust enforcement is badly needed as there is an unprecedented consolidation of broadband market power among only a handful of large corporations. Last year, AT&T CEO Ed Whitacre stated among his justifications for the AT&T/Bell South merger that "no partnership between two independent companies, no matter how well run, can match the speed, effectiveness, responsiveness and efficiency of a solely owned company." While net neutrality proponents were successfully able to restrict the merged entity from engaging in content discrimination for two years, Mr. Whitacre's statement should send a signal to antitrust enforcers that the means and desire to engage in anticompetitive activities is upon us.

Perhaps we would not be as concerned about the potential for anti-competitive behavior if, in fact, there was true competition in the marketplace to choose among broadband providers. Unfortunately, the truth is that the vast majority of Americans have, at best, a choice between only the phone company and the cable company for broadband services. In this environment, consumers face few choices and high prices, and the lack of competition means that broadband speeds available to most consumers are disproportionately slow compared to available speeds in other industrialized countries. It is indeed a shame that the country responsible for inventing the Internet and fostering the

world's most innovative Internet products and services provides its citizens with the slowest broadband speeds compared to our economic competitors.

We applaud the FTC's efforts to study net neutrality issues in greater detail, and feel confident that the workshops will reveal that there is a need for FTC involvement to prevent harms to consumers and competition. Given the lack of broadband competition, the ability and incentive of broadband providers to discriminate among content providers, and the public statements from executives of leading broadband providers, the FTC should be both vigilant and engaged to preserve the open architecture of the Internet *before* there are widespread examples of discriminatory and anticompetitive behavior.

We hope that the FTC will utilize its existing authority under the FTC Act and the antitrust laws to investigate anticompetitive behavior that harms Internet users.

We look forward to continuing to work with the FTC as it seeks to implement its worthy mandate to protect consumers by prohibiting business practices that are anticompetitive, deceptive, or unfair.